

**THE DRINK- AND DRUG-DRIVING
OFFENCES AND THE CRIMINAL LAW
PARADIGM**

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Abstract

This thesis reports on research into the offences, under the Road Traffic Act 1988 as amended, of driving, attempting to drive, or being in charge of a vehicle when unfit through drink or drugs, with excess alcohol, or (under provisions to be brought into force) with an excess of a specified drug. The research was primarily literature-based, using legal doctrinal analysis, supplemented by empirical research.

The offences are examined in the contexts of four principles said to govern how the criminal law and the law of evidence are framed: the preconditions for strict liability, the presumption of innocence, the privilege against self-incrimination and the principle of legal certainty. The literature and case law are reviewed, and the drink- and drug-driving offences are found to offend all four principles.

Uncertainty about the prescribed limit for driving with excess alcohol – by far the most commonly prosecuted of the offences – emerges as the most significant breach. To explore this, the scientific background to the offences is explained, and the literature on what drivers understand the limit to mean is reviewed. An original study on the point is reported, and it is concluded that the drink drive limit, while scientifically precise, is not understood by most drivers.

Despite the difficulties of fitting these offences into the traditional paradigm, it is concluded that a way of accommodating them in the legal theory must be found. The possibility of an alternative paradigm is canvassed, perhaps being justified by the success of the drink-drive legislation in reducing death and injury on the roads, and by recognising a special responsibility on drivers, a duty which may have to include foregoing some of the protections afforded by the traditional criminal law paradigm.

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Preface

This is a work about the law relating to drink- and drug-driving under the Road Traffic Act 1988, the Road Traffic Offenders Act 1988 and the substantial case law elaborating the statutory provisions. I have sought to explain the nature of the offences, and to place this complex body of regulation into the general framework of the criminal law. I find that in fact it defies the traditional paradigm, instead inhabiting a universe far removed from the world of *mens rea*, presumed innocence, burdens of proof and certainty of legislation that I learned about as an under-graduate. Its failure to meet the standards traditionally said to govern how the criminal law is framed poses a challenge for legal theorists. I suggest that this be resolved by contemplating a different paradigm – one that acknowledges and accommodates the extraordinary contribution this area of law has made to reducing death and injury on the road, and recognises a special position, vis-à-vis the law, of those who drive.

My gratitude is due to the many people who have helped and supported me over the years I have been working on this project.

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Chapter 1: Introduction

The drink- and drug-driving offences under the Road Traffic Act (“RTA”) 1988¹ have received little scholarly attention.² This is surprising given the road safety objective of the legislation,³ the number of prosecutions⁴ and the exceptionally high conviction rate.⁵

The offences are also remarkable in that a small group of statutory provisions⁶ has given rise to a disproportionately large body of case law.⁷ Given the period of time since the legislation was first introduced, it might be expected that most points which could arise would have been brought

¹ Driving, attempting to drive or in charge when unfit through drink or drugs (s 4) and driving, attempting to drive or in charge when over the prescribed limit (s 5). New offences of driving, attempting to drive or in charge with an excess of a specified controlled drug were introduced by Crime and Courts Act 2013, s 56, and will come into force from a date to be appointed.

² With the notable exceptions of Claire Corbett, *Car Crime* (Willan 2003) and Sally Cunningham, *Driving Offences. Law, Policy and Practice* (Ashgate 2008). Some reasons why the equivalent offences in the United States do not feature in criminological and jurisprudential writing and research have been suggested: James B Jacobs, *Drunk Driving: An American Dilemma* (University of Chicago Press 1989) xx *et seq.*

³ Road traffic fatalities in Great Britain attributed to drink-driving fell steadily from 1,640 in 1979 to an estimated 290 in 2012. Serious injuries fell from 8,300 to 1,210, and slight injuries from 21,490 to 8,500 over the same period. See Department for Transport, *Reported Road Casualties in Great Britain: Estimates for Accidents Involving Illegal Alcohol Levels: 2012 (provisional) and 2011 (final)* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226068/accidents-involving-illegal-alcohol-levels-2011-2012.pdf> accessed 27 November 2013.

⁴ In 2012 there were over 60,000 prosecutions for the drug- and drink-driving offences in England and Wales. Although this has dropped considerably over the years (from a peak of 107,000 in 2004), there are still, for example, more than twice as many prosecutions for drug- and drink-driving than for driving without due care and attention. See Ministry of Justice, *Criminal Justice Statistics Quarterly - December 2012*, 30 May 2013, Table 8.1, and Motoring Tables, Tables 6.1 and 6.6 <<https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>> accessed 27 November 2013.

⁵ In England and Wales in 2012, there were 55,300 convictions for driving after consuming alcohol or taking drugs – a conviction rate of 91 per cent. This compares with a conviction rate of 83 per cent for all criminal offences and 90.1 per cent for motoring offences as a whole: Ministry of Justice, *Criminal Justice Statistics Quarterly - December 2012*, 30 May 2013, Table Q4.3 <<https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>> accessed 27 November 2013. For the offence of driving with excess alcohol, which is the most commonly prosecuted, 96 per cent of 49,000 defendants were convicted, *ibid*, Motoring Tables, Table 6.1.

⁶ The principal provisions in RTA 1988 comprised ten sections when the Act was first passed; this had grown to fifteen by October 2013 with the prospect of a further section to be added pursuant to Crime and Courts Act 2013, s 56 (see fn 1 above).

⁷ There are almost 800 relevant decisions of the higher courts on points of law arising out of the drink- and drug-driving provisions: PM Callow, *The Drink Drive Offences. A Handbook for Practitioners* (Wildy, Simmonds & Hill 2011) Table of Cases.

before the courts and settled, but the challenges continue.⁸ The result is a body of law of surprising complexity.

The consequences of conviction for many of these offences go beyond the immediate penalty of a fine, a community order or even imprisonment. They include disqualification from driving, which is not only an inconvenience to the offender, but may lead to loss of employment and, in due course, to greatly increased insurance premiums. These factors may well account for the readiness of some defendants to try to avoid conviction. The media have made much of what are perceived to be “loopholes”, especially when the defendant is someone in the public eye.⁹ The statistics, however, show that the legislation is robust, and successful defences are few and far between.¹⁰ Motorists have fared little better when taking appeals on points of law. Between 2007 and 2012 (inclusive), sixty-one appeals on points of law concerning the drink- and drug- driving offences were taken to the High Court. Of these, only seventeen¹¹ were decided in favour of the motorist. Nor have appeals against verdict or sentence often succeeded.¹²

⁸ Between 2010 and 2012, the higher courts dealt with nineteen appeals concerning drink-driving: *Persaud v DPP* [2010] EWHC 52 (Admin) (QBD); *Rose v DPP* [2010] EWHC 462 (Admin); *Coxon v Manchester City Magistrates’ Court* [2010] EWHC 712 (Admin); *Balogun v DPP* [2010] EWHC 799 (Admin); *CPS v Jolly* [2010] EWHC 1616 (Admin); *Moore v DPP* [2010] EWHC 1822 (Admin); *Köhler v DPP* [2010] EWHC 2886 (Admin); *Cox v DPP* [2010] EWHC 3589 (Admin); *Hallett v DPP* [2011] EWHC 488 (Admin); *Atkinson v DPP* [2011] EWHC 706 (Admin); *Hawke v DPP* [2011] EWHC 1345 (Admin); *Bielecki v DPP* [2011] EWHC 2245 (Admin); *Avery v DPP* [2011] EWHC 2388 (Admin); *DPP v Heathcote* [2011] EWHC 2536 (Admin); *Moore v Preston Crown Court* [2011] EWHC 3780 (Admin); *Ryder v CPS* [2011] EWHC 4003 (Admin); *Santos v Stratford Magistrates’ Court* [2012] EWHC 752 (Admin); *Stanesby v DPP* [2012] EWHC 1320 (Admin); *Afolayan v CPS* [2012] EWHC 1322 (Admin); and one concerning drug-driving: *Angel v Chief Constable of South Yorkshire* [2010] EWHC 883 (Admin) (DC).

⁹ See, for example, ‘Rare Failure for ‘Mr Loophole’ <<http://news.bbc.co.uk/1/hi/uk/5279672.stm>> accessed 27 November 2013, and ‘Mr “Loophole” gets Lloyd Drink-drive Case Dropped’ <<http://www.heraldscotland.com/mobile/news/crime-courts/mr-loophole-gets-lloyd-drink-drive-case-dropped.17051801>> accessed 27 November 2013. ‘Mr Loophole’ is the Manchester-based solicitor Nicholas Freeman.

¹⁰ See the statistics on convictions in fn 5 above.

¹¹ *Ng v DPP* [2007] EWHC 36 (Admin); *Mckeon v DPP* [2007] EWHC 3216 (Admin) (DC); *Piggott v DPP* [2008] EWHC 305 (Admin) (DC); *Roberts v DPP* [2008] EWHC 643 (Admin); *McNeil v DPP* [2008] EWHC 1254 (Admin); *Plackett v DPP* [2008] EWHC 1335 (Admin); *Brett v DPP* [2009] EWHC 440; *Mason v DPP* [2009] EWHC 2198 (Admin); *Williams v DPP* [2009] EWHC 2354 (Admin); *Goldsmith v DPP* [2009] EWHC 3010 (Admin); *R (on the Application of Cox) v DPP* [2009] EWHC 3595 (Admin); *Charles v DPP* [2009] EWHC 3521 (Admin); *Visvaratnam v Brent Magistrates’ Court* [2009] EWHC 3017 (Admin); *Persaud v DPP* [2010] EWHC 52 (Admin) (QBD); *Balogun v DPP* [2010] EWHC 799 (Admin); *Hallett v DPP* [2011] EWHC 488 (Admin); *Hawke v DPP* [2011] EWHC 1345 (Admin).

¹² In 2012, only 213 of 791 (31%) appeals to the Crown Court against verdict or sentence were allowed: Freedom of Information Request 85822 by the author to the Ministry of Justice, 21 October 2013.

The higher courts having condemned unmeritorious arguments in no uncertain terms:

- “the ingenuity of defendants and their advisers in confronting the breathalyser legislation has been spectacular”;¹³
- “the unproductive exercise of legal ingenuity ... may lead ... to unmeritorious acquittals”;¹⁴
- “there have been too many attempts before the courts to seek to avoid the conviction of those who have driven with excess alcohol by raising unmeritorious formal points”;¹⁵
- “the vital requirement that the Crown prove its case in criminal proceedings is an instrument of justice and not an invitation to disreputable technicality.”¹⁶

The drug- and drink-driving offences attract media interest in other contexts, notably calls to lower the drink-drive limit and to introduce random breath-testing,¹⁷ individual cases where the consequences of drug- or drink-driving have been newsworthy,¹⁸ high-profile reviews such as the North Report in 2010,¹⁹ and the new offences of driving with an excess of a specified drug.²⁰

They are also inherently interesting by reason of being based on a body of scientific facts about how drugs and alcohol affect driving skills.

As if all this were not enough to stimulate attention, these offences also engage a number of fundamental principles of law – the preconditions for strict liability, the presumption of innocence, the privilege against self-incrimination, and legal certainty, and raise serious questions concerning conformity with those principles, and the extent to which, and the circumstances in which, exceptions may be justified.

¹³ *Sheldrake v DPP* [2003] EWHC 273 (Admin) (DC) [128] (Henriques, J).

¹⁴ *DPP v Ormsby* [1997] RTR 394 (DC) 402 (Leggatt LJ).

¹⁵ *Malcolm v DPP* [2007] EWHC 363 (Admin) [38] (Stanley Burnton, J).

¹⁶ *Jones (Vivian) v DPP* [2004] EWHC 3165 (Admin) [6] (Laws LJ).

¹⁷ Subjects not explored in this work, although in 2010 the North Report recommended both: Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) paras 4.27 and 4.115.

¹⁸ See, for example, ‘Drink Driver who Caused Death of Girl Before she was Born Jailed in Landmark Case’ <<http://www.telegraph.co.uk/news/uknews/crime/9272283/Drink-driver-who-caused-death-of-girl-before-she-was-born-jailed-in-landmark-case.html>> accessed 27 November 2013.

¹⁹ See, for example, ‘Report Calls for Drink-drive Limit to be Reduced’ <http://news.bbc.co.uk/1/hi/uk/8742769.stm>> accessed 27 November 2013.

²⁰ For example, ‘One Spliff and You’re off the Road: Crackdown on Drug Driving’, *London Evening Standard* 9 July 2013: <<http://www.standard.co.uk/news/uk/one-spliff-and-youre-off-the-road-crackdown-on-drug-driving-8697798.html>> accessed 27 November 2013.

Having set out some of the reasons why this group of offences seemed so fascinating, I next describe how my research programme came about and how I framed it.

THE RESEARCH QUESTIONS AND HYPOTHESIS

In connection with my professional work, I had spent much time tracing and reading judgments in drink- and drug-driving cases.²¹ The case law is voluminous and complicated, and while underlying principles of criminal law are sometimes mentioned in the judgments, they are rarely elaborated in any detail. For example, how can the requirement²² to provide a specimen for analysis – in effect, to provide the evidence for the prosecution – be reconciled with the privilege against self-incrimination? Other principles traditionally thought to underlie the criminal law often seemed to be overridden or ignored. As a lawyer I wanted to look in more detail at the substance of the offences, to see how they fit with our notions of the framework within which the criminal law is constructed. Is there something special about this group of offences, setting them apart from the rest of the criminal law, or indeed from the rest of road traffic law? When the opportunity arose to undertake research with a view to the degree of Ph.D, the subject was obvious.

The aim of my research was, therefore, to elucidate the nature of these offences, to question how, if at all, they fit the paradigm of the criminal law,²³ to identify issues arising, and to suggest consequences for the overall theory of the criminal law, perhaps concluding that the theory should be adjusted to accommodate this group of offences.

After much deliberation, my research questions finally crystallized in the following terms:

- what is the nature of these offences?
- to what extent do they comply with or breach the principles said to underlie the criminal law?
- can any such breaches be justified?

²¹ By commission from Lion Laboratories, the manufacturers of much of the breath-testing equipment used throughout the world. This work was originally undertaken for private purposes, but was later published as *Drink Drive Case Notes* (2nd edn, Callow Publishing 2007).

²² Under RTA 1988, s 7; see further below.

²³ I use the words “criminal law” widely, to encompass not only the substantive law but also the procedure for investigating and prosecuting the offences.

- what are the consequences (if any) for legal theory of any such breaches, whether justified or not?
- are there any other consequences or implications?

Unsurprisingly, my hypothesis was that the law relating to the offences would prove complex and difficult. It would also offend many of the traditional principles of criminal law, but a way of forgiving such deviations might need to be found.

I made a number of assumptions. Although these may be self-evident, they are listed here for the sake of completeness:

- that it is in the interests of public safety to limit the amount of alcohol which may be consumed before driving;
- that the major principles of law are broadly accepted and that it is a legitimate analytical exercise to seek to apply them to a particular area of law;
- that the provisions selected for study should conform to the principles of the criminal law as a whole; or that, if they do not, any exceptions or deviations should be justified.

METHOD

My research was primarily literature-based, adopting legal doctrinal analysis as the main method, but supplemented by a piece of empirical research described in detail in Chapter 8. The legal doctrinal approach allowed for appropriate processes of analysis, review, evaluation and appraisal of the materials which form the basis of the work. I studied the relevant legal rules (both statutory and deriving from the case law), and analysed them by reference to established principles as expounded in the legal literature, with a view to acknowledging consistency, and to identifying and seeking explanations for inconsistencies, conflicts and contradictions. I evaluated how the cases engage with fundamental principles of English law, and those under the European Convention on Human Rights.²⁴ I expected that this would illustrate how the courts endeavour to apply the rules to achieve just solutions on the facts of particular cases, even though the effect may be that principles are not applied uniformly, or perhaps, not even at all – an

²⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI.1950 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

example of the “inherent tension between the legal practice and legal scholarship”.²⁵

This method was intended to reveal much about the characteristics of the offences and demonstrate the extent to which they conform to, or contradict, the principles of the criminal law, and facilitate the development of the thesis in the light of the empirical work.

Given the vast body of case law and the wide remit of the research questions, the literature search was confined largely to the jurisdictions of England and Wales and Scotland, taking in decisions of the Court of Justice of the European Union and the European Court of Human Rights, but with some exceptions to include a small number of works originating in other jurisdictions, where they were of special relevance.

THE STRUCTURE OF THIS WORK

The remainder of this introductory chapter includes a brief summary of the relevant statutory provisions. The principles of law engaged are then identified. There follows a review of the legal literature touching on the drink- and drug-driving offences, such as it is.

Chapters 2 to 5 comprise the legal doctrinal work which is the theoretical basis for my project, focusing on fundamental principles of English criminal law – strict liability and *mens rea*, the presumption of innocence and reverse burdens of proof, the privilege against self-incrimination, and the principle of certainty. Each chapter takes much the same form, introducing the issue in question, examining the theoretical background and the literature, then moving on to the statutory provisions and the case law. In all contexts, I found the legal principles compromised.

It soon became clear that the need for certainty in the criminal law gives rise to a major problem in relation to the offences of exceeding the prescribed limit for alcohol. How are drivers to know what they must do, or rather what they must not do, to avoid exceeding the limit? The problem is that the limit is expressed as the concentration of alcohol in the body – the result of drinking, while drivers naturally think in terms of how much they may drink. The relationship between how much is drunk and the resulting concentration of alcohol in the body is complex, depending on many physiological and circumstantial factors. This issue soon came to the forefront of my work, leading me to conclude that the principle of legal certainty is severely compromised in relation to the prescribed limit, with

²⁵ D Manderson and R Mohr, ‘From Oxymoron to Intersection: An Epidemiology of Legal Research’ (2002) 6(1) *Law Text Culture* 10.

serious consequences for both drivers and the theoretical framework of the criminal law. A much greater part of my thesis is therefore devoted to this principle than to the others. To explain the issues in play, Chapter 6 includes an overview of the relevant scientific facts. These facts not only underlie the statutory provisions, but provide the basis for evaluating how drivers understand and interpret the statutory provisions in practice. This is followed by a description of how these facts have been dealt with by the courts. Chapter 7 contains a review of the literature on drivers' understanding of the statutory prohibitions, revealing much ignorance, and calling in question the clarity of the provisions. Chapter 8 describes my own piece of research into what drivers think the prescribed limit means, confirming a high degree of misunderstanding. In Chapter 9, I explain my finding that the prescribed limit offends the principle of certainty.

In Chapter 10, I conclude that my thesis is borne out and consider the consequences. While the drink- and drug-driving offences depart from the general principles of the criminal law in many respects, I nevertheless seek to justify these departures, and consider the possibility that they signal an alternative paradigm.

THE STATUTORY FRAMEWORK

The Background

Early legislation featured, in various forms, an offence of driving when unfit to do so through drink or drugs.²⁶ It was defined by reference to the impairment of driving skill, regardless of the quantity of alcohol or drugs which may have been in the body.

In 1967, a prescribed limit for alcohol was introduced.²⁷ It was, and still is, eighty milligrams of alcohol in 100 millilitres of blood.²⁸ The offences of unfitness through drink or drugs remained, but it became an offence simply to be over the limit, regardless of ability to drive. At the same time, the "breathalyser" was introduced as a method of preliminary screening to provide an indication of whether or not a driver might be over the limit. Following a positive breathalyser test, alcohol concentration was measured

²⁶ See, for example, Criminal Justice Act 1925, s 40, extending the offence of being drunk in charge so as to apply to mechanically propelled vehicles, and RTA 1930, s 15, creating the offence of being under the influence of drink or a drug to such an extent as to be incapable of having proper control of a vehicle, quoted in Louise Butcher, *Driving: Alcohol*, House of Commons Library Standard Note SN788, last updated 11 April 2013, 2.

²⁷ By Road Safety Act 1967, s 1.

²⁸ Or 107 milligrams of alcohol in 100 millilitres of urine.; see also p 14.

by laboratory analysis of a specimen of blood or urine. New offences of refusing to take a breath test or to supply a specimen were created.²⁹ The prescribed limit applied to alcohol only.

The Transport Act 1981 contained provisions reflecting the fact that technology had advanced to the point where alcohol in the body could accurately be measured by analysing breath, using a machine which could be installed at police stations. This avoided having to send body fluids to a laboratory for analysis. Preliminary (or “roadside”) testing continued. Persons whose roadside tests were positive were arrested and required to provide breath specimens for analysis, although there remained certain circumstances in which blood or urine specimens, rather than breath specimens, could be required. The results of analysing the specimen provided the evidential base for any prosecution. This continues to be the usual procedure, now under RTA 1988, sections 4 to 11. The Road Traffic Offenders Act (“RTOA”) 1988 contains further provisions concerning the use in evidence of specimens of breath, blood or urine.

The Offences

Section 4, RTA 1988 provides for the offences of driving, attempting to drive or being in charge of a vehicle when unfit through drink or drugs. The section is headed “Driving or being in charge when under influence of drink or drugs”, and the expression “under the influence” is sometimes used as an alternative to the word “unfit”. Unfitness to drive means that the ability to drive properly is impaired.³⁰ A person accused of an “in charge” offence may be deemed not to have been in charge if there was no likelihood of driving while remaining unfit through drink or drugs. It is for the accused to show, on a balance of probabilities, that there was no such likelihood.³¹

Section 5 concerns the more commonly prosecuted offences – driving, attempting to drive, or in charge with excess alcohol. Again, a person said to have been “in charge” may be deemed not to have been in charge upon showing, again on a balance of probabilities, that there was no likelihood of driving while over the limit.³²

Section 5A RTA 1988,³³ when in force, will create offences of driving, attempting to drive or being in charge with a concentration of a specified

²⁹ Road Safety Act 1967, ss 2(3) and 3(3) respectively.

³⁰ RTA 1988, s 4(5); see pp 209–211.

³¹ *Morton v Confer* [1963] 1 WLR 763 (DC); see pp 90–94.

³² *CPS v Thompson* [2007] EWHC 1841 (Admin) (DC); see pp 90–94.

³³ Inserted by Crime and Courts Act 2013, s 56, to come into force from a date to be appointed.

controlled drug above a specified limit. At the time of writing,³⁴ the section has not been brought into force and no regulations specifying controlled drugs or limits have been made.³⁵

There is clearly some overlap between unfitness to drive through drink, and being over the prescribed limit. A driver may be unfit to drive long before reaching the prescribed limit, while another may just possibly be able to drive unimpaired while over the limit.³⁶ A similar overlap – between being unfit to drive through drugs and being over the limit for a specified controlled drug – may also arise.³⁷ Most prosecutions³⁸ are for driving with excess alcohol contrary to section 5, but the section 4 offences continue to be important, and will remain so after section 5A comes into force, as the basis for proceeding against someone who is impaired but not over the limit, who is impaired but fails to provide a specimen, or who is impaired by a drug which is not specified for the purposes of section 5A.

Section 3A creates the offence of causing death by driving without due care and attention or without reasonable consideration for other road users (“careless driving”) when the driver is unfit through drink or drugs, has excess alcohol or has committed one of the “failing” offences.³⁹ This offence is mentioned here for the sake of completeness, in that the definition refers to the states of unfitness to drive and of being over the prescribed limit, and of failing to provide a specimen for analysis. It is those aspects only which

³⁴ December 2013.

³⁵ Although draft regulations have been issued for consultation: Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013.

³⁶ Although this is less likely; see H Moskowitz and others, ‘Driver Characteristics and Impairment at Various BACs’ US Department of Transportation 2000, 22–23 <<http://ntl.bts.gov/lib/9000/9500/9512/impairment.pdf>> accessed 27 November 2013, reporting findings that the majority of the driving population is impaired in some important measures at blood alcohol concentrations as low as 20 milligrammes per 100 millilitres (the limit in England and Wales is 80). There was no evidence of a blood alcohol level below which impairment does not occur. See also Amanda Kiloran and others, *Review of Effectiveness of Laws Limiting Blood Alcohol Concentration Levels to Reduce Alcohol-related Road Injuries and Death* (Centre for Public Health Excellence NICE 2010) 44 <<http://www.nice.org.uk/media/3fe/1a/bloodalcoholcontenteffectivenessreview.pdf>> accessed 27 November 2013, and Chapter 6.

³⁷ Although this is less likely, given the relatively low concentrations expected to be specified for drugs; see p 206.

³⁸ 49,000 out of 60,000 in 2012 (82%); see fn 5 above.

³⁹ Failing to provide a specimen for analysis contrary to RTA 1988, s 7(6), or failing to permit the analysis of a specimen taken while the driver was incapable of consenting, contrary to RTA 1988, s 7A(6). See below.

are considered here; neither causing death nor careless driving is referred to further except where it is helpful to do so for comparative or illustrative purposes. The offence under section 3A is one of four offences of causing death under the 1988 Act. The remaining three⁴⁰ do not feature alcohol or drugs, and are not considered in this work.

It is an offence to fail, without reasonable excuse, to co-operate in a preliminary test, to provide a specimen for analysis, or to permit the analysis of a specimen taken while the subject was incapable of consenting.⁴¹

The Investigation

The procedure for investigating a suspected offence⁴² usually starts with a preliminary screening test, often at the roadside, to establish whether or not a suspect is likely to be unfit or over the limit. If the test is positive, the suspect is arrested and taken to a police station where specimen(s) are taken and analysed. It is the result of this analysis which forms the basis of any prosecution.

A constable may require a person to co-operate with a preliminary test⁴³ if the constable reasonably suspects that:⁴⁴

- the subject is driving, attempting to drive, or in charge with alcohol or a drug in the body, or is under the influence of a drug;
- the subject has been driving, attempting to drive or in charge with alcohol or a drug in the body or while unfit to drive because of a drug, and still has alcohol or a drug in the body or is still under the influence of a drug;
- the subject has been driving, attempting to drive or in charge and has committed a moving traffic offence;

⁴⁰ The remaining three are causing death by dangerous driving (s 1), causing death by careless or inconsiderate driving (s 2B) and causing death by driving while unlicensed, disqualified or uninsured (s 3ZB).

⁴¹ See pp 55–58.

⁴² Set out in RTA 1988, ss 6, 6A to 6E, 7 and 7A.

⁴³ Or up to three preliminary tests when s 5A (see pp 8–9) is in force. This is to take account of the fact that a single preliminary drug test will likely facilitate testing for a limited range of drugs only (the only device approved as at 27 November 2013 tests for cannabis only), and to allow for testing for both alcohol and drugs. See RTA 1988, s 6C(3), inserted by Crime and Courts Act 2013, s 56, sch 22, para 3(3) and Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013, paras 12.4, 12.5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013.

⁴⁴ RTA 1988, s 6(1) to (5).

- following an accident owing to the presence of a motor vehicle, the subject was driving, attempting to drive or in charge at the time of the accident.

There is, therefore, no power randomly to administer breath tests, although there is no restriction on stopping vehicles at random, and then requiring a specimen if the officer suspects the driver has been drinking.⁴⁵ It is an offence, without reasonable excuse, to fail to co-operate with a preliminary test.⁴⁶

There are three types of preliminary test:⁴⁷

- a preliminary breath test, using an approved device;
- a preliminary impairment test in which a specially trained constable observes the subject performing certain tasks (such as standing on one leg while counting) and observes the person's physical state, in accordance with a code of practice;
- a preliminary drug test, using an approved device.⁴⁸

A constable may arrest a person who fails a preliminary test. There is also power to arrest a person who fails to co-operate with a preliminary test if the constable reasonably suspects that the person has alcohol or a drug in the body. A patient at a hospital may not be arrested.⁴⁹

Following an accident, a constable who reasonably suspects that a person has been injured has a power of entry, using reasonable force if necessary, to require a person to co-operate in a preliminary test or to arrest a person.⁵⁰ There is no express power to enter a suspect's private property in other circumstances.

Section 7 sets out the procedure for providing specimens for analysis, usually at a police station, following arrest. The provisions are outlined here, and described in greater detail in Chapter 4. A constable who is investigating whether or not an offence under section 3A, 4 or 5 has been committed may require two breath specimens for immediate analysis, or a

⁴⁵ *Chief Constable of Gwent v Dash* [1986] RTR 41 (DC).

⁴⁶ RTA 1988, s 6(6); see pp 55–56, 102 *et seq* and 151 *et seq*.

⁴⁷ RTA 1988, ss 6A, 6B and 6C.

⁴⁸ At the time of writing (December 2013), one device has been approved for this purpose: the Draeger Drug Test 5000, which tests for THC, the main ingredient of cannabis and is approved for use at police stations only. See Home Office, Preliminary Drug Testing Device Approval 2012.

⁴⁹ RTA 1988, s 6D.

⁵⁰ RTA 1988, s 6E.

blood or urine specimen to be analysed at a laboratory.⁵¹ Breath specimens are analysed using what is referred to in the legislation as an approved device, now also known as an evidential breath testing instrument (“EBTI”). In anticipation of the type approval of portable EBIs, the section also contains provisions facilitating evidential breath testing elsewhere than at a police station.

Sometimes it is not feasible to analyse breath specimens for alcohol – the device may be out of order, or the suspect may be in hospital. In these cases,⁵² a specimen of blood or urine may be required instead. Breath cannot be tested for drugs, so that where drugs are suspected, the specimen must be one of blood or urine.

Whether a specimen is to be of blood or urine is a matter for the constable.⁵³ Blood specimens are taken by a medical practitioner or a health care professional, but if the practitioner advises that there are medical reasons for not taking blood, the constable may then require a urine specimen.⁵⁴ In that case, a first specimen of urine is discarded and the second specimen must be produced within an hour of the initial requirement.⁵⁵

It is an offence to fail, without reasonable excuse, to provide a specimen,⁵⁶ but the constable must, when requiring a specimen, warn the person that failure to provide it may render the person liable to prosecution.⁵⁷ The expression “reasonable excuse” is not defined and has given rise to a substantial body of case law.⁵⁸

⁵¹ RTA 1988, s 7(1). Section 7 is to be amended from a date to be appointed (under Crime and Courts Act 2013, s 56, sch 22, para 5) to provide a similar power to require a specimen of blood or urine where the officer is investigating a suspected offence under the new s 5A (above, pp 8–9).

⁵² Set out at p 147.

⁵³ RTA 1988, s 7(4); see p 148.

⁵⁴ RTA 1988, s 7(4A); see p 148.

⁵⁵ RTA 1988, s 7(5); see p 149.

⁵⁶ RTA 1988, s 7(6); see pp 151–155.

⁵⁷ RTA 1988, s 7(7); see p 149.

⁵⁸ The leading case is *R v Lennard* [1973] 1 WLR 483 (CA), in which it was held that, for an excuse to be reasonable, the person must be physically or mentally unable to provide the specimen, or its provision would entail a substantial health risk. Drivers facing disqualification have since sought to bring many more sets of circumstances within the definition, but have largely failed. See for example, PM Callow, *The Drink-Drive Offences: A Handbook for Practitioners* (Wildy, Simmonds & Hill 2011) 194 – 204, and pp 151–155 below.

A blood specimen may, in certain circumstances, be taken without consent from a person who is incapable of consenting⁵⁹ – usually someone who is unconscious. The power arises where the person has been involved in an accident, and there would otherwise be power to require a specimen. The specimen may not be laboratory tested without the person’s consent, although failure without reasonable excuse to give such consent is an offence.⁶⁰

Challenges to the procedures followed in individual cases have been legion, and much of the resulting case law is discussed in later chapters.

Potential defendants have an advantage in that, of the two breath specimens analysed, that which yields the higher reading is disregarded, and the specimen which produces the lower reading is used in any proceedings.⁶¹

Further, if the lower reading is 50 microgrammes or below (the limit is 35), the “driver’s option” or “statutory option” procedure⁶² comes into play. This allows the suspect to elect to provide a blood or urine specimen to replace the breath specimen. The suspect may ask for part of the specimen, and may have it independently analysed. With increasing confidence in the accuracy of the evidential breath testing devices, however, the abolition of the driver’s option now seems likely.⁶³

There is protection for hospital patients,⁶⁴ requiring consultation with the medical practitioner in charge of the case before a patient is required to co-operate in a preliminary test or provide a specimen. The constable may not proceed if the doctor objects on the ground that to do so would be prejudicial to the proper care and treatment of the patient.

Persons who have been investigated may be detained at the police station until no longer unfit or over the limit.⁶⁵ The power is not available, however, where it ought reasonably to be apparent that there is no likelihood of driving or attempting to drive while unfit or over the limit. A patient at a

⁵⁹ RTA 1988, s 7A; see p 150.

⁶⁰ RTA 1988, s 7A(6); see p 150.

⁶¹ RTA 1988, s 8(1); see p 146.

⁶² Under RTA 1988, s 8(2).

⁶³ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 4.61; Department for Transport, *Enforcement Procedures against Drink Drivers and Other Offenders – A Consultation Document*, November 2012, paras 4.1–4.21 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/14959/drink-driving-consultation.pdf> accessed 27 November 2013; Draft Deregulation Bill, Cm 8642, 2013, s 24, sch 9, para 1.

⁶⁴ In RTA 1988, s 9; see p 151.

⁶⁵ RTA 1988, s 10.

hospital may not be arrested and taken to a police station if it would be prejudicial to the patient's proper care and treatment. A constable must consult a medical practitioner on questions concerning the impairment through drugs of any detainee, and must act on the advice given.

The Department for Transport has prepared a series of *pro formas* for use by police officers investigating drink-drive offences, to ensure that the procedure is carried out fully and correctly, and to provide a contemporaneous record of the procedure in individual cases.⁶⁶ The fact that these forms total some seventy-five pages reflects the complexity of the procedures, and the number of issues which can arise during an investigation. The forms have no special status in law.⁶⁷

The Prescribed Limit

The prescribed limit for the purpose of the excess alcohol offences is:⁶⁸

- 35 microgrammes of alcohol in 100 millilitres of breath,
- 80 milligrammes of alcohol in 100 millilitres of blood, or
- 107 milligrammes of alcohol in 100 millilitres of urine,

or such other proportion as may be prescribed.

Despite many calls to lower the limit,⁶⁹ the above table has never been amended. The limit clearly contemplates that drinking before driving is permitted, up to a certain point. That point is, however, expressed in terms of the amount of alcohol found in the body, not in terms of the amount consumed. It is common knowledge that the effects of alcohol depend on factors such as its strength, the amount drunk, the time over which it is drunk, the speed at which it is absorbed and eliminated, and the body weight and gender of the person concerned. These issues make it more difficult for an ordinary individual to know whether or not, having taken

⁶⁶ The principal form is form MG DD/A: Drink/Drugs: Station Procedure, general. There are supplementary forms for use where a blood or urine specimen is being required (Form MM DD/B), for the procedure at a hospital (MG DD/C) and in other circumstances. The forms can be viewed at <<https://www.gov.uk/government/publications/manual-of-guidance-drink-and-drug-driving-mgdd>> accessed 27 November 2013.

⁶⁷ Forms MG DD/A and B were described by Turner J, in *DPP v Smith (Robert James)* [2000] RTR 341 (QBD), 349, as “no more than what I would describe as the “plain man’s guide” to a simple understanding of the procedures ... to ensure, in a practical way, that those called upon to operate the procedures do not omit a relevant step; that, at stages where there is a choice of steps, they appreciate that such a choice exists; and it also offers quite clearly common sense guidance as to the way in which choices should be exercised when they fall to be made.”

⁶⁸ RTA 1988, s 11(2).

⁶⁹ Most recently, in the North Report (Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 4.27). See also, for example, British Medical Association, *Drink Driving Limit Demand*, 25 February 2012 <<http://bma.org.uk/news-views-analysis/news/2012/february/drink-driving-limit-demand>> accessed 27 November 2013.

alcohol, he or she is likely to be under or over the limit. For as long as it is permitted to drink before driving, this question of interpreting the limit is of real practical significance and is considered at length in this work.⁷⁰

The Act goes on to stipulate what constitutes co-operation with a preliminary test, and what constitutes providing a specimen of breath for analysis.⁷¹ The subject must consent to the taking of any blood specimen, and certain persons are authorised to take such specimens.⁷²

Use of Specimens in Proceedings

The result of analysing a specimen is to be taken into account in any prosecution that follows.⁷³ It is to be assumed that the alcohol level⁷⁴ at the time of the alleged offence was no lower than in the specimen. This is commonly known as the “statutory assumption” and is discussed in detail in Chapter 3. It applies even though the alcohol concentration may have been rising (because alcohol was still being absorbed) or falling (because alcohol was being eliminated) between the time of the alleged offence and the time the specimen was provided. To ensure that the analysis reflects as accurately as possible the alcohol-concentration at the time of the alleged offence, specimens are taken as soon as possible. The procedure may not be delayed, even for the suspect to take legal advice.⁷⁵

The statutory assumption may be displaced⁷⁶ by what is sometimes called the “hip flask defence”, where the defendant establishes, on a balance of probabilities, that it was alcohol consumed *after* the alleged offence which caused the defendant to be unfit or over the limit.

A blood specimen is disregarded if it was not taken with the defendant’s consent and by the appropriate professional person. A blood specimen taken from a person incapable of consenting is to be disregarded unless the person gave permission for it to be analysed.⁷⁷

⁷⁰ In Chapters 5 to 8.

⁷¹ RTA 1988, s 11(3).

⁷² RTA 1988, s 11(4); see p 149.

⁷³ RTOA 1988, s 15(2).

⁷⁴ Or, in due course, the drug level; RTOA 1988, s 15(2)(b), to come into force from a date to be appointed.

⁷⁵ This is discussed further at pp 105–106 and 154–155.

⁷⁶ Under RTOA 1988, s 15(3); see pp 111–113. Similar provisions will apply to the offences of excess specified drugs: RTOA 1988, s 15(3A), to come into force from a date to be appointed.

⁷⁷ RTOA 1988, s 15(4).

There are provisions concerning the procedure for dividing a blood specimen into two parts and, upon request, giving one part to the suspect.⁷⁸

Penalties

The drink- and drug-driving offences are triable summarily only. The penalties are set out in part 1 of schedule 2 to the RTOA 1988. The offences of driving or attempting to drive when unfit or with excess alcohol⁷⁹ carry more severe maximum penalties than the offences of being in charge in such a condition. The maximum penalty for failing to supply an evidential specimen is the same as that for the offence which was being investigated, and so again is higher where the police were investigating driving or attempting to drive, rather than being in charge.⁸⁰ It is not, therefore, to a defendant's advantage to fail to provide a specimen.⁸¹ Failing to co-operate with a preliminary test attracts a lower penalty.

The sentencing court is obliged to consider disqualifying the offender from driving. Disqualification is obligatory for the driving or attempting to drive offences, and for causing death by careless driving when unfit or over the limit, but is a matter for the discretion of the court in an "in charge" case. For failing to provide specimens, disqualification again depends on the offence which was being investigated, and is obligatory in the driving or attempting to drive cases, and discretionary in the "in charge" cases.

Where disqualification is obligatory, the minimum period of disqualification is usually twelve months, unless for special reasons the court thinks fit to disqualify for a shorter period, or not at all.⁸² The expression "special reasons" is not defined in the legislation, and has given rise to an abundance of case law.⁸³ The court may order that a disqualification for

⁷⁸ RTOA 1988, s 15(5); see pp 149–150.

⁷⁹ Or, in due course, with concentration of a specified controlled drug above the specified limit (by amendment of sch 2 pursuant to Crime and Courts Act 2013, s 56, sch 22, para 4(4), to come into force from a date to be appointed).

⁸⁰ Strangely, however, the equivalent distinction appears not to have been made in relation to the new offences of driving, attempting to drive or in charge with concentration of a specified controlled drug above the specified limit. This may be the result of an oversight in drafting.

⁸¹ Although a person who is greatly over the limit may receive a lesser penalty by failing to provide than if sentenced on the basis of an actual alcohol concentration reading.

⁸² RTOA 1988, s 34. In certain circumstances the minimum period of disqualification is greater than twelve months.

⁸³ The leading case is *Whittall v Kirby* [1947] KB 194 (DC). For a reason to be "special", it must be a mitigating or extenuating circumstance; it must not amount in law to a defence to the charge; it must be directly connected with the commission of the offence and it must be a matter which the court ought properly to take into consideration when imposing punishment.

twelve months or longer may be reduced if the offender satisfactorily completes an approved course.⁸⁴

The Sentencing Council has provided guidelines on the drink-drive offences.⁸⁵

The principles of law which arise out of the provisions summarised above are next identified.

THE PRINCIPLES ENGAGED

Four major principles of law arise in relation to the drink- and drug-driving offences.

Strict Liability

All the drink- and drug-driving offences discussed in this work are offences of strict liability.⁸⁶ This is usually interpreted as meaning that guilt can be established without proof of the defendant's intention to commit the offence charged, knowledge that he or she was committing it, or recklessness as to whether he or she was committing it. While it would be all too easy for a defendant to escape conviction by, for example, claiming not to have been aware of being over the limit, leaving the prosecutor with the near-impossible task of refuting the assertion, it is rather less straightforward to reconcile strict liability for these offences with the arguments advanced in the literature for and against such liability. By contrast, a person may not be convicted of failing to provide a specimen in the absence of a warning that failure constitutes an offence,⁸⁷ suggesting that strict liability does not apply to these offences. The literature on strict liability is reviewed, and these issues considered in detail, in Chapter 2.

⁸⁴ RTOA 1988, ss 34A, B and C. RTOA s 34B contains further provisions for shortening periods of disqualification by complying with an alcohol ignition interlock programme order made by the court. An alcoholock is a device fitted to a motor vehicle which prevents the vehicle from being driven unless the driver provides satisfactory breath specimens into the device both before and while driving. Government has, however, made clear that the provisions will not be brought into force because the cost of implementing and enforcing such a scheme are likely to be disproportionate: *The Government's Response to the Reports by Sir Peter North CBE QC and the Transport Select Committee on Drink and Drug Driving* (Cm 8050, 2011) para 8.3.

⁸⁵ Sentencing Council, *Magistrates' Courts Sentencing Guidelines*, 124–126 <http://sentencingcouncil.judiciary.gov.uk/docs/MCSG_Update9_October_2012.pdf> accessed 27 November 2013.

⁸⁶ See, for example, *R v Drummond* [2002] EWCA Crim 527.

⁸⁷ *DPP v Jackson, Stanley v DPP* [1999] 1 AC 406 (HL).

The Presumption of Innocence and Reverse Burdens of Proof

The general rule of the criminal law is that a defendant is innocent until proved guilty and that it is for the prosecution to establish guilt beyond reasonable doubt.⁸⁸ If, however, the defendant to an allegation of being in charge is to avoid conviction on the basis that there was no likelihood of driving while remaining unfit or over the limit,⁸⁹ it is for the defendant to prove the absence of likelihood, on a balance of probabilities. Furthermore, expert evidence is often required.⁹⁰ This reverse burden of proof compromises the presumption of innocence and raises questions of justification and acceptability.

The statutory assumption that the alcohol level at the time of an alleged offence was no less than that in the specimen⁹¹ is an irrebuttable presumption of law,⁹² again raising questions of the presumption of innocence, while the “hip-flask defence”⁹³ also places a legal burden of proof on the defendant.⁹⁴ By comparison, if a defendant raises a matter amounting to a “reasonable excuse” for failing to provide a specimen, it falls to the prosecution to negative the claim.⁹⁵

These problematic issues concerning onuses of proof and their relationship to the presumption of innocence are examined in detail in Chapter 3.

The Privilege Against Self-Incrimination

The House of Lords has ruled that the requirement to provide a breath specimen constitutes a substantial encroachment on the common law right of a citizen not to be compelled to incriminate himself.⁹⁶ The same surely applies to the provision of blood and urine specimens. As already noted,⁹⁷

⁸⁸ *Woolmington v DPP* [1935] AC 462 (HL).

⁸⁹ Under RTA 1988, ss 4(3) and 5(2); see pp 90–94.

⁹⁰ *DPP v Frost* [1989] RTR 11 (QBD).

⁹¹ Under RTOA 1988, s 15(2); see pp 105–107.

⁹² *Parker v DPP* [2001] RTR 16 (QBD); see p 107.

⁹³ Under RTOA 1988, s 15(3); see pp 111–113.

⁹⁴ *Dawson v Lunn* [1986] RTR 234 (QBD).

⁹⁵ *DPP v Boden* [1988] RTR 188 (QBD); *DPP v Szarzynski* [1993] RTR 364 (QBD); *McKeon v DPP* [2007] EWHC 3216 (Admin) (DC). See p 102–104.

⁹⁶ *Morris v Beardmore* [1981] AC 446 (HL) 458.

⁹⁷ Above, p 16.

failure to provide specimens – in effect, to provide the prosecution with the evidence it needs – attracts a penalty broadly equivalent to the penalty for the principal offence. Self-incrimination further undermines the presumption of innocence, yet the privilege is routinely breached in drink-and drug-driving investigations. This is an important issue of principle which has not been addressed in any depth in the literature. It is tackled in Chapter 4.

Legal Certainty

The principle of legal certainty embraces the idea that those to whom the law applies should have notice of its requirements and should be able to foresee what behaviour will amount to committing an offence. It has been noted above that the prescribed limit is defined in terms of the alcohol concentration in the body, not the amount consumed, and that the amount which a person may consume without reaching the limit depends on a number of factors. Research indicates a wide range of interpretations of the prescribed limit, such that drivers are highly unlikely to know whether or not they are offending unless they are stopped and tested. The principle of legal certainty is reviewed in Chapter 5, before moving on to examine other aspects of certainty in relation to drink- and drug-driving.

Having identified the points of principle arising, I next outline my approach to the literature.

THE LITERATURE

The literature and case law selected for study fell broadly into the following subject areas:

- the legal nature of the drink-and drug-driving offences. Materials proved scarce, but what there is, is reviewed in this chapter, below;
- the paradigm of the criminal law – the principles by reference to which it is said the criminal law is framed. Here the search was much more fruitful, yielding a wealth of scholarship, selected parts of which are reviewed in Chapters 2 to 5;
- the scientific aspects of drink-and drug-driving, confined to materials written for those who are not scientifically trained. I was satisfied that these were sufficient for the purposes of explaining the scientific principles which underlie the law, and these sources are referred to in Chapter 6;

- studies of how drivers interpret the drink- and drug-driving laws. These make an important contribution, and are reviewed in Chapter 7, in support of the argument that the prescribed alcohol limit breaches the principle of legal certainty.

While it was at first disconcerting to find so little scholarly work directly on the legal aspects of the offences, or indeed on road traffic law in general, the abundance of material on the principles of criminal law provided an opportunity for originality in applying those principles in an area which has received so little attention. Although there is a wide literature on many other aspects of drug- and drink-driving,⁹⁸ my review was confined to the aspects listed above.

THE NATURE OF THE OFFENCES

The behaviour comprising the drink-drive offences – drinking alcohol, and driving, are, of course, entirely legitimate activities in themselves; it is the combination which may give rise to an offence. The same applies to drug-driving when the drugs were legitimately acquired.

Seriousness

With the exception of drink-driving, road traffic offences in general tend to be thought of not as “real” crimes, as not deserving of censure.⁹⁹ Commentators have suggested a number of reasons for this:

- when laws regulating motor traffic were first introduced in the early twentieth century, the conduct regulated fell outside those areas traditionally seen as criminal (murder, riot and theft), and applied to classes of society (the car-owning upper and, later, middle classes) whose ordinary activities had not before been regulated in such a way and who were not associated with criminal behaviour;¹⁰⁰
- the absence of intention to harm others;¹⁰¹

⁹⁸ Such as the reasons people offend, the frequency of offending, the profiles of drink-drivers, the likely effects of a lower limit, and the various enforcement, deterrent and rehabilitative measures.

⁹⁹ Sally Cunningham, *Driving Offences. Law, Policy and Practice* (Ashgate 2008) 169, 172.

¹⁰⁰ Clive Emsley, ‘Mother, what did Policemen do when there Weren’t any Motors? The Law, the Police and the Regulation of Motor Traffic in England, 1900–1939’ (1993) 36 *The Historical Jnl* 357; Claire Corbett, *Car Crime* (Willan 2003) 15, 30; David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 1125.

¹⁰¹ Claire Corbett and Frances Simon, ‘Decisions to Break or Adhere to the Rules of the Road, Viewed from the Rational Choice Perspective’ (1992) 32 *Brit J Criminology* 537, 544; Claire Corbett, *Car Crime* (Willan 2003) 28.

- the absence of intention to make a dishonest personal gain;¹⁰²
- the social acceptability (perhaps even normality) of breaking at least some traffic rules;¹⁰³
- the low chance of being caught and the relatively low penalties;¹⁰⁴ motorists can commit several offences before being disqualified under the “totting up” rule;¹⁰⁵
- the fact that an accused motorist often need not even attend court;¹⁰⁶
- the widespread use of the word “accident” to describe incidents which may well feature offending behaviour,¹⁰⁷ suggesting that no one was to blame, that the incident resulted from unforeseen circumstances – the weather, the road conditions, or other drivers, for example, making it easy for a driver to displace responsibility to others. There is support for this in the research finding that most drivers believe their driving to be more skilled and less risky than that of others,¹⁰⁸ and that traffic offences are perceived to result from lack of concentration rather than deliberate breaking of the rules;¹⁰⁹
- the fact that forms such as job applications may ask for details of an applicant’s convictions, but specify that certain road traffic offences may be omitted;¹¹⁰
- the absence of a Home Office core objective for police to investigate and reduce road offences;¹¹¹

¹⁰² Claire Corbett, *Car Crime* (Willan 2003) 28.

¹⁰³ Claire Corbett and Frances Simon, ‘Decisions to Break or Adhere to the Rules of the Road, Viewed from the Rational Choice Perspective’ (1992) 32 *Brit J Criminology* 537, 544.

¹⁰⁴ *Ibid.*

¹⁰⁵ Claire Corbett, *Car Crime* (Willan 2003) 26.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 31.

¹⁰⁸ Ola Svenson, ‘Are we all Less Risky and More Skillful than Our Fellow Drivers?’ (1981) 47 *Acta Psychologica* 143. It is of course impossible that the majority of drivers can be more skilful and/or less risky than average.

¹⁰⁹ L Brook, *Attitudes to Road Traffic Law* (Transport and Road Research Laboratory 1987) 28, reporting that 70 per cent of 1,416 respondents who completed a questionnaire agreed or strongly agreed with the proposition that most road traffic offences occur because of lack of concentration, rather than drivers deliberately breaking the law.

¹¹⁰ Claire Corbett and Frances Simon, ‘Police and Public Perceptions of the Seriousness of Traffic Offences’ (1991) 31 *BJ Crim* 153, 154.

¹¹¹ Claire Corbett, *Car Crime* (Willan 2003) 27.

- the reluctance of politicians to risk alienating motorists, who constitute a large body of voters, by severe measures.¹¹²

Another indicator of the low level of seriousness attached to road traffic offences is the proposition that many of them are so straightforward that they no longer warrant being brought before a full court.¹¹³ Government has suggested that some 500,000 simple road traffic cases could be heard away from traditional courtrooms, perhaps by a single magistrate sitting in an office.¹¹⁴ This number represents well over half of the 819,000 cases in magistrates' courts for offences relating to motor vehicles in 2012.¹¹⁵

Drink-driving, however, seems to be an exception to the perception that road traffic offences are not "real crime". It carries a degree of stigma normally attached to more paradigmatic offences.¹¹⁶ It has been said to be publicly regarded as a serious criminal offence involving inherently wrongful conduct.¹¹⁷ Public education campaigns against drinking and driving may have much to do with this.¹¹⁸ The emergence of groups such as the Campaign Against Drinking and Driving,¹¹⁹ and the public favouring of random breath testing have been cited as possible reasons.¹²⁰ A study reported in 1991 showed that driving when the driver thought he or she was over the limit, whether or not the driver also felt that his or her ability to drive was affected, was considered more serious (by both police and public) than twenty-four other road traffic offences, ranging from driving while disqualified down to parking and minor speeding offences.¹²¹ This reflects an

¹¹² *Ibid*, 34.

¹¹³ Ministry of Justice, *Transforming the CJS. A Strategy and Action Plan to Reform the Criminal Justice System*, Cm 8658, 2013, 16.

¹¹⁴ Damian Green, speech, *Reforming the Role of Magistrates* <<https://www.gov.uk/government/news/damian-green-reforming-the-role-of-magistrates>> accessed 27 November 2013.

¹¹⁵ Ministry of Justice, *Criminal Justice Statistics Quarterly - December 2012*, 30 May 2013, Table 8.1 <<https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>> accessed 27 November 2013.

¹¹⁶ Sally Cunningham, *Driving Offences. Law, Policy and Practice* (Ashgate 2008) 59.

¹¹⁷ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [78].

¹¹⁸ See, for example, AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 659, remarking that the campaign against drink-driving was instrumental in bringing about a sea-change in public attitudes towards the wrongfulness of driving while drunk.

¹¹⁹ <<http://www.cadd.org.uk>> accessed 27 November 2013.

¹²⁰ Claire Corbett and Frances Simon, 'Police and Public Perceptions of the Seriousness of Traffic Offences' (1991) 31 BJ Crim 153.

¹²¹ *Ibid*, 154.

earlier study in which driving after drinking too much was considered the second most serious of eight offences, second only to injuring a pedestrian while driving carelessly.¹²² Driving after drinking is now widely perceived as “very wrong indeed”.¹²³ There has been a cultural shift in that the majority of the public no longer considers drink-driving acceptable.¹²⁴ Indeed, there are suggestions that the legislation itself may have played a part in bringing about this general view.¹²⁵ It has been remarked that, unlike other offences designed to promote safety, such as speeding, drink-driving has become an accepted use of government power to limit autonomy behind the wheel.¹²⁶ Driving while intoxicated has been cited¹²⁷ as an example of the creation of unwarranted risk of injury, which can straightforwardly be characterised as wrongful. Finally, in a civil case¹²⁸ concerning an exclusion clause in an insurance policy, the Queen’s Bench Division held that driving when unfit through drink was not an offence of inadvertence or negligence, but one requiring a degree of moral culpability or turpitude.

The seriousness of drink-driving has not, however, been universally accepted. One commentator, writing in 1994, said that many people think of the drink-driver as not on the right side of the law, but not as a “criminal”.¹²⁹ He posits a number of explanations, for example, that conviction does not carry enough stigma, that drink driving even without being caught does not carry enough disapproval, and that drink-drivers do not attract fear or abhorrence as do those who commit other types of crime.¹³⁰

¹²² L Brook, *Attitudes to Road Traffic Law* (Transport and Road Research Laboratory 1987). Among 1,552 interviewees, the remaining six offences, in descending order of perceived seriousness were: burglary from a house while the owners were away, driving while disqualified, vandalising a telephone box, driving through a red traffic light, shoplifting from a supermarket and driving at 50 m.p.h. where the limit is 30 m.p.h.

¹²³ AP Simester and GR Sullivan, ‘On the Nature and Rationale of Property Offences’ in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 187.

¹²⁴ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 1.9.

¹²⁵ CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 267; AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 194.

¹²⁶ Sally Cunningham, ‘The North Review of Drink-driving: Some Sobering Proposals’ [2011] Crim LR 296, 298.

¹²⁷ AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 20.

¹²⁸ *Marcel Beller Ltd v Hayden* [1978] QB 694, 706.

¹²⁹ Roy Light, *Criminalizing the Drink-Driver* (Dartmouth 1994) 142.

¹³⁰ *Ibid*, 153–154.

It has been argued¹³¹ that the risk presented by individual drink-drivers is exaggerated. The basis for this argument is:

- although statistics show the totality of harm (to both people and property) caused by drink-drivers, there is no way of allocating to individual drivers the risk posed; it may be that many pose no risk at all, while others pose great risk;
- a fixed blood alcohol limit bears no necessary or consistent connection to actual driving behaviour; some aspects of drunken behaviour, such as taking risks and aggression, are not necessarily caused by alcohol at all;
- there is an unjustifiable assumption that alcohol is to blame for an incident in which a drink-driver is at fault; other factors (such as road conditions) are not properly taken into account.

In the context of the appropriate penalties for drink-driving, Husak¹³² proposes that drink-driving is not a serious offence at all. Driving is a dangerous activity in itself, he points out, and drink-driving is not necessarily any more dangerous than driving when sober. He justifies this on the ground that there is no demonstrable difference in the relative culpability of drivers who have taken drink and those who have not, or in the risks posed by each. He proposes, albeit tentatively, that the more precautions it is reasonable for others to take to avoid the harm which the offence is designed to obviate, the less serious the offence; in the context of road traffic, it is incumbent on the state and individuals to take a wide range of measures to reduce risks posed by other drivers, whether or not they have been drinking. A second tentative suggestion is that the offence must be of low seriousness if different people can engage in it yet create differing degrees of risk, in that different blood alcohol levels product different degrees of impairment.

While the views described above may at first glance appear unconventional, they should probably not be dismissed entirely, especially in view of a UK research finding that driving behaviour is impaired more by reason of a telephone conversation than by having a blood alcohol level at the prescribed limit.¹³³ In Chapter 2,¹³⁴ however, I argue that drink-drivers are rarely morally innocent.

¹³¹ Lonn Lanza-Kaduce, Donna M Bishop, 'Legal Fictions and Criminology: The Jurisprudence of Drunk-Driving' (1986) 77 *Jnl of Criminal Law & Criminology* 358.

¹³² Douglas N Husak, 'Is Drunk Driving a Serious Offense?' (1994) 23 *Philosophy and Public Affairs*, 52.

¹³³ PC Burns and others, *How Dangerous is Driving with a Mobile Phone? Benchmarking the Impairment to Alcohol* (Transport Research Laboratory 2002).

¹³⁴ See pp 65–66.

Technology-Led

The excess alcohol offences are also special in that they are proved by operation of technological devices.¹³⁵ Much of the underlying legislation can perhaps now be described as “technology-led”, in the sense that the legislative provisions could not have been implemented unless the requisite scientific procedures were in place or reliable measuring equipment was available. Thus, evidential breath-testing was first introduced by the Transport Act 1981, once reliable breath-analysis machines had been developed. The RTA 1988 now contains provisions facilitating evidential breath testing elsewhere than at a police station, although these provisions are not yet in operation because portable evidential breath testing instruments have not yet been approved.

In 2011 the Home Office published a guide to type approval procedures for preliminary drug testing devices¹³⁶ and a later invitation to manufacturers to submit devices for approval,¹³⁷ to provide further aids to detecting drug-driving offences.

Non-Paradigmatic

It has been suggested that road traffic offences as a whole are perceived as falling outside the paradigm of criminal liability.¹³⁸ This in turn raises the question of defining the paradigm in the first place. Perhaps it is acceptable to adopt Duff’s perspective¹³⁹ that the law exhibits a spectrum of doctrines, rules and definitions ranging from the most specific (in particular those defining offences) to the most general. Duff locates the “general part” of the criminal law towards one end of that spectrum, and it seems fair to equate the paradigm with such general rules. In any event, for my purposes, the paradigm includes at least the general principles which form the headings to Chapters 2, 3, 4 and 5 of this work, and questions of harm and endangerment discussed below. There are other principles which are not offended by the drink- and drug-driving offences – the principle of non-

¹³⁵ Sally Cunningham, *Driving Offences. Law, Policy and Practice* (Ashgate 2008) 59. I take “technological devices” to include not only evidential breath-testing instruments, but methods for analysing blood and urine specimens.

¹³⁶ <<http://www.homeoffice.gov.uk/publications/police/road-traffic-documents/drug-testing-devices/drug-testing-devices-guide?view=Binary>> accessed 27 November 2013.

¹³⁷ Home Office Press Release 1 June 2012, *Drug Driving Devices to Undergo Testing* <<http://www.homeoffice.gov.uk/media-centre/press-releases/Drug-driving-devices>> accessed 27 November 2013. As noted above, one such device has since been approved.

¹³⁸ Sally Cunningham, *Driving Offences. Law, Policy and Practice* (Ashgate 2008) 1.

¹³⁹ RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 4.

retroactivity¹⁴⁰ and of (arguably) non-liability for omissions¹⁴¹ are two examples.

It has been said that the road traffic offences fall outside the paradigm because they lack two elements of paradigmatic crime: harm and blame.¹⁴² All the offences described in this work, except for causing death by careless driving while under the influence of drink or drugs, can be committed without any harm arising. On the other hand, they do attract a considerable element of blame – a subject discussed in some detail in Chapter 2.

Clarkson¹⁴³ says that a paradigmatic crime is one in which a person intentionally causes a prohibited harm. Some crimes may depart from the paradigm, but such departures must be justified and should attract lower sentences. He cites dangerous driving and careless driving as examples of double departures from the paradigm in that they are committed in the absence of both intention and harm.

Endangerment

The criminal law has certain preventive functions, and these include the criminalisation of conduct which creates the risk of certain harms.¹⁴⁴

With the exception of causing death by careless driving while under the influence of drink or drugs, all the offences described in this work fall into this category of “endangerment” or “conduct” offences, the offences consisting in conduct which gives rise to a risk even though that risk often comes to nothing. Causing death by careless driving, by contrast, is a result crime, where a specific harm must be shown to make out the offence.¹⁴⁵

Whether it is just to criminalise conduct that could lead to harm depends, it has been said, on balancing, on the one hand, the seriousness of the possible harm and the likelihood of its occurrence, against, on the other hand, the social value of the conduct and the degree of intrusion on the

¹⁴⁰ See, for example, AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 22, and p 184.

¹⁴¹ See, for example, AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 66 *et seq.*

¹⁴² Sally Cunningham, *Driving Offences Law, Policy and Practice* (Ashgate 2008) 3–4; CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 4.

¹⁴³ CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 130–131.

¹⁴⁴ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 38. See also, for example, RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 125–126.

¹⁴⁵ Sally Cunningham, *Driving Offences. Law, Policy and Practice* (Ashgate 2008) 4.

citizen's life which criminalisation would cause.¹⁴⁶ Thus drink-driving is prohibited, while walking down the street when drunk is not.¹⁴⁷ The potential to cause harm, without actually doing so, has been said to be a key feature distinguishing motoring offences from other criminal offences.¹⁴⁸

The drink-drive offences have also been described as “status” or “situation” offences, in that the offences are made out by proving a specified state of affairs; the state of being in charge when unfit, for example, is the *actus reus* of an “in charge” offence.¹⁴⁹

In the same vein, drink-driving has been described as an anticipatory offence, punishing conduct that is not harmful on each occasion it is performed.¹⁵⁰

The American commentator James Jacobs¹⁵¹ describes a drink-driver as a ticking bomb, who is punished for creating a significant risk of injury or death to other road users. Since the drink- and drug-driving offences do not require any harm, he continues, they are inchoate and pre-emptive, proscribing behaviour before its dangerousness is manifest. They are incompatible with a criminal jurisprudence that emphasises individual culpability, and fit uneasily into the law of crimes. A fixed blood-alcohol limit is a prophylactic safety standard.¹⁵²

Duff defines endangerment as the creation, by act or omission, of a significant risk that another person will suffer harm.¹⁵³ Non-consummated endangerment offences are those which are committed even though no

¹⁴⁶ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 649–650; AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 45, 67–68; RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 156.

¹⁴⁷ AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 55–56.

¹⁴⁸ Claire Corbett, *Car Crime* (Willan 2003) 29.

¹⁴⁹ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 63. See also CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 45.

¹⁵⁰ Douglas N Husak, ‘Is Drunk Driving a Serious Offense?’ (1994) 23 *Philosophy and Public Affairs*, 52, 66.

¹⁵¹ James B. Jacobs, *Drunk Driving: An American Dilemma* (University of Chicago Press 1989) 59 *et seq.*

¹⁵² *Ibid.*, 71. Compare prophylactic crimes, said to be distinct from endangerment offences in that the risk of harm does not arise directly from a prohibited act, but only after some further human intervention: AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 79.

¹⁵³ RA Duff, ‘Criminalizing Endangerment’ in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 46.

harm materialises.¹⁵⁴ On this basis, I take it that causing death by careless driving when unfit or over the limit would be a consummate endangerment offence, while the remaining drink- and drug-driving offences would be non-consummate endangerment offences.

Duff¹⁵⁵ goes on to identify two types of endangerment offence – explicit and implicit. Explicit endangerment offences are those in which a person commits an offence by creating a risk which is specified in the definition of the offence, while implicit endangerment offences are those which consist in behaviour which is liable to lead to harm, but the risk is not specified in the definition of the offence. Duff cites driving when unfit as an explicit endangerment offence (the risk being, presumably, the unfitness), while driving with excess alcohol is an implicit endangerment offence which does not include in its statutory formulation a definition of the relevant endangerment. This distinction must be based on the assumption that driving when over the limit is not in itself a risk. This presents a difficulty. While it is just possible that a person who is over the limit may be able to drive without creating a risk, it is unlikely. The evidence is that almost any amount of alcohol impairs driving skills, rendering the person unfit to drive,¹⁵⁶ such that both unfitness to drive and being over the limit are endangerments in themselves. This is not necessarily to undermine Duff's argument, but simply to question whether this particular example is as apt as he may have thought.¹⁵⁷

Duff argues that, in general, the law should not prohibit conduct which is intrinsically harmless since this fails to treat citizens as responsible agents, but he makes an exception for situations in which there is reason to think that individuals cannot be trusted to judge for themselves, citing the drink-drive offences as examples.¹⁵⁸

Drink-driving and exceeding a speed limit have been described as internal endangerment rules in that they provide protection to the members of the group (drivers) whose conduct is being regulated. It is a scheme of mutual protection, providing reciprocal benefits.¹⁵⁹ If all drivers abide by the

¹⁵⁴ *Ibid*, 55.

¹⁵⁵ RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 166–172.

¹⁵⁶ See above, fn 36.

¹⁵⁷ A possibility he acknowledges: RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 166, fn 78.

¹⁵⁸ RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 170.

¹⁵⁹ AP Simester and Andrew von Hirsch, 'Remote Harms and Non-constitutive crimes' (2009) 28 *Criminal Justice Ethics* 89, 96.

rules, they are protected from their own excessive speed (or, presumably, driving with excess alcohol) and from that of other drivers. I revisit the idea that drivers are in some special position vis-à-vis each other in Chapter 10.¹⁶⁰

The offence of drink-driving addresses a remote risk in the sense that some contingency (the presence of another vehicle on the road, perhaps) must come about before harm – damage to other persons or property – materialises. It has also been called an offence of abstract endangerment, in that the harm anticipated, which was the reason for the legislation, is not mentioned in the statutory formulation of the offence¹⁶¹ – a perception reminiscent of Duff’s distinction between explicit and implicit endangerment offences, described above. Crimes in which the prospective harm is not specified in the definition of the crime are designated “non-constitutive” crimes by Simester and von Hirsch,¹⁶² and endangerment offences are a type of non-constitutive offence.¹⁶³ Simester and von Hirsch¹⁶⁴ give as an example of an abstract endangerment offence breaking a 70 m.p.h. speed limit – not only does the statutory provision creating the offence not specify the harm sought to guard against, but breaking the limit is an offence even if it gives rise to no real risk. Such abstract formulations, the argument goes, also protect against the secondary risk of mistake by the driver, by specifying what measures are appropriate to avoid the risk of harm. Thus, the prohibition on driving too fast is more easily obeyed when formulated as a speed limit. The writers give another example – “how much alcohol can I safely drink?” suggesting that they bring drink-driving into this category of offence. This seems to be an over-simplification of a highly complex issue; as will be seen,¹⁶⁵ the drink-drive limit is far more difficult to understand and observe than a speed limit.

The “in charge” offences concern even remoter harm in that they prohibit conduct which has no adverse consequences in itself, but may lead to a further act (driving) that creates a risk of harm. The offence depends on

¹⁶⁰ See p 314.

¹⁶¹ AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 57.

¹⁶² *Ibid*, 70.

¹⁶³ *Ibid*, 75.

¹⁶⁴ *Ibid*, 77.

¹⁶⁵ In Chapters 6, 7 and 8.

the making of an intervening choice, but the conduct is punishable whether or not that choice is made.¹⁶⁶

Mala in se; Mala Prohibita

Returning to Duff, elsewhere¹⁶⁷ he says that driving when impaired by drink or drugs is a *mala in se* offence, that is, it comprises behaviour which is wrong in itself, regardless of the fact that it is prohibited by law, since it exposes others to an unjustified risk of harm. Traditional examples of *mala in se* offences are murder, rape and theft. On the other hand, *mala prohibita* offences are those comprising behaviour which is wrongful only because it is prohibited by the criminal law. Driving when over the prescribed alcohol limit, Duff argues, often comprises the *mala in se* of exposing others to an unjustified risk of harm, but not always so, because, again, some people are able to drive quite safely even when over the limit. These offences are neither purely *mala in se* nor purely *mala prohibita*.

Husak¹⁶⁸ describes them as “hybrid offences” and, in an argument concerning the justification for punishment for such offences, adopts the same view that driving with excess alcohol does not necessarily feature any *malum in se* since, he says, some people may drive safely even when over the limit. He construes Duff as meaning that a majority of those who commit a hybrid offence commit a *malum in se* and questions whether it is right for the state to punish those who commit an act simply because that act is wrongful when committed by a majority of people.

As I have already argued, these classifications of offences are not wholly convincing in that they seem to imply, in error, that quite some numbers of people who are over the limit may be able to drive safely.

Clarkson¹⁶⁹ cites Feinberg’s proposition that criminalisation is justified to prevent or reduce harm to others, and that the more serious the threatened harm, the less probable it need be. Clarkson then proceeds on the basis that the drink-drive limit has been set quite low, concluding that the potential harm (the death of or serious injury to others) is so great that it is justifiable to criminalise the mere fact of driving while over the limit even though, statistically, it might not be very probable that the harm would

¹⁶⁶ AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 58. The example given is gun possession, but the “in charge” offences seem equally apt.

¹⁶⁷ RA Duff, ‘Crime, Prohibition and Punishment’ (2002) 10 *Jnl of Applied Philosophy* 97, 102–103.

¹⁶⁸ Douglas Husak, ‘Malum Prohibitum and Retributivism’, in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 75, 79.

¹⁶⁹ CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 262.

materialise. Clarkson does not say on what basis he describes the drink-drive limit as “quite low”, but those who argue in favour of lowering the limit would almost certainly disagree with him, and he might be surprised to know just how much some people can drink before reaching the limit.¹⁷⁰

None of the literature reviewed above has the drink-drive offences as the primary focus, but the offences are mentioned in the discourses cited to illustrate various arguments and classifications of offences. I am uncomfortable with Duff’s reference to the drink-drive offences to support his distinction between implicit and explicit endangerment offences, with the basis for Simester and von Hirsch’s classification of drink-driving as an abstract endangerment offence, and with Husak’s categorisation of drink-driving as a hybrid offence. It seems to me that the small possibility that a person may drive without danger to others even when over the limit has been taken too far, and that the true nature of the offences has not been fully appreciated.

CONCLUSION

In this opening chapter I have outlined the reasons I believe the drink- and drug-driving offences are worthy of academic attention, set out the contours of my research project, summarised the statutory regime, and looked at what literature there is on the offences in general. They are referred to as an exception to the common perception that road traffic offences are not “real crime”, but the view that they are serious offences is not universal. The drink-drive offences are given as examples of particular categories of offence – of offences of endangerment of various kinds, and as a combination of *mala in se* and *mala prohibita*. That is all very interesting, but there is much more to discover about these offences. I now turn to the major principles engaged, starting with the question of strict liability.

¹⁷⁰ See Chapter 7, p 242 *et seq.*

Chapter 2: Strict Liability

INTRODUCTION

This chapter is on strict liability and how it features in the drink- and drug-driving offences. The case law establishes a presumption in favour of *mens rea* as a precondition for criminal liability, which is to be departed from only in certain circumstances. *Mens rea* is said to relate to a defendant's mental state,¹ comprising different degrees of awareness by a person that what he or she is about to do will bring about a prohibited harm. Many commentators have, however, lamented the ease and frequency with which the presumption has been overridden, with the result that many offences require no mental element at all, and are instead offences of strict liability.

I first briefly review the theoretical background to the concepts of strict liability and *mens rea*, and the case law, then examine the drink- and drug-driving offences to relate them to the principles identified in the literature. I conclude that, despite a strong presumption in favour of *mens rea*, the principal drink- and drug-driving offences are offences of strict liability, but that this can be justified.

THE THEORETICAL BACKGROUND

The Nature of Strict Liability

To the extent that *mens rea*, in the sense of intention, knowledge, recklessness or other specified mental state,² in relation to one or more elements of an offence, does not have to be proved for a prosecution to succeed, the offence is one of strict liability.³

In the early case of *Woodrow*,⁴ the defendant was held liable for possessing adulterated tobacco, even though the adulteration would have been discoverable only by “a nice chemical analysis”; and in *Hobbs v*

¹ See, for example, AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 125.

² Discussed further below, pp 37–38.

³ This is the approach adopted by Professor Ashworth, acknowledging that there is no clear convention about when liability should be regarded as strict: Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 160. See also, for example, Douglas W Husak, ‘Varieties of Strict Liability’ (1995) 8 *Canadian Jnl of Law & Jurisprudence* 189.

⁴ *R v Woodrow* (1846) 15 M&W 404.

Winchester Corporation,⁵ a butcher was convicted of selling unsound meat even though he could not have discovered the disease which affected the meat unless he had an analyst on the premises – both cases in which the references to scientific analysis seem particularly apt in the context of breath, blood and urine specimens. In *Pharmaceutical Society of Great Britain v Storkwain*,⁶ the defendant company was convicted for supplying medicines, in contravention of the Medicines Act 1968, against forged prescriptions, even though the defendant did so in good faith. All these are widely quoted examples of strict liability offences.

Green⁷ identifies six meanings which have been given to the term strict liability, but argues that it should be confined to offences omitting the requirement for *mens rea* in relation to at least one material element of the offence, such that there is liability in the absence of intent, purpose, knowledge, belief, recklessness, negligence or some other prescribed mental state. He characterises strict liability in this sense as “formal” strict liability, as opposed to substantive (or broad, or moral) strict liability, under which a person can be convicted without a showing of moral fault. His reasons include that *mens rea* in his narrow sense can be determined fairly easily, while in the sense of blameworthiness, it is more likely to be difficult and cause controversy. Nevertheless, he concludes, eliminating the requirement for *mens rea* remains a radical (if now common) departure from the paradigm of criminal responsibility.

Green goes on to say that offences of formally strict liability can be divided into those of pure strict liability where no *mens rea* is required as to any aspect of the offence;⁸ and impure strict liability where *mens rea* is required for at least one element but is not required for at least one other element.

⁵ [1910] 2 KB 471 (CA).

⁶ (1986) 83 Cr App R 359 (HL).

⁷ Green SP ‘Six Senses of Strict Liability: A Plea for Formalism’, in Semester AP (ed) *Appraising Strict Liability* (OUP 2005) 2 *et seq.* For another approach to the categorisation of forms of strict liability see, for example, Kenneth W Simons, ‘When is Strict Criminal Liability Just?’ (1997) 87 *Jnl Crim Law & Criminology* 1075, 1079–1085.

⁸ Elsewhere, this is referred to as “absolute” liability; see, for example, RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 232. The concept of absolute liability is not examined here.

Fault

Other commentators make the same distinction between “formal” and “substantive” strict liability as does Green.⁹ Husak goes on to point out that an offence may be one of formal strict liability without any requirement that the defendant be at fault in any way, although fault is not necessarily dispensed with. Conversely, a person may be at fault despite the absence of a requirement for *mens rea*, and not all instances of formal strict liability necessarily lead to the conviction of the innocent. Fault, Husak continues, involves a moral, extra-legal judgment (which may be controversial) about whether a person deserves blame.

Despite early definitions of *mens rea* in terms such as “an evil intention, or a knowledge of the wrongfulness of the act”,¹⁰ Ormerod stresses that *mens rea* is concerned with legal, not moral, guilt. It is possible (although exceptional) for a person to have *mens rea* even though no reasonable person would regard the person’s state of mind as blameworthy.¹¹ Husak comments¹² that there is a persistent but unfortunate tendency to equate liability without *mens rea* and liability without fault. Fault and *mens rea* are not, he insists, synonymous; *mens rea* is not a sufficient condition for fault.

While commentators such as Ashworth and Horder say that offences which require only minimal fault or no fault at all are usually termed offences of strict liability,¹³ and refer to intention, recklessness and knowledge as “fault requirements”¹⁴ which go to make up *mens rea*, these references to fault should be taken to mean legal, not moral, fault. Other commentators seem to proceed on the basis that fault and *mens rea* are synonymous.¹⁵

John Gardner,¹⁶ again acknowledging the distinction between formal and substantive strict liability, adopts the terms, “the *mens rea* principle”

⁹ AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 22–23; RA Duff, ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’ in *ibid.*, 126; Douglas Husak, ‘Strict Liability, Justice and Proportionality’ in *ibid.*, 86–88.

¹⁰ *Sherras v De Rutzen* [1895] 1 QB 918 (QBD) 921.

¹¹ David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 105.

¹² Douglas W Husak, ‘Varieties of Strict Liability’ (1995) 8 Canadian Jnl of Law & Jurisprudence 189, 207.

¹³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 6.

¹⁴ *Ibid.*, 168.

¹⁵ For example, Grant Lamond, ‘What is a Crime?’ (2007) 27 OJLS 609, 610, referring to “fault-based crimes” as “crimes of *mens rea* as they are known in the common law”.

¹⁶ John Gardner, ‘Wrongs and Faults’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 68–69.

requiring criminal wrongs to have certain constituents, here intention or awareness of the wrong-making features of the action in question; and the “fault principle” – a principle regulating the conditions for imposing criminal liability in the first place, rather than the constituents of a particular offence.

Chan and Simester¹⁷ again point out that, while *mens rea* is relevant to fault, proof of *mens rea* does not of itself necessarily establish fault. In the offence of causing death by dangerous driving, liability in relation to the death is strict, but there is culpability in relation to the offence as a whole – it is the risk of just such an occurrence that makes it wrong to drive dangerously in the first place. Examining the functions of *mens rea*, the authors refer to the “gateway role” of some activity-specific prohibitions. They give as an example the offence of rape. While sexual intercourse is in itself a perfectly lawful activity, matters of consent are so closely bound up with it that those engaged in it are, implicitly, on notice that questions of consent are in play; this generates an immediate and obvious duty to consider the matter of consent; failure to be alert to such a question is itself ground for condemnation. Again, this is a helpful concept in the drink- and drug-driving offences and I return to it later.¹⁸

Roberts stresses that procedural devices such as strict liability and reverse onus provisions are not interchangeable with definitional elements of an offence; the morally unacceptable elements must be encompassed in the definition of the offence, not relegated to a secondary provision specifying defences, a reverse burden or some other procedural mechanism; if the law is to have moral authority, the moral message should be clear.¹⁹

Highlighting fault as an independent issue, distinct from the constituents of *mens rea*, is useful in relation to the drink- and drug-driving offences. I adopt this distinction, and discuss it further below.²⁰

In differentiating attacks from endangerments,²¹ Duff argues²² that *mens rea* is required for the former, but not the latter; endangerment need involve only an *actus reus*, an act or omission that actually creates a suitable

¹⁷ Winnie Chan and AP Simester, ‘Four Functions of Mens Rea’ (2011) 70 CLJ 381. See also RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 246–249.

¹⁸ See pp 65–66.

¹⁹ Paul Roberts, ‘Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 177 *et seq.*

²⁰ See pp 67–68.

²¹ On endangerment, see above, pp 26–30.

²² RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 151.

risk. Liability for endangerment can, therefore, he argues, be strict since the wrong consists in the failure of proper concern.

Mens Rea

The term *mens rea* is generally understood to mean the mental element of an offence – the “guilty mind”.²³ The form it takes varies from offence to offence, depending on the statutory definition and/or the relevant case law.²⁴

Mens rea commonly comprises:

- intention,²⁵ as in the case of theft – the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it;²⁶
- recklessness as to a consequence of an action,²⁷ as in the case of criminal damage, defined as destroying or damaging another person’s property, either intending to do so, or being reckless as to whether it would be destroyed or damaged;²⁸
- knowledge, wilfulness, belief or suspicion.²⁹ For example, knowingly and wilfully travelling by train beyond the distance paid for, with intent to avoid payment;³⁰ wilfully obstructing a constable in the execution of the constable’s duty;³¹ and

²³ For example, AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 125; David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 105.

²⁴ David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 134. For an argument in favour of clear definitions and uniform application of *mens rea* terms such as recklessness and intention, see Findlay Stark, ‘It’s Only Words: On Meaning and Mens Rea’ (2013) 72 CLJ 155.

²⁵ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 168 *et seq*; AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 126 *et seq*; David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 106 *et seq*.

²⁶ Contrary to Theft Act 1968, s 1(1).

²⁷ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 175 *et seq*; AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 140 *et seq*; David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 118 *et seq*.

²⁸ Contrary to Criminal Damage Act 1971, s 1(1).

²⁹ David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 104. See also Stuart P Green, ‘Six Senses of Strict Liability’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 3.

³⁰ Contrary to Regulation of Railways Act 1889, s 5(3)(b).

³¹ Contrary to Police Act 1996, s 89(2).

disclosing information knowing, or having reasonable grounds to suspect that it is information of a certain kind.³²

The above list is not exhaustive, and many other forms, such as malice or dishonesty, or the frame of mind suggested by the words “with a view to”³³ also occur.

Mens rea which takes the form of intention or knowledge is said to be the most culpable, followed by recklessness, belief and suspicion.³⁴

Negligence

“Negligence” here means conduct which falls below a given standard, usually that of a reasonable person.³⁵ The weight of opinion appears to be that negligence is not of itself sufficient to constitute *mens rea*, although it may be a constituent of fault and so ground criminal liability.

Ormerod is of the view that, if the term *mens rea* is used to embrace all the varieties of fault that may give rise to criminal liability, then negligence is included within it, but if *mens rea* is taken in its traditional sense of the “guilty mind”, then negligence is not a type of *mens rea*.³⁶

Ashworth and Horder³⁷ recognise that a number of offences, including careless driving³⁸ and dangerous driving³⁹, are based on negligence. They acknowledge that defining offences in this way has been criticised because it derogates from the principle that liability should depend on the defendant’s having intended the outcome of his or her action, or at least having been aware of it as a possibility. In an offence defined by reference to negligence, no such intention or awareness need be proved; it is enough that a reasonable person would have been aware of the consequences. Although it may be fair to hold accountable someone who could have behaved otherwise if there were sufficient signals to alert a reasonable citizen to the need to take care, that does not necessarily mean

³² Contrary to Serious Crime Act 2007, s 69.

³³ As, for example, in Police Reform and Social Responsibility Act 2011, s 143(2)(d), prohibiting the placing or keeping in place in a specified part of Parliament Square any sleeping equipment with a view to its use for the purpose of sleeping overnight there.

³⁴ David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 106.

³⁵ *Ibid*, 146.

³⁶ *Ibid*, 147.

³⁷ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 181–185.

³⁸ Contrary to RTA 1988, s 3.

³⁹ Contrary to RTA 1988, s 2.

that negligence is an appropriate standard for criminal liability. Ashworth and Horder are of the view that it could be justified only if certain conditions are fulfilled. Those conditions are that the potential harm is great; the risk of its occurrence is obvious; the person in question has a duty to avoid the risk; and that person has capacity to take the required precautions.⁴⁰ In many situations, such a person would be sufficiently culpable to justify criminal sanctions. Ashworth and Horder conclude that negligence is more acceptable as a form of fault than as a form of *mens rea* – we may define offences by reference to negligence (as in the cases of careless driving and dangerous driving), but they are still strict liability offences.

Simester and Sullivan⁴¹ adopt a broadly similar view, again highlighting careless driving as an example of an offence where the negligence relates to the prohibited behaviour itself, rather than to the consequences or circumstances of some other act. They suggest that the standard in such offences is objective, referring to a 1938 case⁴² where the test for careless driving was said to be:

an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience to be attained by the individual driver. ...

The standard may be higher where the person in question has special knowledge or skill; in dangerous driving and careless driving, the court is to have regard⁴³ to any circumstances shown to be within the driver's knowledge. But skills below those normally to be expected may or may not favour an accused; a learner driver doing his or her best but falling below the required standard⁴⁴ would not escape conviction for careless driving.⁴⁵

⁴⁰ A position which is not without controversy; see, for example, David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 152.

⁴¹ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 151–159. See also David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 146–154.

⁴² *McCrone v Riding* [1938] 1 All ER 157 (KBD) 158.

⁴³ Under RTA 1988, ss 2A(3) and 3ZA(3).

⁴⁴ Defined in RTA 1988, s 3ZA(2) as “what would be expected of a competent and careful driver”.

⁴⁵ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 148–149.

One final point on negligence is that offences defined by reference to it have the advantage that they signal the degree of care which will ensure immunity from conviction.⁴⁶

The Presumption in Favour of Mens Rea

The case law is to the effect that there is a presumption that *mens rea* is a precondition for criminal liability. The Queen's Bench Division articulated the presumption in 1895, saying that *mens rea* is an essential ingredient of every offence, but can be displaced either by the words of the statute which creates the offence, or by the subject matter of the statute; both must be considered.⁴⁷

The presumption was restated in *Sweet v Parsley*,⁴⁸ the House of Lords insisting on *mens rea* where Parliament had not intended to criminalise those who are not blameworthy.

In 1985, the Privy Council stated the principles as follows:⁴⁹

- (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;
- (2) the presumption is particularly strong where the offence is "truly criminal" in character;
- (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
- (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;
- (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

More recently, the House of Lords said that:

the starting point for a court is the established common law presumption that a mental element, traditionally called *mens rea*, is an essential ingredient unless Parliament has indicated a

⁴⁶ AP Simester, 'Is Strict Liability Always Wrong?' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 30.

⁴⁷ *Sherras v De Rutzen* [1895] 1 QB 918 (QBD) 921.

⁴⁸ [1970] AC 132 (HL).

⁴⁹ *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1 (PC) 14.

contrary intention either expressly or by necessary implication.⁵⁰

The presumption relates to “all elements of the offence” unless Parliament intended otherwise.⁵¹

Displacing the presumption

The five principles in *Gammon* have been applied inconsistently, and the courts have been ready to find exceptions.⁵² A survey, reported in 1996,⁵³ of all indictable offences listed in *Archbold*⁵⁴ showed that half included at least one element which did not require *mens rea* to be shown to establish guilt. If the less serious either-way and summary-only offences⁵⁵ were also taken into account, the proportion of strict liability offences would almost certainly be even greater.

Most offences are created by statutory provisions which are silent as to *mens rea*, leaving to the courts the task of deciding what Parliament intended.⁵⁶ The language of the statute is an important method of determining whether or not the presumption in favour of *mens rea* is to apply. Words such as “intentionally”, “recklessly”, “maliciously” and “knowingly” argue in favour of *mens rea*.⁵⁷

⁵⁰ *B (A Minor) v DPP* [2000] 2 AC 428, 460.

⁵¹ Colin Manchester, ‘Knowledge, Due Diligence and Strict Liability in Regulatory Offences’ [2006] Crim LR 213, 215.

⁵² Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 166–167; AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 178 *et seq*; David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, 2011 OUP) 161–2; Winnie Chan and AP Simester, ‘Four Functions of Mens Rea’ (2011) 70 *CLJ* 381.

⁵³ Meredith Blake and Andrew Ashworth, ‘The Presumption of Innocence in English Criminal Law’ [1996] Crim LR 306.

⁵⁴ *Archbold Criminal Pleading, Evidence and Practice 1995* (Sweet & Maxwell 1995).

⁵⁵ “Either-way” offences are tried either in the Crown Court or the magistrates’ court; “summary-only” offences are tried in the magistrates’ courts. Both are less serious than indictable-only offences, which are tried in the Crown Court only. The presumption in favour of *mens rea* is less compelling in relation to offences which are less serious, or “not truly criminal”; see below.

⁵⁶ AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 174. On inconsistency in applying the principles, see Kiron Reid, ‘Strict Liability: Some Principles for Parliament’ (2008) 29 *Statute Law Review* 173, 174.

⁵⁷ David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, 2011 OUP) 106 *et seq*, 165–169; AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 184–5.

Offences which are “truly criminal”

The presumption is particularly strong if the offence in question is “truly criminal” in character,⁵⁸ although the judgment in *Gammon* gives no guidance on the meaning of these words. Many offences are obviously and immediately truly criminal while many others are clearly not truly criminal, but it can be difficult to draw the line.⁵⁹

The phrase “truly criminal” has been equated with offences which are “overtly wrongful”, such as murder and assault, which attract moral condemnation, as opposed to those which are “quasi-criminal”, “public welfare” or “regulatory” and attract little or no stigma.⁶⁰ An obvious example of the latter is a parking offence. The lower the stigma attaching to conviction for an offence, the less the need for a *mens rea* element,⁶¹ while the “more serious or more disgraceful the offence the greater the stigma”.⁶² Quasi-criminal offences have been said to lack a key underlying feature which sets the criminal law apart from the civil – the declaration of reprehensible wrongdoing implicit in a verdict of guilty and the punishment of an offender.⁶³

In seeking to distinguish between quasi-criminal regulations and true stigmatic crimes, Stumer⁶⁴ suggests that a rough distinction can be drawn on the basis that criminal offences are those which involve conduct so reprehensible that it ought to be prohibited completely – murder, sexual assault, fraud, robbery and theft, for example. Regulatory offences relate to conduct which has potential to create conditions which are dangerous to others, but which is not so obviously wrongful that it should be prohibited in its entirety; such offences arise in the contexts of regimes regulating matters

⁵⁸ *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1 (PC) 14. See also *R v Muhamad* [2002] EWCA Crim 1856 [15], “... the more serious the offence, the greater the weight to be attached to the presumption, and conversely, the less serious the offence, the less weight to be attached.”

⁵⁹ AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 40; David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, 2011 OUP) 169; Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 162.

⁶⁰ AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 180.

⁶¹ *Ibid*, 173.

⁶² *Sweet v Parsley* [1970] AC 132 (PC) 149. For a distinction between “psychological” and “normative” stigma, see John Stanton-Ife, ‘Strict Liability: Stigma and Regret’ (2007) 27 OJLS 151.

⁶³ AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 23–24.

⁶⁴ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 162.

such as workplace health and safety, environmental protection, licensing regimes and road traffic.

In an early judgment, examples of “acts which are not criminal in any real sense” were given, and included offences relating to taxation, the possession of adulterated tobacco, and the sale of adulterated food.⁶⁵ Another example is offences under the Trade Descriptions Act 1968.⁶⁶

A further factor bearing on seriousness is the severity of the penalty which may be imposed.⁶⁷ In particular, the availability of imprisonment as a penalty may be taken to indicate seriousness such that strict liability is not appropriate.⁶⁸

The effect of the statute

According to *Gammon*, the presumption in favour of *mens rea* may be displaced only where that is clearly or by necessary implication the effect of the statute. The language of the statute must be scrutinised and the behaviour it regulates considered; both are relevant.⁶⁹ The absence of words implying varieties of *mens rea*, such as “intentionally”, “knowingly”, “recklessly” “believing” and “suspecting” would suggest there is no element of *mens rea* in the offence.

The presence of a “due diligence” defence, under which an accused person may escape conviction by showing that he or she exercised due diligence (or all reasonable care, or an equivalent standard) to avoid the commission of the offence, is often interpreted as meaning that the offence is one of strict liability.⁷⁰ The Licensing Act 2003 provides many examples;

⁶⁵ *Sherras v de Rutzen* [1895] 1 QB 918 (QBD) 922.

⁶⁶ *Wings v Ellis* [1985] AC 272 (HL), referred to in AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 24.

⁶⁷ David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 176.

⁶⁸ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 165; GR Sullivan, ‘Strict Liability for Criminal Offences in England and Wales following Incorporation into English Law of the European Convention on Human Rights’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 202.

⁶⁹ Ben Fitzpatrick, ‘Strict Liability and Article 6(2) of the European Convention on Human Rights: School Non-attendance Offence (2004) 68 JCL 16, 19. The behaviour regulated is considered below; see pp 62–64. It has been suggested that Parliament should specifically address the issue of *mens rea* and strict liability before creating a new offence, and then to adopt appropriate statutory language so that the matter is clear: Kiron Reid, ‘Strict Liability: Some Principles for Parliament’ (2008) 29 Statute Law Review 173.

⁷⁰ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 160–161; Stuart P Green, ‘Six Senses of Strict Liability’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 4; Colin Manchester, ‘Knowledge, Due Diligence and Strict Liability in Regulatory Offences’ [2006] Crim 213, 223.

thus, it is a defence to a charge of selling alcohol to someone aged under eighteen for the defendant to show that he or she believed the person was eighteen or over, and had taken all reasonable steps to establish the individual's age, or that nobody could reasonably have suspected, from the individual's appearance, that the individual was under eighteen.⁷¹

Issues of social concern

Finally, the Privy Council in *Gammon* ruled that the presumption in favour of *mens rea* can be displaced only where the statute in question is concerned with an issue of social concern, and it can be shown that displacing the requirement for *mens rea* will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

In an early case, the Divisional Court declared that it was dealing with a statute (the Public Health Act 1875) passed for the protection of the public, and its purpose would be defeated if it were necessary to show guilty knowledge in the seller – here a sausage-maker who was found to be using unsound meat in contravention of the Act.⁷²

It has been suggested⁷³ that the type of offence most suitable for strict liability would involve substantial public harm or inconvenience, whether directly or cumulatively, and relatively little stigma for an individual; “certain road traffic offences” are cited as examples, but, unfortunately for the present review, they are not further specified. Elsewhere, it is said⁷⁴ that strict liability is confined to “regulatory law”, where the emphasis is on the preservation of standards of safety, hygiene and environmental integrity in the relevant industry or activity, rather than the imposition of just deserts for individual offenders.

It has been observed that it is easier to displace *mens rea* and infer strict liability in relation to matters which involve special skills or which require licensing,⁷⁵ or where the provision in question applies specifically to a

⁷¹ Licensing Act 2003, s 146(4).

⁷² *Blaker v Tillstone* [1894] 1 QB 345 (DC).

⁷³ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 184.

⁷⁴ GR Sullivan, ‘Strict Liability for Criminal Offences in England and Wales following Incorporation into English Law of the European Convention on Human Rights’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 196.

⁷⁵ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 180–181.

particular trade, profession or special activity.⁷⁶ The House of Lords has recognised these criteria:

... where the subject matter of the statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act...⁷⁷

And:

A strict responsibility may be acceptable in the case of statutory offences which are concerned to regulate the conduct of some particular activity in the public interest. The requirement to have a licence in order to carry on certain kinds of activity is an obvious example. The promotion of health and safety and the avoidance of pollution are among the purposes to be served by such controls. These kinds of cases may properly be seen as not truly criminal. Many may be relatively trivial and only involve a monetary penalty. Many may carry with them no real social disgrace or infamy.⁷⁸

Ormerod points out that the activity in question may be one in which citizens generally engage, like driving a car. Since this is an activity of choice, which involves danger to others, it falls within the principle above and it is acceptable that some offences regulating the conduct of motorists should be strict.⁷⁹

The degree of social danger posed by the behaviour regulated by the statute in question has sometimes influenced courts in favour of finding strict liability; examples given⁸⁰ include dangerous drugs, the possession of prohibited items, and the management of premises and pollution,⁸¹ but driving must fall within this principle as well.

If an offence is framed so as to include an element defined by reference to an arbitrary line in relation to an element such as time, quantity

⁷⁶ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, 2011 OUP) 170–171.

⁷⁷ *Sweet v Parsley* [1970] AC 132 (HL) 163.

⁷⁸ *R v Lambert* [2001] UKHL 37 [154].

⁷⁹ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 171.

⁸⁰ *Ibid*, 172 *et seq*.

⁸¹ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 181.

or size, *mens rea* is less likely to be required. The obvious example is speeding, where driving at 31 m.p.h. rather than 30 m.p.h. is significant only because the law draws the line at 30. It would be “indulgent” to require *mens rea* – knowledge of one’s speed – in such cases.⁸²

Arguments For and Against Strict Liability

A number of arguments are often cited to justify strict liability. For the most part, these seem to confer advantages on the prosecutor at the expense of the defendant.

Being often aimed at corporate bodies, and dealing with matters such as pollution, defective products, food and drugs, safety at work and transport systems, strict liability is said to protect fundamental social interests, focusing on the welfare of citizens.⁸³ The protection of the public sometimes requires a higher standard of care on the part of those who undertake risk-creating activities.⁸⁴ The threat of criminal liability motivates those who engage in such activities to adopt precautions; this is most compelling in relation to the regulation of corporate behaviour.⁸⁵ Strict liability can reduce the risk of harms by regulating these forms of conduct, providing for penalties in the case of breach to motivate compliance; motoring offences appear to serve just such a purpose.⁸⁶ Where prevention rather than retribution is appropriate, as in the case of many regulatory offences, deterrence is apposite for strict liability.⁸⁷ Bodies charged with regulating certain activities can negotiate compliance with the relevant law, with prosecution as a costly and time-consuming last resort.⁸⁸ A person who must be licensed to carry

⁸² *Ibid*, 182.

⁸³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 161, 162.

⁸⁴ AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 28.

⁸⁵ AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 189–190; AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 28; CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell, 2005) 140.

⁸⁶ Grant Lamond, ‘What is a Crime?’ (2007) 27 OJLS 609, 630.

⁸⁷ Solomon E Salako, ‘Strict Criminal Liability: A Violation of the Convention?’ (2006) 70 *Jnl Crim L* 531.

⁸⁸ GR Sullivan, ‘Strict Liability for Criminal Offences in England and Wales following Incorporation into English Law of the European Convention on Human Rights’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005), 201; AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 32–33.

out a particular activity is, at least in theory, by virtue of the licensing process, on notice of the risk of committing offences.⁸⁹

While evidence of fault may well be relevant to sentencing,⁹⁰ it is nevertheless easier for a prosecutor to prepare a case without having to prove *mens rea*.⁹¹ The number of issues to be decided by the court is reduced, and the costs are therefore often lower.⁹² Minor offences may not be worth the public expenditure which would be incurred if fault had to be proved.⁹³

A defendant may be better placed than a prosecutor to understand the issues in some specialised regulated activity, and it may well be easier for a large company than for a prosecutor to identify the person(s) at fault,⁹⁴ and to know what went wrong or how it could have been prevented.⁹⁵

In more philosophical vein, Honoré⁹⁶ argues that strict liability can be morally justified on the basis that, as members of society, we are responsible for the outcomes of our actions, whether good or bad, and that in general the good outcomes outnumber the bad. He calls this “outcome responsibility” and acknowledges that outcomes may be dependent on luck, but argues that we must accept the bad luck as well as the good.

While the arguments in favour of strict liability are largely of a practical nature, the arguments against raise matters of principle, and have been aired with passion and conviction. The widespread adoption of strict

⁸⁹ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 180.

⁹⁰ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 163.

⁹¹ *Ibid.*

⁹² AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 26.

⁹³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 164.

⁹⁴ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 191.

⁹⁵ *Ibid.*, 180. For an argument that, in deciding whether or not strict liability is appropriate, the practices of the relevant enforcement agency should be taken into account, see Jeremy Horder, ‘Whose Values Should Determine When Liability is Strict?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 105.

⁹⁶ Tony Honoré, ‘Responsibility and Luck: The Moral Basis of Strict Liability’ (1988) 104 LQR 530. This approach, when applied to the criminal law rather than the law of torts, has been criticised as leading to questions of human rights: GR Sullivan, ‘Strict Liability for Criminal Offences in England and Wales following Incorporation into English Law of the European Convention on Human Rights’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 200–201.

liability has been much criticised, Husak referring to “a general climate of hostility to strict liability.”⁹⁷

Strict liability has been said to be inimical to traditional theories of the criminal law. The criminal law is society’s most condemnatory instrument and a person should not be censured for wrongdoing without proof that the person chose that course of action.⁹⁸ If a person is to be censured publicly by being labelled a criminal and sentenced, the court should be satisfied not only that the person caused the consequence in question, but also that he or she did so culpably; the criminal law should require proof of fault as a condition of imposing censure.⁹⁹ Strict liability is said to lead to the conviction of those who are, morally speaking, innocent; it is a misuse of the criminal law, which should be reserved for the regulation of serious wrongs by those who are culpably wrong.¹⁰⁰

As has been seen,¹⁰¹ other commentators insist on a distinction between legal fault and moral fault, arguing that only those who are at moral fault should be punished for their wrongs because punishment expresses or communicates blame.¹⁰²

Simester¹⁰³ argues:

- in relation to stigmatic crimes (which he equates with the “truly criminal” discussed above), *substantive* strict liability (liability without proof of moral fault)¹⁰⁴ is always wrong. In some circumstances, however, *formal* strict liability (liability in respect of an offence which features at least one material element for which *mens rea* need not be shown)¹⁰⁵ may be justifiable for these serious offences. Those circumstances are where strict liability applies only to some aspect(s) of the offence, but there

⁹⁷ Douglas W Husak, ‘Varieties of Strict Liability’ (1995) 8 Canadian Jnl of Law & Jurisprudence 189.

⁹⁸ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 156, 162.

⁹⁹ Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 LQR 225, 241.

¹⁰⁰ AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 21, 33, 34; AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 188.

¹⁰¹ Above, pp 35–37.

¹⁰² John Gardner, ‘Wrongs and Faults’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 69.

¹⁰³ AP Simester, ‘Is Strict Liability Always Wrong?’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 21 *et seq.*

¹⁰⁴ See above, pp 35–37.

¹⁰⁵ *Ibid.*

is an element of blameworthiness in relation to other aspects for which *mens rea* is required. Examples are where liability is strict in respect only of some non-material element, such as the time or place of an act, or in relation to an objective standard independent of individual offenders and their personal views, as in the cases of careless and dangerous driving.¹⁰⁶

- in relation to quasi-criminal, non-stigmatic regulations, formal strict liability may be acceptable on the basis that the punishment imposed is justifiable, not in terms of the convicted person's deserts, but in terms of deterrence, or as part of a regime for distributing the costs of an activity voluntarily undertaken by the person convicted which puts others at risk.¹⁰⁷ The fact that imprisonment may be wrong unless deserved does not necessarily mean that an offence which attracts imprisonment should not be an offence of strict liability, rather that the punishment must be proportionate to the culpability of the person convicted.¹⁰⁸

Husak asserts that substantive strict liability is always unjust in that it leads to punishment. Most objections to formal strict liability relate to punishment, which is often disproportionate to the degree of blameworthiness; punishment must always be justified and proportionate; but formal strict liability may or may not be unjust.¹⁰⁹ Elsewhere, it is said that the objection to strict liability is that the accused's legal liability exceeds his or her moral culpability in relation to one or more elements of the offence.¹¹⁰

Adopting a different standpoint, Horder¹¹¹ argues that the imposition of strict liability impinges on significant personal liberties, including freedom to pursue lifestyle activities of intrinsic worth. Examples of such activities are the pursuit of a business, profession or hobby. By contrast, transport is

¹⁰⁶ AP Simester, 'Is Strict Liability Always Wrong?' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 42–44.

¹⁰⁷ *Ibid*, 37.

¹⁰⁸ *Ibid*, 38.

¹⁰⁹ Douglas Husak, 'Strict Liability, Justice and Proportionality' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 91–92.

¹¹⁰ Paul Roberts, 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 152.

¹¹¹ Jeremy Horder, 'Strict Liability, Statutory Construction, and the Spirit of Liberty' (2002) 118 LQR 458.

said to be of instrumental value only, in the sense of facilitating the pursuit of personal freedoms, such that there can be no objection to strict liability for offences such as driving without insurance, or while disqualified.

Having reviewed the literature on strict liability and *mens rea*, I turn now to the place of strict liability in road traffic offences, and the drink- and drug-driving offences in particular.

ROAD TRAFFIC OFFENCES

In General

A vast number of minor road traffic offences are offences of strict liability.¹¹² On the basis that negligence is not of itself sufficient to constitute *mens rea*,¹¹³ so are a small number of much more serious road traffic offences are also offences of strict liability:

- causing death by dangerous driving.¹¹⁴ The driving must be a cause of death, although it need not be a substantial or major cause.¹¹⁵ Dangerous driving is driving which falls far below what would be expected of a competent and careful driver, and it would be obvious to a competent and careful driver that driving in such a way would be dangerous;¹¹⁶
- causing serious injury by dangerous driving;¹¹⁷
- causing death by careless or inconsiderate driving.¹¹⁸ Careless driving is driving which falls below what would be expected of a competent and careful driver.¹¹⁹ The circumstances of which

¹¹² For example, failure to exhibit a road fund licence under Vehicles (Excise) Act 1971, s 12(4): *Stroeger v John* [1974] RTR 124 (DC); failure by the registered keeper to give information about the identity of the driver in response to a notice under RTA 1988, s 172 (usually following the capturing of an offence on camera): *Whiteside v DPP* [2011] EWHC 3471 (Admin).

¹¹³ See pp 38–40.

¹¹⁴ Contrary to RTA 1988, s 1.

¹¹⁵ *R v Hennigan* (1971) 55 Cr App R 262 (CA (Crim)).

¹¹⁶ RTA 1988, s 2A(1).

¹¹⁷ Contrary to RTA 1988, s 1A. For a critique, see Sally Cunningham, ‘Taking “causing serious injury by dangerous driving” seriously’ [2012] Crim LR 261.

¹¹⁸ Contrary to RTA 1988, s 2B. For a critique, see Sally Cunningham, ‘Punishing drivers who kill: putting road safety first?’ (2007) 27 Legal Studies 288.

¹¹⁹ RTA 1988, s 3ZA(2).

the driver could be expected to have been aware, as well as those shown to have been within the driver's knowledge, are taken into account;¹²⁰

- causing death by careless driving when under the influence of drink or drugs.¹²¹ There need be no causal connection between the drink and the death;¹²²
- causing death by driving when unlicensed, disqualified or uninsured.¹²³
- driving while disqualified;¹²⁴
- causing or permitting another to use a motor vehicle without insurance.¹²⁵

The Drink- and Drug-Driving Offences

None of the offences of driving or being in charge when unfit through drink or drugs,¹²⁶ with excess alcohol¹²⁷ or with an excess of a specified controlled drug¹²⁸ requires *mens rea*. The same applies to being unfit or having excess alcohol for the purposes of the offence of causing death by careless driving under section 3A.¹²⁹ The offences of attempting any of these actions are, however, in a different category, and are dealt with separately below.¹³⁰

Driving with excess alcohol is undoubtedly a strict liability offence:

¹²⁰ RTA 1988, s 3ZA(3).

¹²¹ Contrary to RTA 1988, s 3A.

¹²² *Attorney-General's Reference (Nos 14 and 24 of 1993)* [1994] 1 WLR 530 (CA (Crim)) 535.

¹²³ Contrary to RTA 1988, s 3ZB.

¹²⁴ Contrary to RTA 1988, s 103(1)(b). See *R v Bowsher* [1973] RTR 202 (CA (Crim)), where the driver did not realise that two periods of disqualification were running consecutively rather than concurrently and thought his disqualification was over; *R v Miller* [1975] 1 WLR 1222, where the Court of Appeal found that it was irrelevant that the driver thought he was driving on a private road to which the disqualification did not apply. See also Alured Darlington, 'The Principle of Legality (Proving The Guilty Mind – A Traditional Approach)' (2001) 165 JPN 998, arguing that, in the light of *B (A Minor) v DPP* [2000] 2 AC 428 (HL), *Miller* might be revisited.

¹²⁵ Contrary to RTA 1988, s 143(1)(b): *Tapsell v Maslen* [1967] Crim LR 53 (DC).

¹²⁶ Contrary to RTA 1988, s 4.

¹²⁷ Contrary to RTA 1988, s 5.

¹²⁸ Contrary to RTA 1988, s 5A, when in force; see pp 8–9.

¹²⁹ As already noted (pp 9–10), the elements of unfit to drive and exceeding the prescribed limit for the purposes of this offence are considered in this work for the sake of completeness. Causing death by careless driving is not considered here.

¹³⁰ See p 54.

It has been said over and over again that a man who chooses to combine in one evening both drink and driving a motor car does so at his peril, and it is for him to see that the amount of alcohol which he consumes does not bring the content in his blood above the statutory maximum. It is his duty to observe the quantity and quality of the drink that he consumes, and if he makes a mistake and in fact takes more alcohol than is justified by the statutory limit, then he is guilty of the offence ...¹³¹

... the offence of driving while over the legal limit is not an offence which requires the court to ascertain the intent of the accused at all.¹³²

... neither the [Road Traffic] Act nor the common law provides that ignorance of the presence of alcohol is a defence to a charge under section 5.¹³³

... [no mens rea] is required for the offence of driving with an excess of alcohol ... it is an offence of strict liability.¹³⁴

The quotations above relate to driving with excess alcohol, but surely apply equally to unfitness through drink or drugs and to an excess of a specified drug. The statutory provisions creating these offences¹³⁵ are couched in similar terms, and there has never been any suggestion in the case law that unfitness through drink or drugs gives rise to anything other than strict liability.

Driving

Whether or not strict liability applies to the act of driving is less clear. In an early case, a person got into the driving seat of a vehicle. The engine was running, the driver's door was standing open and the gear selector was in "drive". He did not intend to drive or exercise control over the car, but accidentally depressed the accelerator, causing the vehicle to move. The Queen's Bench Division distinguished the case from those featuring persons who were consciously seeking some movement of the car; here, the defendant had not intended to drive or exercise control of the vehicle; he

¹³¹ *Adams v Bradley* [1975] RTR 233 (QBD) 236.

¹³² *R v Drummond* [2002] EWCA Crim 527 [31].

¹³³ *DPP v Johnson* [1995] 1 WLR 728 (QBD) 731, where the defendant was unaware that he had alcohol in his body as a result of a slow-release pain-killer injected a month earlier.

¹³⁴ *DPP v Harper* [1988] RTR 200 (QBD) 213, criticised (on other grounds) in Tony Ward, 'Magistrates, Insanity and the Common Law' [1997] Crim LR 796.

¹³⁵ RTA 1988, ss 4 and 5A.

was not therefore driving.¹³⁶ While that decision suggests that driving must be intended, later judgments¹³⁷ make clear that each case depends on its facts, and do not refer to the mental state of the person in question.

In charge

An accused person's intention is not, it seems, entirely irrelevant to the question whether or not he or she is in charge of a vehicle. While the meaning of "in charge" is, again, a matter of fact and degree,¹³⁸ intention may sometimes have a bearing. The Divisional Court considered the status of a person who is not the owner, lawful possessor or recent driver of a vehicle, but is in the vehicle or otherwise involved with it. Such a person could be in charge if voluntarily in *de facto* control, or, given the circumstances, such as the person's position, intentions and actions, may be expected imminently to assume control.¹³⁹ While intention may therefore sometimes go towards establishing being in charge, it is not a prerequisite for conviction.

There are provisions under which a defendant accused of an "in charge" offence can escape conviction by proving no likelihood of driving while unfit through drink or drugs or while over the limit. Like "due diligence" provisions, these again suggest strict liability,¹⁴⁰ and are discussed in detail in Chapter 3.¹⁴¹

Excess of a specified drug

A defence to a charge of an excess of a specified drug can be made out by showing that the drug in question had been prescribed or supplied for medical or dental purposes, and that the accused took it as directed and in accordance with any manufacturer's advice. The drug must have been

¹³⁶ *Blayney v Knight* [1975] RTR 279 (QBD).

¹³⁷ *R v MacDonagh* [1974] QB 448 (CA) (containing the classic definition of "driving" as the use of the driver's controls to direct movement, no matter how the movement was produced; "drive" was to be given a wide meaning, but not so wide as to include activities which could not be said to constitute driving in any ordinary sense of the word). See also *Saycell v Bool* [1948] 2 All ER 83 (DC); *Langman v Valentine* [1952] 2 All ER 803 (DC); *Tyler v Whatmore* [1976] RTR 83 (DC); *McQuaid v Anderton* [1981] 1 WLR 154 (DC); *Jones v Pratt* [1983] RTR 54 (DC); *Rowan v Chief Constable of Merseyside*, *The Times* 10 December 1985 (DC); *McKoen v Ellis* [1987] RTR 26 (DC); *DPP v Hastings* [1993] RTR 205 (DC); *Gunnell v DPP* [1994] RTR 151 (DC); *Attorney General's Reference (No 4 of 2000)* [2001] EWCA Crim 780; *DPP v Alderton* [2003] EWHC 2917 (Admin).

¹³⁸ *Haines v Roberts* [1953] 1 WLR 309 (DC); *R v Harnett* [1955] Crim LR 793 (CA(Crim)); *Woodage v Jones (No 2)* (1974) 60 Cr App R 260 (DC); *CPS v Bate* [2004] EWHC 2811 (Admin) (DC).

¹³⁹ *DPP v Watkins* [1989] QB 821 (QBD).

¹⁴⁰ Above, p 43.

¹⁴¹ See pp 90–94.

lawfully in the possession of the accused person.¹⁴² Again, the presence of a “due diligence” defence suggests strict liability. The defence is discussed in detail elsewhere in this work.¹⁴³

Thus, while there is some suggestion that a defendant’s mental state may not be wholly irrelevant to certain elements of the offences, there can be no doubt that liability is strict in relation to being unfit through drink or drugs, and having excess alcohol or a specified drug.

Attempting

By contrast, and in keeping with other offences of attempt, intention is required for the offences of attempting to drive. A person is guilty of an attempt to commit an offence contrary to RTA 1988 if, with intent to commit the full offence, the person does an act which is more than merely preparatory to the commission of the offence.¹⁴⁴ A person may be guilty of such an attempt even if commission of the full offence is impossible.¹⁴⁵ *Mens rea*, in the form of intention, is clearly required.¹⁴⁶

Aiding and abetting, counselling and procuring

As with other offences of complicity,¹⁴⁷ *mens rea*, in the form of intention, is required to make out the offences of aiding, abetting, counselling or procuring.¹⁴⁸ These offences are committed only if the accused person intends what he does, and knows that the principal offender will thereby be assisted or encouraged in some way.¹⁴⁹

The supervisor of a learner driver was held to have aided and abetted driving with excess alcohol where the supervisor knew that the driver had

¹⁴² RTA 1988, s 5A(3), to come into force from a date to be appointed.

¹⁴³ See pp 99–102.

¹⁴⁴ Criminal Attempts Act 1981, s 3(1), creating this offence in relation to “attempts under a special statutory provision”. Section 3(2) defines an attempt under a special statutory provision as an offence created by any other enactment, including an enactment passed after the 1981 Act and which is expressed as an offence of attempting to commit another offence. In *Mason v DPP* [2009] EWHC 2198 (Admin) the Divisional Court confirmed that, in the absence of anything to indicate a contrary Parliamentary intention, the 1981 Act applies to RTA 1988, s 5(1)(a) – attempting to drive with excess alcohol.

¹⁴⁵ Criminal Attempts Act 1981, s 3(4).

¹⁴⁶ *Mason v DPP* [2009] EWHC 2198 (Admin) [20]; *Moore v DPP* [2010] EWHC 1822 (Admin) [14].

¹⁴⁷ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 431 *et seq.*

¹⁴⁸ AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 218 *et seq.*

¹⁴⁹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 431–432.

consumed alcohol to such an extent that it was probable that he was over the limit.¹⁵⁰

To make out the offence of aiding and abetting driving with excess alcohol, it must be shown that the principal offender committed the offence; that the defendant was aware that the principal offender had consumed excess alcohol, or was reckless as to the possibility that he had; and that the defendant aided, abetted, counselled or procured the commission of the offence.¹⁵¹

A person who surreptitiously laced the drinks of another, who he knew was going to drive, causing the other's blood-alcohol to be over the prescribed limit when he drove, was guilty of procuring the offence. There was a causal link between the defendant's act and the offence, which would not otherwise have been committed.¹⁵²

The "failing" offences

While driving or being in charge when unfit, with excess alcohol or with an excess of a specified drug are matters of strict liability, by contrast, two of the three "failing" offences call for specific prior notice of the risk of prosecution, such that a person may be convicted only if he or she committed the offence with such knowledge – a form of *mens rea*.

The Road Traffic Act 1988 creates three offences of failing to do as required by an officer investigating a suspected drink- or drug-driving offence. First, it is an offence to fail, without reasonable excuse, to co-operate with a preliminary (or roadside) test,¹⁵³ which may take the form of a requirement for breath, a preliminary impairment test, a preliminary drug test, or, when s 5A comes into force,¹⁵⁴ a combination of these. It is also an offence to fail, without reasonable excuse, to provide a specimen of breath, blood or urine for analysis for evidential purposes when required to do so (usually at a police station).¹⁵⁵ Finally, it is an offence to fail, again without reasonable excuse, to give permission for a laboratory test of a blood

¹⁵⁰ *Carter v Richardson* [1974] RTR 314 (QBD).

¹⁵¹ *DPP v Anderson (David Bradford)* [1990] RTR 269 (DC), where all those elements were made out. The defendant was a motor cyclist's pillion passenger; he knew how much the motor cyclist had had to drink (half a bottle of wine, half a bottle of cider, and a mixed spirit) and nevertheless encouraged him to ride the motor cycle.

¹⁵² *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773 (CA (Crim)). See also *Blakely v DPP* [1991] RTR 405 (QBD).

¹⁵³ RTA 1988, s 6(6); see also pp 102–105 and 151–155.

¹⁵⁴ See pp 8–9.

¹⁵⁵ RTA 1988, s 7(6); see also pp 102–105 and 151–155.

specimen taken while the subject was incapable of consenting (usually because the subject was in hospital and unconscious).¹⁵⁶

People can fail to provide breath by not blowing hard or long enough,¹⁵⁷ or at all, by sucking rather than blowing, by trying to blow around the tube or to block the nozzle, or by providing a single specimen only,¹⁵⁸ or (in the case of all three types of specimen) by simply refusing.¹⁵⁹

There is no requirement for any form of *mens rea* for the roadside offence. On requiring a specimen for evidential purposes, however, the officer must warn the subject that a failure without reasonable excuse to provide the specimen may render the subject liable to prosecution.¹⁶⁰ Likewise, where a blood specimen has been taken from a person incapable of consenting, and the officer later requires the person's permission for the analysis of the specimen, the officer must warn the person that failure to give permission will give rise to liability to prosecution.¹⁶¹ It is quite clear from the case law that failure to give the appropriate warning must lead to acquittal.¹⁶² This was so even if the defendant was not prejudiced by the failure to give the warning,¹⁶³ and even where the defendant was a serving police officer and the court thought he should have been familiar with the procedure.¹⁶⁴

A subject who does not understand the warning because of an inadequate knowledge of English must be acquitted.¹⁶⁵

When breath analysis was first introduced, it might have been thought that one way to avoid being prosecuted would be simply to refuse to provide a specimen. Parliament pre-empted this by creating the offence of failing to provide (and now also, of failing to consent to the analysis of a specimen

¹⁵⁶ RTA 1988, s 7A(6); see also pp 102–105 and 151–155.

¹⁵⁷ As in *DPP v Darwen* [2007] EWHC 337 (Admin) (DC).

¹⁵⁸ *Stepniewski v Commissioner of Police for the Metropolis* [1985] RTR 330 (DC).

¹⁵⁹ “Fail” includes “refuse” (RTA 1988, s 11(2)).

¹⁶⁰ RTA 1988, s 7(7).

¹⁶¹ RTA 1988, s 7A(5).

¹⁶² *DPP v Jackson*; *Stanley v DPP* [1999] 1 AC 406 (HL) 425.

¹⁶³ *Murray v DPP* [1993] RTR 209 (QBD).

¹⁶⁴ *Simpson v Spalding* [1987] RTR 221 (DC).

¹⁶⁵ *Chief Constable of Avon & Somerset v Singh* [1988] RTR 107 (DC).

taken while incapable of consenting).¹⁶⁶ That would not have been widely known at the time, and indeed may not now be widely known, hence the requirement to give the statutory warning:

I am confident that many police officers – and lawyers and judges – are not fully conversant with the police procedure ... and would not have the knowledge that failure to provide a specimen after a duly made requirement would cause a driver to be liable to prosecution.¹⁶⁷

The words used to require breath specimens are:

I require you to provide two specimens of breath for analysis by means of a device of a type approved. The specimen with the lower proportion of alcohol in your breath may be used as evidence and the other will be disregarded. I warn you that failure to provide either of these specimens will render you liable to prosecution. Do you agree to provide two specimens of breath for analysis?¹⁶⁸

Warnings in similar terms are given when the requirement is for blood or urine.¹⁶⁹

The absence of reasonable excuse is an element of the offence and is to be proved by the prosecutor; it is not a defence.¹⁷⁰ The argument that the availability of a “due diligence” defence usually indicates strict liability¹⁷¹ is not therefore relevant.

There is no requirement, when giving the warning, to say what amounts to a “reasonable excuse”. The term is narrowly construed: a person has a reasonable excuse only if “physically or mentally unable to provide” the specimen, or if “the provision of the specimen would entail a substantial risk to health”.¹⁷² If it later turns out that the subject has a medical

¹⁶⁶ The penalties for the “failing” offences are the same as for the principal offences of unfitness to drive and being over the limit: RTOA 1988, sch 2 and above, p 16.

¹⁶⁷ *Simpson v Spalding* [1987] RTR 221 (DC) 228.

¹⁶⁸ Pro forma MG DD/A, *Drink/Drugs Station Procedure General*, version 5.2.1 December 2012, para A10 <<http://www.homeoffice.gov.uk/publications/police/road-traffic-documents/drink-drug-driving-forms/form-a-mgdd?view=Binary>> accessed 27 November 2013.

¹⁶⁹ Pro forma MG DD/B, *Drink/Drugs Station Procedure, Specimens/Impairment Supplement*, version 5.2.1, December 2012, paras B3 and B17 <<http://www.homeoffice.gov.uk/publications/police/road-traffic-documents/drink-drug-driving-forms/form-B-mgdd?view=Binary>> accessed 27 November 2013.

¹⁷⁰ *Piggott v DPP* [2008] EWHC 305 (Admin) (DC). The burden of proof in relation to reasonable excuse is discussed further in Chapter 3; see p 104.

¹⁷¹ Above, p 43.

¹⁷² *R v Lennard* [1973] 1 WLR 483 (CA) 487.

condition which would have prevented the provision of breath, but was unaware of it at the time, a reasonable excuse argument does not succeed unless the subject actually tried to blow.¹⁷³ If the subject makes no attempt to provide, and offers no reason, particularly if the subject has an excuse but chooses not to invoke it, the subject cannot later call on that excuse.¹⁷⁴

It is clear that no prosecution for a drink- or drug-driving offence will succeed if the subject is not on notice that failure without reasonable excuse to provide a specimen (or consent to its analysis) will give rise to the risk of prosecution. Although not couched in the traditional terms of intention, knowledge or recklessness, this is as convincing a requirement for *mens rea* as any. The required notice is, however, limited and does not extend to explaining reasonable excuse. There have been no challenges to the wording of the warning, in particular, no suggestion that the meaning of “reasonable excuse” should be explained.

DISCUSSION

I have described above the presumption in favour of *mens rea* and the grounds for departing from it, and, on the other hand, the justifications for, and criticisms of, strict liability. I next turn to the question of how, if at all, strict liability can be justified for the drink- and drug-driving offences. The discussion is confined to the strict liability offences, that is, driving or in charge when unfit through drink or drugs,¹⁷⁵ driving or in charge when over the prescribed limit¹⁷⁶ or with an excess of a specified drug,¹⁷⁷ and to these elements of the offences of causing death by careless driving when under the influence of drink or drugs.¹⁷⁸ It does not extend to attempting to drive when unfit or with excess alcohol,¹⁷⁹ or to the offences of failing without reasonable excuse to provide specimens or to consent to the analysis of a specimen.¹⁸⁰

¹⁷³ *Teape v Godfrey* [1986] RTR 213 (QBD).

¹⁷⁴ *Martiner v DPP* [2004] EWHC 2484 (Admin).

¹⁷⁵ Contrary to RTA 1988, s 4.

¹⁷⁶ Contrary to RTA 1988, s 5.

¹⁷⁷ Contrary to RTA 1988, s 5A, when in force.

¹⁷⁸ Contrary to RTA 1988, s 3A.

¹⁷⁹ Contrary to RTA 1988, s 4 or 5.

¹⁸⁰ Contrary to RTA 1988, ss 7(6) and 7A(6).

The Criteria in *Gammon*

I examine first the circumstances in which, according to *Gammon*,¹⁸¹ the presumption in favour of *mens rea* may be displaced, to ascertain whether any of these criteria apply. It will be seen in Chapter 3 that many of the same matters are relevant in the context of the presumption of innocence and reverse burdens of proof.

“Truly criminal”

According to *Gammon*, the presumption in favour of *mens rea* is particularly strong when the offence is “truly criminal” in character. The meaning of the term “truly criminal” has been discussed above,¹⁸² where it was noted that offences are more likely to be truly criminal if the moral condemnation implicit in a verdict of guilty is appropriate, or if conviction attracts stigma.

As seen in Chapter 1,¹⁸³ the offence of drink-driving carries a degree of stigma normally attached to more paradigmatic offences,¹⁸⁴ and is viewed as “very wrong indeed”.¹⁸⁵ There are minority views to the contrary, only one of which bears on the effect of conviction on an offender.¹⁸⁶ In terms of moral condemnation and stigma, it is submitted that the offence of driving with excess alcohol – by far the most commonly charged of the offences under discussion¹⁸⁷ – is sufficiently serious that the presumption in favour of *mens rea* is strongly in play. It will be seen in Chapter 7 that it takes a surprisingly large amount of alcohol to put a person over the limit, such that the degree of impairment of driving skills of someone over the limit may well be even more serious than many people might realise.

But what of the “in charge” and the “unfitness” elements of the offences? They feature less frequently in the literature and research, and there are far fewer prosecutions for these offences.

¹⁸¹ Above, p 40.

¹⁸² See p 42.

¹⁸³ See p 22.

¹⁸⁴ Sally Cunningham, *Driving Offences Law, Policy and Practice* (Ashgate 2008) 59.

¹⁸⁵ AP Simester and GR Sullivan, ‘On the Nature and Rationale of Property Offences’ in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 187.

¹⁸⁶ Roy Light, *Criminalizing the Drink-Driver* (Dartmouth 1994) 142, where an argument that the drink-driver is not regarded as “criminal” is not supported by references to literature, and the assertion that “the criminal law has not succeeded as well as many had hoped in suppressing drink-driving” seems outdated in light of the statistics quoted on p 1, fns 3, 4 and 5.

¹⁸⁷ See p 9.

The danger addressed by the “in charge” offences is the risk that the person may in fact drive.¹⁸⁸ That a person who is in charge cannot be trusted to refrain from driving has been acknowledged,¹⁸⁹ and is borne out by the fact that the statutory defences to the “in charge” offences are based on no likelihood of driving.¹⁹⁰ Nevertheless, being in charge without actually driving may be perceived as less dangerous, and therefore as less criminal, but there has been no research confirming this.

Turning to unfitness to drive through drink or drugs, it may well be that unfitness through drink would, by association with driving with excess alcohol, be perceived as wrongful, but again there is nothing to confirm this. While the dangers of driving when under the influence of drugs are being addressed in public education,¹⁹¹ and by the legislature,¹⁹² not enough is known about how the general public perceives drug-driving to draw any conclusions.¹⁹³ The effects of drugs are complex, and while there has been some research into drivers’ understanding of the effects of illicit drugs,¹⁹⁴ less is known about their understanding of the effects of medicinal drugs. It may well be that, if asked, people would think driving after taking drugs is as culpable as driving after drinking, although that would raise further questions about the extent to which the effects of different drugs are known, and whether or not it is understood that the law applies to both medicinal and illicit drugs.

Punishment is also relevant to seriousness:

Motor vehicles are dangerous things and deliberately bad, aggressive or irresponsible driving, including drunken driving, merits serious punishment especially (but not only) where it causes death.¹⁹⁵

¹⁸⁸ Although even this is not without controversy; see pp 94–97.

¹⁸⁹ RA Duff, ‘Criminalising Endangerment’ in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 63.

¹⁹⁰ See pp 90–94.

¹⁹¹ The Department for Transport has run campaigns, including a TV advertisement: <<http://drugdrive.direct.gov.uk/>> accessed 27 November 2013.

¹⁹² In the new offences under RTA 1988, s 5A, of driving, attempting to drive or in charge with a concentration of a specified drug in excess of a specified limit; see pp 8–9.

¹⁹³ See p 248.

¹⁹⁴ See p 250.

¹⁹⁵ Michael Hirst, ‘Causing Death by Driving and Other Offences: A Question of Balance’ [2008] Crim LR 339.

The fact that a person may be imprisoned for an offence again makes it more likely that it is truly criminal such that strict liability is not appropriate. Although the drink- and drug-driving offences are triable summarily only,¹⁹⁶ they carry some of the heaviest penalties which magistrates may impose. The maximum penalty for being in charge when unfit through drink or drugs, or with excess alcohol or an excess of a prescribed drug,¹⁹⁷ is three months' imprisonment, a level 4 fine (up to £2,500), or both. Disqualification from driving is a matter for the discretion of the sentencing court, but if the offender is not disqualified, ten penalty points must be imposed. For driving when unfit through drink or drugs, or with excess alcohol or an excess of a specified drug, the maximum penalty is six months' imprisonment, a level 5 fine (up to £5,000), or both, coupled with disqualification from driving¹⁹⁸ for a minimum of twelve months.¹⁹⁹ While imprisonment is usually reserved for offences which are more serious in terms of the degree of impairment or alcohol reading,²⁰⁰ the impact of disqualification from driving should not be under-estimated; it can result in loss of employment, and always leads to higher insurance premiums when the disqualification is over.²⁰¹ In terms of the penalties, therefore, being in charge when unfit or when over the limit is less serious than driving when in either such condition. This is probably as it should be, given that being in charge carries less risk than actually driving.

While the availability of imprisonment as a penalty on the face of it suggests that strict liability is inappropriate, as noted above,²⁰² it does not necessarily mean that the offence should not be one of strict liability, but that punishment must be proportionate to the offender's culpability.

¹⁹⁶ That is, in the lower magistrates' court, rather than in the higher Crown Courts.

¹⁹⁷ When in force; see pp 8–9.

¹⁹⁸ Subject to the possibility of arguing that there is a special reason for disqualifying for a shorter period or not at all: Road Traffic Offenders Act 1988, s 34(1); see pp 16–17.

¹⁹⁹ Road Traffic Offenders Act 1988, sch 2.

²⁰⁰ Sentencing Council, *Magistrates' Courts Sentencing Guidelines*, 124–126, 132–134 <<http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>> accessed 27 November 2013.

²⁰¹ See p 2.

²⁰² See p 49.

The question of the seriousness of an offence – in terms both of how it is regarded by the public and the available penalties – is also relevant to the question of reverse burdens of proof, discussed in Chapter 3.²⁰³

The effect of the statute

Again, according to *Gammon*, the presumption in favour of *mens rea* can be displaced only if this is clearly or by necessary implication the effect of the statute. This seems to be undoubtedly the case in relation to all the drink- and drug-driving offences. The Act creates the offences (with the notable exception of the offences of failing to provide – see below) without reference to any words implying *mens rea*, and proceeds to set out a detailed statutory regime for investigating suspected cases and gathering evidence which does not take any account of the state of mind of the suspect.

Issues of social concern

Third, according to *Gammon*, the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern. The drink- and drug-driving offences clearly relate to issues of social concern in the sense of road safety. While some of the legislation goes as far as to embrace road safety in the title,²⁰⁴ other recent Road Traffic Acts have been expressed to be consolidating or amending measures, but at least one earlier statute cited road safety as a specific objective.²⁰⁵

Another ground for displacing *mens rea* is that the drink- and drug-driving legislation is part of a regime regulating special skills which require licensing.²⁰⁶ Driving is a matter of choice; it is a special skill, a special activity.²⁰⁷ In the Privy Council, it was said that:

All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime which does not apply to members of the public who do neither. ...This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the state but because the possession and use of cars (like, for example, shotguns, the possession of which

²⁰³ See pp 81–82, 84–85, 115.

²⁰⁴ The Road Safety Act 2006, for example.

²⁰⁵ The preamble to the Road Traffic Act 1962 recited “An Act to make further provision as to road safety and road traffic and for purposes connected therewith”.

²⁰⁶ Above, p 44. The requirement to be licensed is in RTA 1988, s 87.

²⁰⁷ Above, p 45.

is very closely regulated) are recognised to have the potential to cause grave injury.²⁰⁸

It will be seen in Chapter 3²⁰⁹ that similar arguments are raised to justify reverse burdens of proof, which adversely impact on the presumption of innocence. These arguments may be especially strong in relation to the drink- and drug-driving offences, given the nature of the process for becoming licensed to drive. Prospective drivers must pass both a theory and a practical test. The former consists of answering questions concerning the Highway Code, traffic signs and essential skills;²¹⁰ and a hazard perception part. The practical test is designed to see if candidates can drive safely in different road and traffic conditions and can demonstrate, through their driving ability, that they know the Highway Code.²¹¹ The extent of the testing process is such that drivers can be expected to be aware of the many provisions of the Highway Code, which include a specific warning not to drive with excess alcohol.²¹²

It has been noted above that if an element of an offence, such as speeding, is defined by reference to an arbitrary line, *mens rea* is less likely to be required; the example given is speeding, where driving at 30 m.p.h. is acceptable, but driving at 31 m.p.h. is not.²¹³ The argument surely applies in relation to the prescribed limit for the purposes of the excess alcohol offences,²¹⁴ although the term “arbitrary”, which suggests something rather less considered than was in fact the case in relation to the prescribed limit,²¹⁵ may not be the most apt.

The objects of the statute

Finally, the court in *Gammon* ruled that even where a statute is concerned with an issue of social concern, the presumption of *mens rea* stands unless it can also be shown that strict liability would be effective to promote the

²⁰⁸ *Brown v Stott* [2003] AC 681 (PC) 705.

²⁰⁹ See pp 85–87.

²¹⁰ Two practice theory tests, each comprising 50 questions, are available online at <http://www.safedrivingforlife.info/practicetheorytest/practicetests_car.html> accessed 27 November 2013, when they did not contain any questions relating to drink or drugs.

²¹¹ <<https://www.gov.uk/practical-driving-test-for-cars>> accessed 27 November 2013.

²¹² <<https://www.gov.uk/rules-drivers-motorcyclists-89-to-102/alcohol-and-drugs-95-to-96>> accessed 27 November 2013.

²¹³ Above, p 46.

²¹⁴ And, in due course, to the specified limits under RTA 1988, s 5A, when in force; see pp 8–9.

²¹⁵ See pp 192–194.

objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. The statistics noted above²¹⁶ clearly show a steady and dramatic reduction in road traffic fatalities and serious injuries attributed to drink-driving. That, coupled with the fact that drink-driving is viewed more seriously now than in earlier years,²¹⁷ indicate that, certainly in relation to drink-driving, if not to drug-driving, the legislation has made a substantial contribution to improving road safety. I return to this theme in Chapter 10.²¹⁸

On the basis of the criteria in *Gammon*, therefore, the excess alcohol offences fall into the class of the truly criminal such that *mens rea* should be a requirement. Whether the “in charge” offences, and the offences of unfitness through drink or drugs, are also truly criminal is less clear. While there seems to be no basis, in terms of the stigma attaching or of the blameworthiness of offenders, for concluding that they are, likewise there is little to suggest that they are not truly criminal. The same arguments can, no doubt, be made for the new offences of excess specified drugs,²¹⁹ which are couched in the same terms of the excess alcohol offences.

In terms of maximum penalties, driving when unfit and driving with excess alcohol (and, in due course, with excess of a specified drug) are of equal seriousness, and more serious than the “in charge” offences. But all attract sentences of imprisonment. Some commentators argue that imprisonment may be consistent with strict liability, while others say that the possibility of imprisonment may be taken to indicate that *mens rea* ought to be a requirement.

The remaining criteria in *Gammon* – the effect of the statute, issues of social concern and the promotion of the objectives of the legislation – all support an argument that *mens rea* can be dispensed with for all the drink- and drug-driving offences.

Overall, the criteria in *Gammon* do not provide a comprehensive set of justifications for dispensing with *mens rea* in relation to the drink- and drug-driving offences under discussion.

²¹⁶ See Chapter 1, fn 3.

²¹⁷ See pp 22–23.

²¹⁸ See p 309.

²¹⁹ Under RTA 1988, s 5A when in force; see pp 8–9.

Fault

The distinction between, on the one hand, the constituents of *mens rea*, and, on the other, fault, was noted above.²²⁰ In relation to the drink- and drunk-driving offences, although *mens rea* in the sense described earlier²²¹ is not a prerequisite for conviction, the requirement for fault is nevertheless met. It is submitted that drink-drivers, and possibly also drug-drivers, are rarely morally innocent, and that John Gardner's "fault principle"²²² is met.

To drive after drinking is to risk failing in the duty to remain within the limit. Drink-drivers may intend to drive when over the limit; they may know or suspect that they are doing so; they may be reckless, careless or negligent as to whether or not they are doing so. All these are worthy of blame and constitute fault, especially as the dangers of driving after drinking are so widely known. It may well be the very absence of mental element – the lack of forethought, the lack of care, the risk-taking – which constitutes fault.

This is in line with Ashworth and Horder's view that negligence may be more acceptable as a form of fault than as a form of *mens rea*.²²³ It is also said that,²²⁴ to determine a person's just deserts, we must look beyond the formal culpability with respect to each element of an offence, and view the person's culpability in the context of the offence as a whole; assessing blameworthiness involves an evaluation of a person's actions, taking into account all the circumstances, including the person's state of mind.

As the question of consent is engaged in circumstances which may give rise to an allegation of rape,²²⁵ so too, a person about to drive after drinking or taking a drug must realise that the questions of fitness to drive and/or the prescribed limit, are in play. The risk that the person's behaviour amounts to an offence is worthy of condemnation. This is especially so in relation to alcohol, given that most people under-estimate how much drink will take them over the limit,²²⁶ so that those who do prove to be over the limit may well have drunk far more than they believed would take them to the limit.

²²⁰ See pp 35–37.

²²¹ See pp 37–38.

²²² See p 36.

²²³ See p 39.

²²⁴ CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell, 2005) 56.

²²⁵ See p 36.

²²⁶ See pp 240–244.

It has been argued that actions are serious enough to merit punishment if they demonstrate unwillingness to be guided by a value in the appropriate way, including where someone takes an unjustified risk of violating such a value.²²⁷ As in the case of offences of endangerment,²²⁸ the wrong consists in failure of proper concern. The drink- and drug-driving laws, based in the promotion of road safety, surely fall within this argument.

All these elements of fault on the part of a person who fails to ensure that he or she is within the limit or fit to drive, suggest that there is a standard to be met, and that failure to meet that standard amounts to a form of fault sufficient to ground criminal liability.²²⁹

Deterrence

The argument that strict liability can be justified on the ground that it acts as a deterrent has usually been raised in the context of corporate bodies undertaking hazardous processes which engage issues such as food safety or the avoidance of pollution. Nevertheless, there seems no reason why strict liability should not act as a deterrent to taking the risk of committing a drink- or drug-driving offence. Indeed, there is much to suggest that this is so.²³⁰

Ease of Prosecution

This justification for strict liability – ease of prosecution – seems on the face of it to apply to the drink-drive offences. The high conviction rate²³¹ appears to bear this out. On the other hand, it is necessary to prove that the sometimes complex procedure has been carried out fully and correctly, and in defended cases, this may not always be easy.

CONCLUSION

In relation to the offence of driving with excess alcohol, the presumption in favour of *mens rea* is particularly strong because the offence is one which can

²²⁷ Grant Lamond, 'What is a Crime?' (2007) 27 OJLS 609, 622–623.

²²⁸ Above, pp 26–30.

²²⁹ See above, pp 38–39.

²³⁰ See p 22, fn 118; and pp 274–277.

²³¹ See p 1.

be described as truly criminal.²³² This is a compelling argument against strict liability. It is not entirely clear that the same can be said of the remaining drink- and drug-driving offences. While the balance of the arguments may just tip in favour of saying that it can, the question need not be definitively answered in view of the strength of the arguments justifying strict liability.

The arguments which can be advanced to justify strict liability for driving when unfit or with excess alcohol are:

- those who drive after consuming drink or drugs knowingly take a risk that they may break the law;
- the excess alcohol offences feature a fixed point on a continuum which defines the offences.

The following justifications also apply to the offences of driving when unfit or with excess alcohol, but, in addition, to the “in charge” offences and the drug-driving offences:

- the effect of the Road Traffic Act 1988 is that liability should be strict;
- the Act regulates matters of social concern;
- the behaviour regulated – driving – requires special skill and is subject to a well developed licensing system;
- strict liability promotes the objects of the statute;
- the legislation demonstrably has a deterrent effect;
- it is clearly easier to prosecute the offences as strict liability offences without having to show *mens rea*.

The most compelling of these arguments is that someone who drives after drinking is aware of the risk of breaking the law, yet goes ahead; this is sufficiently culpable to justify conviction without a showing of *mens rea*. This falls within Simester’s concession²³³ that formal strict liability may be justified for stigmatic crimes where liability is strict in relation to an objective standard independent of individual offenders and their personal views; the examples given are careless and dangerous driving, but excess alcohol surely qualifies too. In relation to being in charge, it has been suggested that a person could fairly be blamed for voluntarily putting himself in a position

²³² Whether or not the new offences of excess of a specified drug in RTA 1988, s 5A (see pp 8–9) will come to be regarded as equally serious remains to be seen. On the basis that they are drafted in the same terms as the excess alcohol offences, there seems to be no reason why not.

²³³ Above, p 49.

where he knew or ought to have known of the risk that he might be over the limit when about to drive.²³⁴

In relation to the remaining offences, the most convincing argument, and it applies to drink-driving too, is the fact that driving is a complex activity, subject to a great many rules and regulations and impinging upon many other members of society. It seems only reasonable that those who undertake the inherently dangerous activity of driving must accept special responsibility – including strict liability in relation to many offences – for what they do.

The strongest argument for dispensing with *mens rea* is the obvious one of the ease with which a defendant could assert ignorance of the fact that he or she was unfit or over the limit, and the difficulty for the prosecution of ousting such an assertion. As will be seen in Chapter 7, it is virtually impossible for an individual to recognise the point at which the limit is reached – even more difficult for a prosecutor to prove a driver’s awareness of such a point.

While strict liability for the principal drink- and drug-driving offences can be justified, the “failing” offences are different. It has been seen that a person cannot be convicted without first having been warned of the possibility of prosecution for failing to do as the investigating officer requires. In light of the novelty of the drink-driving investigative procedures when first introduced, and the strong likelihood that suspects would have no idea that failing to provide a specimen would itself be an offence, let alone one which is as serious, in terms of penalty, as actually driving or in charge when unfit or over the limit, it seem wholly reasonable to require that the warning be given, so importing a requirement for a form of *mens rea*.

Closely allied to questions of *mens rea*, the state of the mind of an accused person and strict liability, is the presumption of innocence, and its place in the drink- and drug-driving offences. These matters are the subject of the next chapter.

²³⁴ Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] Crim LR 901, 921.

Chapter 3: The Presumption of Innocence

INTRODUCTION

This chapter concerns the presumption of innocence and its bearing on a number of aspects of the drink- and drug-driving offences. The principle that a person is presumed innocent until proved guilty is said to be a fundamental tenet of English law and has been recognised in many international instruments and agreements. Statutory presumptions of law may impinge on this principle. So too may reverse burdens of proof, which impose on a defendant, rather than the prosecutor, the task of proving some aspect of a case to some degree of persuasiveness. The drink- and drug-driving offences feature both a presumption of law and a number of reverse burdens.

To evaluate the tension between the presumption of innocence and the drink- and drug-driving offences, I explore the theoretical background, the literature and the case law, before moving on to outline the statutory provisions in question and the case law arising from them. I identify an irrebuttable presumption of law and two reverse burdens which are difficult to justify by reference to most of the theory, but propose a way forward.

THE BACKGROUND

The common law presumption of innocence is encapsulated in the much-quoted mantra:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.¹

For the purposes of this discussion, the presumption of innocence is taken to mean that the prosecution must bear the burden of proving, beyond reasonable doubt, the guilt of the accused.²

¹ *Woolmington v DPP* [1935] AC 462 (HL) 481. For a history of the development of the presumption, from Roman times to *Woolmington*, see Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 1–8.

² See, for example, AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 55–57. Elsewhere, the term is also used to mean that pre-trial procedures are to be conducted as though the suspected person were innocent; see Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 E&P 241, 243–244; Liz Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76 MLR 681, 683 *et seq.*

The presumption was restated with equal simplicity in article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”):³

[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Article 6(2) is to be read in conjunction with section 3 of the Human Rights Act 1998, which requires domestic legislation to be read in a way which is compatible with the Convention rights, so far as it is possible to do so.

The presumption of innocence has also been articulated in a number of instruments to which the United Kingdom is party, including the United Nations Universal Declaration of Human Rights⁴ and the Charter of Fundamental Rights of the European Union.⁵

Rationale

The requirement that a criminal case be proved beyond reasonable doubt provides for a high standard of certainty about a defendant’s guilt,⁶ so reducing the possibility of erroneous convictions. It is better for the guilty to go free than for the innocent to be convicted.⁷ The presumption is directly grounded in a concern to avoid the intrinsic moral wrongness of punishing people who should not be punished.⁸ It counters any tendency to assume that a defendant is guilty merely by virtue of having been accused.⁹

The state has wide powers of investigation, prosecution, trial and sentencing, and the requirement that the prosecution prove guilt beyond reasonable doubt goes some way towards redressing this imbalance between

³ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, <http://echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

⁴ General Assembly Resolution 217A(III), 10 December 1948, art 11 <http://www.un.org/en/documents/udhr/hr_law.shtml> accessed 27 November 2013.

⁵ OJ 2000/C 364/01, article 48.

⁶ AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 55–57; Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 E&P 241, 247.

⁷ Victor Tadros and Stephen Tierney, ‘The Presumption of Innocence and the Human Rights Act (2004) 67 MLR 402; Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 E&P 241, 248; *R v Lambert* [2001] UKHL 37 [156].

⁸ Patrick Tomlin, ‘Extending the Golden Thread? Criminalisation and the Presumption of Innocence’ (2013) 21 Jnl Pol Phil 44.

⁹ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 33 *et seq.*

the resources of the state and those of the individual.¹⁰ The consequences of wrongful conviction are greater for the convicted person than for the prosecutor, and fall entirely on the convicted person.¹¹

Procedural and Substantive Approaches

Some commentators¹² take the view that the presumption of innocence relates only to the procedure in a criminal trial, in the sense that it gives the prosecutor the burden of proving beyond reasonable doubt the constituents of the offence as defined in the relevant statute, but does not bear on how the offence is formulated in the first place. Ashworth¹³ gives as an example a hypothetical offence of causing serious injury, without any requirement for intention or recklessness. Under the procedural approach, the presumption of innocence would be complied with if the prosecution proves beyond reasonable doubt that a serious injury was caused, even though this would take no account of the possibility that the injury was entirely accidental, so contravening the principle that people should not be convicted unless blameworthy.¹⁴

Other commentators¹⁵ consider that, regardless of how an offence is drafted, the substance is relevant to the presumption of innocence. If an offence is defined so that it does not include a sufficient degree of culpability or blameworthiness, the presumption is breached. Duff,¹⁶ for instance, takes the view that the presumption of innocence requires that defendants be convicted only on proof beyond reasonable doubt of what the law legitimately defines as culpable wrongdoing. This is usually called the substantive approach, and is discussed in greater detail below.¹⁷

¹⁰ Paul Roberts, 'Taking the Burden of Proof Seriously' [1995] Crim LR 783, 787; Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 E&P 241, 250; Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 33.

¹¹ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 36.

¹² Notably Paul Roberts, see below, p 82.

¹³ Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 E&P 241, 253.

¹⁴ For another example, see RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 199.

¹⁵ For example, Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act 1998' (2004) 67 MLR 402.

¹⁶ RA Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 134.

¹⁷ See pp 82–84, 94–97.

Tadros¹⁸ makes a similar distinction between what he calls the classical theory of the presumption of innocence – that it protects against conviction of an offence where it has not been proved beyond reasonable doubt that the conduct fell within the definition of the offence; and the moral theory, protecting against conviction where the conduct is of a kind which ought not to be criminal.

Stumer¹⁹ divides the procedural approach into the narrow and the broad. Under the narrow procedural approach, the prosecution must bear the burden of proving the core aspects of an offence, leaving it to the defendant to prove any defence, excuse or exception. The broad procedural approach requires the prosecution to prove all such matters – both core and peripheral aspects of the offence, including the absence of defences, justifications, or excuses.

These different approaches emerge in more detail in the literature review below.²⁰

Inroads

Inroads into the presumption of innocence have been evident for some time.²¹ It is said to be all too easy to take for granted or neglect the practical and political significance of fundamental principles.²² Many offences are defined in such a way that the prosecution has to prove little, the defence bearing the burden of exculpation.²³ It was reported in 1996 that some forty per cent of offences triable in the Crown Court appear to violate the presumption, the researchers noting with regret, “the apparent casualness with which Parliament has continued to add to the number of derogations”.²⁴ In summary trials, the defendant has the statutory task of proving any exception, exemption, proviso, excuse or qualification, whether

¹⁸ Victor Tadros, ‘Rethinking the Presumption of Innocence’ (2007) 1 *Crim Law & Philos* 193, 197.

¹⁹ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 68 *et seq.*

²⁰ See pp 80–89.

²¹ The golden thread “is, to say the least, a little frayed at the edges”: Ben Fitzpatrick, ‘House of Lords: Reverse Burden and Article 6(2) of the ECHR: Drunk in Charge; Terrorism Offence’ (2005) 67 *JCL* 193.

²² Paul Roberts, ‘Taking the Burden of Proof Seriously’ [1995] *Crim LR* 783, 785.

²³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 72. See also Glanville Williams, ‘The Logic of “Exceptions”’ (1988) 47 *CLJ* 261, 263.

²⁴ Meredith Blake and Andrew Ashworth, ‘The Presumption of Innocence in English Criminal Law’ [1996] *Crim LR* 306, 314.

or not provided for in the enactment creating the offence.²⁵ Ashworth identifies four ways²⁶ in which the presumption of innocence is being undermined, including its erosion by exceptions, defences or presumptions, under which the defendant has to prove some fact to avoid conviction.

Tadros²⁷ points out that the presumption of innocence is set out in article 6(2) without qualification. Other rights articulated in the Convention may be modified in certain circumstances, for example, where “necessary in a democratic society”.²⁸ He examines whether there could be any justification for interfering with the presumption of innocence even if the reference to necessity in a democratic society were to apply to it. He concludes not, going so far as to say that the right in article 6(2) should be regarded as inviolable.

Having outlined the concept of the presumption of innocence and the encroachments upon it, I turn to two aspects of the law which may offend it – legal presumptions and reverse burdens of proof.

LEGAL PRESUMPTIONS

Legal presumptions are statutory provisions requiring a court to reach a specified conclusion upon proof of a specified fact. They leave no discretion to draw inferences.²⁹

They are often rebuttable by the defence. For example, in proceedings under the Dangerous Dogs Act 1991, it is presumed that a dog is a dog bred for fighting, or other specially dangerous dog, unless “the contrary is shown by the accused by such evidence as the court considers sufficient”.³⁰

²⁵ Magistrates’ Courts Act 1980, s 101.

²⁶ Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 E&P 241.

²⁷ Victor Tadros, ‘Rethinking the Presumption of Innocence’ (2007) 1 Crim Law & Philos 193, 197, 212.

²⁸ See, for example, art 9(2): “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

²⁹ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 13.

³⁰ Dangerous Dogs Act 1991, s 5(5).

Some presumptions, on the other hand, are irrebuttable. For example, in a drink-driving prosecution, it is to be assumed (irrebuttably³¹) that the proportion of alcohol in the accused's breath, blood or urine³² at the time of the alleged offence was not less than in the specimen provided later.³³ Such irrebuttable presumptions lighten or qualify the prosecutor's probative duty.³⁴ They are said to be more in the nature of substantive rules of law that contribute to the definition of the offence in question, given that they allow no scope for adducing evidence to undermine them.³⁵ They have been criticised as serving no other purpose than to enact substantive criteria of criminal liability in procedural disguise,³⁶ and as undermining the presumption of innocence by mandating the conviction of those who have not been proved substantively guilty beyond reasonable doubt.³⁷

REVERSE BURDENS OF PROOF

As noted above, reverse burdens of proof place on the defendant, rather than the prosecutor, the task of proving some aspect of a case, to some degree of persuasiveness.³⁸ This may mean rebutting a presumption, or proving an exception or defence. Reverse burdens raise the question of the extent to which they compromise the presumption of innocence by modifying the usual duty of the prosecutor to establish guilt beyond reasonable doubt. Most reverse burdens are specifically created by statute.³⁹

³¹ *Beauchamp-Thompson v DPP* [1989] RTR 54; see further below, pp 106–107.

³² Or, when RTA 1988, s 5A comes into force (see pp 8–9), the proportion of a specified drug in the accused's blood or urine.

³³ RTOA 1988, s 15(2), discussed in detail below, pp 105–111.

³⁴ RA Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 132.

³⁵ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 13.

³⁶ Paul Roberts, 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 184.

³⁷ RA Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 135.

³⁸ See, for example, *Sheldrake v DPP* [2005] 1 AC 264 (HL) [1].

³⁹ See, for example, Paul Roberts, 'Taking the Burden of Proof Seriously' [1995] Crim LR 783, 789.

Types of Reverse Burden

Evidential

Two types of reverse burden have been identified. The first is the less onerous “evidential” burden, requiring a defendant to raise a reasonable doubt as to a matter, which the prosecution must then negative beyond reasonable doubt. For example, the exemptions to illegal hunting with dogs⁴⁰ have been found to give rise to an evidential burden.⁴¹ Evidential burdens do not breach the presumption of innocence and are compatible with article 6(2) ECHR.⁴²

There is no universally accepted formula to describe how much evidence must be put before the court to satisfy an evidential burden,⁴³ but the defendant must raise “a live issue fit and proper to be left to the jury”,⁴⁴ an arguable case,⁴⁵ or “an issue as to the matter in question fit for consideration by the tribunal of fact.”⁴⁶ An evidential burden is not a burden of proof; it can be discharged by something short of proof,⁴⁷ although the mere allegation of some fact would not be sufficient to satisfy the burden.⁴⁸ Nor would an entirely self-serving out-of-court statement.⁴⁹ The accused need not necessarily give evidence; what witnesses in the case have said may be sufficient.⁵⁰ The burden is not illusory; the accused must put before the court evidence which, if believed, could be taken by a reasonable jury to support the defence case.⁵¹

⁴⁰ In Hunting Act 2004, sch 1.

⁴¹ *DPP v Wright* [2009] EWHC 105 (Admin) (DC).

⁴² *R v DPP, ex parte Kebilene* [2000] 2 AC 326 (HL) 379; AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 58–61; David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 29.

⁴³ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 17.

⁴⁴ *R v Gill* [1963] 1 WLR 841 (CCA), 846.

⁴⁵ *R v Lang* [2002] EWCA Crim 298 [31].

⁴⁶ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [1].

⁴⁷ Richard Glover, ‘Codifying the Law on Evidential Burdens’ (2008) 72 JCL 305, 308; *Jayasena v The Queen* [1970] AC 618 (PC) 624.

⁴⁸ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 17.

⁴⁹ *Thynne v Hindle* [1984] RTR 231 (QBD) 244, a “hip flask defence” case.

⁵⁰ *Salmon v HM Advocate* [1999] JC 67, 75.

⁵¹ *R v Lambert* [2001] UKHL 37 [90].

Legal or persuasive

The second and more onerous reverse burden is the legal burden, also called a persuasive burden, requiring a defendant to prove something on the balance of probabilities. For example, the defence under section 1(5) of the Firearms Act 1982 – that the accused did not know and had no reason to suspect that an imitation firearm was so constructed or adapted as to be readily convertible into a firearm – has been held to impose a legal burden.⁵²

Legal burdens are subject to section 3 of the Human Rights Act 1998,⁵³ and their compatibility with the Convention rights therefore falls to be considered. If found incompatible, a reverse legal burden must be reinterpreted as an evidential burden to bring it within section 3,⁵⁴ or the provision in question must be declared incompatible with the ECHR.⁵⁵

Objections

Reverse burdens have been said to reverse the presumption of innocence, replacing it with a presumption of criminality,⁵⁶ and to be “repugnant to ordinary notions of fairness”.⁵⁷ The fact that a defendant may be innocent does not necessarily equip the defendant to prove it.⁵⁸ If the defendant is able to adduce enough evidence to raise a reasonable doubt about guilt, but not enough to come up to the balance of probabilities, the defendant is convicted, even though there remains a reasonable doubt about guilt.⁵⁹ Thus, where a defendant just fails to prove a reverse burden, a mere 49 per cent chance of guilt is enough to result in conviction.⁶⁰

⁵² *R v Williams (Orette)* [2012] EWCA Crim 2162.

⁵³ Above, p 70.

⁵⁴ As, for example, in *R v Webster* [2010] EWCA Crim 2819; see also Laura Madhloom, ‘Corruption and a Reverse Burden of Proof’ (2011) 75 JCL 96.

⁵⁵ Under Human Rights Act 1998, s 4. See, AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 59.

⁵⁶ *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 58.

⁵⁷ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [9].

⁵⁸ Paul Roberts, ‘Taking the Burden of Proof Seriously’ [1995] Crim LR 783, 787; RA Duff, ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’ in AP Simester (ed) *Appraising Strict Liability* (OUP 2005) 140.

⁵⁹ RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 236; Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 9.

⁶⁰ Victor Tadros, ‘Rethinking the Presumption of Innocence’ (2007) 1 Crim Law & Philos 193, 201.

Having outlined the presumption of innocence, presumptions of law and reverse burdens, I move on to review the case law of the European Court of Human Rights (ECtHR) and of the domestic courts on these issues.

THE CASE LAW

Although the right in article 6(2) (to be presumed innocent until proved guilty⁶¹) is set out in the Convention without any words of qualification, the case law indicates that it may, subject to certain limits, be modified.

The European Court of Human Rights

In *Salabiaku v France*,⁶² the appellant had been convicted under a provision of the French Customs Code which provided for a presumption that a person found in possession of certain items was guilty of smuggling them. He argued that the presumption offended article 6(2). The ECtHR recognised that presumptions of fact or law operate in every legal system. It held that article 6(2) requires such presumptions to be kept within reasonable limits, which take into account the importance of what is at stake and maintain the rights of the defence, and that they must not be arbitrary. The presumption in question was held compatible with article 6(2).⁶³

Although *Salabiaku* concerned a presumption of law, the court's finding has been generally accepted as the standard interpretation of the presumption of innocence in article 6(2) in cases involving reverse burdens as well as presumptions of law.

In a later case,⁶⁴ the ECtHR said that, in employing presumptions, the means must be reasonably proportionate to the legitimate aim sought to be achieved.

The House of Lords

Although the domestic courts have been called upon to examine reverse burdens for compatibility with article 6(2), no consistent principles for

⁶¹ See p 70.

⁶² (1988) 13 EHRR 379.

⁶³ Leaving plenty of leeway for the courts to develop the dividing line: Andrew Ashworth, 'Burden of Proof: A Retreat from Lambert' [2002] Archbold News 4.

⁶⁴ *Janosevic v Sweden* (2004) 38 EHRR 22 [H31(f)].

determining such compatibility have emerged. This has been lamented in many quarters.⁶⁵

*Kebilene*⁶⁶ concerned the offence⁶⁷ of possessing an article in circumstances giving rise to a reasonable suspicion that the article was held for a purpose connected with terrorism. An accused could avoid conviction by proving absence of terrorist purpose, or by proving no knowledge of (or no control over) the article(s) in question.⁶⁸ Since the Human Rights Act had not been in force at the relevant time, the comments of the House of Lords on the compatibility of the defence with article 6(2) were *obiter*, but have nevertheless been influential. The House recognised that article 6(2) does not absolutely prohibit reverse burdens, whether evidential or legal, but in each case the presumption subject to the reverse burden must be within reasonable limits. In deciding where that balance lies, it was useful to consider:

- what the prosecution has to prove in order to transfer the onus to the defence;
- the nature of the burden on the accused, whether it is likely to be difficult to prove, or within the accused's knowledge, or something to which the accused readily has access;
- the nature of the threat faced by society which the provision is designed to combat.

In *Lambert*,⁶⁹ the defendant had been convicted of possession of a controlled drug with intent to supply.⁷⁰ It would have been a defence⁷¹ for him to prove that he neither knew, nor suspected or had reason to suspect, that the bag found in his possession contained drugs. He appealed on the ground that the legal burden of proving the defence conflicted with the presumption of

⁶⁵ For example, Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act 1998 (2004) 67 MLR 402; Dilys Tausz, AJ Ashworth 'Burden of Proof: Whether Reverse Burden of Proof in Road Traffic and Terrorism Legislation Incompatible with Presumption of Innocence in Art 6(2) ECHR' [2005] Crim LR 215; Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901; David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' [2007] CLJ 142; AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 59; David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 29.

⁶⁶ *R v DPP ex p Kebilene* [2000] 2 AC 326 (HL).

⁶⁷ Contrary to Prevention of Terrorism (Temporary Provisions) Act 1989, s 16A.

⁶⁸ Prevention of Terrorism (Temporary Provisions) Act 1989, s 16A(3), (4).

⁶⁹ *R v Lambert* [2001] UKHL 37.

⁷⁰ Contrary to Misuse of Drugs Act 1971, s 5(3).

⁷¹ Under Misuse of Drugs Act 1971, s 28(2).

innocence under article 6(2). Again, the Human Rights Act did not apply since it had not been in force at the relevant time, but the House of Lords provided *dicta*. The principle of proportionality required the House to consider whether there was a pressing necessity to impose on the defendant a legal rather than an evidential burden; it would be difficult to show that only a reverse legal burden would overcome the prosecution's difficulties of proof in a possession of drugs case, and the defence was therefore to be read as imposing an evidential burden only.

In *R v Johnstone*,⁷² a defence under the Trade Marks Act 1994 was found to impose a legal burden which was compatible with article 6(2). As in *Kebilene*, the language used was the language of balance – it must be fair and reasonable to deny a defendant the protection normally guaranteed by the presumption of innocence. There was no discussion of whether an evidential burden would have sufficed.

The presumption of innocence next came before the House of Lords in the conjoined cases *Sheldrake v DPP and Attorney General's Reference (No 4 of 2002)*.⁷³ *Sheldrake* is of particular interest since it concerned an offence of being in charge with excess alcohol.⁷⁴ The motorist argued that the defence⁷⁵ of no likelihood of driving while remaining over the limit infringed the presumption of innocence in article 6(2) if interpreted as imposing a legal burden of proof, and that it should be interpreted as imposing an evidential burden only. He further argued that the risk of driving was an essential element of the offence, and the prosecution should be required to prove the existence of that risk beyond reasonable doubt.

The House of Lords reviewed the jurisprudence of the ECtHR, and identified a number of factors as relevant to the reasonableness or proportionality of a legal presumption. These included the opportunity given to the defendant to rebut the presumption; flexibility in applying the presumption; the importance of what is at stake; and the difficulty a prosecutor may face in the absence of a presumption. The House of Lords was clear that there is no general rule for decisions of this kind, and that each case must be dealt with on its merits.⁷⁶ The House found that likelihood of driving was not an element of the offence. Nevertheless, the

⁷² [2003] UKHL 28.

⁷³ [2005] 1 AC 264 (HL).

⁷⁴ Contrary to RTA 1988, s 5(1)(b).

⁷⁵ In RTA 1988, s 5(2); see pp 90–99.

⁷⁶ A view later cited with approval by the House of Lords in *R v Chargot* [2008] UKHL 73 [28].

reverse burden infringed the presumption of innocence,⁷⁷ but could be justified because it was aimed at the legitimate objective of preventing death, injury and damage, and because it met the tests of acceptability for a presumption of fact identified by the ECtHR jurisprudence. The reverse burden was reasonable and in no way arbitrary; the defendant had every opportunity to show that there was no likelihood of driving while over the limit. Furthermore, the likelihood of driving was a matter so closely conditioned by the defendant's own knowledge and state of mind that it was more appropriate for the defendant to prove unlikelihood of driving, than for the prosecutor to prove likelihood. The imposition of a legal burden did not go beyond what was necessary. It was not to be "read down" under section 3 of the Human Rights Act 1988 to an evidential burden.

The conjoined case, *Attorney General's Reference (No 4 of 2002)*, concerned an offence of belonging to, and professing to belong to, a proscribed organisation.⁷⁸ It would be a defence⁷⁹ to show that the organisation in question had not been proscribed at the relevant time and that the defendant had not taken part in its activities while it was proscribed. The House of Lords found that Parliament had intended a legal burden of proof, but that there was a real risk that an innocent person would not be able to discharge such a burden and that the presumption of innocence would be infringed. The imposition of a legal burden was not a proportionate and justifiable legislative response to the threat of terrorism. While security considerations carried weight they did not absolve the state from its duty to ensure basic standard of fairness were observed. The burden was therefore read down to an evidential burden.

THE LITERATURE

Lack of Principle

The decisions in *Sheldrake* and *Attorney General's Reference (No 1 of 2004)* have been criticised as providing no clear guidance on how to interpret statutes

⁷⁷ This has been criticised on the grounds that, having found that likelihood of driving – the subject of the reverse burden – was not part of the offence, the House should have concluded that there was therefore no breach of the presumption of innocence. See, for example, PW Ferguson, 'Proof of Innocence' [2004] SLT 223.

⁷⁸ Contrary to Terrorism Act 2000, s 11(1).

⁷⁹ Under Terrorism Act 2000, s 11(2).

which impose reverse burdens.⁸⁰ In 2005, Dennis⁸¹ reviewed the case law, noting that the courts had approached each reverse burden case individually. He identified six factors, about which there were varying degrees of judicial uncertainty and inconsistency, as having featured, to different degrees of persuasiveness, in their decision-making:

- given the requirement⁸² to interpret domestic legislation so as to be compatible with Convention rights, the extent to which courts defer to the will of Parliament concerning where the burden of proof is to lie;
- the seriousness of offences. The suggestion is that interference with the presumption of innocence may more easily be justified in respect of less serious offences;
- the distinction between elements of an offence and defences. A reverse burden may be less acceptable in respect of an essential element of an offence, or in respect of something which goes to its “true nature” or “gravamen”;
- the maximum penalty. Although it might seem that reverse burdens should be less acceptable in respect of offences carrying higher penalties, the decisions are inconsistent;
- ease of proof and the peculiar knowledge of the defendant, embracing the idea that the burden of proof may properly lie with whichever party would have least difficulty discharging it;
- the presumption of innocence, which has been interpreted in the jurisprudence of the ECtHR largely as a procedural safeguard.

Many of these issues are discussed in greater detail below.

Seriousness and the Balancing of Interests

Hamer⁸³ has also sought to reconcile the cases in the quest for principle. He acknowledges the tension between, on the one hand, the presumption of innocence and the weight it gives to the defendant’s right to avoid mistaken

⁸⁰ Dilys Tausz, AJ Ashworth ‘Burden of Proof: Whether Reverse Burden of Proof in Road Traffic and Terrorism Legislation Incompatible with Presumption of Innocence in Art 6(2) ECHR’ [2005] Crim LR 215; Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 130.

⁸¹ Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] Crim LR 901.

⁸² In Human Rights Act 1998, s 3; see pp 70, 76.

⁸³ David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 CLJ 142.

conviction; and, on the other hand, society's interest in law enforcement which may sometimes be at the expense of the defendant's rights. Reversing a burden so that a defendant is required to prove his innocence, albeit only on a balance of probabilities, increases the risk of mistaken conviction (although it reduces the risk of erroneous acquittal), so favouring society's interest in law enforcement at the expense of the individual's rights.

Ashworth⁸⁴ points out that combating a particularly prevalent and serious offence may argue in favour of overriding the presumption of innocence, but at the same time, the defendant has an interest in protection from wrongful conviction because of what is at stake.

Stumer⁸⁵ accepts that the community interest in preventing, deterring and punishing crime increases with the seriousness of the offence, but so too does the interest of a defendant in avoiding wrongful conviction. He contends that the values protected by the presumption of innocence are too important to be limited on the basis of a competing public interest.

Elements of an Offence Distinguished from Defences

Among the factors identified by Dennis⁸⁶ is the distinction between elements of an offence and defences, the courts sometimes, although not invariably,⁸⁷ having found that the prosecutor must prove all the essential elements of an offence.

Roberts⁸⁸ insists that any distinction between elements of the offence and defences depends on the language of the statute in question. For him, the presumption is procedural, not substantive. Substance and procedure are independent dimensions of penal law.⁸⁹ Interpreting a statutory offence should be a discrete exercise independent of applying the presumption of

⁸⁴ Andrew Ashworth, 'Four Threats to the Presumption of Innocence' [2006] E&P 241, 260–262.

⁸⁵ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 156, 40 *et seq.* For a thorough-going critique of Stumer's thesis, see David Hamer, 'A Dynamic Reconstruction of the Presumption of Innocence' (2011) 31 OJLS 417.

⁸⁶ Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901, 911.

⁸⁷ Indeed, Hamer finds that the English courts have dealt with article 6(2) with little reliance on the formal distinction between offence and defence: 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 CLJ 142, 144.

⁸⁸ Paul Roberts 'The Presumption of Innocence Brought Home? Kebilene Deconstructed' (2002) 118 LQR 41.

⁸⁹ Paul Roberts, 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in AP Simister (ed), *Appraising Strict Liability* (OUP 2005) 154.

innocence. In practice, if a statutory offence is interpreted according to normal principles, then the presumption of innocence is applied to it, with the result that the definition of the offence is modified, then a substantive conception of the presumption of innocence is in operation. This should not be so, he argues. The definition of the offence should itself encapsulate the moral wrong proscribed, thereby making clear where potential criminal liability lies.

Substance or Gravamen

While a procedural interpretation of the presumption of innocence depends on the distinction between elements of an offence and defences, the “gravamen” approach addresses the substance of the offence, which may include elements of the offence and of a defence.⁹⁰ Hamer⁹¹ argues that reverse burdens are less likely to be acceptable if they relate to matters crucial to the criminality or gravamen of an offence, although he recognises the difficulties of identifying such matters.

Tadros and Tierney,⁹² adopting a substantive approach, argue that it should be for the prosecutor to prove those factors which comprise the mischief at which Parliament aimed when creating the offence, such that a reverse burden is acceptable only if it does not require the defendant to prove an element of the offence. Likewise, for Stumer,⁹³ the real question ought to be whether a person comes within the scope of what was intended to be prohibited, and both elements and defences are relevant to that – a person who falls within a defence was not intended to fall within what was intended to be prohibited.

Dennis⁹⁴ also considers an approach which takes into account the rationale of the offence and the extent to which the prohibited conduct is blameworthy or “properly criminal”. If the prohibition extends to conduct which is not in itself blameworthy or morally criminal, the effect of a reverse

⁹⁰ The literature on the distinction between offences and defences is not examined in this work. For a forerunner of the modern “gravamen” approach, see Glanville Williams, ‘The Logic of “Exceptions”’ (1988) 47 *CLJ* 261.

⁹¹ David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 *CLJ* 142, 151.

⁹² Victor Tadros and Stephen Tierney, ‘The Presumption of Innocence and the Human Rights Act (2004) 67 *MLR* 402, 410.

⁹³ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 76.

⁹⁴ Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] *Crim LR* 901, 921–924.

onus provision may be to require the defendant to prove innocence in morally substantive terms; this would be objectionable as disproportionate.

Duff⁹⁵ distinguishes between, on the one hand, offences (to be proved by the prosecution beyond reasonable doubt) and defences (to be proved by the defence on at least an evidential burden); and, on the other hand, between criminal responsibility and criminal liability. Proof of the offence establishes that the accused is criminally *responsible* for committing the offence and must answer for it. At this point, the accused, if not admitting guilt, may still be able to avert criminal *liability* by offering a justification or excuse, and has at least an evidential burden. The presumption of innocence requires that a person be presumed innocent until proved criminally responsible; at that point it is up to the accused to rebut the presumption of guilt by offering an answer that blocks the presumptive inference from responsibility to guilt.

Glover⁹⁶ points to the dangers of making decisions about the legitimacy of reverse burdens on the basis of their gravamen, citing *Sheldrake* as an example of how difficult it can be to be sure of the defining features of an offence – a point I come back to later in this chapter.⁹⁷

Stumer⁹⁸ dismisses gravamen as a guide to the acceptability of reverse burdens. Gravamen can be defined either by reference to the characteristics of the offence which make it wrongful and suitable for criminal sanctions, or by reference to the conduct which Parliament intended to control, but both depend on controversial theories of what is wrongful and switch attention away from the words of the statute to far more nebulous concepts.

Maximum Penalty

It might be expected that, the more serious the consequences of conviction, the less likely it is that a reverse burden would be acceptable. Hamer is of the view that the cases largely bear this out.⁹⁹ He suggests that the offence in *Sheldrake*, of being in charge while over the limit, could be viewed as a mere traffic offence although it does carry a possible prison sentence, but goes no

⁹⁵ RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 207.

⁹⁶ Richard Glover, 'Regulatory Offences and Reverse Burdens: The "Licensing Approach"' (2007) 71 JCL 259.

⁹⁷ See pp 94–97.

⁹⁸ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 77–80.

⁹⁹ David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 CLJ 142, 150.

further than concluding that the offence in *Sheldrake* is less serious than those in *Lambert*¹⁰⁰ (possession of drugs with intent to supply) and *Attorney General's Reference (No 4 of 2002)*¹⁰¹ (membership of a proscribed terrorist organisation). Ashworth¹⁰² cites both *Lambert* and *Attorney-General's Reference (No 4 of 2002)* as cases in which the House of Lords treated high maximum sentences (ten years and life) as favouring insistence on the presumption of innocence, and one¹⁰³ in which the approach was less clear-cut. He argues that where deprivation of liberty is a possible penalty, there is no place for a reversal of proof.

Dennis,¹⁰⁴ on the other hand, finds maximum penalty an uncertain guide to the acceptability of a reverse burden, citing cases where reverse burdens were upheld even though penalties of up to five years', seven years' and ten years' imprisonment were available.

Simester and Sullivan suggest that the principle should be that, for stigmatic crimes involving proof of culpability and a potential sentence of imprisonment, reverse legal burdens should always be reduced to evidential burdens.¹⁰⁵ Dennis takes a similar view.¹⁰⁶

Justifying Legal Reverse Burdens and Legal Presumptions

The objections to legal reverse burdens are summarised above.¹⁰⁷ There have, however, been a number of suggestions for ways in which, and circumstances in which, such burdens may be acceptable.

Dennis¹⁰⁸ canvasses what he calls voluntary acceptance of risk. This concept is engaged when a person participates in a regulated activity from which the person intends to derive benefit. Such participation carries a

¹⁰⁰ [2002] 2 AC 545 (HL), above, p 78.

¹⁰¹ [2005] 1 AC 264, above, p 80.

¹⁰² Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 E&P 241, 260 – 262.

¹⁰³ *R v Johnstone* [2003] UKHL 28.

¹⁰⁴ Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901, 914.

¹⁰⁵ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 60.

¹⁰⁶ Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901, 920.

¹⁰⁷ See pp 76–77.

¹⁰⁸ Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901, 921.

corresponding burden of having to disprove an assumption of blame for certain acts committed in the course of the activity.

Likewise, Glover has proposed¹⁰⁹ that reverse legal burdens may generally be justified under what he calls a “licensing approach”. If a person voluntarily engages in a lawful, regulated activity which presents a serious risk or danger to the public, in so doing that person accepts any reverse legal burden as a condition of being licensed or permitted (either specifically, or by the absence of constraint) to engage in the activity. He suggests that driving offences could be included within such a definition, where the use of the term “licensing” is of course especially apt.

Dennis’s and Glover’s approaches are reminiscent of the argument described in Chapter 2,¹¹⁰ that it is legitimate to displace *mens rea* for the drink- and drug-driving offences because the legislation is part of a regime regulating special skills which require licensing.

Stumer¹¹¹ says that the characterisation of offences as regulatory is unhelpful to the question of the acceptability of reverse burdens; what matters is what is at stake for the defendant. But he does concede that, if the penalties are low, voluntary participation in a regulated sphere of activity might be relevant to justifying a reverse burden.¹¹²

Duff¹¹³ also says that it is not unreasonable that those who engage in activities which create risks of serious harm, beyond those which are acceptable as features of normal life, should bear the additional responsibility of rebutting a presumption. But he exempts drivers from these special responsibilities because, he says, driving is an “ordinary” rather than a specialised activity, creating a “normal” level of risk which is part of everyday life. The example he gives is that a driver who drives satisfactorily is not thereby equipped to prove having driven with due care and attention.

¹⁰⁹ Richard Glover, ‘Regulatory Offences and Reverse Burdens: The “Licensing Approach”’ (2007) 71 JCL 259.

¹¹⁰ See pp 44–45.

¹¹¹ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 164, 166.

¹¹² He refers, however, to an obligation to keep records as an aspect of any such regime, suggesting that what he has in mind are regimes such as workplace safety rather than driving.

¹¹³ RA Duff, ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 138 *et seq.* See also RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 242 *et seq.*

In relation to irrebuttable legal presumptions, Duff¹¹⁴ goes on to say that these are consistent with the presumption of innocence only if it can be shown that there is no scope for a defendant to admit the fact proved yet deny the presumption which ensues; proof of the fact should constitute irrefutable proof of the presumption.

Hamer¹¹⁵ suggests that the public interest in law enforcement is likely to come to the fore, to justify a reverse burden, in a “regulatory regime” where, although the offence in question features significant harm, the penalties are relatively light. By regulatory regimes Hamer means those established to respond to practical rather than moral concerns, such as food and drug production, environmental protection and safety in the workplace. These regimes feature situations where a defendant should be considered to have chosen to engage in the activity, with notice of the conditions attaching to it. Hamer admits, though, that driving is less straightforward; while drivers are on notice that driving is regulated, this would not justify, for example, a presumption that a person is driving dangerously unless the person can prove otherwise.

Roberts says that a reverse burden may be justified where (*inter alia*) it is necessary to save a criminal prohibition from being unenforceable or virtually unenforceable.¹¹⁶ He gives as an example a presumption that a person refusing to give a breath sample at the roadside has been driving with excess alcohol. There is of course no such presumption in road traffic law. Instead, the legislature made such a refusal an offence in itself.

Ease of Proof and Peculiar Knowledge

There is an argument that if a matter can be proved more easily by the defendant than by the prosecutor, the objection to a reverse burden is reduced.¹¹⁷

Clearly some reverse burdens are easier to prove than others; demonstrating possession of a licence may be perfectly compatible with the presumption of innocence where it is reasonable that a person must be

¹¹⁴ RA Duff, ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 143.

¹¹⁵ David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 CLJ 142, 146 *et seq.*

¹¹⁶ Paul Roberts ‘The Presumption of Innocence Brought Home? Kebilene Deconstructed’ (2002) 118 LQR 41, 63.

¹¹⁷ Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 E&P 241, 266–267. See also David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 CLJ 142, 158–159.

licensed in the first place to participate in the activity in question.¹¹⁸ Indeed, the Divisional Court has held that it is wholly proportionate that a defendant who disputed that he was driving while disqualified had the burden of establishing that he was entitled to drive.¹¹⁹ An example of a burden which would be difficult for a defendant to prove would be the chemical composition of a substance found in his possession, which would give rise to very real practical difficulties, especially as such substances are normally seized by the police.¹²⁰ But ease of proof is not in itself a reason to reverse a burden, rather difficulty of proof is a reason not to reverse the burden.¹²¹

The “peculiar knowledge” concept is to the effect that if a matter is solely within the knowledge of the defendant, it may be more acceptable that the defendant should bear the burden of proving it. It is another of the factors identified by Dennis as having featured in the courts’ decision-making on reverse burdens.¹²²

Ashworth and Horder find this approach is acceptable in relation to certain matters, but should be kept within limits. It should not be extended to *any* matter within an individual’s peculiar knowledge, since this could encompass elements such as intention, knowledge and other aspects of *mens rea*, and would undermine the presumption of innocence completely.¹²³ In any event, state of mind is not so easily proved as is possession of a licence.¹²⁴

Stumer¹²⁵ argues that the question of knowledge possessed only by the defendant can easily be resolved by imposing an evidential burden under

¹¹⁸ Paul Roberts ‘The Presumption of Innocence Brought Home? Kebilene Deconstructed’ (2002) 118 LQR 41, 62.

¹¹⁹ *DPP v Barker* [2004] EWHC 2502 (Admin) (DC). But see Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 171, pointing out that nowadays registers of licence holders are often kept and the keeper of such a register could easily give evidence about whether or not a particular person holds a licence.

¹²⁰ *R v Hunt (Richard)* [1987] AC 352 (HL) 377.

¹²¹ Paul Roberts ‘The presumption of innocence brought home? Kebilene deconstructed’ (2002) 118 LQR 41, 66.

¹²² Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] Crim LR 901, 914; see p 81.

¹²³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 72–73. See also Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 E&P 241, 267–268.

¹²⁴ Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] Crim LR 901, 919.

¹²⁵ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 176.

which the defendant must disclose any such matter to the prosecution. It can then be scrutinised and tested in the normal way. There is no need for a legal burden.

My review of the case law has revealed no consistent principles about the circumstances in which the presumption of innocence may be put aside, while the literature shows some commonality of views among scholars, but no definitive consensus about where the lines are to be drawn.

I turn next to the drink- and drug-driving offences, pinpointing the situations in which the presumption of innocence is in play, and identifying and evaluating how it has been dealt with in those situations.

THE DRINK- AND DRUG-DRIVING OFFENCES

In the context of the drink- and drug-driving offences, there are five situations in which the presumption of innocence falls to be considered:

- *no likelihood of driving*: a person accused of being in charge when unfit to drive through drink, or when over the limit,¹²⁶ or (in due course) while having an excess of a specified drug¹²⁷ can escape conviction by proving there was no likelihood of driving while remaining in such a condition;¹²⁸
- *the “medical defence”* to a charge of driving, attempting to drive or being in charge with a specified controlled drug in excess of the specified limit for that drug,¹²⁹ when in force. It will be a defence¹³⁰ to show that the drug in question had been supplied to the accused for medical or dental purposes, that the accused took it as directed by the prescriber or supplier, and in accordance with any manufacturer’s or distributor’s instructions, and that the accused was lawfully in possession of the drug.
- *reasonable excuse*: a person charged with failing without reasonable excuse to co-operate with a preliminary test, or to provide a specimen, or to consent to the analysis of a blood

¹²⁶ Contrary to RTA 1988, s 4(2) or 5(1)(b) respectively.

¹²⁷ Contrary to RTA 1988, s 5A(1)(b), (2); see pp 8–9.

¹²⁸ Under s RTA 1988, s 4(3), 5(2) or 5A(6) respectively.

¹²⁹ Contrary to RTA 1988, s 5A(1), (2), when in force; see pp 8–9.

¹³⁰ Under RTA 1988, s 5A(3).

specimen taken while incapable of consenting,¹³¹ may claim that there was a reasonable excuse; it is then for the prosecution to negative the proffered excuse;

- *the statutory assumption*¹³² that the proportion of alcohol, or (in due course) of a specified drug,¹³³ in a defendant's body at the time of the alleged offence was not less than that found in the specimen taken later;
- *the "hip-flask defence" or "post-incident consumption"*: the statutory assumption may be displaced if the defendant can show that the unfitness through drink, or excess over the prescribed limit, was caused by alcohol consumed after the alleged offence.¹³⁴ There will be similar provisions in relation to an excess of a specified drug.¹³⁵

Each of these situations is examined in turn below.

IN CHARGE: NO LIKELIHOOD OF DRIVING

The Statutory Provisions

Section 4 of the Road Traffic Act 1988 provides for the offences of driving or attempting to drive, or being in charge of, a vehicle while unfit through drink or drugs. Section 5 establishes the same offences (driving, attempting to drive, or in charge) by a person who has consumed so much alcohol that the proportion of it in the breath, blood or urine exceeds the prescribed limit. In due course, s 5A will establish the same three offences by a person having a concentration of a specified controlled drug above the specified limit.¹³⁶ A person accused under the "in charge" leg of these groups of provisions can escape conviction upon proof that:

- at the material time the circumstances were such that there was no likelihood of his driving so long as the defendant remained unfit ... ;¹³⁷ or

¹³¹ Contrary to RTA 1988, ss 6(6), 7(6), 7A(6) respectively.

¹³² In RTOA 1988, s 15(2)(a).

¹³³ RTOA 1988, s 15(2)(b), when in force.

¹³⁴ RTOA 1988, s 15(3).

¹³⁵ Under RTOA 1988, s 15(3A), to come into force from a date to be appointed.

¹³⁶ See pp 8–9.

¹³⁷ RTA 1988, s 4(3).

- at the time of the alleged offence the circumstances were such that there was no likelihood of driving whilst the proportion of alcohol in the breath, blood or urine remained likely to exceed the prescribed limit;¹³⁸
- at the time of the alleged offence the circumstances were such that there was no likelihood of driving whilst the proportion of the specified controlled drug in the blood or urine remained likely to exceed the specified limit for that drug.¹³⁹

The provisions are couched in somewhat different terms. Under the first, a person is to be “deemed” not to have been in charge upon proving no likelihood of driving; under the second and third it is “a defence” to prove no such likelihood. In relation to the first two, the Queen’s Bench Division decided that, at least for the purposes of the case in question “the essential problems to which those two provisions give rise are not significantly different”.¹⁴⁰ In the House of Lords, Lord Bingham remarked that there appeared to be “no very good reason (other than history) for the adoption of these different legislative techniques, but the outcome is effectively the same”.¹⁴¹ In *Wilkinson*, it is submitted that these differences are “purely semantic”.¹⁴² For the purposes of the present discussion, the difference in drafting likewise appears of no significance.

The Case Law

The nature of the offences

The meaning of the expression “in charge” is critical to the question of how the presumption of innocence applies in such cases. Whether or not a person is in charge of a vehicle is a matter of fact and degree in each case.¹⁴³

In *Watkins*,¹⁴⁴ the Queen’s Bench Division said that being in charge was the lowest on the scale of drink-drive offences, the next being

¹³⁸ RTA 1988, s 5(2).

¹³⁹ RTA 1988, s 5A(6), to come into force from a date to be appointed.

¹⁴⁰ *DPP v Frost* [1989] RTR 11 (QBD) 18. The question was the difference between the evidence required to establish no likelihood of driving when the offence charged was one of unfitness to drive, and when the offence charged was one of being over the limit; see below, pp 93–94.

¹⁴¹ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [40].

¹⁴² McCormac and others, *Wilkinson’s Road Traffic Offences*, 26th edn, Sweet & Maxwell 2013) 4.318.

¹⁴³ *DPP v Webb (David George)* [1988] RTR 374 (QBD).

¹⁴⁴ *DPP v Watkins* [1989] QB 821 (QBD).

attempting to drive, and the highest, driving; a person may be in charge while neither driving nor attempting to drive. The aim of the offence was:

... to prevent driving when unfit through drink. The offence of being 'in charge' must therefore be intended to convict those who are not driving and have not yet done more than a preparatory act towards driving, but who in all the circumstances have already formed or may yet form the intention to drive the vehicle, and may try to drive it whilst still unfit.

The prosecution must prove some connection (which may be less than attempting to drive) between the person who is unfit and a motor vehicle on a road or public place, but the nature of that connection is elusive. The court distinguished two situations:

- the owner or lawful possessor of a vehicle, or someone who has recently driven it, is in charge of it unless shown to be no longer in charge. Such a person would no longer be in charge if he or she has put the vehicle in someone else's charge, or has ceased to be in actual control and there is no realistic possibility of resuming actual control while unfit, as where the person is at home in bed for the night, is a great distance from the car, or the vehicle is taken by someone else;
- in relation to someone who is not the owner, lawful possessor or recent driver, but is sitting in the car or is otherwise involved with it, the question is whether the person has assumed being in charge. Such a person is in charge of the vehicle if voluntarily in *de facto* control of it, or, given the circumstances (such as the person's position, intentions and actions) may be expected imminently to assume control – as where the person has gained entry to the vehicle and evinced an intention to take control of it, although gaining entry may not be necessary if there is some other manifestation of intention, such as stealing the keys in circumstances indicating an intention to drive it.

Despite all the above – the purpose of the provisions, and the relevance of control of the vehicle – the court in *Watkins* nevertheless found that the “in charge” offences included no element of likelihood of driving and it was not for a prosecutor to prove such likelihood. This may reflect the fact that the offence was first created without the “no likelihood of driving” escape route, which was introduced by the Road Traffic Act 1956. *Hansard*¹⁴⁵

¹⁴⁵ Lord Winster, HL Deb, vol 191, col 584, 28 February 1955, 39.<http://hansard.millbanksystems.com/lords/1955/feb/28/road-traffic-bill-hl>> accessed 27 November 2013.

recites an assumption that the original purpose of the “in charge” offences was that a person in charge of a car should not be under the influence such as to render him incapable of controlling it. Such a person might have no intention of driving but might, for example, inadvertently release the brake, causing the vehicle to roll away.

In the leading case of *Sheldrake*,¹⁴⁶ the House of Lords confirmed that the prosecutor must prove the being in charge, coupled with the impairment or excess alcohol, but not likelihood of driving. I discuss this further below.¹⁴⁷

Burden of proof

The burden of proving no likelihood of driving while remaining unfit falls on the accused, and the standard of proof is on a balance of probabilities.¹⁴⁸ In *Sheldrake*, the House of Lords confirmed that the burden of proving no likelihood of driving while remaining over the limit is a legal burden on the defendant, which was compatible with the presumption of innocence in article 6(2) of the ECHR.¹⁴⁹ The reverse burden could be justified because it was aimed at legitimate road safety objectives and met the tests of acceptability for a presumption of fact identified by the ECtHR jurisprudence, in that it was reasonable and in no way arbitrary.

Discharging the burden of proof

It is not enough for a defendant simply to assert having had no intention to drive while unfit or over the limit; it is absence of likelihood that must be proved. Intention may be relevant,¹⁵⁰ but it is not definitive of the issue.¹⁵¹

Expert evidence may be necessary to support an argument of no likelihood of driving. Where a defendant was accused of being in charge while unfit, and with being in charge while over the limit, the Divisional Court emphasised the distinction between the two offences. It found that, while justices may be able to decide for themselves, on the evidence, whether or not the defendant was unfit, the position is entirely different in respect of being in charge while over the limit, where the question is “the rate of decline over a given period of the blood- or breath-alcohol level”. Given the

¹⁴⁶ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [43].

¹⁴⁷ See pp 94–97.

¹⁴⁸ *Morton v Confer* [1963] 1 WLR 763 (DC).

¹⁴⁹ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [41]–[44].

¹⁵⁰ *CPS v Bate* [2004] EWHC 2811 (Admin) (DC).

¹⁵¹ *CPS v Thompson* [2007] EWHC 1841 (Admin) (DC).

lapse of time before the defendant next planned to drive (at most, some six hours), and the high reading (nearly three times the limit), the court concluded that it was not possible to discharge the burden of no likelihood of driving while over the limit without expert evidence.¹⁵² It may well be that the courts will adopt the same approach in relation to the new offences of excess of a specified controlled drug.¹⁵³

Discussion

Procedural approach

On the basis of the procedural approach to the presumption of innocence¹⁵⁴ – that the prosecutor must prove beyond reasonable doubt the constituents of the offence, as defined in the statute – the presumption of innocence is met in the provisions on no likelihood of driving. There is no reference to likelihood of driving in the sections creating the offences and it need not be proved by the prosecutor, even though the purpose of the offence is to prevent driving when unfit or over the limit.

The House of Lords in *Sheldrake* took such a procedural approach, finding that the statutory ingredients of the offence contain no reference to doing an act preparatory to driving or forming an intention to drive. There could be no complaint if the original enactment of the offence had not been modified to include the exculpatory provisions on no likelihood of driving.¹⁵⁵ This neatly illustrates what Tadros¹⁵⁶ highlights as a problem with the classical approach to reverse burdens – it suggests that where a statute provides for a defence, and it is for the defendant to prove the defence, the presumption of innocence is interfered with, but there would be no such interference in the absence of the defence.

Substantive approach

A substantive approach,¹⁵⁷ applying the presumption of innocence to the substance or gravamen of the offence, would mean that the question of likelihood of driving could be tested for compliance with the presumption of innocence only if such a likelihood – or at least a risk of driving – is a

¹⁵² *DPP v Frost* [1989] RTR 11 (QBD).

¹⁵³ Under RTA 1988, s 5A, when in force; see pp 8–9.

¹⁵⁴ Reviewed above, pp 71–72, 82–84.

¹⁵⁵ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [40].

¹⁵⁶ Victor Tadros, ‘Rethinking the Presumption of Innocence’ (2007) 1 Crim Law & Philos 193, 202.

¹⁵⁷ Reviewed above, pp 71–72, 82–84.

component of the offence. This is contrary to what the House of Lords found, but there are grounds for questioning that finding. I contend that if likelihood (or at least, risk) of driving is not a constituent of an “in charge” offence, then, given the definitions of “in charge” and “attempting to drive”, it is very difficult to see quite what being “in charge” does comprise.

The *Hansard* extract mentioned above,¹⁵⁸ to the effect that the original purpose of the “in charge” offences was that a person should not be under the influence such as to be incapable of controlling a vehicle, is strained. If the issue is whether or not a person is capable of controlling the vehicle, the person would surely have to be in some situation where the question of control arises. It is difficult to imagine any such circumstance in which the person would not also be so close to driving or attempting to drive that there is at least a risk of driving. The example quoted in *Hansard*, of inadvertently releasing the brake, causing the vehicle to roll away, is questionable in that these circumstances would likely not amount to being in charge at all, but to driving or attempting to drive. A defendant who boarded a coach and, for a joke, released the handbrake, but then could not control the coach and bring it to a stop, appealed against conviction for driving with excess alcohol on the ground that he had not been driving.¹⁵⁹ The Divisional Court, albeit somewhat reluctantly, upheld the finding of the court below that the appellant had indeed been driving.

There is no statutory definition of “in charge”, but the case law, while not putting it in quite these words, suggests that a person is not in charge unless the circumstances are such that there is some risk of driving. The judgment in *Watkins* deals with the concept of being in charge by reference to whether or not a person is in actual control, or has assumed control, or who may be expected to assume control, of a vehicle. The use of the word “control” suggests something close to the possibility of driving, while the examples of circumstances in which a person would not be in control – in bed asleep, or a great distance away from the car – comprise situations where there is little risk of driving.

The following circumstances have been found to amount to being in charge:

¹⁵⁸ Lord Winster, HL Deb, vol 191, col 584, 28 February 1955 <39.http://hansard.millbanksystems.com/lords/1955/feb/28/road-traffic-bill-hl> accessed 27 November 2013.

¹⁵⁹ *Rowan v Chief Constable of Merseyside*, The Times, 10 December 1985 (DC).

- where a motor cyclist was in the car park of a pub, drunk; his friends had arranged for someone else to ride his motor cycle away, but he did not know of that;¹⁶⁰
- where a defendant was supervising a learner driver;¹⁶¹
- where an accused was seen approaching his car, keys in hand. He stumbled. When the officer reached him, he was sitting in the driver's seat, but had not started the engine.

In all these situations, there is clearly some element of control, but inherent in each is some risk of driving. The motor cyclist did not know that other arrangements had been made, and so might have ridden himself; a supervisor may have to take over control of the vehicle, such as would amount to driving;¹⁶² if a person stumbles into the driving seat of a car there may well be a risk that he may drive it. On these cases, being in charge seems broadly equivalent to attempting to drive, but without, necessarily, the intention needed for an attempt.

When *Sheldrake* was before the High Court, that court adopted the words of Taylor LJ in *Watkins*, quoted above, finding that the offence of being in charge is aimed at those who may try to drive while still unfit, or put themselves in a situation where there is a risk that they may drive while still unfit.¹⁶³ There was a contravention of the presumption of innocence in article 6(2) of the Convention in that a person could be convicted of being in charge with excess alcohol even though the court was not sure that there was a likelihood of driving. The burden of proof was therefore read down from a legal burden to a persuasive burden. Just as the prosecution must prove driving or attempting to drive in relation to the other offences, so too, the Divisional Court said, it must prove that there was a real risk that a person in charge would drive.¹⁶⁴

The House of Lords, as has been seen, disagreed, finding that “a person in charge of a car when unfit to drive it may properly be expected to divest himself of the power to do so (as by giving the keys to someone else) or put it out of his power to do so (as by going well away).”¹⁶⁵ The examples

¹⁶⁰ *Haines v Roberts* [1953] 1 WLR 309 (DC).

¹⁶¹ *DPP v Janman* [2004] EWHC 101 (Admin) (QBD).

¹⁶² “The essence of driving is the use of the driver's controls to direct ... movement”: *R v MacDonagh* [1974] QB 448 (CA) 451.

¹⁶³ *Sheldrake v DPP* [2003] EWHC 273 (Admin) (QBD) [30].

¹⁶⁴ *Ibid* [81].

¹⁶⁵ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [40].

of ways to divest oneself of being in charge do not seem to bear much scrutiny. It is all very well to say one may give the keys to someone else, but if I am in the pub, drunk, and give my car keys to my friend, it would be difficult to argue that I was not in charge, certainly for as long as I could simply ask for the keys back. And “going well away” likewise embraces many circumstances. It seems inconceivable that there would be any question of my being in charge if I leave my car at home and am drunk two hundred miles away. But where a person abandoned a vehicle on a garage forecourt and walked away without locking it, he was found to have been still in charge of it when police came upon him half a mile away.¹⁶⁶ “Going well away” seems simply to beg the question, “how far?”

Lord Carswell referred to being in charge when over the limit as an anti-social act.¹⁶⁷ He did not elaborate further, and it is difficult to imagine how being drunk in charge is any more anti-social than being drunk in any other circumstances, unless the possibility of driving arises.

Thus the problem with the view taken by the House of Lords is that it is extremely difficult to visualise situations in which a person would be in charge without there also being at least some risk of driving. The preferable view, I suggest, is that risk or likelihood of driving is an integral part of the “in charge” offences, such that the imposition of a legal burden of disproving that offends the presumption of innocence and should instead be an evidential burden.

Of course risk is not the same thing as likelihood. Likelihood suggests more probable than not, while risk may be no more than a few percentage points of possibility. If it is accepted that being in charge comprises at least a risk of driving, it would remain acceptable for the reverse burden to be couched in terms of “no likelihood”, in that “no likelihood” would be less difficult to prove than the far more demanding “no risk”, although again it should be interpreted as an evidential burden rather than a legal burden.

Ease of proof

It has been said that reverse burdens may be less objectionable if they relate to matters which can be proved more easily by the defendant than by the prosecutor.¹⁶⁸ This gives rise to the question whether the absence of likelihood of driving equips a person to prove that fact; if there truly was no likelihood that he would drive, and can raise that possibility before the court,

¹⁶⁶ *Woodage v Jones (No 2)* (1974) 60 Cr App R 260 (DC).

¹⁶⁷ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [84].

¹⁶⁸ See pp 87–88.

yet cannot prove it on the balance of probabilities, the presumption of innocence is breached.

“Likelihood” is defined in the *Oxford English Dictionary*¹⁶⁹ as “something that is likely, a probability”, making this a complex intellectual exercise of proving, on the balance of probabilities, that there was no probability that the defendant would drive.

In *Sheldrake*, the House of Lords remarked that likelihood of driving was a matter so closely conditioned by the defendant’s own knowledge and state of mind that it was more appropriate for the defendant to prove unlikelihood of driving, than for the prosecutor to prove likelihood.¹⁷⁰ Hamer¹⁷¹ criticises this on the ground that the defendant’s peculiar knowledge of his own mind does not necessarily facilitate proving the matter in question. This may be to give the defendant’s state of mind too great a role in the matter, for, as has been seen, the crux is likelihood rather than intention.¹⁷² But Hamer goes on to say that, knowing the restrictions on drink-driving, the driver might reasonably be expected to put himself in a position where he could demonstrate no likelihood of driving while over the limit – something perhaps more easily suggested than done.

There are surely circumstances in which it might be extremely difficult to prove no likelihood of driving. Padfield¹⁷³ counsels, “don’t ever wash your car when drunk: you may be convicted of this offence”. And Mason¹⁷⁴ refers to situations where, following a domestic dispute, a party simply resorts to sitting in the car as a place of refuge, not as a means of transport. It is difficult to imagine that the car washer or the retreating partner would reasonably be expected to be able to prove no likelihood of driving.

Conclusion

I have argued that, despite the decision of the House of Lords in *Sheldrake*, a characteristic of being in charge of a vehicle must be that there is at least a risk that the person in charge will drive and thereby endanger others.

¹⁶⁹ *Oxford English Dictionary Online* <<http://www.oed.com.eresources.shef.ac.uk/view/Entry/108313?redirectedFrom=likelihood&>> accessed 27 November 2013.

¹⁷⁰ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [41].

¹⁷¹ David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 CLJ 142, 165; David Hamer, ‘A Dynamic Reconstruction of the Presumption of Innocence’ (2011) 31 OJLS 417, 427.

¹⁷² *CPS v Thompson* [2007] EWHC 1841 (Admin) (DC), above, p 93.

¹⁷³ Nicola Padfield, ‘The Burden of Proof Unresolved’ (2005) 64 CLJ 17, 19.

¹⁷⁴ JK Mason, ‘Section 5(1)(b) or not (2) be?’ [2007] SLT 95.

Without an element of risk of driving, the offence is surely as hollow as Ashworth's hypothetical offence of causing serious injury.¹⁷⁵ On a substantive or gravamen approach, the reverse burden breaches the presumption of innocence in giving the defendant the task of disproving this element of the offence. Even if a procedural approach is adopted, such that the presumption is met, the offence falls foul of the principle that people should not be convicted unless blameworthy.¹⁷⁶ I conclude that the reverse burdens of proving no likelihood of driving while remaining unfit or over the limit should be evidential only, which would render them compatible with the presumption of innocence in article 6(2).

I turn now to two matters featuring evidential burdens only: the medical defence to the new excess drug offences, and reasonable excuse for failing to provide specimens.

EXCESS DRUGS: THE MEDICAL DEFENCE

There is to be a defence to the new offences of driving, attempting to drive or in charge with a concentration of a specified controlled drug above the specified limit.¹⁷⁷ The legislature intends to "avoid the new offence catching" drivers who have taken properly prescribed or supplied drugs as directed, and in accordance with any manufacturer's or supplier's instructions, so far as consistent with the directions.¹⁷⁸ In pursuit of that aim, most of the proposed limits are said to reflect levels of drug-taking in excess of normal therapeutic doses.¹⁷⁹ Under section 5A(3), it will be a defence for a defendant to show that:

- the drug in question had been prescribed or supplied to the defendant for medical or dental purposes;
- the defendant took the drug in accordance with any directions given by the person who prescribed or supplied it, and with any accompanying instructions (as far as consistent with any such

¹⁷⁵ See p 71.

¹⁷⁶ *Ibid.*

¹⁷⁷ Under RTA 1988, s 5A, to come into force from a date to be appointed; see pp 8–9.

¹⁷⁸ Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013, para 1.13 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013.

¹⁷⁹ *Ibid.*, para 1.14.

- directions) given by the manufacturer or distributor of the drug; and
- that the defendant was in lawful possession of the drug immediately before taking it.

The defence is likely to arise rarely since those taking such drugs in normal dosages would not, presumably, be expected to show concentrations above the specified levels.

Subsection (5) specifically addresses the burden of proving the defence, providing that if the defendant adduces evidence that is sufficient to raise an issue with respect to the defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not. In the consultation document, it is said that:

The defence places an evidential burden on a person accused of committing the offence. This means that the accused person must simply put forward enough evidence to “raise an issue” regarding the defence that is worth consideration by the court, It is then for the prosecution to prove beyond reasonable doubt that the defence cannot be relied upon.¹⁸⁰

Quite how this will work in practice is difficult to foresee. The evidence needed to satisfy an evidential burden of this kind is reviewed above.¹⁸¹ In relation to reasonable excuse, I will argue that even though the burden of proof is evidential only, it may be extremely difficult to raise the requisite issue.¹⁸² In relation to the new defence, presumably something more than a simple assertion will be required. It will not always be easy to prove that a drug was prescribed, since the prescription will have been given up to the pharmacy which dispensed it, so that a defendant may have to go back to the prescriber for evidence.¹⁸³ A suspect who still has the packaging, showing the date the drug was dispensed, to whom it was dispensed, and directions for taking it, may be better placed. A defendant who had taken an over-the-counter drug may be able to satisfy section 5A(3) by producing the packaging and a dated receipt for the purchase. Similar issues seem likely to arise in relation to showing that possession of the drug was lawful.

¹⁸⁰ *Ibid*, para 11.2.

¹⁸¹ See p 75.

¹⁸² See pp 102–103, 104.

¹⁸³ The statement in the consultation document (*ibid*, para 102) that “If a driver provides a positive result because they are on a properly supplied medication but does not have the evidence at the time of the test such as a prescription ... ” seems not to take into account that if a person has taken a prescribed drug, the person will no longer be in possession of the prescription for it.

It is difficult to imagine how a defendant is to raise the issue of having taken the drug as prescribed and/or as directed unless, perhaps, there happens to be a witness who saw the drug being taken. There could be a problem if the practitioner who prescribed the drug told the defendant that taking it would not affect driving, but that contradicts the wording on the dispensary label and/or in the product information leaflet. It may be that doctors will be called on to give evidence of directions given orally.

There has been little research into how directions about medicines are understood,¹⁸⁴ and this may have implications for the new defence. There may be defendants who believe they were following directions or instructions, but had misunderstood them and in fact were not.

Apart from the question of the evidence a defendant will have to raise to plead the defence is the matter of how prosecutors will then go about disproving such matters. Since the limits are to equate with an excess over therapeutic doses, anything substantially over the limit might be accepted as evidence that the drug was not taken in accordance with the relevant directions and/or instructions, but the difficulty would be to pinpoint quite how far over the specified limit would be enough to disprove the defence.

Section 5A(4) goes on to provide that the defence is not available if the defendant's actions were:

- contrary to any advice given by the person who prescribed or supplied the drug about the time which should elapse between taking the drug and driving; or
- contrary to any accompanying instructions (so far as consistent with any such advice) about those matters given by the manufacturer or distributor of the drug.

These provisions address compliance with advice concerning the time between taking a drug and driving, and limit the scope of the defence in section 5A(3). Presumably any assertion of failure to comply will fall to be proved by the prosecution, who may have to deal with the difficulties of establishing exactly when a drug was taken, the time which elapsed before driving, and exactly what directions (over and above, or in contradiction of, those appearing on the pharmacy label or product information leaflet) were given.

The original offence of unfitness to drive through drink or drugs¹⁸⁵ will continue alongside the new offence. There seems nothing to prevent a person who is taking medication fully in accordance with all directions and

¹⁸⁴ See p 249.

¹⁸⁵ Under RTA 1988, s 4; see p 8.

advice from being charged with the offence of driving while unfit. Such a person would be disadvantaged compared with someone charged under section 5A, in that the defence under section 5A(3) would not be available.

In so far as the new defence specifically provides for an evidential burden, it appears not to offend the presumption of innocence. The second evidential burden arising relates to reasonable excuse for failing to provide specimens.

FAILING WITHOUT REASONABLE EXCUSE

The Statutory Provisions

As already noted,¹⁸⁶ it is an offence, when required to do so, to fail without reasonable excuse:

- to co-operate with a preliminary test (usually at the roadside);
- to provide a specimen for analysis for evidential purposes (usually at a police station); or
- to give permission for a laboratory test of a specimen of blood taken when the subject was incapable of consenting (usually because of unconsciousness).¹⁸⁷

The Case Law

The prosecution must prove all the elements of these offences beyond reasonable doubt. The absence of reasonable excuse is an element of the offence, not a defence.¹⁸⁸ A defendant wishing to argue that there was a reasonable excuse must raise the issue. The onus is then on the prosecution to negative the argument.¹⁸⁹ The court must be satisfied to the criminal standard – beyond reasonable doubt – that the defendant had no reasonable excuse.¹⁹⁰

The classic statement of what constitutes a reasonable excuse remains that in *R v Lennard*, where the Court of Appeal said that:

¹⁸⁶ See p 55.

¹⁸⁷ Contrary to RTA 1988, ss 6(6), 7(6) and 7A(6) respectively.

¹⁸⁸ *McClory v Owen-Thomas* 1990 SLT 323 (HCJ) 325, cited with approval in *Piggott v DPP* [2008] EWHC 305 (Admin) (DC) [17].

¹⁸⁹ *Rowland v Thorpe* [1970] RTR 406 (QBD).

¹⁹⁰ *R v Harling* (1971) 55 Cr App R 8. See also *DPP v Boden* [1988] RTR 188 (QBD); *DPP v Szarzynski* [1993] RTR 364 (QBD); and *McKeon v DPP* [2007] EWHC 3216 (Admin) (DC).

no excuse can be adjudged a reasonable one unless the person from whom the specimen is required is physically or mentally unable to provide it or the provision of the specimen would entail a substantial risk to his health.¹⁹¹

Some years later, in the House of Lords, Lord Edmund Davies remarked, *obiter*, that he was not wholly persuaded that only physical or mental inability to comply with the requirement could constitute a reasonable excuse.¹⁹² Nonetheless, the definition has not been widened, and the multiplicity of arguments advanced by defendants in their attempts to bring their own circumstances within the scope of reasonable excuse have largely failed.¹⁹³

To raise a question of reasonable excuse, the defendant must establish a causative link between the condition claimed and the inability to provide the specimen(s).¹⁹⁴ While the judgments do not specify what is meant by a “causative link”, they do suggest that the medical evidence should indicate that the failure to provide was a result of the condition in question.

The cases demonstrate that, in the absence of expert evidence of some condition which amounts to a physical or mental inability to provide, an argument of reasonable excuse is unlikely to succeed. Although it has been said that the court in *Lennard* “did not intend to lay down something rigid and exhaustive”,¹⁹⁵ the case law clearly shows that the test has been applied rigorously and has remained narrow in scope. This is so even though, since the decision in *Lennard*, evidential breath testing has been introduced as the preferred alternative to blood or urine testing. In the context of a decision that even legal advice not to provide a specimen does not afford a defendant a reasonable excuse, the steadfast application of the decision in *Lennard* has been described as a “harsh gloss on the wording of the Act”.¹⁹⁶

Reasonable excuse is discussed further in Chapter 4,¹⁹⁷ in the context of the privilege against self-incrimination.

¹⁹¹ [1973] 1 WLR 483, 487.

¹⁹² *Morris v Beardmore* [1981] AC 446 (HL) 461.

¹⁹³ See further pp 151–154.

¹⁹⁴ *DPP v Brodsky* [1997] RTR 425 (QBD); *DPP v Furby* [2000] RTR 18 (QBD); *DPP v Falzarano* [2001] RTR 14 (QBD).

¹⁹⁵ *R v John* [1974] RTR 332 (CA (Crim)) 337.

¹⁹⁶ *Ibid*, Case comment on *Dickinson v DPP* [1989] Crim LR 741 (QBD); see also p 152.

¹⁹⁷ See pp 151–155.

The Reverse Burden

The burden of proof on the defendant is evidential only, in the sense that the task is to raise a reasonable doubt as to the matter in question,¹⁹⁸ rather than the more onerous legal or persuasive burden, calling for proof on the balance of probabilities. Since the burden is evidential only, it is compatible with the presumption of innocence in article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹⁹

While the burden is evidential only, it is not necessarily a light one, given that medical or other expert evidence is usually needed.²⁰⁰

It is an indicator of the complexity of these issues that the Crown Prosecution Service advises crown prosecutors, if reasonable excuse based on medical evidence is raised, to require the defence to provide the evidence before the hearing or seek an adjournment for the purpose.²⁰¹

Discussion

While the evidential burden in the “without reasonable excuse” offences clearly does not offend the presumption of innocence, the weight of the burden on the defendant is of some interest. As noted above,²⁰² an evidential burden requires the defendant to proffer something more than a mere self-serving assertion of some excuse, but less than proof on the balance of probabilities. The requirement for expert defence evidence seems a relatively heavy burden, especially as most defendants would have to pay privately for the services of an expert, raising the question of the imbalance of resources between the state and the individual.²⁰³ On the other hand, it is difficult to imagine what else might be sufficient properly to raise the question and to put the prosecution on adequate notice of what it has to disprove. The challenge for a defendant seems to arise not so much from the fact that the burden is evidential, but that the term “reasonable excuse” has been so narrowly defined.

¹⁹⁸ See above, p 75, on the weight of an evidential reverse burden.

¹⁹⁹ See above, p 70.

²⁰⁰ For example, *Smith (Nicholas) v DPP* [1992] RTR 413 (DC), but see *DPP v Crofton* [1994] RTR 279 (DC) for an exception.

²⁰¹ <http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_drink_driving/#a06> accessed 27 November 2013.

²⁰² See p 75.

²⁰³ Above, pp 70–71.

As will be seen in Chapter 4,²⁰⁴ however, the procedure for requiring specimens is such that any medical reason for inability to provide breath or blood is likely to come to light during the investigation, such that the investigating officer can require blood if there is a medical reason why breath cannot be provided, or urine if there is a medical reason why blood cannot be provided.

The question of reasonable excuse does not, therefore, compromise the presumption of innocence. The same cannot, however, be said for the next matter to be considered in this chapter – the statutory assumption concerning the result of analysing a specimen.

EXCESS ALCOHOL: THE STATUTORY ASSUMPTION

The Statutory Provisions

The “statutory assumption” in section 15(2)(a), Road Traffic Offenders Act 1988 is as follows:

it is to be assumed, subject to subsection (3) below, that the proportion of alcohol in the accused’s breath, blood or urine at the time of the alleged offence was not less than in the specimen.

Section 15(2)(b) makes a similar provision in relation to drugs and will come into force along with the new offences under section 5A.²⁰⁵

These provisions reflect the fact that it may not be possible to take a specimen until some time after a driver is stopped or until some time after the incident being investigated. This may be because of the time which elapses before police learn of an incident, the time it takes police to arrive at the scene, delays travelling from the scene to the police station, or delays at the police station. During that time, alcohol²⁰⁶ may be being absorbed or eliminated, or even both,²⁰⁷ such that the level shown by the analysis of the specimen may be either lower or higher than at the time of the suspected offence. To minimise any such discrepancies, delay in taking a specimen is to

²⁰⁴ See p 154.

²⁰⁵ Of driving, attempting to drive or in charge with a concentration of a specified controlled drug above the specified limit; see pp 8–9.

²⁰⁶ Or, when RTA 1988, s 5A comes into force (see pp 8–9), drugs.

²⁰⁷ See p 193.

be avoided.²⁰⁸ The introduction of roadside evidential testing for alcohol²⁰⁹ will further reduce the scope for delay. The statutory assumption is clearly aimed at ruling out any argument that the reading upon which a prosecution is based was higher than at the time of the alleged offence, because of alcohol²¹⁰ which had been consumed but not absorbed at the time of the incident.

The assumption works both ways. Often, the suspect is eliminating alcohol between the time of the incident and the time of giving the specimen. The assumption advantages such a person in that the analysis shows a concentration lower than at the time of the incident. But this is not always the case. If a person consumes a large amount of alcohol quickly, immediately before driving, the concentration in the body may still be rising when evidential specimens are taken. Although there would rarely be much sympathy for such a driver,²¹¹ the assumption could operate to his or her disadvantage, showing a level higher than at the time of driving.

The Case Law

The case law on the statutory assumption relates to alcohol specimens only, but there would seem to be no reason to think it will not apply equally to drugs when the new offences under section 5A are in force.

The assumption is irrebuttable; a defendant may not adduce evidence to show that at the time of the offence charged, he or she must have been below the limit.²¹²

The statutory assumption is that the alcohol concentration at the crucial time was no less than in the specimen. Consequently, there is nothing to prevent a prosecutor from adducing evidence that at the time of the offence the accused's alcohol concentration was higher than in the specimen, a process known as "back-calculation" or "back-tracking".²¹³

²⁰⁸ See, for example, the cases to the effect that the procedure may not be delayed for a subject to take legal advice, p 152, fns 177, 178 and 179.

²⁰⁹ See p 12.

²¹⁰ Or, when RTA 1988, s 5A comes into force (see pp 8-9), drugs.

²¹¹ See *Parker v DPP* [2001] RTR 16 (QBD), below

²¹² *Beauchamp-Thompson v DPP* [1989] RTR 54, where the Queen's Bench Division upheld a decision of justices not to allow in expert evidence to show that at the time of driving the defendant must have been below the limit. *Beauchamp-Thompson* was applied in *Millard v DPP* [1990] RTR 201 (QBD).

²¹³ *Gumbley v Cunningham* [1989] AC 281, where, four hours after a fatal accident, blood analysis showed an alcohol level below the limit. The House of Lords upheld the admissibility of medical evidence that, at the time of the accident, the blood-alcohol level would have been over the limit.

In *Parker*,²¹⁴ the statutory assumption was challenged as incompatible with articles 6(1) and 6(2), ECHR. The argument before the Divisional Court was that the assumption should be construed as rebuttable because:

- to prevent a defendant from calling evidence to establish that he had been below the limit while driving could lead to the conviction of an innocent driver;
- the fact that the prosecution is entitled to calculate back to demonstrate guilt, but that the defendant is not entitled to do the same to establish innocence, amounts to inequality of arms – an imbalance between the resources of the prosecutor and those of the defendant which disadvantages the latter;
- the driver who consumes alcohol before, but not after, driving is at a disadvantage compared with a driver who takes alcohol after driving and invokes section 15(3) (below).

The court rejected these arguments, confirming that section 15(2) provided for an irrebuttable presumption. In practice, most drivers who provide evidential specimens have already failed a preliminary breath test, suggesting excess alcohol. Delay before providing evidential specimens normally worked in favour of a suspect, but it went against the purpose of the legislation for a motorist to argue that he drank a great deal immediately before driving which would not have registered on a preliminary breath test, but would register on an evidential test. The legislation was aimed at preventing consumption of large quantities of alcohol before taking charge of a vehicle. The presumption of innocence was not offended by assuming that the amount of alcohol shown by a breath or blood analysis was the quantity at the time of driving or being in charge. Even if that was taking it too far, having regard to what was at stake, the assumption was reasonable.

In a later case,²¹⁵ the Administrative Court applied *Parker*, reiterating that the statutory assumption is wholly proportionate to the situation where a person has drunk alcohol and then drives. It is a fair compromise between the risk posed to the public by someone who drinks before driving, and the fact that the prescribed limit is artificial. Parliament preserved the right to have a drink before driving, but imposed the statutory assumption.

²¹⁴ *Parker v DPP* [2001] RTR 16 (QBD).

²¹⁵ *Griffiths v DPP* [2002] EWHC 792 (Admin).

Discussion

It has been noted above that irrebuttable presumptions reduce the prosecutor's task,²¹⁶ and the statutory assumption provides an example. The definitions of the drink- and drug-driving offences all include references to time. Under section 4, the offences are of being unfit *when* driving, attempting to drive or in charge. Likewise, under the new section 5A, the offences will be of driving, attempting to drive or in charge *when* there is in the defendant's body an excess of a specified controlled drug. Where the analysis of an evidential specimen is in evidence,²¹⁷ the effect of the statutory assumption is to relieve the prosecution of the task of proving that the alcohol or drug level shown by analysing the specimen related to the time *when* the accused was driving, attempting to drive or in charge.

Under section 5, the offences are of driving, attempting to drive or in charge *after* consuming so much alcohol that the limit is exceeded. Driving with excess alcohol is by far the more commonly prosecuted offence;²¹⁸ evidential specimens are always used and no other evidence of the excess alcohol is needed. Here the statutory assumption relieves the prosecution of proving that the drinking preceded the driving; a defendant who invokes section 15(3),²¹⁹ claiming that it was alcohol drunk after driving which caused the unfitness or excess alcohol, must accept the burden of proving the relative times of drinking and driving.

In either case, the prosecution need not deal with these questions of time in relation to specimen analyses, even though, given the words in the statutory definitions, they are elements of the offences on both a procedural or a substantive approach. The presumption of innocence is surely undermined by this.

The statutory assumption falls within the definition of legal presumptions,²²⁰ requiring the court to draw a conclusion about the accused's alcohol (or drug) level at a given time, upon proof of the results of analysing a specimen given at a different time. Since it is possible for a specimen to show a concentration higher than at the time of the alleged

²¹⁶ See p 74.

²¹⁷ In practice, the analysis of specimens is not often used as evidence of unfitness to drive because, if it shows the subject to be below the limit, it may be perceived as not particularly supportive of the case (despite the fact that a person can be unfit to drive while well below the limit; see pp 192–193); if it does, it is simpler for the police to charge excess alcohol. Alternatively, specimens may not have been taken at all.

²¹⁸ See p 9, fn 38.

²¹⁹ Or subs (3A), when the new s 5A offences (see pp 8–9) are in force. See below.

²²⁰ See p 73.

offence, there is a risk – albeit remote – that a person could be convicted even if he or she was below the limit at the time of being in charge, attempting to drive or driving, so breaching the presumption of innocence. As noted above, the circumstances in which this could happen might not reflect well on the accused, but an injustice is an injustice regardless of how deserving or otherwise the victim may be.

Irrebuttable presumptions have been said to undermine the presumption of innocence in that they contribute to the definition of the offence.²²¹ In the present context, the relevant element of the substantive offences²²² is defined as “after consuming so much alcohol that the proportion of [alcohol] in [the] breath, blood or urine exceeds the prescribed limit”. The prescribed limit is in turn defined²²³ as a proportion of alcohol in a specimen of breath, blood or urine. The definition contains no reference to the assumption. Nonetheless, the effect of the statutory assumption is that the offence consists in having consumed so much alcohol that the proportion in the breath, blood or urine exceeds the prescribed limit *as indicated by the analysis of a specimen taken under section 7*. This is so despite the fact that the assumption appears in a separate enactment altogether,²²⁴ and is headed “Use of specimens in proceedings for an offence under any of sections 3A to 5A of the Road Traffic Act 1988”. This is a further argument that the assumption breaches the presumption of innocence. The same point applies in relation to the new excess drug offences under section 5A.²²⁵

Section 15(2) fails Duff’s test²²⁶ for the compatibility of an irrebuttable legal presumption with the presumption of innocence – that there must be no scope to admit the fact proved yet deny the presumption which ensues. Clearly there is scope to accept the accuracy of the analysis of the evidential specimen, yet argue that the alcohol (or drug) concentration was lower at the time of the alleged offence.

²²¹ See p 74.

²²² In RTA 1988, s 5(1). The corresponding wording in s 3A(1)(b) (causing death by careless driving when under the influence of drink or drugs) is “and ... he has consumed ...”.

²²³ In RTA 1988, s 11(2).

²²⁴ The Road Traffic Offenders Act 1988.

²²⁵ See pp 8–9.

²²⁶ See p 87.

Stumer's²²⁷ test for the reasonableness of a presumption is that if the prosecution proves a basic fact which makes it very likely that a presumed fact is also true, the presumption is reasonable, and the closer the connection between the basic and the presumed fact, the more likely it is that the presumed fact is true. If the closeness of the connection in relation to the statutory assumption is measured by reference to the length of time between the alleged offence and the taking of the specimen, then the shorter that time, presumably, the less objectionable the assumption – the shorter the time, the smaller the difference between the result of the analysis and the alcohol concentration at the time of the alleged offence. But, in relation to alcohol at least,²²⁸ given the speed of absorption and elimination,²²⁹ to pass this test, the time lapse would probably have to be a matter of minutes only – in practice, this is unlikely until such time as roadside evidential testing²³⁰ comes into use.

Roberts has argued²³¹ that a reverse burden may be acceptable if necessary for enforceability,²³² a view which is relevant to the statutory assumption. Without the assumption, prosecutions would be vulnerable to challenge on the basis that the alcohol level at the time of the alleged offence was below the limit. That might not present too great a problem for the prosecution if the defence were to have a legal burden of proof (although that would of course raise further issues relating to the presumption of innocence). If, however, any such burden of proof were to be evidential only, the prosecution would have to counter a defendant's argument. That would no doubt require expert evidence taking into account all the factors which contribute to a person's alcohol²³³ concentration.²³⁴ The effect would be to emasculate the statutory testing regime. The statutory assumption can therefore be viewed as an important part of an evidential scheme designed to ensure the enforceability of the principal drink- and drug-driving provisions.

²²⁷ Andrew Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (Hart 2010) 187–188.

²²⁸ And possibly also to some drugs, pursuant to s 5A when in force.

²²⁹ See p 193.

²³⁰ See p 12.

²³¹ Above, p 87.

²³² An issue referred to in *R v Lambert* [2001] UKHL 37; see above, pp 78–79.

²³³ Or, in due course, drug concentration, when the new s 5A (see pp 8–9) comes into force.

²³⁴ See pp 193–194.

For these reasons I conclude that the statutory assumption breaches the presumption of innocence. I discuss this further below.²³⁵

THE “HIP FLASK DEFENCE”

The Statutory Provision

While the statutory assumption described above is irrebuttable, there are certain circumstances in which it is not to be made. Those circumstances, set out in section 15(3) of the Road Traffic Offenders Act 1988, are, first, that the defendant proves having consumed alcohol after driving, attempting to drive or being in charge, but before providing a specimen. Secondly, the defendant must show that but for such consumption, the limit would not have been exceeded or he/she would not have been unfit to drive. There are to be similar provisions²³⁶ in relation to the new excess drug offences, and what is said below applies to them too.

Section 15(3) regulates the so-called “hip-flask defence”,²³⁷ named after the receptacle from which a driver might take a draught upon being stopped by police, then claim that it was that alcohol, rather than alcohol drunk before driving, which caused the excess alcohol or unfitness to drive. Section 15(3) was enacted²³⁸ to bring to an end the possibility of defeating the purpose of the legislation by such a ploy.²³⁹ On the other hand, there may be quite legitimate cases in which these provisions come into play.

Section 15(3) has been referred to as a reversal of the burden of proof,²⁴⁰ a “defence²⁴¹ and a “statutory escape clause”.²⁴² Elsewhere,²⁴³ it is said to “operate by way of an exception to the normal presumption”.

²³⁵ See pp 114–119.

²³⁶ In RTA 1988, s 15(3A).

²³⁷ Also known as “post-incident” consumption.

²³⁸ By the Transport Act 1981.

²³⁹ A possibility acknowledged in the judgment in *R v Drummond* [2002] EWCA Crim 527 [31] below.

²⁴⁰ *DPP v Williams* [1989] Crim LR 382 (DC).

²⁴¹ *Rynsard v Spalding* [1986] RTR 303 (DC).

²⁴² Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] Crim LR 901, 922.

²⁴³ DJ Birch, Clare Barsby ‘Road Traffic: Defendant Charged with Causing Death by Careless Driving with Excess Alcohol’ [2002] Crim LR 667.

The Case Law

A series of cases illustrates how these provisions operate. In the first place, the court must have before it evidence of drinking after the time of the alleged offence; it is not sufficient that the defendant asserts having done so, or that a police officer accepted that assertion, or that the defendant had the time and opportunity to consume alcohol.²⁴⁴

The burden of proof is on the accused, on the balance of probabilities,²⁴⁵ that is, the defendant has a legal burden of proof. The defendant must almost always adduce medical or scientific evidence to show that it was the alcohol consumed after the incident which caused the unfitness or excess alcohol, “unless the case really is an obvious one”.²⁴⁶ It is unclear what might amount to the “really obvious”, since there are no reported cases in which section 15(3) has been successfully invoked without medical or scientific evidence.

In *R v Drummond*,²⁴⁷ the Court of Appeal examined the compatibility of section 15(3) with the ECHR. The case was one of causing death by careless driving when under the influence of drink or drugs,²⁴⁸ but the court made clear that what it had to say applies equally to all the drink- and drug-driving offences. The court pointed out that conviction follows a scientific test which is intended to be as exact as possible. Drinking after the event defeats the aim of the legislature by making the scientific test potentially unreliable. There is a distinct danger that an accused may take alcohol after the event for the precise purpose of defeating the scientific test. The evidence to challenge the result of the test is all within the means of the accused, and includes:

- the amount he had to drink after the incident;
- what is called his ‘blood-breath’ ratio, important for calculating the rate at which his body absorbs alcohol;
- the rate at which his body eliminates alcohol over time;
- the accused’s body weight.

Section 15 imposes a persuasive (or legal) burden. While that does interfere with the presumption of innocence, such interference was not only

²⁴⁴ *Thynne v Hindle, R v Newcastle upon Tyne Justices* [1984] RTR 231 (QBD).

²⁴⁵ *Dawson v Lunn* [1986] RTR 234 (QBD). See also *DPP v Tooze* [2007] EWHC 2186 (Admin) on the burden of proof, and *DPP v Bolton* [2009] EWHC 1502 (Admin) and *DPP v Dukolli* [2009] EWHC 3097 (Admin) (DC) on the need for expert evidence.

²⁴⁶ *Dawson v Lunn* [1986] RTR 234 (QBD).

²⁴⁷ [2002] EWCA Crim 527.

²⁴⁸ Contrary to RTA 1988, s 3A; see p 9.

justified but was no greater than necessary. There was no reason to read down the reverse burden from a persuasive to an evidential burden. The court characterised driving while over the limit as a social evil which Parliament had sought to minimise by the legislation.

Discussion

In the sense that not having drunk between the time of the alleged offence and the time of providing an evidential specimen is not a constituent of any of the drink-drive offences, the “elements of the offence” approach²⁴⁹ is not engaged in relation to section 15(3). But, as I have argued above,²⁵⁰ the statutory assumption passes to the defendant the burden of proving the time aspect of the offences, in that section 15(3) requires a defendant to prove that he drank *after* driving, rather than *before*.

In most cases there is simply no opportunity for a suspect to drink between the time of an incident giving rise to an investigation and the time of providing a specimen, as where a person is stopped for, say, erratic driving, gives a positive road side sample and is taken immediately to the police station. While it is difficult to sympathise with those who take a drink after driving with the deliberate intention of frustrating an investigation,²⁵¹ there may nevertheless be cases where a person has not drunk enough to be over the limit when driving, then drinks more which causes the person to exceed the limit, and is only then required to provide a specimen. An example is where a person had been involved in an accident, then went home and drank gin before the police arrived – one of the few factual situations in which a section 15(3) argument succeeded and was upheld (albeit somewhat reluctantly) on appeal.²⁵² Circumstances of this kind indicate the possibility that a person who cannot prove the two elements in section 15(3) to the required standard could be convicted even if below the limit when driving. There is no restriction on how long after an incident a specimen may be required; several hours could pass, allowing ample opportunity for a person to consume alcohol perfectly innocently. In theory a specimen could be taken as long as twenty-four hours after driving. While it seems inconceivable that the analysis of such a specimen could successfully ground a prosecution for driving with excess alcohol a whole day before, the legislation does not in fact prevent it. There is, therefore, an

²⁴⁹ See pp 82–83.

²⁵⁰ Above, p 108.

²⁵¹ See p 111.

²⁵² *DPP v Lowden* [1993] RTR 349 (QBD).

argument that the legal burden of proving this defence breaches the presumption of innocence.

CONCLUSIONS

It has been observed that there has “been little appetite for findings of incompatibility [with article 6(2)] in road traffic provisions”.²⁵³ In the narrower context of the drink- and drug-driving cases this is surely borne out. In short, the courts have upheld reverse legal burdens of proving no likelihood of driving,²⁵⁴ and of proving that excess alcohol or unfitness was caused by alcohol consumed after the alleged incident but before providing a specimen.²⁵⁵ And the statutory assumption in section 15(2)²⁵⁶ has been found to be an irrebuttable presumption of law.

On the other hand, to assert a reasonable excuse with a view to escaping conviction for failing to provide,²⁵⁷ a defendant has an evidential burden only, although it is a relatively weighty burden. The weight of the evidential burden under the medical defence to an excess drug charge²⁵⁸ remains to be seen. These two questions are not discussed further in this chapter.

The Presumption Undermined

It has been seen above²⁵⁹ that, to require a defendant to prove an element of an offence, whether that element derives from the statutory definition or is part of the core or gravamen of the offence, may give rise to a breach of the presumption of innocence.

In relation to proving no likelihood of driving while remaining unfit or over the limit, I have argued²⁶⁰ that, despite the House of Lords’ ruling in *Sheldrake*, the “in charge” offences are without substance unless construed so to include at least a risk of driving. On that interpretation, proving no

²⁵³ B. Fitzpatrick, ‘Burden of Proof: Defendant Charged with Driving While Disqualified’ [2006] Crim LR 140, 142.

²⁵⁴ Above, pp 91–94.

²⁵⁵ Above, pp 112–113.

²⁵⁶ Above, pp 106–107.

²⁵⁷ Above, pp 102–103.

²⁵⁸ Under RTA 1988, s 5A(3), when in force (see pp 8–9).

²⁵⁹ See pp 83–84.

²⁶⁰ See pp 94–97.

likelihood of driving would require an accused to disprove an element of the offence and so contravene the presumption of innocence.

A prosecutor has the benefit of the statutory assumption. There is no scope (except by proving having taken alcohol after the offence but before providing the specimen) for a defendant to argue that his or her alcohol concentration was in fact below the limit at the time of the alleged offence. The consequence is that, in some rare cases, a person who was below the limit at the time of the alleged offence may be convicted. The same may also prove true in relation to the new excess drug offences.²⁶¹

In relation to alcohol (or a drug²⁶²) consumed after an alleged offence but before providing a specimen, the effect of invoking section 15(3) is to require a defendant to disprove the critical element of the offence – of being unfit or over the limit at the time of driving, attempting to drive or being in charge.

The drink- and drug-driving offences are serious in terms of the possible penalties (up to a maximum of six months' imprisonment) and the social consequences of disqualification.²⁶³ Some commentators are of the view that reverse burdens are never appropriate in relation to offences which carry the risk of imprisonment,²⁶⁴ but the seriousness of the outcome for the defendant has had no discernible influence on the decisions of the courts in relation to the reverse burdens and the statutory assumption in the drink- and drug-driving legislation.

I contend that the provisions under discussion therefore offend the presumption of innocence, yet they have all been ruled compatible with article 6(2), ECHR. Arguments that the burdens of proof should be read down to evidential burdens, and that the assumption should be rebuttable, have been roundly rejected.

All this gives rise to the question of how, if at all, these three sets of provisions can be reconciled with the theory. While the literature includes references to the drink-drive offences, often to illustrate a point or to highlight an exception, these are passing references only. The theory on reverse burdens has not been systematically analysed in relation to the road

²⁶¹ Under s RTA 1988, s 5A; see pp 8–9.

²⁶² When the new offence under s 5A come into force; see pp 8–9.

²⁶³ See pp 2, 16–17.

²⁶⁴ Above, pp 84–85.

traffic offences in general,²⁶⁵ or (apart from the present review) in relation to the drink-drive offences in particular.

Justifying the Derogations from Principle

The House of Lords in *Sheldrake* made it perfectly plain that it would consider each reverse burden case individually. Commentators have nevertheless sought to elicit themes by reference to which encroachments on the presumption of innocence might be considered acceptable or unacceptable. Some of these themes are relevant to the two reverse burdens and the statutory assumption in the drink- and drug-driving legislation. I next draw together the justifications upon which the courts have relied, then canvas other grounds, drawn from the literature, which might justify the breaches of principle.

Road safety

Reducing risk and enhancing safety on the roads has played a significant part in the development of the case law, and was influential in upholding:

- the legal reverse burden on no likelihood of driving:

Plainly the provision is directed to a legitimate object: the prevention of death, injury and damage caused by unfit drivers.²⁶⁶
- the irrebuttable statutory assumption:

The offence is concerned with preventing consumption of quantities of alcohol which impair the ability of a driver to drive.²⁶⁷
- the exception in section 15(3):

It hardly needs to be said that driving while over the limit and causing death by driving in such circumstances are both social evils which Parliament sought to minimise by this legislation.²⁶⁸

While commentators have bemoaned the lack of principle running through the case law on reverse burdens in general,²⁶⁹ road safety is a consistent theme in the cases on drink-driving. The public interest raises

²⁶⁵ The dearth of academic attention to driving offences has been noted; see p 1.

²⁶⁶ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [41].

²⁶⁷ *Parker v DPP* [2001] RTR 16 (QBD) [23].

²⁶⁸ *R v Drummond* [2002] EWCA Crim 527 [34].

²⁶⁹ Above, pp 80–81.

compelling questions about balancing the interests of society against those of individual defendants,²⁷⁰ but in relation to drink-driving, the courts have taken a clear view that road safety is to have priority.

Proportionality

Similarly, in the drink-drive cases, reasonableness and proportionality have been used to support all three situations:

I do not regard the burden [of proving no likelihood of driving] placed on the defendant as beyond reasonable limits or in any way arbitrary ... I do not think that imposition of a legal burden went beyond what was necessary.²⁷¹

... having regard to the importance of what is at stake, the [statutory] assumption is a reasonable one and well within limits.²⁷²

... the legislative interference with the presumption of innocence in section 15 of the Road Traffic Offenders Act 1988 ... is ... no greater than necessary.²⁷³

There is also the suggestion in the judgment in *Griffiths* that, as some kind of *quid pro quo* for the fact that Parliament did not altogether outlaw drinking before driving, drivers must accept some diminution of the safeguards otherwise afforded by the presumption of innocence:

Parliament, while preserving the right of any person to take a drink before driving, expressed itself in such a way that if such a person is then subjected to a breath, blood or urine test which shows an excess proportion of alcohol the person who has provided that specimen is, by section 15(2), assumed to have had no less a proportion of alcohol in his breath at the time when he was driving.²⁷⁴

The drink-drive cases also show that the perceived ease with which a defendant might discharge a reverse burden has been used to justify the

²⁷⁰ See pp 81–82.

²⁷¹ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [41].

²⁷² *Parker v DPP* [2001] RTR 16 (QBD) [24].

²⁷³ *R v Drummond* [2002] EWCA Crim 527 [34].

²⁷⁴ *Griffiths v DPP* [2002] EWHC 792 (Admin) [30].

reverse burdens and the statutory assumption,²⁷⁵ while the difficulties of proof for a prosecutor without it have also been cited.²⁷⁶

Finally, the defendant's own knowledge of the circumstances of the case, not known to the prosecutor, has been referred to, to justify reverse burdens.²⁷⁷

The special responsibilities of drivers

Glover's licensing approach, Dennis's voluntary acceptance of risk principle and Hamer's regulatory regimes approach²⁷⁸ all might be invoked to justify the reverse burdens and the statutory assumption in the drink-drive offences. These have in common that participation in activities which are inherently dangerous may justify deviation from, or the development of a variation of, the principles which comprise the usual paradigm. Although Duff considers that drivers should not be one of the groups who accept special responsibilities,²⁷⁹ the idea certainly finds support in the case law.²⁸⁰

Enforceability

The other possible justification for the derogations from the presumption of innocence in relation to the drink- and drug-drive offences is the need for the statutory regime to be enforceable, canvassed by Roberts.²⁸¹ Certainly, the task for the prosecutor, to backtrack from the time the specimen was taken to the time of the alleged offence, would be time-consuming and expensive without the statutory assumption. On the other hand, a risk of driving while remaining unfit or over the limit would seem less difficult to prove, and would likely often be inferred from the factual situation.

Overall, then, there are reasons to believe that the presumption of innocence is compromised in certain respects. Grounds on which these derogations from principle might be justified have been identified. These derive, first, from the case law – the suppression of drink-driving and promotion of road safety, and reasonableness and proportionality; and from

²⁷⁵ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [41]; *R v Drummond* [2002] EWCA Crim 527 [31].

²⁷⁶ *Sheldrake v DPP* [2005] 1 AC 264 (HL) [21].

²⁷⁷ *R v Drummond* [2002] EWCA Crim 527 [31].

²⁷⁸ Described at pp 85–86.

²⁷⁹ See p 86.

²⁸⁰ See the quotations from *Brown v Stott* on pp 62–63 and from *O'Halloran and Francis v United Kingdom* on p 127.

²⁸¹ Above, p 87.

the literature, notably the idea that those who drive must accept some kind of compromise of their rights, and the provisions must be capable of being effectively enforced. These suggestions are considered further in Chapter 10.²⁸²

Next, I turn to another important principle which, in the drink- and drug-driving offences, seems to be more honoured in the breach than the observance – the privilege against self-incrimination.

²⁸² See pp 309–319.

Chapter 4: Self-Incrimination

INTRODUCTION

This chapter concerns the privilege against self-incrimination and its role, if any, in the investigation and prosecution of the drink- and drug-driving offences. I open with an overview of the background to the privilege. I next review the case law of the European Court of Human Rights (“ECtHR”) and the literature arising from that jurisprudence in so far as relevant to the drink- and drug-driving offences. There follows a short account of the case law of the domestic courts. I examine the literature on self-incrimination in general, focusing on what has been said about its scope, and the possible justifications for it. I then explain the statutory provisions on requirements for specimens of breath, blood or urine in suspected drink- and drug-driving offences. On the basis of the principles deriving from the case law and the literature, I find much to suggest that the privilege should apply to these requirements, but that it does not. I contend that this departure from principle must be accepted, and suggest a basis for so doing.

THE BACKGROUND

The privilege against self-incrimination is an elusive concept, in substance, scope and rationale. It is said to derive from the Latin *nemo tenetur se ipsum prodere* (no one can be compelled to betray himself), and may have its origins in the right of an accused to remain silent, possibly as a reaction to the excesses of the Star Chamber, where defendants were first charged and then interrogated by compulsion under oath.¹

The privilege has been said to be “one of the peculiarities of the common law systems”;² controversial;³ “one of the more puzzling rules of criminal procedure”;⁴ and more complex than other principled constraints

¹ MRT Macnair, ‘The Early Development of the Privilege Against Self-incrimination’ (1990) 10 OJLS 66, 67.

² *Ibid.*, 66.

³ Ian Dennis, ‘Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination’ (1995) 54 CLJ 342.

⁴ Mike Redmayne, ‘Rethinking the Privilege Against Self-Incrimination’ (2007) 27 OJLS 209.

on the ability of the state to gather and use evidence against suspects.⁵ On the other hand, it has been described as a cornerstone of any adversarial criminal justice system,⁶ and “deep rooted in English law”.⁷

The privilege embraces the right of silence – the rule that a defendant cannot be compelled to give evidence against himself or herself – but goes further. A defendant need not collaborate in his or her own conviction, or in any way assist the prosecution make its case.⁸

The right to silence is recognised in the International Covenant on Civil and Political Rights,⁹ article 14.3 of which provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(g) Not to be compelled to testify against himself or to confess guilt.

While the general rule may be that suspects should play no part in collecting evidence against themselves, drink- and drug- drive suspects, on the other hand, are required to provide evidence in the form of specimens of breath, blood or urine. Failure to do so attracts penalties broadly equivalent to those for the principal offences.¹⁰ On the face of it, these provisions appear to breach the privilege against self-incrimination. To explore this proposition, I first examine the case law.

THE EUROPEAN COURT OF HUMAN RIGHTS

A number of cases decided by the ECtHR concern self-incrimination. The ECtHR has often used the term “right” rather than “privilege”, which is the traditional language of the domestic courts. This difference is discussed

⁵ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 145–146.

⁶ Sybil Sharpe, “The Privilege Against Self-incrimination: Do We Need a Preservation Order?” (1998) 27 *Anglo-Am LR* 494.

⁷ *Lam ChiMing and Others v The Queen* [1991] 2 AC 212 (PC) 222, a case on the (in)admissibility of confessions.

⁸ AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 57.

⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> accessed 27 November 2013.

¹⁰ See p 16.

below.¹¹ First, the decisions of the Strasbourg court are described, followed by a review of the criticism they have received. The cases can be divided broadly by subject matter as follows.

Production of Documents

Although protection from self-incrimination is not specifically provided for in the European Convention on Human Rights,¹² it has been found to be implicit therein. In *Funke v France*,¹³ the applicant had been convicted and fined for failing to comply with a requirement by the customs authorities to provide certain bank statements. He argued that his right not to give evidence against himself had been violated. The ECtHR ruled that the special features of customs laws could not justify such an infringement of the right of a person charged with a criminal offence to remain silent and not to incriminate himself. Article 6(1) of the ECHR (the right to a fair trial) had therefore been breached.

In the high profile case of *Saunders v United Kingdom*,¹⁴ the documents in question were statements given by the applicant to inspectors from the then Department of Trade and Industry,¹⁵ under statutory powers which compelled him to make those statements on pain of penalty for failure. He argued that the use of those statements in criminal proceedings against him breached his right to a fair trial under article 6(1). The ECtHR found that the use made of the statements amounted to an unjustifiable infringement of the right not to incriminate oneself. Although not specifically mentioned in article 6, the right to silence and the right not to incriminate oneself were generally recognised international standards lying at the heart of the notion of a fair procedure under article 6. These principles protected an accused against improper compulsion, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6. The right not to incriminate oneself:

is primarily concerned ... with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings

¹¹ See pp 155–156.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, <http://echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

¹³ (1993) 16 EHRR 297.

¹⁴ (1997) 23 EHRR 313.

¹⁵ Now the Department for Business, Innovation & Skills.

of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.¹⁶

The ECtHR specifically rejected the UK government's argument that the public interest in the investigation of corporate fraud should be allowed to take priority over the right against self-incrimination.

The court returned to the question of the production of documents in *JB v Switzerland*.¹⁷ Tax authorities had requested the applicant to submit documents relating to certain investments. The applicant admitted he had made such investments without fully declaring the income, but refused to submit the documents. The tax authorities eventually agreed not to pursue proceedings for tax evasion upon the applicant's paying a large fine.¹⁸ The ECtHR found that article 6(1) had been breached. Even though the applicant had admitted that he had not made full declarations to the tax authorities, the documents sought could have been used against him in a prosecution for tax evasion. The right to silence and the privilege against self-incrimination had been violated. The situation in this case was not the same as where there is an obligation to produce material (such as a blood sample) which has an existence independent of the person concerned.

The Right to Silence

The central point in *Murray v UK*¹⁹ was that adverse inferences had been drawn²⁰ from the applicant's silence at his trial. He alleged breach of his right to silence, his right not to incriminate himself, and the principle that the prosecution must bear the burden of proving the case without assistance from the accused. The ECtHR acknowledged the importance of the rights to remain silent and not to incriminate oneself. Article 6 protected against improper compulsion and so contributed to avoiding miscarriages of justice. A person should not be convicted on the sole basis of silence, but in

¹⁶ *Saunders v United Kingdom* (1997) 23 EHRR 313 [69]. The European Commission of Human Rights later applied these words to find that a conviction based on the analysis of a blood specimen compulsorily obtained did not deprive the person concerned of a fair hearing: Application No 30551/96: *Cartledge v United Kingdom*, unreported.

¹⁷ [2001] Crim LR 748.

¹⁸ Of over 20,000 Swiss francs.

¹⁹ (1996) 22 EHRR 29.

²⁰ Under Criminal Evidence (Northern Ireland) Order 1988, art 3.

situations which clearly call for an explanation, silence may be taken into account. The right to silence was not absolute, but the question was where the line should be drawn. This in turn depended on all the circumstances of the case, including the situations in which inferences may be drawn, the weight attached to them, and the degree of compulsion inherent in the situation. On the particular facts of the case, there had been no breach of article 6.

The right to silence was again invoked in *Heaney and McGuinness v Ireland*,²¹ where the applicants had been suspected of terrorist activity. They were convicted of an offence of failing to comply with requests²² to account for their movements over a certain period, and imprisoned. They claimed that the statutory provision requiring them to answer questions violated their right to silence and their right not to incriminate themselves. The court reiterated the rationale for these rights, as in *Saunders*, adding that the right not to incriminate oneself presupposed that the prosecution would seek to prove its case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused, and was closely linked to the presumption of innocence. The rights were not absolute rights, but, in the present case, the degree of compulsion to provide information “destroyed the very essence of their privilege against self-incrimination and their right to remain silent”. Once again, an argument based on proportionality was unsuccessful, the court rejecting the proposition that the statutory provisions in question were a proportionate response to the threat of terrorism and the need to maintain public order and peace.

Compulsion to Identify a Driver

*Weh v Austria*²³ was the first case to feature the compulsory disclosure of the identity of a driver. The registered owner of a car had been required to disclose the name and address of the person who had been driving on a particular occasion when the vehicle had been detected speeding. The owner supplied false information and was convicted and fined for so doing, but was not prosecuted for speeding. He complained that the requirement to disclose the driver’s identity breached his right to remain silent and the privilege against self-incrimination. The ECtHR found that all the owner had been asked was to say who had been driving, which was not in itself

²¹ (2001) 33 EHRR 12.

²² Under Offences Against the State Act 1939, s 52.

²³ (2005) 40 EHRR 37.

incriminating. The link between the requirement to identify the driver and possible proceedings for speeding was “remote and hypothetical”,²⁴ and the right to remain silent and the privilege against self-incrimination were not in issue. In reaching this conclusion, the court seems to have relied heavily on the fact that the applicant was not prosecuted for speeding, only for giving false information. The decision was, however, by a majority of four to three. In the dissenting judgment,²⁵ it was said, more realistically in my view, that proceedings for speeding were probably in contemplation, and the request for information about the driver was no more than a preliminary to proceedings against the applicant if he had been the driver. The applicant was compelled on pain of a fine to give what might prove to be incriminating evidence, or to be punished for remaining silent; article 6(1) was therefore engaged and it was irrelevant that he was not charged with speeding.

*O’Halloran and Francis v United Kingdom*²⁶ again concerned the disclosure of the identities of drivers. Vehicles owned by the two applicants had been photographed by speed cameras, and the applicants were required²⁷ to say who had been driving at the time. The first applicant complied, admitting he had been driving, and was convicted of speeding. The second applicant refused to comply and was fined £750 for refusing. Both complained that the right to remain silent and the privilege against self-incrimination had been breached. The court found that derogations from the right to remain silent and the right not to incriminate oneself were permissible without infringing article 6. Unlike in *Saunders*, no distinction was to be drawn between cases where incriminating statements were obtained by compulsion, and those in which “real” evidence, such as breath, blood and urine samples, was obtained by compulsion. Rather, to determine whether the essence of the right to remain silent and the privilege against self-incrimination had been infringed, it was necessary to focus on the nature and degree of compulsion used, any relevant procedural safeguards, and the use made of any material obtained. The court also took into account that motor cars are potentially dangerous and the state is justified in making laws to regulate their use:

²⁴ *Ibid* [56].

²⁵ Of Judges Lorenzen, Levits and Hajiyev, 898–901.

²⁶ (2008) 46 EHRR 21.

²⁷ Under RTA 1988, s 172.

those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and ... these responsibilities include the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion.²⁸

On the above basis, the right had not been violated. The second justification for the derogation was the limited nature of the inquiry – the registered keeper was being asked to provide a single, specific piece of information, which could be distinguished from requiring a person to engage in a compulsory interview.

Administration of Emetic

*Jalloh v Germany*²⁹ concerned an entirely different method of seeking evidence. Here, an emetic was forcibly administered to a suspect so that he regurgitated a bag of cocaine. The ECtHR ruled that to allow the use at trial of evidence thereby obtained would render unfair the trial as a whole; it also infringed the right against self-incrimination. The degree of force was great, and well beyond the compulsion typically used to obtain a blood or breath sample. There was insufficient public interest in such evidence to secure the conviction of a small-scale drug dealer. While the Convention did not specifically prohibit the use of medical procedures to obtain evidence, forcible medical intervention must be convincingly justified, especially where the procedure was intended to retrieve evidence from inside the body. The use of force was liable to arouse fear, anguish and inferiority amounting to inhuman and degrading treatment contrary to article 3.³⁰ The proceedings also violated the presumption against self-incrimination in that the evidence was obtained against the will of the applicant, the degree of force used was disproportionate, and the evidence had been obtained in violation of article 3.

²⁸ (2008) 46 EHRR 21 [57].

²⁹ (2007) 44 EHRR 32.

³⁰ “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI.1950 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

Discussion

While the decision in *Funke*, in which the ECtHR first recognised the right against self-incrimination, was hailed as a bold and far-reaching decision,³¹ the Strasbourg case law as a whole has since been criticised for not providing consistent guidelines on the application of the privilege,³² leaving the precise state of the law far from clear.³³ The court in *Funke* said nothing about the scope of the privilege, or about its origins or rationale,³⁴ and the words in the judgment concerning the special features of customs laws have been described as “rather cryptic comments”.³⁵

Of the issues arising from the ECtHR cases, those of most relevance to the drink- and drug-driving offences are, first, the concept of “material which has an existence independent of the will of the subject”, and whether or not specimens of breath, blood or urine obtained in the course of a drink- or drug-driving investigation fall within this category; and, second, the extent to which the interests of the individual may be balanced or set off against wider community interests.

Material which has an independent existence

The phrase “material ... which has an existence independent of the will of the suspect” has “caused much bemusement.”³⁶ The distinction between such material, which does not attract the privilege, and oral admissions, which do, has been said to be open to obvious criticism,³⁷ and has never

³¹ Ian Dennis, ‘Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination’ (1995) 54 CLJ 342, 371.

³² Tim Ward, Piers Gardner, ‘The Privilege Against Self-incrimination: In Search of Legal Certainty’ [2003] EHRLR 388; Andrew Ashworth, ‘Human Rights: Article 6(1) Privilege Against Self-incrimination – Offence under the Road Traffic Act 1988 s. 172 of Failing to Furnish Information’ [2007] Crim LR 897; Andrew L-T Choo, ‘“Give Us What You Have” Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right’ in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 254.

³³ Malcolm Birdling, ‘Self-incrimination Goes to Strasbourg: O’Halloran and Francis v United Kingdom’ (2008) 12 E&P 58, 63.

³⁴ Andrew Ashworth, ‘Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?’ (2008) 30 Cardozo LR 751, 753.

³⁵ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 146.

³⁶ *Ibid.*, 148.

³⁷ Jonny Landau, ‘The Right Against Self-incrimination and the Right to Silence under Article 6’ (2007) 12JR 261 para 16.

properly been explained.³⁸ The finding in *Saunders* that the privilege did not apply to such material seems in conflict with the decision in *Funke*, where the documents in question clearly did have independent existence, but were nevertheless protected by the privilege. Yet the court in *Saunders* did not discuss *Funke* or seek to distinguish it, and the decision in *Funke* was affirmed in *Heaney*.³⁹

Compulsion to co-operate

Ashworth⁴⁰ questions whether the distinction is a matter of substance or merely an attempt to limit the scope of the privilege. He suggests that *Funke* and *Saunders* can perhaps be reconciled on the basis that in both cases what was being required was the *co-operation* of the suspect, in *Funke* by handing over documents, and in *Saunders*, by answering questions. This would be consistent with Redmayne's proposal⁴¹ that the application of the privilege depends not on the type of information sought, but on the means by which it is sought, the privilege being in play where the co-operation of the subject is required. On this view, since bodily samples can be obtained without the co-operation of the subject (that is, by force) they can be differentiated from attempts to force someone to speak or hand over documents. I return to this point below;⁴² for the moment it is enough to note that specimens in drink-and drug-driving cases may not be taken by physical force. The key question, Ashworth continues, should be, not whether documents have an existence independent of the person concerned, but whether a requirement to produce evidence, whether oral or real, operates as coercion on the mind of the subject. If it does, the privilege should apply.⁴³

³⁸ Malcolm Birdling, 'Self-incrimination Goes to Strasbourg: O'Halloran and Francis v United Kingdom' (2008) 12 E&P 58, 61–62.

³⁹ Andrew Ashworth, 'Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?' (2008) 30 *Cardozo LR* 751, 759–760.

⁴⁰ *Ibid*

⁴¹ Mike Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 *OJLS* 209, 215 (see also p 159); Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 151–153 and Andrew L-T Choo, "'Give Us What You Have" – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 254.

⁴² See p 157.

⁴³ The same point – that a requirement to produce documents operates on the will of the owner, requiring the owner to decide whether or not to comply – is made in relation to the case of *JB*: Andrew J Ashworth, Clare Ovey, 'Human Rights: Whether Proceedings to be Classified as "Criminal" – Privilege Against Self-incrimination' [2001] *Crim LR* 748, 750.

Choo⁴⁴ supports this view, referring to one of the examples the court gave of material *not* subject to the privilege – documents acquired pursuant to warrant – as perhaps indicating that it is compulsion to co-operate which lies at the heart of the court’s concern, and that it is freedom from such compulsion which forms the essence of the privilege.

Ashworth⁴⁵ returns to the distinction in evaluating *Jalloh*, where the court found that the drugs in the applicant’s body could have had an existence independent of the applicant’s will. On the basis of *Saunders*, therefore, the privilege would not be in play, but the court cited several elements taking *Jalloh* out of the exception in *Saunders* – the high degree of force used, the fact that article 3⁴⁶ was violated, and the defiance of the applicant’s will in retrieving the evidence. The effect of *Jalloh* was, therefore, to create an exception to the exception in *Saunders*.

The public interest

The ECtHR rejected arguments that the wider public interest might outweigh the right against self-incrimination in *Funke*, *Saunders* and *Heaney*. Yet in *Jalloh*, the public interest was mentioned as one of the factors going to whether or not the privilege is violated.⁴⁷

In relation to *O’Halloran*, Ashworth⁴⁸ suggests, albeit tentatively, that there may be a consensus that the privilege against self-incrimination does not apply to the various regimes in European countries for ascertaining who was driving a vehicle on a particular occasion. Such an argument might be based on the fact that those who choose to own cars thereby take on certain obligations in order to preserve road safety, and identifying the driver is one such obligation. This would suggest a limited exception to the privilege. But that was not the approach the court took. Instead, it focused on the nature and degree of compulsion, the existence of any safeguards and the use made of any material obtained. The court quoted from the House of Lords

⁴⁴ Andrew L-T Choo, “‘Give Us What You Have’ – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right” in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 242.

⁴⁵ Andrew Ashworth, ‘Human Rights: Article 3 - Article 6’ [2007] Crim LR 717. See also Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 152.

⁴⁶ The prohibition on torture, inhuman or degrading treatment; see fn 30 above.

⁴⁷ Andrew Ashworth, ‘Human Rights: Article 3 - Article 6’ [2007] Crim LR 717; Andrew Ashworth, ‘Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?’ (2008) 30 *Cardozo LR* 751, 766.

⁴⁸ Andrew Ashworth, ‘Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?’ (2008) 30 *Cardozo LR* 751, 763–767.

case, *Brown v Stott*,⁴⁹ on balancing the community interest in road safety against the interests of the individual, an exercise which Ashworth describes as the trumping of a basic right by the public interest – exactly what the ECtHR found impermissible in *Saunders* and *Heaney*. In both *Weh* and *O'Halloran*, it would have been more honest and more persuasive to describe these situations as considered exceptions to the privilege, founded mainly on the need to promote road safety and on the apparent European consensus, rather than deny the *prima facie* violation.⁵⁰ Making an exception where there is a clear regulatory regime, involving licensing, registration, number plates and the like which vehicle owners voluntarily enter into has some pedigree in the literature on strict liability,⁵¹ and is preferable to a plain balancing argument.⁵²

The use to which the material is put

Another question is whether or not the privilege applies if the material compulsorily obtained is not then used to support a prosecution.⁵³ This point is not pursued here in view of the near-certainty that prosecution follows from a positive analysis of a breath, blood or urine specimen in a drink- or drug-driving case.

Material per se incriminating

In the dissenting judgment in *Saunders*,⁵⁴ it was said that fraud investigations, to which the privilege does not apply, are designed to ascertain whether or not a crime has been committed at all. In most other investigations, such as robbery or violence, it is clear from the outset that a crime has taken place and the purpose of the investigation is to identify the perpetrator. The right applies to the latter, but not necessarily to the former. A drink- or drug- drive investigation is likewise to ascertain whether or not an offence has been committed, and so may fall outside the privilege on the basis of this distinction.

⁴⁹ See p 135.

⁵⁰ This would also resolve the conflict between the fact that in *Weh* the court placed great emphasis on the fact that the applicant had not been prosecuted for speeding, but that that was exactly what happened to one of the applicants in *O'Halloran*.

⁵¹ See pp 62–63.

⁵² Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 150.

⁵³ See, for example, Tim Ward, Piers Gardner, 'The Privilege Against Self-incrimination: In Search of Legal Certainty' [2003] EHRLR 388, 395.

⁵⁴ Judges Martens and Kuris [25].

Choo⁵⁵ takes up a similar theme, suggesting that the ECtHR distinguished *Jalloh* from *Saunders* on the basis that the samples mentioned in *Saunders* would be obtained with a view to *detecting* whether or not a crime has been committed, as when analysing a specimen for the presence of alcohol or drugs. They would not become incriminating until analysed and shown to give rise to an offence. In *Jalloh*, by contrast, the regurgitated drugs were *per se* incriminating. This distinction between *per se* incriminating and neutral information also appears in *R v S(F) and (S)*,⁵⁶ where the court said, perhaps rather obviously, that the privilege would be engaged only if the data turned out to be incriminating. The inference appears to be that, when specimens are provided in a drink- or drug-driving investigation, the privilege is not in play because of the possibility that analysis may absolve rather than incriminate the suspect.

I come back to the question of material which is *per se* incriminating below.⁵⁷

THE DOMESTIC COURTS

While the question of protection from self-incrimination is relatively recent in the jurisprudence of the ECtHR, it has a longer pedigree in domestic law, although it is:

well understood that the principle is subject to numerous statutory exceptions which limit, amend or abrogate the privilege in certain circumstances.⁵⁸

Parliament has recognised that the drink-driving provisions make significant inroads into the privilege against self-incrimination. Debating the bill which became the Transport Act 1981, it was said in the House of Commons that the Road Safety Act 1967,⁵⁹ which first introduced the offence of being over the prescribed limit, had:

⁵⁵ Andrew L-T Choo, “‘Give Us What You Have’ – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right’ in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 243.

⁵⁶ A decision of the Court of Appeal; see below, p 135.

⁵⁷ See below and p 166.

⁵⁸ *R v S(F) and (S)* [2008] EWCA Crim 2177 [17]. For a list of examples of derogations from the privilege in criminal law, see Susan Edwards, ‘The Self-incrimination Privilege in Care Proceedings and the Criminal Trial and “shall not be admissible in evidence”’ (2009) 73 JCL 48, 50–51.

⁵⁹ Re-enacted in the Road Traffic Act 1972.

... made criminal a condition of which only the person accused could convict himself by giving evidence against himself and being obliged to do so.⁶⁰

The cases on drink- and drug-driving contain acknowledgements that suspects are required to provide evidence against themselves. In the House of Lords, it was said that section 8 of the Road Traffic Act 1972⁶¹ constitutes:

a substantial encroachment on the common law right of a citizen not to be compelled to incriminate himself. It was introduced for the beneficent purpose of protecting the public against drunken drivers ...⁶²

More recently, the Divisional Court said:

... this legislation, contrary to the general traditions of the criminal law but for good and pressing social reasons, compels a suspected person to provide evidence against himself.⁶³

A number of cases have concerned self-incrimination in other contexts. In relation to the right to silence, the House of Lords⁶⁴ has acknowledged a strong presumption against interpreting a statute so as to take away an accused's right to silence, but recognised that statutory interference is almost as old as the right itself. The various immunities conferred by the right to silence are concerned with the protection of citizens against the abuse of powers by those investigating crimes. All civilised states recognise the assertion of personal liberty and privacy, although it is unclear where the line is to be drawn; some curtailment of these liberties is necessary to the stability of society.⁶⁵

⁶⁰ Mr J Enoch Powell, *Hansard* 13 January 1981, col 875 <<http://hansard.millbanksystems.com/commons/1981/jan/13/transport-bill>> accessed 27 November 2013. See also, for example, Roy Light, *Criminalizing the Drink-Driver* (Dartmouth, 1994) 71, on self-incrimination under the Road Safety Act 1967.

⁶¹ Containing powers to require evidential specimens – the forerunner of RTA 1988, s 7.

⁶² *Morris v Beardmore* [1981] AC 446 (HL) 458.

⁶³ *Murray v DPP* [1993] RTR 209 (QBD) 220–221.

⁶⁴ In *R v Director of Serious Fraud Office ex p Smith* [1993] AC 1, 40, a case on the powers of the Director of the Serious Fraud Office, under s 2(2), Criminal Justice Act 1987, to require a person charged with an offence under s 458, Companies Act 1985 (of having knowingly been a party to the carrying on of the business of a company with intent to defraud creditors) to be interviewed, answer questions and provide information, under pain of penalty.

⁶⁵ *Ibid*, 30–31.

There followed a series of cases concerning the compulsory disclosure of information. In *R v Hertfordshire County Council*,⁶⁶ the House of Lords held that a power to require information under the Environmental Protection Act 1990⁶⁷ was conferred not only for the purpose of obtaining evidence against offenders, but also to protect public health and the environment; that purpose would be frustrated if those who knew about a relevant hazard were entitled to refuse to provide urgently required information on the ground that they might incriminate themselves. The House of Lords distinguished *Saunders* on the basis that *Saunders* was concerned only with the legality of using information obtained by compulsion as evidence at a criminal trial; in the present case none of the answers given was ever used in evidence.

In the Scottish case of *Brown v Gallacher*⁶⁸ the appellant argued that the use at trial of evidence arising from the requirement in the Road Traffic Act 1988 to provide breath specimens infringed his right not to incriminate himself. The High Court of Justiciary recited the ECtHR's distinction between, on the one hand, material such as breath or urine specimens, provided in accordance with statutory procedures, which had an existence independent of the person concerned and did not attract the privilege; and, on the other hand, answers obtained under compulsion, which did engage the privilege. The requirement for breath specimens had been lawfully made and did not interfere with the implied right not to incriminate oneself, even though accompanied by notice that failure to provide might give rise to liability to prosecution. The court also opined that if, on the other hand, the privilege was engaged, it could be justified on the grounds that the degree of compulsion implied by liability to prosecution for failing to comply was not disproportionate given the aim of the legislation, the requirement could be made only of people who had already failed a breath test and the level of penalty if convicted of failing to provide.

A year later, the Privy Council had before it a drink-drive case where the question of self-identification as the driver fell to be considered: *Brown v Stott*.⁶⁹ A woman was arrested for theft at a supermarket. She appeared to have been drinking, and pointed out a car in the car park, saying it was hers.

⁶⁶ [2000] 2 AC 412 (HL).

⁶⁷ Section 71(2).

⁶⁸ [2002] SLT 1135 (HCJ).

⁶⁹ [2003] 1 AC 681 (PC).

The police required her⁷⁰ to say who had been driving, and she admitted it was her. She was convicted of driving with excess alcohol. On appeal, she argued that it was incompatible with her human rights for the prosecutor to rely on her admission that she had driven. Having considered *Saunders*, the Privy Council ruled that while the right to a fair trial under article 6 is absolute, the privilege against self-incrimination – one of the constituent rights under article 6 of the ECHR – was not. Limited qualification was acceptable if reasonably directed towards a clear and proper public objective and if representing no greater qualification than the situation called for. The provision in question allowed for the putting of a single simple question; the answer did not in itself incriminate the person answering. It did not represent a disproportionate legislative response to the problem of maintaining road safety. The manner in which the balance between the interests of the community at large and of the individual was struck was not unduly prejudicial to the latter and did not infringe a human right.

The next judgment on self-incrimination was in a terrorism case: *R v S(F) and A(S)*.⁷¹ Notices served on the defendants⁷² required them, under threat of criminal proceedings for non-compliance, to provide sufficient information to facilitate access to the contents of their computers, which were already in the hands of police. The Court of Appeal rejected an argument that the requirement infringed the privilege against self-incrimination. Knowledge of the means of access to the data might engage the privilege, but only if the data itself contained incriminating material. If the data was neutral or innocent, the knowledge of the means of access to it would likewise be neutral or innocent. The material was lawfully in the hands of the police, and the process of making it readable would not alter it. The requirement for information was based on national security interests and the prevention and detection of crime, and was expressly subject to a proportionality test and judicial oversight.

In the course of the judgment, Lord Judge remarked that:

In much the same way that a blood or urine sample provided by a car driver is a fact independent of the driver, which may or

⁷⁰ Under RTA 1988, s 172(2), which provides that, where the driver of a vehicle is alleged to be guilty of an offence to which the section applies, the keeper of the vehicle must give such information as to the identity of the driver as may be required by or on behalf of a chief officer of police, and any other person shall, if required, give any information which it is in his power to give and may lead to identification of the driver.

⁷¹ [2008] EWCA Crim 2177.

⁷² Under Regulation of Investigatory Powers Act 2000, s 49.

may not reveal that his alcohol level exceeds the permitted maximum, whether the defendants' computers contain incriminating material or not, the keys to them are and remain an independent fact.⁷³

The court's conclusion in *R v S* that the encryption key had an existence independent of the appellant's will has been questioned.⁷⁴ Unless details of such a key are documented somewhere, the key is an intangible "psychological fact" or information which exists only in the suspect's memory and that of any other person who may know it. As such, it presumably has no existence independent of the will of the accused and the demand for its production seems *prima facie* to attract the privilege. On the other hand, by analogy with *Brown v Stott*, the demand for information was directed to national security and might be justifiable on that ground.

Thus, while the early case of *Morris v Beardmore* seemed to recognise that the duty to provide evidential specimens in a drink-drive case was an encroachment upon the right not to incriminate oneself, which could be justified by reference to the overall purpose of the legislation, the more recent Scottish case of *Brown v Gallacher* moved away from that stance, applying instead the approach of the ECtHR that the provision of breath specimens does not even engage the privilege in the first place. In *Brown v Stott* the importance of proportionality in road traffic cases came to the fore. I return to these themes later.⁷⁵

THE LITERATURE

The literature on the scope of the privilege against self-incrimination, the justifications for it and criticisms of it, are reviewed next. As already noted, the privilege includes the right to silence, but since the concern here is the role of the privilege in relation to requirements to provide specimens in drink- and drug-driving investigations, the right to silence is mentioned only in so far as is useful for comparative or illustrative purposes.

⁷³ [2008] EWCA Crim 2177 [21], and see p 159 below.

⁷⁴ Andrew J Roberts, 'Evidence: Privilege Against Self-incrimination – Key to Encrypted Material' [2009] Crim LR 191.

⁷⁵ See p 156 *et seq.*

Scope

Easton⁷⁶ discusses the privilege in the context of intimate samples taken under section 62, PACE.⁷⁷ While section 62 does not apply to the drink- and drug-driving procedures,⁷⁸ what she says is nevertheless of interest. She acknowledges that bodily samples are excluded from the scope of the privilege, but argues that there is no fundamental difference between relying on a suspect's words and relying on the composition of his blood, yet a suspect may decline to speak, but may not decline to provide a sample. She quotes from a US case⁷⁹ in which, in a dissenting judgment, it was said, with some perspicacity, to be a strange hierarchy of values which allows the state to extract a human being's blood to convict him of a crime because of the blood's content, but proscribes compelled production of his lifeless papers.

Also in defence of the privilege, Sharpe⁸⁰ argues that it should be refocused on the initial gathering of evidence rather than on the fairness of admitting the evidence in any proceedings which follow. The state must prove a criminal case without assistance from the defendant, and this refocusing would ensure that defendants are not obliged to remedy deficiencies in the evidence obtained by state investigators. The privilege thus goes to the burden of proof; without it, the state's task of proving a case may be lighter, and in the long term there would be nothing to prevent total subjugation of the private interest to the public need for information. The statutory safeguards in PACE⁸¹ do not justify abandoning the privilege.

Not all commentators are, however, entirely in favour of the privilege. Dennis⁸² points out that, on one view, it obstructs the efficient investigation of crimes; on another, it is simply one of a number of protective devices, and should have a distinct but limited place in criminal procedure. He distinguishes what he calls primary applications of the privilege from

⁷⁶ Susan M Easton, 'Bodily Samples and the Privilege against Self-incrimination' [1991] Crim LR 18.

⁷⁷ Section 62 is headed "Intimate Samples" and falls within Part V of PACE: Questioning and Treatment of Persons by Police.

⁷⁸ PACE Act 1984, s 62(11).

⁷⁹ *Schmerber v California* [1965] 384 US 757.

⁸⁰ Sybil Sharpe, 'The Privilege Against Self-incrimination: Do We Need a Preservation Order?' (1998) 27 Anglo-Am LR 494.

⁸¹ The powers to exclude a confession obtained by compulsion or in other circumstances which might render it unreliable (s 76), and to exclude evidence which would have an adverse effect on the fairness of proceedings (s 78).

⁸² Ian Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination' (1995) 54 CLJ 342.

derivative applications. In primary applications, the privilege defines the scope of legal duties to co-operate in certain legal procedures which call for a suspect's co-operation in evidence-gathering, whether by answering questions, handing over documents, or allowing searches or the taking of samples. It has little or no role in evidence-gathering except through direct demands for information. Derivative applications (for which there may well be other rationales, besides the privilege) might include the right to silence; the inadmissibility in evidence of involuntary confessions or of evidence obtained by police deception or entrapment; and the requirement that suspects be told of their rights to legal advice and to remain silent.

Redmayne⁸³ suggests that the privilege is engaged when a suspect is under a legal duty to provide incriminating information, as where there is a legal sanction for failure to do so. This also helps distinguish between the privilege and the right to silence. The latter is understood as forbidding inferences from failure to answer questions or other forms of non-cooperation; provisions allowing courts to draw inferences from silence do not infringe the privilege because they do not put the suspect under a duty to cooperate.

Choo⁸⁴ makes the same point – that the privilege should mean that a person cannot be compelled, on pain of a criminal sanction, to provide information that could reasonably lead to, or increase the likelihood of, that person's prosecution for a criminal offence. It could be argued that the privilege is counter to the idea that there are general moral duties on citizens to assist and co-operate with the authorities in investigating crime, but concludes that, to the extent that dedicated pre-trial protections are in place and are routinely supervised and enforced, perhaps little would be lost if the privilege were abandoned altogether, or at least downplayed.

The tension between the state's interest in collecting evidence and the individual's interest in avoiding self-incrimination is discussed below⁸⁵ in the context of the presumption of innocence as a rationale for the privilege.

The Rationale

A number of matters have been proposed as the rationale for the privilege, although all have been criticised as unsatisfactory.

⁸³ Mike Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 OJLS 209, 217.

⁸⁴ Andrew L-T Choo, "'Give Us What You Have' – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 240, 257.

⁸⁵ See pp 140–142.

Avoiding false self-incrimination

First, the privilege is said to help avoid convicting the innocent by reducing the risk of false confessions. Since this argument applies to police questioning and the right to silence, it is not pursued here, other than to note that immunity from being required to answer questions has been said to protect only the guilty, while the innocent are likely to want to explain themselves.⁸⁶ On the other hand, the privilege against self-incrimination in relation to providing specimens is less clear-cut. Here refusal may be for reasons other than to hide guilt, but may instead arise out of fear, anxiety, embarrassment, anger, or scepticism about the accuracy of the test.⁸⁷

Privacy, freedom and dignity

A number of commentators have defended the privilege on the basis of arguments relating to individual privacy and integrity.

Sharpe⁸⁸ argues that the privilege protects the right to a minimum level of human privacy; it should apply to any evidence which cannot be discovered without the free cooperation of the subject, although she recognises that the privilege may have to be forfeit in certain circumstances where there is an objective need to do so, as where there is a reasonable basis for suspecting the individual is involved in offending and the investigation is necessary in the interests of public safety or the prevention of crime.

Having to provide bodily samples, as well as being searched or having fingerprints taken, invades privacy, and may be even more intrusive than questioning.⁸⁹

Choo⁹⁰ cites as one of the justifications for the privilege the idea that compelling suspects to provide information which is potentially incriminatory is an affront to dignity. Respect for personal autonomy demands that those at risk of prosecution must be given a fair opportunity to

⁸⁶ Adrian AS Zuckerman, "The Right Against Self-incrimination: An Obstacle to the Supervision of Interrogation" (1986) 102 LQR 43, 64.

⁸⁷ Susan M Easton, 'Bodily Samples and the Privilege against Self-incrimination' [1991] Crim LR 18, 27.

⁸⁸ Sybil Sharpe, 'The Privilege Against Self-incrimination: Do We Need a Preservation Order?' (1998) 27 Anglo-Am LR 494, 521, 522.

⁸⁹ Ian Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination' (1995) 54 CLJ 342, 357.

⁹⁰ Andrew L-T Choo, "'Give Us What You Have" – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 256.

formulate a response to allegations of wrongdoing, including having control over the time and circumstances for disclosing information.

Landau⁹¹ refers to the three tests in *O'Halloran*⁹² for deciding whether or not the privilege has been breached as consistent with the rationale deriving from the right to privacy.⁹³ He suggests three further criteria, all allied to the idea of protecting individual privacy. The first is the nature of the requirement. The more personal, onerous and intrusive it is, the more difficult it should be to justify. The second consideration should be whether the information could be obtained by other means, and, if so, its reliability and the relative cost. Finally, there should be a presumption that a requirement to self-incriminate violates article 6 where there is no reasonable cause for making the enquiry; random requests for information should be closely regulated. Landau does not give examples of such random requests, but an instance might be police officers asking cyclists where they got their cycles from, without anything to suggest they came by them other than entirely legitimately.

The relationship between state and citizen

At its simplest, the argument in favour of the privilege based on the presumption of innocence and/or the relationship between state and citizen is that the state should prove the case against a presumptively innocent citizen without the compelled assistance of that citizen; the rationale is not only the placing of the burden of proof, but a political statement about the relationship between the state and the citizen.⁹⁴

Ashworth is of much the same view,⁹⁵ arguing that the effect of *Saunders* is that the defendant should be able to put the prosecution to proof without any obligation to assist in providing evidence. If the defendant were obliged to supply evidence, the duty of the prosecution to establish guilt beyond reasonable doubt would be watered down or even contradicted. While the presumption of innocence sets out to ensure a proper relationship between the state and the citizen, the practical meaning of the privilege

⁹¹ Jonny Landau, 'The Right Against Self-incrimination and the Right to Silence under Article 6' (2007) 12 JR 261 [21].

⁹² See pp 126, 160–163.

⁹³ As well as on considerations of cost which, he suggests [20], should be taken into account when documents are required to be produced.

⁹⁴ Sybil Sharpe, 'The Privilege Against Self-incrimination: Do We Need a Preservation Order?' (1998) 27 Anglo-Am LR 494, 522.

⁹⁵ Andrew Ashworth, 'Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?' (2008) 30 Cardozo LR 751, 767.

should be that it is wrong to require an individual to supply evidence against himself when the police are in the process of building a case against him.

By protecting people from being obliged to co-operate with the prosecution, the privilege says something about the proper relationship between citizens and the state, allowing citizens to keep some distance between themselves and the state and avoiding having to make what may often be significant personal sacrifices. Putting people under an obligation to co-operate, with criminal sanctions, would often be an excessive response to a suspect's non-cooperation, when the state is in one of its most powerful guises. On this argument, the privilege applies to blood specimens and documents as much as to answers to questions, so long as they are obtained by obliging the suspect to co-operate.⁹⁶

This view is taken further by Dennis.⁹⁷ He agrees that the interest of all suspects, guilty or innocent, in not being obliged to incriminate themselves derives from the requirement that it is for the prosecution to prove guilt, and not for the accused to prove innocence. The state, which has the greater resources, must prove its case without help from the suspect. If a suspect is presumed innocent, it is wrong in principle to compel the suspect to be a source of incriminating evidence. Dennis goes on, however, to point out that this approach denies the state access to much relevant material. Nor does it explain why the privilege does not extend to the collection of real evidence by searches and the taking of fingerprints and samples. Evidence of this kind is so highly probative that there are compulsory powers to obtain it, the privilege being overridden by the public interest in truth-finding. He suggests that one way to reconcile these difficulties might be to interpret the privilege as applying only in relation to compulsion to disclose evidence which would otherwise be unobtainable, but accepts that this might unduly restrict the privilege.

Dennis⁹⁸ concludes that seeking to justify the privilege by reference to the presumption of innocence or protection against wrongful conviction is unsatisfactory, yet there remains a sense of unease about power and propriety in the criminal process, where agencies of the state both investigate and adjudicate. He proposes that the public interest in the enforcement of the criminal law may justify overriding the rule against self-incrimination. The critical principle might then be that there should be no

⁹⁶ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010), 153–155.

⁹⁷ Ian Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination' (1995) 54 CLJ 342, 353–356.

⁹⁸ *Ibid*, 373 *et seq.*

compulsion to comply with procedures for the collection of evidence except where such procedures can be justified by reference to the need to secure reliable evidence which is probative of guilt, and the collection of such evidence is governed by procedures based on natural justice to individuals, or there are other safeguards (such as PACE) in place aimed at ensuring that state power is exercised in accordance with fundamental principles.

Balancing social needs

Another theme in the literature on the privilege against self-incrimination is the matter of balancing the privilege against the demands of the community for protection against crime.⁹⁹ This is reminiscent of Dennis’s argument¹⁰⁰ that the privilege may make valuable evidence unavailable and his proposed solution. For Redmayne,¹⁰¹ the privilege is not so weighty that exceptions cannot be allowed, but he is cautious about the reasons for particular exceptions. In *Brown v Stott*, the goal of maintaining road safety justified a breach of the driver’s rights, but Redmayne suggests that this sort of reasoning should be avoided as it could be used to justify the erosion of all manner of rights. He prefers the court’s other reason – that those who own cars or wish to drive can be seen as accepting the duties that go with it, including the duty to account for the degree of sobriety in which they drive, and to explain who was driving at a particular time.

Ashworth¹⁰² is not persuaded that cases such as *Brown v Stott*, where the duty to “self-identify” is, in principle, inconsistent with the privilege when imposed in the context of an ongoing or probable criminal prosecution, can be justified by reference to the public interest in road safety. A pragmatic yet more rights-sensitive approach would be to suggest that an exception to the privilege may be justifiable on considerations similar to those in *O’Halloran*, that is, where the citizen:

- has relatively little at stake (and certainly does not risk imprisonment); this should be the dominant consideration;
- has chosen to participate in a particular social enterprise, and
- may be excused if without fault.

⁹⁹ See, for example, Adrian AS Zuckerman, ‘The Right Against Self-incrimination: An Obstacle to the Supervision of Interrogation’ (1986) 102 LQR 43.

¹⁰⁰ Above, p 141.

¹⁰¹ Mike Redmayne, ‘Rethinking the Privilege Against Self-Incrimination’ (2007) 27 OJLS 209, 228–230.

¹⁰² Andrew Ashworth, ‘Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?’ (2008) 30 Cardozo LR 751, 769 *et seq.*

Choo also urges caution in relation to balancing exercises. He argues that the right not to self-incriminate may lose its symbolic significance if it can simply be balanced away,¹⁰³ and that, in conducting balancing exercises, greater weight should be given to the right than to the competing public interest.

Evidence not otherwise available

Finally, access to evidence which would otherwise be unobtainable has been put forward as a reason for condoning breaches of the privilege against self-incrimination. Lord Bingham commented¹⁰⁴ that the purpose of requiring a suspect to provide breath specimens was to obtain evidence not otherwise available. As already noted,¹⁰⁵ Dennis takes this further in suggesting that the privilege might apply only in relation to compulsion to disclose evidence which otherwise would be unobtainable. Landau¹⁰⁶ likewise proposes that whether or not there are other means of obtaining the evidence is a relevant consideration.

The literature briefly reviewed above suggests various possible ways of delineating the privilege and reconciling the contradictions arising from the cases, but proffers little basis for drawing any definitive conclusions in relation to specimens taken in drink- and drug- driving cases. Before attempting to do that, the statutory provisions on requiring specimens fall to be explained.

THE STATUTORY PROVISIONS ON PROVIDING SPECIMENS

The provisions of the Road Traffic Act (RTA) 1988 on police powers to require specimens of breath, blood or urine are set out in sections 7, 7A, 8 and 9,¹⁰⁷ and described in Chapter 1.¹⁰⁸ They are reviewed in rather more

¹⁰³ Andrew L-T Choo, “Give Us What You Have” – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right’ in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 251.

¹⁰⁴ In *Brown v Stott* when in the court below, quoted at [2003] 1 AC 681, 705.

¹⁰⁵ Above, p 141.

¹⁰⁶ Jonny Landau, ‘The Right Against Self-incrimination and the Right to Silence under Article 6’ (2007) 12 JR 261 [23].

¹⁰⁷ Reproduced in Appendix 1.

¹⁰⁸ See pp 11–13.

detail here to illustrate the nature and extent of the procedure for requiring specimens.

Preliminary Tests

Police officers have powers¹⁰⁹ to administer preliminary tests, usually at the roadside, to provide an indication whether a person is likely to have excess alcohol, or to be unfit to drive through drink or drugs. Preliminary testing is in the nature of screening, to eliminate those who are almost certainly not offending. There is no requirement for preliminary testing before evidential testing by way of breath, blood or urine specimens. The circumstances in which they may do so, and the three types of preliminary test, are set out in Chapter 1.¹¹⁰ It is an offence to fail without reasonable excuse to co-operate with a preliminary test.¹¹¹

Preliminary testing is incriminatory to the extent that, if the result is positive, it usually leads to further investigation. While the result of preliminary testing may not be used to establish whether or not an accused had committed an excess alcohol offence,¹¹² there are some circumstances in which the outcome of a preliminary test may work against a defendant in other ways. For example, where an accused sought to challenge the reliability of the evidential breath analysis device, the Divisional Court upheld the justices' rejection of his assertion that he had not consumed enough to be over the limit. In doing so, the court relied on, among other matters, the result of the roadside test.¹¹³

Evidential Specimens

Powers to require specimens of breath, blood or urine for use as evidence in prosecutions for drink- and drug-driving offences are contained in section 7 RTA 1988. The only precondition for making the requirement is that the officer is in the course of an investigation into whether the person in

¹⁰⁹ Under RTA 1988, ss 6, 6A, 6B and 6C.

¹¹⁰ See pp 10–11.

¹¹¹ RTA 1988, s 6(6).

¹¹² *Smith (Stephen John Henry) v DPP* [2007] EWHC 100 (Admin) (QBD).

¹¹³ *Williams (John Robert) v DPP* [2001] EWHC 932 (Admin) (DC).

question has committed an offence under section 3A,¹¹⁴ 4¹¹⁵ or 5¹¹⁶ 117 of the Road Traffic Act.¹¹⁸

Breath specimens

Under section 7(2) to (2D), breath specimens are to be provided only at a police station, a hospital, or (when roadside evidential breath testing comes into force)¹¹⁹ at or near the place where a roadside specimen has been required. Breath is to be analysed using an approved device. For the purpose of proving the proportion of alcohol in a person's breath, it is presumed that an approved device operates reliably,¹²⁰ but evidence that the device has correctly self-checked its calibration is necessary.¹²¹ The presumption is rebuttable.¹²²

In a so-called "borderline" case where breath analysis produces a reading of no more than 50¹²³ microgrammes of alcohol in 100 millilitres of breath, the person may claim that it be replaced by an alternative specimen of blood or urine. Although it now seems probable that this option will be withdrawn in the near future,¹²⁴ it was originally provided as a safeguard.

¹¹⁴ Causing death by careless driving when under the influence of drink or drugs.

¹¹⁵ Driving or in charge when under the influence of drink or drugs.

¹¹⁶ Driving or in charge with excess alcohol.

¹¹⁷ Or s 5A (driving or in charge with concentration of specified controlled drug above the specified limit) when in force; see pp 8–9.

¹¹⁸ RTA 1988, s 7(1), and s 7(1A) when in force; see pp 8–9. For cases interpreting the expression "in the course of an investigation", see *Graham v Albert* [1985] RTR 352 (DC); *Pearson v Commissioner of Police of the Metropolis* [1988] RTR 276 (DC); *DPP v Webb* [1988] RTR 374 (QBD) and *Hawes v DPP* [1993] RTR 116 (DC).

¹¹⁹ See p 12.

¹²⁰ *DPP v Brown*; *DPP v Teixeira* [2001] EWHC 931 (Admin) (QBD).

¹²¹ *Mayon v DPP* [1988] RTR 281; *Greenaway v DPP* [1994] RTR 17.

¹²² *Cracknell v Willis* [1988] AC 450 (HL). *R v Kingston upon Thames Justices ex p Khanna* [1986] RTR 364 (DC) and *Waite v Smith* [1986] Crim LR 405 (DC) are examples of the circumstances in which the presumption has been rebutted on the basis that there was no proof of proper calibration. See also *DPP v Spurrier* [2000] RTR 60 (QBD), where the driver's claim not to have drunk enough, exceptionally, succeeded. There are many examples of unsuccessful attempts to rebut the presumption; these include *Morgan v Lee* [1985] RTR 409 (DC) where the device did not produce a printout, *DPP v Hill* [1991] RTR 351 (DC) where the defendant claimed to have drunk only half a pint of beer, and *Hingley-Smith v DPP* [1997] EWHC 952 (Admin) where the driver's argument was based on the officer's record of the timing of the procedure.

¹²³ Against the limit of 35; see p 14.

¹²⁴ See p 13.

Debating what became the Transport Act 1981, introducing breath analysis for the first time, Lord Bellwin said in the House of Lords:

Because this is a new approach we have provided several safeguards for suspects. The most important of these will be the right to request a blood test to replace the result of a breath analysis if this has not exceeded 50 microgrammes.¹²⁵

The statute imposes no express obligation to tell a suspect who qualifies of the right to provide an alternative specimen, but there is an implied duty to do so.¹²⁶ Where the option arises, the officer has no power to *require* a blood or urine specimen, and where, in error, the officer made such a requirement instead of offering the option, the result of the blood analysis was not admissible in evidence.¹²⁷

When offering the option, the officer need not ask the suspect whether he or she prefers to give blood or urine. But the suspect must be told that the lower breath reading does not exceed 50 microgrammes of alcohol in 100 millilitres of breath. The suspect must understand that a blood specimen would be taken by a doctor, not by a police officer, and the option must be put in such a way that the suspect is not deprived of the opportunity to exercise it, or caused to exercise in a way he or she would not otherwise have done.¹²⁸

Where breath specimens are provided, the lower of the two analyses (if they differ¹²⁹) is used in evidence and the other is disregarded.¹³⁰ A person cannot be convicted on the basis of a single specimen.¹³¹

Blood and urine specimens

Considerations of speed, simplicity and cost all favour ascertaining body alcohol by analysing breath specimens, but there are circumstances in which this is not possible, and a specimen of blood or urine may be required instead. Those circumstances are:

¹²⁵ *Hansard* (HL) 7 May 1981 col 231 <<http://hansard.millbanksystems.com/lords/1981/may/07/transport-bill>> accessed 27 November 2013.

¹²⁶ *Anderton v Lythgoe* [1985] 1 WLR 222 (DC).

¹²⁷ *Wakeley v Hyams* [1987] RTR 49 (DC).

¹²⁸ *DPP v Jackson, Stanley v DPP* [1999] 1 AC 406 (HL).

¹²⁹ *R v Brentford Magistrates' Court ex p Clarke* [1987] RTR 205 (DC).

¹³⁰ RTA 1988, s 8(1) RTA.

¹³¹ *Cracknell v Willis* [1988] AC 450 (HL).

- the officer has reasonable cause to believe¹³² that there are medical reasons¹³³ why breath cannot be provided or should not be required;¹³⁴
- an approved device is not available or is not reliable,¹³⁵ or for any other reason it is not practicable¹³⁶ to use it;¹³⁷
- breath specimens have been analysed but the officer has reasonable cause to believe that a reliable indication of the alcohol concentration has not been produced;¹³⁸
- following a preliminary drug test, the officer has reasonable cause to believe that the person has a drug in his or her body.¹³⁹

There is no equivalent for drugs-testing of the evidential breath testing instruments, so that where drugs are suspected, a blood or urine specimen may be required at a police station, but only if, as a result of administering a preliminary drug test¹⁴⁰ the officer has reasonable cause to believe that the

¹³² On the interpretation of “reasonable cause to believe”, see *Dempsey v Catton* [1986] RTR 194 (QBD); *Horrocks v Binns* [1986] RTR 202 (DC); *Davis (Paul) v DPP* [1988] RTR 156 (DC); *White v Proudlock* [1988] RTR 163 (QBD); *Davies (Gordon) v DPP* [1989] RTR 391 (DC).

¹³³ For the meaning of “medical reasons” in this context, see *Webb (Deborah) v DPP* [1992] RTR 299 (DC); *Young (Paula) v DPP* [1992] RTR 328 (DC); *Steadman v DPP* [2002] EWHC 810 (Admin) (DC).

¹³⁴ RTA 1988, s 7(3)(a).

¹³⁵ On the meaning of “unreliable”, see *Morgan v Lee* [1985] RTR 409 (DC); *Slender v Boothby* [1986] RTR 385 (DC); *Waite v Smith* [1986] Crim LR 405 (DC); *Haghigat-Khou v Chambers* [1988] RTR 95 (DC).

¹³⁶ For the meaning of “not practicable”, see *Chief Constable of Avon & Somerset v Kelliher* [1987] RTR 305 (DC); *Rawal v DPP*, unreported, 21 March 2000 (DC).

¹³⁷ RTA 1988, s 7(3)(b). The wording of s 7(3)(b) does not include any reference to reasonable cause to believe that a device is (un)reliable, but the courts have ruled that such a requirement is implied: *Thompson v Thynne* [1986] RTR 293 (QBD). See also *DPP v Dixon* [1993] RTR 22 (DC); *Evans v DPP*, unreported, 9 May 1996 (DC); *Hague v DPP* [1997] RTR 146 (DC); *Kneale v DPP*, unreported, 15 May 2000 (DC); *Kelsey v DPP* [2008] EWHC 127 (Admin).

¹³⁸ RTA 1988, s 7(3)(bb). This provision is relevant where the device is operating correctly, but there is some reason to believe that the specimens are unsatisfactory with the result that the alcohol concentration indicated may be unreliable. Such matters would be detected and indicated by the device, and include an unacceptably wide difference between the two breath readings, an unacceptably high reading, the presence of an “interfering substance” such as acetone, and the presence of mouth alcohol. The meaning of “mouth alcohol” for these purposes is not without difficulty; see PM Callow, ‘The Drink-Drive Legislation and the Breath-Alcohol Cases’ [2009] Crim LR 707, and the cases discussed there. On the interpretation of this provision, see *DPP v Smith (Robert James)* [2000] RTR 341 (QBD); *Jubb v DPP* [2002] EWHC 2317 (Admin); *Stewart v DPP* [2003] EWHC 1323 (Admin); *Taylor v DPP* [2009] EWHC 2824 (Admin) (DC).

¹³⁹ RTA 1988, s 7(3)(bc).

¹⁴⁰ Under RTA 1988, s 6C; see above, p 11.

person has a drug in his or her body,¹⁴¹ or if a medical practitioner has advised that the person's condition might be due to a drug.¹⁴² Thus, there has to be something to suggest the presence of drugs. This is to protect a suspect from being required to provide a blood specimen where there is a medical explanation for the suspect's condition which excludes the influence of drugs.¹⁴³

The officer making the requirement must tell the suspect the reason why breath specimens cannot be taken or cannot be used. As in the case of the statutory option, the suspect must understand that a blood specimen would be taken by a doctor,¹⁴⁴ not by the officer. Failure to do so results in acquittal.¹⁴⁵

The investigating officer decides whether the alternative specimen is to be of blood or urine.¹⁴⁶ In making the decision, the officer has the "broadest of discretions"¹⁴⁷ and need not seek the view of the suspect.¹⁴⁸ This applies both when blood or urine specimens are required, and when the "statutory option" is exercised.

A blood specimen may not be required if the medical practitioner or health care professional who is asked to take it is of the opinion that, for medical reasons, it cannot or should not be taken, and, in the case of a registered health care professional, there is no contrary opinion from a medical practitioner.¹⁴⁹ In the case of suspected drug-driving, if there is

¹⁴¹ RTA 1988, s 7(3)(bc). On the interpretation of this requirement, see *Cole v DPP* [1988] RTR 224 (DC); *Bell v DPP*, unreported, 30 July 1997 (DC); *Angel v Chief Constable of South Yorkshire* [2010] EWHC 883 (Admin) (DC).

¹⁴² RTA 1988, s 7(3)(c). It has been proposed that registered healthcare professionals, as well as medical practitioners, should be empowered to provide such advice: Draft Deregulation Bill, Cm 8642, 2013, s 24, sch 9, paras 5, 6.

¹⁴³ *Angel v Chief Constable of South Yorkshire* [2010] EWHC 883 (Admin) (DC).

¹⁴⁴ Or, now, by a health care professional.

¹⁴⁵ *DPP v Jackson*; *Stanley v DPP* [1999] 1 AC 406 (HL).

¹⁴⁶ RTA 1988, s 7(4).

¹⁴⁷ *Joseph v DPP* [2003] EWHC 3078 (Admin) (DC).

¹⁴⁸ *DPP v Warren* [1993] AC 319 (HL). See also, on the exercise of the discretion, *Wyllie v CPS* [1988] Crim LR 753 (DC); *Hayes v DPP* [1994] RTR 163 (DC); *DPP v Garrett* [1995] RTR 302 (DC).

¹⁴⁹ RTA 1988, s 7(4A). For the interpretation of this section, see *Johnson v West Yorkshire Metropolitan Police* [1986] RTR 167 (DC); *Andrews v DPP* [1992] RTR 1 (DC); *DPP v Whyte* [1996] RTR 137 (QBD); *Wade v DPP* [1996] RTR 177 (DC); *DPP v Joiner* [1997] RTR 387 (DC); *Robinson (Dena) v DPP* [1997] RTR 403 (DC); *Gorman v DPP*; *DPP v Arnup* [1997] RTR 409 (DC); *R v Epping Justices ex p Qwy* [1998] RTR 158 (QBD); *DPP v Jackson*, *Stanley v DPP* [1999] 1 AC 406 (HL); *DPP v Gibbons* [2001] EWHC 385 (Admin); *Kinsella v DPP* [2002] EWHC 545 (Admin) (QBD); *Jubb v DPP* [2002] EWHC 2317 (Admin).

medical advice that a blood specimen cannot or should not be taken, it seems that a prosecution under the new s 5A would then be precluded since specified limits in urine are not in contemplation.¹⁵⁰ The only course open to an investigating officer in these circumstances would, it seems, be to require a urine specimen with a view to charging the section 4 offence of unfitness through drugs.

The suspect must consent¹⁵¹ to provide a specimen, or risk being prosecuted for failure to provide. In any proceedings, a blood specimen is to be disregarded unless taken with consent of the accused, and the specimen must be taken by a medical practitioner or a registered health care professional.¹⁵²

A urine specimen is to be provided within one hour of its being required and “after the provision of a previous specimen of urine”. Thus, it is the second of two specimens, provided within an hour of the requirement, which forms the basis of any prosecution; the first is discarded.¹⁵³ These requirements are designed to ensure the specimen analysed is fresh, so best reflecting the alcohol concentration in the body.

When requiring an evidential specimen, the officer must warn the suspect that failure to provide it will put the suspect at risk of prosecution.¹⁵⁴ If the officer does not administer the warning, any prosecution for failing to provide, as well as for a substantive drink- or drug-driving offence, is defeated.¹⁵⁵

Where a blood or urine specimen is provided, the suspect is entitled to ask for part of the specimen, which the suspect may decide to have independently analysed.¹⁵⁶ The suspect must ask for it; the officer is not obliged to offer it.¹⁵⁷ There is no requirement that the right to have part of

¹⁵⁰ Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013, para 10.6 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013; see p 207.

¹⁵¹ RTA 1988, s 11(4). On “consent” in this context, see *R v Palfrey*, *R v Sadler* [1970] 1 WLR 416 (CA (Crim)); *Hier v Read* [1978] RTR 114 (DC); *Persaud v DPP* [2010] EWHC 52 (Admin) (QBD).

¹⁵² RTOA 1988, s 15(4).

¹⁵³ RTA 1988, s 7(5). For cases on this provision, see *Prosser v Dickeson* [1982] RTR 96 (DC); *Over v Musker* [1985] RTR 84 (DC) and *Ryder v CPS* [2011] EWHC 4003 (Admin).

¹⁵⁴ RTA 1988, s 7(7).

¹⁵⁵ *Murray v DPP* [1993] RTR 209 (QBD); *DPP v Jackson*; *Stanley v DPP* [1999] 1 AC 406 (HL).

¹⁵⁶ RTOA 1988, s 15(5) and (5A).

¹⁵⁷ *Jones (Elaine) v CPS* [2003] EWHC 1729 (Admin).

the specimen be explained to the suspect, although the pro formas¹⁵⁸ used by police to guide them through the procedure in fact include the words, “you will be supplied with part of the specimen if you so require”. Under earlier versions of the legislation, by contrast, the investigating officer was obliged to offer part of the specimen to the suspect. In practice, those who supply blood or urine are still offered part of the specimen.

Persons Incapable of Consenting

The provisions¹⁵⁹ which authorise taking a blood specimen from a person who is incapable of consenting (usually because the person is unconscious) are particularly interesting in the context of self-incrimination.¹⁶⁰

The power arises where the person has been involved in an accident and police are investigating a drink- or drug-driving offence. The person must be someone from whom an officer could otherwise require a specimen, and the incapacity must be one which appears to the officer to be attributable to medical reasons. The specimen is not to be taken by a medical practitioner having responsibility for the clinical care of the person, and is, preferably, to be taken by a police medical practitioner.¹⁶¹ It is lawful for a medical practitioner to take a specimen pursuant to the section, although there is no obligation to do so. The medical practitioner may, presumably, decline to take the specimen if there are ethical objections.¹⁶² The specimen may not be laboratory tested unless the person from whom it was taken regains capacity and consents. Failure without reasonable excuse to give such consent is an offence, and the officer making the requirement for consent must warn the suspect of this.¹⁶³

¹⁵⁸ See p 14.

¹⁵⁹ In RTA 1988, s 7A.

¹⁶⁰ See p 157.

¹⁶¹ RTA 1988, s 7A(2).

¹⁶² The British Medical Association has issued guidance for doctors on taking blood specimens from incapacitated drivers: <<http://bma.org.uk/practical-support-at-work/ethics/ethics-a-to-z>> accessed 27 November 2013. It emphasises that clinical care and forensic procedures should be kept separate, and sets out basic preconditions for taking a specimen under these provisions.

¹⁶³ RTA 1988, s 7A(6).

Hospital Patients

There are also special provisions¹⁶⁴ relating to patients at hospital,¹⁶⁵ the effect of which is to give priority to care and treatment rather than to the investigative procedure. A patient at hospital is not to be required to undergo a preliminary test or provide a specimen unless the medical practitioner in immediate charge of the patient's case has been notified and does not object. The medical practitioner may object where the requirement, the provision of the specimen, or the giving of the warning of the consequences of failing to provide, would be prejudicial to the proper care and treatment of the patient. Where a blood specimen is required at a hospital, the usual requirement that the officer say why a breath specimen is not being required does not apply.¹⁶⁶ Otherwise, the usual requirements concerning the procedure appear to apply.¹⁶⁷

Failing without Reasonable Excuse

As explained above,¹⁶⁸ it is an offence if, without reasonable excuse, a person fails to co-operate with a preliminary test,¹⁶⁹ fails to provide evidential specimens,¹⁷⁰ or fails to give permission for the testing of a specimen taken while he or she was incapable of consenting.¹⁷¹

The definition of "reasonable excuse" has been noted¹⁷² and the interpretation of this expression¹⁷³ is relevant to the privilege against self-incrimination.

The following have been found not to amount to reasonable excuses:

¹⁶⁴ In RTA 1988, s 9.

¹⁶⁵ For the interpretation of the expression "patient at a hospital", see *Hollingsworth v Howard* [1974] RTR 58 (QBD); *Attorney-General's Reference (No 1 of 1976)* [1997] 1 WLR 646 (CA (Crim)); *Askew v DPP* [1988] RTR 303 (QBD); and *Webber v DPP* [1998] RTR 111 (DC).

¹⁶⁶ *R v Burton upon Trent JJ ex p Woolley* [1995] RTR 139 (DC); *Jones (Vivian) v DPP* [2004] EWHC 3165 (Admin) (DC).

¹⁶⁷ *Butler v DPP* [2001] RTR 28 (DC); *Townson v DPP* [2006] EWHC 2007 (Admin) (DC); *R v Bryan* [2008] EWCA Crim 1568.

¹⁶⁸ See pp 102–103.

¹⁶⁹ RTA 1988, s 6(6).

¹⁷⁰ RTA 1988, s 7(6).

¹⁷¹ RTA 1988, s 7A(6).

¹⁷² Above, pp 102–103: "[n]o excuse can be adjudged a reasonable one unless the person from whom the specimen is required is physically or mentally unable to provide it or the provision of the specimen would entail a substantial risk to his health." *R v Lennard* [1973] 1 WLR 483 (CA) 487.

¹⁷³ See pp 151–155.

- trying hard but failing to produce breath specimens, unless there is a physical or mental disability;¹⁷⁴
- personal beliefs and perceptions, even if genuine and/or mistaken, for example, a defendant's belief that he had not drunk enough to take him over the limit;¹⁷⁵
- conditional agreement to provide.¹⁷⁶ This includes agreeing to provide specimens after receiving legal advice,¹⁷⁷ unless, possibly, the investigating officer consents to delay the procedure for the purpose¹⁷⁸ or a solicitor is immediately available;¹⁷⁹
- being advised by a solicitor not to provide a specimen;¹⁸⁰
- being too drunk to understand the requirement;¹⁸¹
- having been unlawfully arrested;¹⁸²
- the three-minute time limit for providing each breath specimen not having been explained;¹⁸³

¹⁷⁴ *Grady v Pollard* [1988] RTR 316 (QBD).

¹⁷⁵ *Cracknell v Willis* [1988] AC 450 (HL) 468. See also, for example, *R v John* [1974] RTR 332 (CA (Crim)) (sincerely held personal belief which did not allow the subject to comply with the requirement); *McGrath v Vipas* [1984] RTR 58 (DC) (genuine but mistaken belief that the request for a breath specimen was invalid).

¹⁷⁶ *Solesbury v Pugh* [1969] 1 WLR 1114 (DC), where the suspect insisted the blood specimen be taken from his big toe; *Chief Constable of Avon & Somerset v O'Brien* [1987] RTR 182 (DC) where the defendant wished to see a doctor and a solicitor before providing specimens; *DPP v Smith (Alan Robert)* The Times 1 June 1993 (DC), where the defendant agreed to provide a blood specimen only if it was taken by his own doctor. See also *DPP v Skinner*; *DPP v Cornell* [1990] RTR 254 (QBD); *Salter v DPP* [1992] RTR 386 (DC); *DPP v Kirk*, The Times, 2 December 1992 (DC); *DPP v Varley* [1999] Crim LR 753 (DC); *Oberoï v DPP*, unreported, 23 November 1999 (QBD); *DPP v Noe* [2002] RTR 351 (DC); *Campbell v DPP* [2002] EWHC 1314 (Admin).

¹⁷⁷ *Francis v Chief Constable of Avon and Somerset* [1988] RTR 250 (DC) (where the delay was of five minutes only); *DPP v Billington* [1988] 1 WLR 535 (QBD) (the right to consult a solicitor does not afford a suspect a reasonable excuse for failing to provide).

¹⁷⁸ *Smith v Hand* [1986] RTR 265 (DC).

¹⁷⁹ *Kennedy v DPP* [2002] EWHC 2297 (Admin) (DC).

¹⁸⁰ *Dickinson v DPP* [1989] Crim LR 741 (QBD).

¹⁸¹ *DPP v Beech* [1992] RTR 239 (DC). It has, however, been suggested that the result might have been different had the suspect lapsed into a state of total unconsciousness: [1992] Crim LR 64, unattributed Case Comment. See also *Young (Paula) v DPP* [1992] RTR 328 (DC).

¹⁸² *Hartland v Alden* [1987] RTR 253 (DC); *Thomas v DPP* [1991] RTR 292 (QBD).

¹⁸³ *DPP v Coyle* [1996] RTR 287 (DC).

- the subject's awkward position in the back of a police car and his inability to see the lights on the screening device;¹⁸⁴
- emotional distress, unless severe enough to render the defendant mentally unable to provide a specimen or understand the requirement for it;¹⁸⁵
- fears and embarrassment about the process for providing specimens, unless amounting to a medically recognised phobia;¹⁸⁶
- a fear of contracting AIDS,¹⁸⁷ unless amounting to a phobia;¹⁸⁸
- where a suspect makes no effort to blow into the device, medical conditions of which he/she was unaware at the time.¹⁸⁹

By contrast, few cases result in a finding that there was a reasonable excuse for failing to provide. But the following have been accepted:

- fear of a needle such that the subject was truly incapacitated;¹⁹⁰
- failure to understand the procedure because of limited English;¹⁹¹
- distress amounting to mental inability to provide a specimen;¹⁹²
- distress and intoxication such that the defendant was physically incapable of providing;¹⁹³
- shortness of breath resulting from a panic attack;¹⁹⁴

¹⁸⁴ *Dawes v Taylor* [1986] RTR 81 (DC).

¹⁸⁵ *Spalding v Paine* [1985] Crim LR 673 (DC); *DPP v Pearman* [1992] RTR 407 (DC); *DPP v Meller* [2002] EWHC 733 (Admin).

¹⁸⁶ *Rowland v Thorpe* [1970] RTR 406 (QBD); *R v Harding* (1974) 59 Cr App R 153 (CA (Crim)); *Alcock v Read* [1980] RTR 71 (DC); *Sykes v White* [1983] RTR 419 (DC).

¹⁸⁷ *DPP v Fountain* [1988] RTR 385 (QBD), but see also [1988] Crim LR 123, Case Comment by DJB, suggesting that the court's conclusion may have been too wide.

¹⁸⁸ *De Freitas v DPP* [1993] RTR 98 (DC).

¹⁸⁹ *DPP v Furby* [2000] RTR 181 (QBD); *Martiner v DPP* [2004] EWHC 2484 (Admin); *Piggott v DPP* [2008] EWHC 305 (Admin) (DC).

¹⁹⁰ *R v Harding* (1974) 59 Cr App R 153 (CA (Crim)) 158. No fear short of a phobia recognised by medical science to be as strong and inhibiting as, for instance, claustrophobia, can be allowed to excuse failure to provide a blood specimen.

¹⁹¹ *Beck v Sager* [1979] RTR 475 (DC).

¹⁹² *Spalding v Paine* [1985] Crim LR 673 (DC).

¹⁹³ *DPP v Pearman* [1992] RTR 407 (DC).

¹⁹⁴ *DPP v Falzarano* [2001] RTR 14 (DC).

- a fear of contracting AIDS which amounted to a phobia.¹⁹⁵

If there is a genuine medical reason – bronchitis, asthma, a cold or flu, perhaps – it is likely to emerge early in the procedure. Subjects who do not produce breath specimens are asked whether there are any medical reasons why not.¹⁹⁶ If, from what the subject says, the investigating officer has reasonable cause to believe that there may be a medical reason why breath cannot be provided or should not be required, the officer may require a blood specimen instead.¹⁹⁷ Officers may also move on to blood if they have reasonable cause to believe there is a medical reason as a result of something other than what the subject says – for example, where the suspect has medication with him or her. Whether or not there is a medical reason is, at this stage, a matter for the officer alone; there is no need for medical advice.¹⁹⁸ The test is objective – it is enough that the subject proffers something, or the officer observes something, which may be a medical reason; the officer need not necessarily believe what a subject says to justify requiring a blood specimen instead of a breath specimen.¹⁹⁹ Officers can therefore err on the side of caution and proceed to require blood instead of breath if there is any suggestion of medical reasons which could amount to a reasonable excuse. The effect is to reduce the scope for claiming reasonable excuse.

Once a blood specimen is required in place of a breath specimen, any question whether there is a medical reason why such a specimen cannot or should not be taken is a matter for a medical practitioner.²⁰⁰

The procedure for requiring evidential specimens of breath, blood or urine is not an interview for the purposes of the Codes of Practice under the Police and Criminal Evidence Act 1984.²⁰¹ The provisions of Code C concerning interviews (on the procedure, records, and special provisions in relation to juveniles, the mentally ill and vulnerable persons) do not

¹⁹⁵ *De Freitas v DPP* [1993] RTR 98 (DC).

¹⁹⁶ Pro forma MG DD/A, version 5.2.1 December 2012, para A11 <<http://www.homeoffice.gov.uk/publications/police/road-traffic-documents/drink-drug-driving-forms/form-a-mgdd?view=Binary>> accessed 27 November 2013.

¹⁹⁷ Under RTA 1988, s 7(3)(a) – constable having reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required; see p 147.

¹⁹⁸ *Dempsey v Catton* [1986] RTR 194 (QBD).

¹⁹⁹ *White v Proudlock* [1988] RTR 163 (DC).

²⁰⁰ RTA 1988, s 7(4A).

²⁰¹ *DPP v Rous and Davis* [1992] RTR 246 (QBD), and PACE Code C 2013, para 11.1A, October 2013.

therefore apply. Because the procedure is not an interview, the subject has no right to delay the procedure until legal advice has been given. All that is required is that the defendant is permitted to consult a solicitor as soon as practicable. Nothing in the Act requires the police to delay taking a specimen in the meantime.²⁰²

DISCUSSION

That there is a connection between the privilege against self-incrimination and the requirement to provide specimens in drink- and drug-driving cases has long been clear. It is the exact nature of the connection, and its relevance for the theory of criminal law, which is elusive.

“Right” or “Privilege”

The use of the word “privilege” in relation to self-incrimination is distinctive, and does not appear to have been discussed in the literature. “Privilege” has been the traditional terminology in the jurisprudence of England and Wales. The ECtHR, when first recognising protection against self-incrimination in the case of *Funke*,²⁰³ referred to a *right*, only adopting the word “privilege” in later cases, inconsistently and without acknowledging or explaining the shift. It may be that the change in terminology reflects the court’s developing attitude as it has begun to delineate limitations on its initial formulation.

The *Oxford English Dictionary* defines “privilege” as:

a right, advantage, or immunity granted to or enjoyed ... beyond the usual rights or advantages of others; *specifically* (a) an exemption from a normal duty, liability, etc.; (b) enjoyment of some benefit (as wealth, education, standard of living, etc.) above the average or that deemed usual or necessary for a particular group (in pl. sometimes contrasted with rights).²⁰⁴

Although the definition opens with a reference to “right”, it concludes by noting that privileges are often contrasted with rights. It also refers to advantage and immunity, exemption and enjoyment of benefit – all of which suggest that what is being conferred by a privilege is something over and above that to which a person is ordinarily entitled; that it is some

²⁰² *DPP v Billington* [1988] 1 WLR 535 (QBD). See also the cases listed in fns 177, 178 and 179 above.

²⁰³ Above, p 123.

²⁰⁴ *Oxford English Dictionary Online* <<http://www.oed.com.eresources.shef.ac.uk/view/Entry/151624?rskey=Z7fR0&result=1&isAdvanced=false>> accessed 27 November 2013.

concession, something special, perhaps something that must be deserved, merited or earned, which can be conferred or withdrawn without, necessarily, applying consistent principles or, indeed, any principles at all.²⁰⁵ Based on this definition, the privilege against self-incrimination can perhaps be seen as something conferred on some suspects, but not on others, in some circumstances, but not all.

Existence Independent of the Will of the Suspect

The critical question arising from *Saunders*²⁰⁶ is whether breath, blood or urine specimens required in a drink- or drug-driving investigation engage the right against self-incrimination. The answer is by no means clear.

A number of preliminary points need to be made. First, *Saunders* concerned the use made, in a criminal trial, of statements obtained by government inspectors in exercise of statutory powers of compulsion, so that what the court said about the privilege against self-incrimination in relation to other procedures is, strictly, *obiter*. Second, the differences between the various types of specimen may be relevant – breath specimens are given and analysed quite differently from blood or urine specimens, and exist only for a few moments in a breath analysis device before being purged away. Blood and urine specimens, on the other hand, are taken and stored in phials which are then sent for laboratory analysis, and suspects have the opportunity to take away part of such a specimen²⁰⁷ for comparative analysis. Finally, none of these specimens has any kind of independent existence at all until a requirement to provide it is made and it is in fact provided. Until that point, the breath, blood or urine which may later constitute a specimen is an unidentified part of the air inhaled by the suspect, or of the suspect's body fluids.

It may be possible to sustain an argument that specimens produced in the course of a drink- or drug-driving investigation, once provided into an evidential breath analysis device or into phials for laboratory analysis, then exist independently of the will of the suspect, in the sense that (excluding any part specimen supplied to the suspect) they are then beyond the suspect's control. The critical question, however, may be whether or not they *come into* existence independently of the suspect's will. The court in *Saunders* referred

²⁰⁵ This may be in line with notions of diplomatic privilege, Parliamentary privilege and legal professional privilege, but it is beyond the scope of the present work to investigate these concepts.

²⁰⁶ *Saunders v United Kingdom* (1997) 23 EHRR 313, above, p 123.

²⁰⁷ Under RTOA 1988, s 15(5) and, in due course, (5A); see pp 149–150.

to the right not to incriminate oneself as presupposing that the prosecution would seek to prove a case:

without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.²⁰⁸

While evidence of excess alcohol or of drugs in the body cannot be obtained by physical force, it is obtained by compulsion. The consent of the suspect to the taking of a blood or urine specimen is required,²⁰⁹ yet a suspect has virtually no scope to decline to provide specimens of any kind without risking prosecution. This is because of the restricted interpretation of the term “without reasonable excuse” for failing to produce specimens,²¹⁰ and the ease with which an investigating officer can move from requiring a breath specimen to requiring a blood specimen, and from blood to urine.²¹¹ The pressure to co-operate is immense. The suspect is under threat of prosecution for failure to provide and must be told so. The suspect is in a police station undergoing an investigative procedure and must decide immediately whether or not to co-operate, without any right to delay matters to take legal advice.²¹² Although the suspect may be unaware of it at the time, the penalties for failing to provide are the same as for the principal offences, and include terms of imprisonment.

A specimen taken from a person incapable of consenting²¹³ is taken without so much as the person’s being aware of it, let alone consenting, and is surely taken against that person’s will, despite the fact that permission must be given before it is analysed.

It is submitted that these procedures amount at least to coercion, and the right against self-incrimination therefore seems to be breached in that the prosecution would be doing just what the court proscribed – seeking to prove the case by reference to evidence obtained by coercion.

The second part of the court’s formula for the prohibitions on what the prosecution may do to prove a case is that the evidence must not be obtained in defiance of the will of the accused. In a drink- or drug-driving case, this may well depend on the attitude of the individual suspect.

²⁰⁸ (1997) 23 EHRR 313 [68].

²⁰⁹ RTA 1988, s 11(4)(a).

²¹⁰ See pp 151–154.

²¹¹ See p 154.

²¹² See pp 152 (third bullet and fns 177, 178 and 179), 154–155.

²¹³ See p 150.

Certainly some suspects give specimens willingly, and would perhaps do so even in the absence of the pressure described above. After all, they may be cleared of suspicion. But many are surely unwilling. The case law is testimony to the many (largely unsuccessful) attempts to avoid providing specimens.²¹⁴ It seems unsatisfactory to conclude that the application of the privilege would depend on the will of the individual suspect, and that the unwilling should have the benefit, while the willing do not.

Having specified the manner in which the prosecution would seek to prove a case, the court in *Saunders* went on²¹⁵ to narrow the focus of the right, saying it is “primarily concerned” with the right to silence, before declaring that it does not extend to material which may be obtained through compulsory powers but which has an existence independent of the will of the suspect, giving the examples of documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing. This seems to raise a direct conflict with what the court said in the preceding paragraph of its judgment. The latter refers to evidence obtained by coercion or oppression, paragraph 69 to compulsory powers. The language used may suggest that “compulsory powers” are less draconian than coercion or oppression, but if there is a distinction, it would have been helpful if the court had said so and given a reason. Paragraph 69 introduces the idea of existence independent of the will of the subject, but does not specify the time at which the independent existence test is to be applied – before the requirement for the evidence is made, at the time the requirement is made, or after it has been made and complied with. Only in the last of these three situations would a drink-drive specimen meet the “independent existence” test so as to disapply the privilege.

The use of the word “primarily” in the phrase confining the privilege primarily to the right to silence clearly does not exclude other circumstances in which the right might apply, and in *Jalloh*, the ECtHR revisited the concept of material having an existence independent of the will of the suspect, finding that there could, after all, be circumstances where the privilege would apply to such material. Those circumstances, it will be recalled, were the high degree of force used, the violation of article 3 and the defiance of the applicant’s will in retrieving the evidence.²¹⁶ The only element of these circumstances which might apply in a drink- or drug-

²¹⁴ See, for example, pp 152–153 above, listing circumstances in which defendants have unsuccessfully sought to establish reasonable excuses for not providing specimens.

²¹⁵ (1997) 23 EHRR 313 [69].

²¹⁶ See p 127.

driving investigation is the defiance of the suspect's will in obtaining a specimen. That would probably not be enough to engage the privilege on the basis of *Jalloh*, but *Jalloh* does pave the way for further concessions.

Finally, it has been noted²¹⁷ that in *R v S*, Lord Judge referred to “a blood or urine sample provided by a car driver” as “a fact independent of the driver which may or may not reveal that his alcohol level exceeds the permitted maximum”. It really is extremely difficult to make sense of this reference. In the first place, a specimen is a specimen, not a fact. If it is the alcohol concentration – the result of analysis – which is the fact under discussion, it is very difficult to see how that either can be independent of the driver, given that the presence of alcohol or a drug is a direct consequence of what the driver has consumed.

The Method of Obtaining Evidence

The idea that it is the method by which evidence is obtained, not the nature of the evidence itself, which should be determinative of whether or not the privilege applies has been taken up in the literature.²¹⁸ The argument is²¹⁹ that the privilege should engage where the suspect is required to co-operate, and would not therefore apply if the evidence could be obtained by force, since that would not require co-operation. In a drink- or drug-driving investigation, co-operation is required and, although there is much pressure to comply, there is no question of using physical force, so that, on this argument, the privilege applies. Ashworth refines the argument to the point that the privilege should apply where a requirement to produce evidence, whether oral or real, operates as coercion on the mind of the subject.²²⁰ Elsewhere²²¹ it is said that the privilege is engaged when a suspect is under a legal duty to provide incriminating information, as where there is a legal sanction for failure to do so. Both these interpretations support a contention that breath, blood and urine specimens should be protected by the privilege.

²¹⁷ See pp 135–136.

²¹⁸ Above, pp 129–130.

²¹⁹ Andrew Ashworth, ‘Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?’ (2008) 30 *Cardozo LR* 751, 759.

²²⁰ See p 129.

²²¹ Mike Redmayne, ‘Rethinking the Privilege Against Self-Incrimination’ (2007) 27 *OJLS* 209, 217.

The Criteria in O’Halloran

In *O’Halloran*, it was said that three matters were relevant when determining whether the essence of the right to remain silent and the privilege against self-incrimination had been infringed:

- the nature and degree of compulsion used,
- any relevant procedural safeguards, and
- the use made of any material obtained.

It is worth examining these three criteria in some detail, to gauge the extent, if any, to which they suggest that the privilege should or should not apply in a drink- or drug-driving investigation.

In *O’Halloran*, the nature of the compulsion to name the drivers was that it was subject to the threat of a fine for failure to do so. The court justified this on the basis of the responsibilities accepted by those who drive, and in light of the limited nature of the information sought.²²² The degree of compulsion in a drink- or drug- driving investigation has been described above, and is clearly far greater than in the circumstances pertaining in *O’Halloran*, where a person receives a written request in the post, allowing time,²²³ should the recipient so wish, to take advice and reach a considered decision about how to react. Given the extent and immediacy of the pressure on a drink- or drug-drive suspect to provide a specimen, I contend that, on this first criterion in *O’Halloran*, the nature and degree of compulsion is such that the privilege should be in play.

Again in *O’Halloran*, the in-built safeguard was the provision that no offence would be committed if the person required to identify the driver could not with reasonable diligence have known who was driving. This was one of the factors which influenced the court in favour of finding that the privilege did not apply.²²⁴ In a drink- or drug-drive investigation, it may seem that there is a comparable safeguard in the reference to reasonable excuse in the offences of “failing without reasonable excuse” to provide specimens. As has been seen, this expression is narrowly construed, and in such a way that if a suspect actually has a reasonable excuse for not providing breath, then the investigating officer can usually require a blood or urine specimen instead. Once a blood specimen has been required, any proffered excuse may result in switching to a requirement for a urine specimen, or calling in a medical practitioner. If the medical practitioner is of the opinion that a blood specimen cannot or should not be taken for

²²² (2008) 46 EHRR 21 [57, 58].

²²³ Twenty-eight days from the date of service: RTA 1988, s 172(7).

²²⁴ (2008) 46 EHRR 21 [59].

medical reasons, again a urine specimen may be required instead.²²⁵ The circumstances in which it is not possible to require any form of specimen are very limited indeed. As has been seen, specimens can be obtained even from patients in hospital²²⁶ and from persons who are unable to give consent. The effect of all this is not only to limit the availability of the safeguard of reasonable excuse, but to increase the degree of coercion on the suspect.

There are other features of a drink- or drug-drive investigation aimed at protecting the interests of suspects, but none alleviates the risk of self-incrimination. Some concern the accuracy of the analysis of a specimen and can therefore be said to help prevent *false* self-incrimination, but they do not alleviate a suspect of having to incriminate himself or herself in the first place. Among these are:

- the statutory option;²²⁷
- the right of a suspect, upon request, to be given part of a blood or urine specimen;²²⁸
- the fact that it is the lower of two breath readings which is used in evidence;²²⁹
- the provisions requiring proof that the breath analysis device correctly self-checked its calibration;²³⁰
- the rebuttable presumption that a breath analysis device is reliable.²³¹

The right to be told that any blood specimen would be taken by a doctor,²³² or, in a statutory option case, that the breath reading does not exceed 50,²³³ do not bear on self-incrimination. Nor does the explanation, when requiring blood, of why breath cannot be taken or used.²³⁴ The requirement to warn of the consequences of failing to provide surely acts as

²²⁵ But not under the new s 5A; see p 207.

²²⁶ A urine specimen may be provided even where a catheter is in use: *Ryder v CPS* [2011] EWHC 4003 (Admin).

²²⁷ See p 145.

²²⁸ See pp 149–150.

²²⁹ See p 146.

²³⁰ See p 145.

²³¹ *Ibid.*

²³² See pp 146, 148.

²³³ See p 146.

²³⁴ See p 148.

pressure to provide evidence so, if anything, promoting self-incrimination rather than guarding against it.

Not only do the safeguards built into the procedure not assist in avoiding self-incrimination, but the usual safeguards in PACE do not apply at the stage when specimens are taken.²³⁵ Most notably, a suspect may not delay the procedure to take legal advice and so must make the decision whether or not to accede to the requirement for a specimen unaided and immediately. The absence of real procedural safeguards suggest that, on the basis of the second criterion in *O'Halloran*, the privilege should be engaged.

The third ground in *O'Halloran* upon which it was found that the privilege did not apply was the use to which the material was put. *O'Halloran's* statement that he had been driving was admissible in evidence; the prosecution had to prove the offence in the usual way, and the defendants were free to invoke ss 76 and 78 of PACE²³⁶ if appropriate.²³⁷ The identity of the driver was only one element in the offence of speeding, and there was no question of a conviction based solely on the information compulsorily obtained. The situation in a drink- or drug-drive case is similar. The analysis of the specimen is to be taken into account in any proceedings, and the statutory assumption that the alcohol level at the time of the offence was not less than in the specimen²³⁸ applies. Section 76 is not relevant, but section 78 can be called upon if appropriate. The results of analysing a specimen are only one part of the case as a whole; the prosecution must prove all the other elements of the offence – that the defendant was driving, attempting to drive or in charge of a motor vehicle or mechanically propelled vehicle on a road or other public place.

So far, then, on the basis of the third element in *O'Halloran*, the privilege should not apply to a drink- or drug-driving investigation. But there is a difficulty with the proposition that the identity of the driver in the *O'Halloran* situation, and the results of analysing a specimen in a drink- or drug- driving case, are merely one part of the case as a whole. They may be only one part, but they are critical, and without them, a prosecution would not get off the ground. It has been pointed out²³⁹ that, although the piece of information which the court in *Brown v Stott* said had a limited nature – the

²³⁵ As noted above, p 154.

²³⁶ See p 137, fn 81.

²³⁷ (2008) 46 EHRR 21 [60].

²³⁸ Under RTOA 1988, s 15(2), discussed at pp 105–111.

²³⁹ Malcolm Birdling, 'Self-incrimination Goes to Strasbourg: *O'Halloran* and *Francis v United Kingdom*' (2008) 12 E&P 58, 61.

identity of the driver only – in reality this detail often leads directly to the conviction of the compelled person. The dissenting judgment in *Weh*, quoted above,²⁴⁰ is to the same effect. So too in a drink- or drug-driving investigation, it is the analysis which is critical. Lord Bingham,²⁴¹ in *Brown v Stott* (when in the Court of Appeal), pointed out that the purpose of requiring the suspect to provide a breath specimen was to obtain evidence not otherwise available, and the reading could, in all but exceptional circumstances, be enough to convict a driver of an offence. All the remaining elements of the offence – driving, being in charge, and so on – are in themselves perfectly innocent. I contend that too much has been made of the fact that a single piece of information is in issue, and that its high evidential value should also be taken into account to bring these circumstances within the privilege.

Thus two of the considerations identified in *O'Halloran* would support an argument that the privilege should apply to the taking of specimens of drink- and drug-driving investigations, while the third, on the face of it, does not, although there is a good argument that, in fact, it should.

Other Criteria

A number of the formulations of the privilege also suggests that it should apply to a drink or drug-driving investigation.

The requirement to provide specimens clearly runs counter to the basic idea that the prosecution should prove its case without assistance from the defendant.²⁴² It has been suggested that there is no fundamental difference between relying on a suspect's words, which attract the privilege, and relying on the composition of a suspect's blood, which does not,²⁴³ or, likewise, between the drugs in *Jalloh* and a blood specimen.²⁴⁴ In a dissenting opinion in *Saunders*,²⁴⁵ it was questioned why the right against self-incrimination should protect a suspect from being coerced into making incriminating statements, but not from coercion to co-operate in providing

²⁴⁰ See p 126.

²⁴¹ Quoted at [2003] 1 AC 681, 705.

²⁴² Above, pp 124, 137.

²⁴³ Susan M Easton, 'Bodily Samples and the Privilege against Self-incrimination' [1991] Crim LR 18, 22.

²⁴⁴ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 152.

²⁴⁵ Judges Martens and Kuris [10].

other types of incriminating data (or specimens). In both instances the suspect is forced to bring about his own conviction.

The idea that the privilege protects suspects from cruel choices seems particularly apt in relation to drink- or drug-driving investigations. The suspect has the choice between providing a specimen which may result in exoneration or incrimination, and refusing to provide a specimen, so risking prosecution for failing to provide.

Based on *Funke* and *Heaney*, it has been said that where failure to provide information requested is a criminal offence in itself, liability for that offence violates the privilege.²⁴⁶ Choo²⁴⁷ likewise suggests that the privilege should mean that a person cannot be compelled, on pain of a criminal sanction, to provide information that could reasonably lead to, or increase the likelihood of, that person's prosecution for a criminal offence. While *Funke* and *Heaney* concerned documents, there seems no reason not to apply the same argument to a requirement to provide breath, blood or urine specimens, where again there are specific offences of failing without reasonable excuse to provide. The argument may be more compelling since the maximum penalties for failing to provide are the same as for the substantive offences.

The privilege has been said to protect individual privacy, freedom and dignity.²⁴⁸ Providing a sample of body fluid or even of breath seems to encroach on all three. Landau's argument²⁴⁹ that the more personal, onerous and intrusive the requirement, the greater the importance of the purpose required to justify it, seems apt.

Dennis²⁵⁰ canvasses the idea that there should be no compulsion to comply with procedures for the collection of evidence except where those procedures can be justified by reference to the need to secure reliable evidence which is probative of guilt, and the collection of such evidence is governed by procedures based on natural justice to individuals, or there are other safeguards in place aimed at ensuring that state power is exercised in

²⁴⁶ Andrew Ashworth, 'Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?' (2008) 30 *Cardozo LR* 751, 757.

²⁴⁷ Andrew L-T Choo, "'Give Us What You Have" – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart 2012) 240.

²⁴⁸ See pp 139–140.

²⁴⁹ Jonny Landau, 'The Right Against Self-incrimination and the Right to Silence under Article 6' (2007) 12 *JR* 261 [22].

²⁵⁰ Ian Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination' (1995) 54 *CLJ* 342, 373 *et seq.*

accordance with fundamental principles. If these criteria are met in drink- and drug-driving investigations, then it can be said that the privilege need not apply. Clearly there is a need to secure reliable evidence probative of guilt, but the whole burden of my thesis is that, in a drink- or drug-driving investigation, fundamental principles of law are set aside, and the conclusion must be that Dennis's proposed preconditions for dispensing with the privilege are not met.

Applying Ashworth's three tests²⁵¹ for allowing exceptions to the privilege also leads to the conclusion that the privilege should apply to drink- and drug-driving investigations. The first and most important test is that the suspect should have relatively little at stake, and certainly should not be at risk of imprisonment. Given the seriousness of conviction for a drink- or drug-driving offence, and the fact that imprisonment is available as a penalty,²⁵² this test is not met. On the other hand, the second criterion, that the suspect has chosen to participate in a particular social enterprise – driving – applies. On the face of it, the third test, that the suspect may be excused if without fault, may be met in that the legislation allows for reasonable excuse for failing to provide. It has been demonstrated, however, that in practice this excuse is difficult to make out, to the extent even that being advised by a solicitor not to provide specimens has been ruled not to be a reasonable excuse.²⁵³

A final point in favour of applying the privilege to the drink- and drug-driving offences may be the fact that evidence may not be available by any other means.²⁵⁴ Exceeding the prescribed limit can be proved only by analysing a specimen, and specimens are often critical to proving “in charge” offences.

The weight of the arguments is in favour of applying the privilege to drink- and drug-driving investigations. There is far less by way of justification for disapplying it. But it may be possible to do so on the basis that the purpose of the privilege is to avoid wrongful convictions. Analysing a specimen, assuming the analysis is accurate, will not lead to the conviction of someone who is innocent, but will instead exonerate such a person.

²⁵¹ Andrew Ashworth, ‘Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?’ (2008) 30 *Cardozo LR* 751, 770 *et seq*, above, p 142.

²⁵² See pp 2, 16.

²⁵³ *Dickinson v DPP* [1989] *Crim LR* 741 (QBD).

²⁵⁴ See p 141.

The distinction between material *per se* incriminating, and material which may prove incriminating only after analysis, has been noted above. Breath, blood and urine specimens may of course exonerate as well as inculpate a suspect, and this could be said to be a basis for upholding the non-application of the privilege. But the argument is unsatisfactorily circular: if the evidence exonerates the suspect, there is no question of incrimination in any event and so no reason why the privilege should be in play.

CONCLUSION

In the discussion above, I have sought to marshal the arguments for and against applying the privilege against self-incrimination to specimens of breath, blood and urine collected in drink- and drug-driving investigations. There is much to suggest that, in principle, the privilege should apply.

The difficulty with that conclusion is, of course, that it would defeat the very purpose of the legislation; an investigation would never get off the ground if a suspect could simply refuse to provide specimens because of the risk of self-incrimination. To avoid such a conclusion, it is necessary to recognise an exception to the privilege, and support it with convincing reasons. Such reasons are not difficult to find.

In a dissenting opinion in *Saunders*,²⁵⁵ it was said that national legislatures are in principle free to compel suspects to co-operate in, among other matters, breath and blood-testing for alcohol, on the basis that the general interest in bringing about the truth and in bringing culprits to justice is to take precedence over the privilege against self-incrimination. And in *Brown v Stott*, the Privy Council decided that the right against self-incrimination can be qualified to a limited extent if the limitation is reasonably directed towards a clear and proper public objective and is no more restrictive than the situation calls for.²⁵⁶ I contend that the general interest in detecting drug- and drink-driving and the road safety purposes underlying the legislation are clear and proper public objectives, and that the non-application of the privilege against self-incrimination is no more restrictive than the situation requires.

In *O'Halloran* the ECtHR also accepted that there may be derogations from the right not to incriminate oneself, and said that people who choose to drive are taken to accept certain responsibilities and obligations as part of

²⁵⁵ Judges Martens and Kuris [10]; see p 131.

²⁵⁶ *Brown v Stott* [2003] 1 AC 681 (PC) 704; see p 135.

the regulatory regime. Although the court used these as reasons for not applying the privilege, the better interpretation, in my view, is that of Ashworth,²⁵⁷ that this is a situation which should be considered an exception to the privilege, given the clear regulatory regime of licensing, registration, number plates and the like, which vehicle owners voluntarily accept.

In *Brown v Gallacher*,²⁵⁸ the High Court of Justiciary found that the taking of breath specimens was not protected by the privilege, but, *obiter*, offered grounds for making an exception if it was. The court said that the degree of compulsion implied by liability to prosecution for failing to comply was not disproportionate, having regard to the aim of the legislation, the fact that the requirement could be made only of people who had already failed a breath test, and the level of penalty if convicted of failing to provide. The degree of compulsion is in fact high, as I have demonstrated, but that is not necessarily to say that it is out of proportion to the aims of the legislation. The other two points are less convincing. Although most suspects have failed a roadside breath test, there is no statutory requirement that such a test should be administered and so it not correct to say that a requirement for evidential specimens may be made only of those who have already failed a breath test. The reference to the penalty for failing to provide seems to be a suggestion that it is sufficiently low that an exception to the privilege could be made out, but in fact, as has been seen, the penalties for failing to provide are as high as for the substantive offences, and include imprisonment.

The case law and the literature concerning self-incrimination reveal a departure from principle which disadvantages defendants. My position is that we must acknowledge that departure, justifying it by reference to the road safety purposes underlying the legislation, and by reasoning that drivers must accept the road traffic regulatory regime in its totality, including an obligation to co-operate in a drink- or drug-driving investigation by providing specimens. I take up these arguments again in Chapter 10.²⁵⁹ I have also suggested that the use of the term “privilege” may be interpreted to mean that the prohibition on self-incrimination is not universal.²⁶⁰

²⁵⁷ See p 131.

²⁵⁸ [2002] SLT 1135 (HCJ); see p 134.

²⁵⁹ See pp 309–319.

²⁶⁰ See p 155.

THE DRINK- AND DRUG-DRIVING OFFENCES

I turn next to the difficult question of exactly what the prohibitions on drink- and drug-driving are, how they are understood by drivers, and the consequences for the principle of certainty in the law.

Chapter 5: The Principle of Certainty

INTRODUCTION

I have argued that, in many respects, the manner in which the drink- and drug-driving offences have been framed and interpreted is such that they do not meet the principles of law relating to strict liability, the presumption of innocence and the privilege against self-incrimination. The focus now moves to the idea of legal certainty in relation to these offences. Legal certainty has been interpreted and applied in many ways, and in a range of contexts, across both the criminal and the civil law, but has not before been considered in detail in relation to the drink- and drug-driving offences. It raises a special challenge, in relation at least to the prescribed alcohol limit, and perhaps also in relation to unfitness to drive and the proposed drug-driving limits. Despite strong arguments that the law should be ascertainable by, and comprehensible to, those to whom it applies, there is much to suggest that many drivers are profoundly ignorant of the details of the prohibitions.

In this chapter, I examine the relevant literature and case law, before moving on to explain, in Chapter 6, the scientific background underlying the statutory provisions on drink- and drug-driving. Chapter 7 is devoted to drivers' perspectives and raises the important question of the extent to which the drink-drive limit is misunderstood. I go on to describe, in Chapter 8, my own study of this question, before concluding (in Chapter 9) that this may be a case of the wrong kind of certainty.

FORESEEABILITY

The principle of certainty arises in all areas of law,¹ but the focus here is the criminal law. Probably the most important aspect of certainty in the context of driving when unfit or when over the limit is the question of the

¹ For recent discussions, see, for example, Jonathan Morgan, 'A Victory for "Justice" over Commercial Certainty' (2007) 66 CLJ 263 (on the law of contract); Richard Williams, 'Bona Fide in the Interest of Certainty' (2007) 66 CLJ 500 (on company law); Gary Slapper, 'Penalties in the Penumbra of the Criminal Law' (2008) (72) JCL 467; Anton Ming-Zhi Gao, 'Increasing Legal Certainty in the European Strategic Environmental Assessment Directive' (2008) 97 Env LR 10; Marc Stauch, "'Material Contribution" as a Response to Causal Uncertainty: Time for a Rethink' (2009) 68 CLJ 27 (on negligence); Geraldine Morris, 'Seeking Certainty' (2011) 161 NLJ 99 (on nuptial agreements); Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 OJLS 61; Susan Bright, 'The Uncertainty of Certainty in Leases' (2012) 128 LQR 337 and Kevin K F Low, 'Certainty of Terms and Leases: Curiouser and Curiouser' (2012) 75 MLR 401.

foreseeability of breaking the law. What must an individual do, or not do, to avoid falling foul of the prohibitions?

The Literature

The rule of law

In an early defence of the principle of legal certainty, HWR Wade wrote that citizens must know that certain acts will lead to certain legal consequences, so they know what to do and what not to do. They should not have to rely on their own judgments to know whether or not a court would approve their actions. Law exists for security, confidence and freedom and must be invested with as much certainty and uniformity as possible.²

More recent authoritative texts place the principle of certainty at the heart of the rule of law, requiring that those under the control of the state be dealt with by fixed and knowable law. Citizens must be able to live within the law and one of the functions of the criminal law is to provide them with advance guidance on what not to do; they must have an opportunity to know the law before they can be convicted of breaking it.³

A person's ability to know of the existence and extent of a rule is fundamental. Rational citizens with social and political duties are entitled to fair warning of the provisions of the criminal law and no undue difficulty in ascertaining them.⁴

The citizen is entitled to know what actions are permissible and which are not.⁵ The task of the legislature is to create laws that are clear and accessible to those affected by them.⁶ In the context of a plea for clarity in the many laws controlling drugs, it is said that the criminal law should be consonant with common sense and perfectly clear to the public.⁷

² HWR Wade, 'The Concept of Legal Certainty: A Preliminary Skirmish' (1941) 4 MLR 183, 187, 189.

³ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 21, 26.

⁴ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 64.

⁵ Richard Buxton, 'The Human Rights Act and the Substantive Criminal Law' [2000] Crim LR 331, 332.

⁶ William Twining and David Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 211.

⁷ Gary Slapper, 'Clarity and the Criminal Law' (2006–7) 71 JCL 475.

Those about to commit a criminal wrong should be on stark notice that that is what they are about to do. Criminal laws should be clear, open, consistent, stable and prospective.⁸

In what is called the descriptivist approach to defining crimes,⁹ it is said that, to achieve clarity and certainty, the rules should, as far as possible, specify the proscribed conduct in purely descriptive terms, without reference to any underlying values or principles, to minimise the extent to which citizens have to call on their own normative standards to interpret and apply the law.

Raz summed it up in this way:

The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.¹⁰

The criminal law sets standards which must be communicated to the public and potential wrongdoers, in a language and form that is accessible and comprehensible to them.¹¹

Criminal convictions should not be surprises; people need reasonable opportunities to avoid them; the law must give fair warning, by defining the prohibited activity with sufficient certainty.¹²

In the specific context of road traffic offences, it has been said that if deterrence as an objective of criminalising specified behaviour is to be effective, a person must be able to identify the course of conduct the law seeks to prevent; in particular, drivers should, if they choose to drink before driving, familiarise themselves with the amount permitted under the current blood alcohol limit.¹³

⁸ John Gardner, 'Wrongs and Faults' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 69–70. See also Winnie Chan and AP Simester, 'Four Functions of Mens Rea' (2011) 70 CLJ 381, 392, suggesting that the demand for "stark notice" is too heavily weighted in favour of defendants.

⁹ RA Duff and Stuart P Green 'Introduction: The Special Part and its Problems' in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 10; contrast the moralistic approach, under which the aim is not only to make clear what conduct is prohibited, but to declare the wrong which underpins each offence (*ibid*, 13).

¹⁰ Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 214.

¹¹ CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 9.

¹² AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 199.

¹³ Sally Cunningham, *Driving Offences Law, Policy and Practice* (Ashgate 2008) 174.

Jeffrey Barnes¹⁴ recognises that certainty in legislation is problematic and contested. He examines a number of sources of doubt, but concludes in favour of the orthodox legal view that certainty is achievable but not in all situations.

In practical terms, too, certainty is desirable because it reduces recourse to the courts to interpret provisions. Uncertainty makes criminal trials unduly long and expensive, and unpredictable in outcome.¹⁵

In summary, certainty, uniformity, stability, clarity, accessibility and consistency are required. In Chapter 9, I argue that, while the prescribed limit for alcohol is expressed in precise scientific terms, it fails in uniformity, stability and consistency of application, and in clarity and accessibility to those to whom it applies. Unfitness to drive is also subject to the uncertainty that it is judged on the facts of each case, and so may not always be clear in advance.

Parliamentary draftsmanship

Underlying the need to know in advance that a certain action would or would not amount to a criminal offence is the manner in which statutory provisions are drafted in the first place. It has been said that the task of those who draft legislation is to give reliable expression to the will of Parliament in a manner that enables the public to perceive the parliamentary will with clarity, and order its future behaviour accordingly. The challenge for the draftsman is the tension between simplicity and clarity on the one hand, and certainty of meaning on the other.¹⁶

Another commentator asserts that:

a system of law is just and effective only if people know at least in outline by what laws they are bound, and are readily able to discover an authoritative text of those laws, *and can properly understand* the text once obtained (emphasis added).¹⁷

The Scottish Office of Parliamentary Counsel acknowledged a consensus that, despite the many inherent constraints, the law should be expressed in the simplest terms available and in a way which communicates

¹⁴ Jeffrey Barnes, 'Sources of Doubt and the Quest for Legal Certainty' (2008) 2 Leg 119.

¹⁵ Richard Buxton, 'The Human Rights Act and the Substantive Criminal Law' [2000] Crim LR 331, 332.

¹⁶ The Rt Hon Sir Patrick Mayhew, 'Can Legislation Ever be Simple, Clear and Certain?' [1990] Stat LR 1, 7.

¹⁷ Daniel Greenberg, 'The Volume and Complexity of United Kingdom Legislation Today' in *Halsbury's Laws of England Centenary Essays 2007* (LexisNexis 2007) 55.

directly and effectively with as much of its intended audience as possible.¹⁸ In another context (the definition of forms of *mens rea*), referring to the communicative enterprise of the criminal law, it has been said that citizens must be able to understand the nature of what the law declares to be a criminal offence, and “it is obvious that this will usually be conducted without the benefit of legal advice”.¹⁹ I argue in Chapter 9 that the prescribed limit is simple and clear only to those with special knowledge, and not to the general body of motorists.

In contrast with this body of opinion, it has been argued that a legislative text constitutes the law, and is intended to be read by lawyers. It is not a function of such a text to explain the law. Explanations should be sought elsewhere, and an individual may need legal advice to understand how a particular law applies to the individual. It is imperative that the law be clear *to the lawyer*.²⁰ In Chapter 9, I argue that this stance is not sustainable in relation to legislation applying to ordinary individuals.

The drift from principle

Many have rued the greater uncertainty accompanying the increasing volume of legislation in recent years.²¹ Examples include the difficulty of identifying whether or not property has been derived from criminal conduct for the purposes of money laundering legislation;²² the meaning of possessing articles for terrorist purposes;²³ and the question of who may be liable for the offence of selling alcohol to an under-age person.²⁴

In a sentencing case before the Court of Appeal, Lord Wall sympathised with the judge in the court below who had found it unacceptable in a society governed by the rule of law for it to be well nigh

¹⁸ Office of the Scottish Parliamentary Counsel, *Plain Language and Legislation* 2006, 17 <<http://www.scotland.gov.uk/Publications/2006/02/17093804/0>> accessed 27 November 2013.

¹⁹ Findlay Stark, ‘It’s Only Words: On Meaning and Mens Rea’ (2013) 72 CLJ 155, 163–164.

²⁰ Francis Bennion, ‘Confusion over Plain Language Law’ <<http://www.francisbennion.com/pdfs/fb/2007/2007-018-plain-language-actual-article.pdf>> accessed 27 November 2013. On the role of legal advice, see below, pp 187–188.

²¹ For example, JR Spencer, ‘The Drafting of Criminal Legislation: Need it be so Impenetrable?’ (2008) 67 CLJ 585.

²² Paul Marshall, ‘Part 7 of the Proceeds of Crime Act 2002: Double Criminality, Legal Certainty, Proportionality and Trouble Ahead’ (2003) 10 J of Financial Crime 111; Paul Marshall, ‘Risk and Legal Uncertainty under the Proceeds of Crime Act 2002 - The Result of Legislative Oversight’ (2004) 25 Comp Law 354.

²³ Graham Virgo, ‘Terrorism: Possession of Articles’ (2008) 67 CLJ 236, case comment on *R v Zafar and Others* [2008] EWCA Crim 184.

²⁴ Colin Manchester, ‘Sale of Alcohol to Children’ [2009] Crim LR 689.

impossible to discern from statutory provisions what a sentence meant in practice.²⁵

Among suggested reasons for increasing uncertainty are that too much law is made too quickly, with insufficient regard for the basic rules of the substantive criminal law, and the adoption of language which is unjustifiably complicated.²⁶ Haste in drafting provisions introduced as a matter of political expedience has also been cited as producing unexpected results.²⁷

While these views on the decline in certainty are not directly relevant to motoring offences, they are indicative of a general drift away from principle, which is discussed further in Chapter 10.²⁸

The Case Law

The principle of certainty has been acknowledged and developed in the case law of the Court of Justice of the European Union, the European Court of Human Rights and the domestic courts.

The Court of Justice of the European Union

The jurisprudence of the European Union bearing on certainty arises mainly in the contexts of contractual, fiscal and commercial law,²⁹ although a small number of cases bear on the criminal law.

The Court of Justice has ruled that legal clarity is imperative in any sector in which uncertainty may lead to particularly serious sanctions: *Fishing Quotas (Commission v UK)*,³⁰ where the sanctions consisted of penalties for fishing without a licence, and the uncertainty lay in the terms of such licences and the conditions under which they would be issued.

The same court reiterated the principle of certainty in its preliminary ruling in *R on the Application of International Association of Independent Tanker*

²⁵ *R (on the application of Noone) v Governor of Drake Hall Prison* [2008] EWCA Civ 1097 [60].

²⁶ JR Spencer, 'The Drafting of Criminal Legislation: Need it be so Impenetrable?' (2008) 67 CLJ 585. See also, on the impediments to simplicity and clarity inherent in the law-making process, Malcolm Gammie, 'Legislation for Business: Is It Fit for Public Consumption?' (1994) 15 Fiscal Studies 129; William Twining and David Miers, *How to Do Things with Rules* (5th edn, CUP 2010), Chapter 7.

²⁷ JR Spencer, 'Legislate in Haste, Repent at Leisure' (2010) 69 CLJ 19.

²⁸ See pp 307–308.

²⁹ See, for example, Trevor C Hartley, 'Five Forms of Uncertainty in European Community Law' (1996) 55 CLJ 265; Gerrit Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' (2002) 22 OJLS 397; Trevor Hartley *The Foundations of European Community Law* (7th edn, OUP 2010) 160; Juha Raitio, 'Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law' (2008) 2 Leg 1; Niamh Dunne, 'Margin Squeeze: From Broken Regulation to Legal Uncertainty' (2011) 70 CLJ 34.

³⁰ Case 32/79 [1980] ECR 2403 [46].

Owners & Others v Secretary of State for Transport.³¹ The question was whether criminal liability based on serious negligence, arising from an EU Directive,³² was compatible with the principle of legal certainty. It was argued that the Member States would be unlikely to implement the concept into national laws and apply it uniformly. The court found that, since the directive did not contain directly effective penal provisions, the requirement for certainty did not apply to it. It nevertheless acknowledged that rules (transposing community measures into national laws where appropriate) must be clear and precise so that individuals may ascertain unequivocally their rights and obligations. Legislation must clearly define offences and the penalties which they attract. The requirement of foreseeability may be satisfied, the court went on, even if the person concerned has to take expert advice to assess, to a degree that is reasonable in the circumstances, the consequences of a given activity. This was particularly true in relation to persons carrying on a professional activity, such as marine transport, who are used to having to proceed with a high degree of caution when pursuing their occupation.

The European Court of Human Rights

While it was once thought that the European Convention on Human Rights³³ would not have much direct effect on the substantive domestic criminal law,³⁴ the more recent case law suggests otherwise. The ability of a citizen to know in advance what behaviour would amount to a criminal offence has arisen in relation to a number of provisions of the Convention. The ECtHR has considered penal provisions to determine whether or not they are sufficiently precise to fall within the terms “in accordance with a procedure prescribed by law”,³⁵ “in accordance with the law”,³⁶ or “as

³¹ [2009] Env LR 14.

³² Council Directive 2005/35/EC of 7 September 2005 on Ship-source Pollution and on the Introduction of Penalties for Infringements [2005] OJ L225/11.

³³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI.1950 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

³⁴ See, for example, Richard Buxton, ‘The Human Rights Act and the Substantive Criminal Law’ [2000] Crim LR 331.

³⁵ Article 5, on the right to liberty and security <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

³⁶ Article 8, on the right to respect for private and family life, *ibid.*

prescribed by law”.³⁷ These terms appear in the Convention in provisions limiting the power of states to interfere with the rights conferred. For example, a person may not be deprived of liberty except in defined cases and in accordance with a procedure prescribed by law. Other rights may not be interfered with except as prescribed by (or in accordance with) law, and then subject to further limitations.

The court considered the expression “prescribed by law” in *Sunday Times v United Kingdom*,³⁸ in the context of article 10(2), which provides that the right of freedom of expression in article 10(1) may be subject to restrictions as prescribed by law and as necessary in a democratic society. The ECtHR held that “prescribed by law” means that the law must be adequately accessible, in that the citizen must be able to have an indication of it that is adequate in the circumstances of the legal rules applicable to a given case. A norm cannot be regarded as “law” unless formulated with sufficient precision to enable the citizen to regulate his conduct.

The court again reviewed the words “prescribed by law” in *Kokkinakis v Greece*,³⁹ this time in relation to article 9, on the right to freedom of thought, conscience and religion. The case concerned a Jehovah’s Witness who had been arrested many times for the offence of proselytism. The offence was defined as any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion with the aim of undermining those beliefs in certain defined ways. The court found that the offence fell within the term “prescribed by law” in article 9. There was a body of settled national case law, supplementing the statutory provisions, which was accessible and enabled the complainant to regulate his conduct. The ECtHR also noted that the wording of many statutes is not absolutely precise. To avoid excessive rigidity and to keep pace with changing circumstances, many laws are couched in terms which are vague to some degree.

In *Steel v United Kingdom*,⁴⁰ demonstrators had been arrested and detained for acting in a manner said to have caused, or to have been likely to cause, a breach of the peace. The ECtHR considered whether their arrests and detention were lawful for the purposes of article 5(1) of the Convention (on the right to liberty). The applicants argued that the concept of breach of

³⁷ Articles 9, 10 and 11 on, respectively, freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association, *ibid.*

³⁸ (1979-80) 2 EHRR 245.

³⁹ (1994) 17 EHRR 397.

⁴⁰ (1999) 28 EHRR 603.

the peace and the attendant powers of arrest were insufficiently clear under English law. The court found, however, that the English courts have made clear that a breach of the peace is committed only when a person causes harm, or appears likely to cause harm, to persons or property, in such a way that the natural consequence would be to provoke others to violence. It was also clear that a person may be arrested for causing a breach of the peace, or where it is reasonably apprehended that the person is likely to cause a breach of the peace. These rules were sufficiently precise to meet the requirements of the Convention. They were also sufficiently clear to enable persons to foresee the circumstances in which they might be bound over, and that if they refused to be bound over, they would be committed to prison. The court also ruled that the binding-over orders themselves were sufficiently precise in their terms; the applicants were being asked to agree to refrain from causing further, similar, breaches of the peace.

The term “prescribed by law” was again before the ECtHR in *Hashman v United Kingdom*,⁴¹ when the court confirmed that the expression calls for foreseeability. The applicants disturbed a fox hunt. Magistrates found that their behaviour was *contra bonos mores*, that is, “wrong rather than right in the judgment of the majority of contemporary citizens”,⁴² and bound them over to keep the peace and be of good behaviour. The ECtHR accepted that their behaviour constituted an expression of opinion for the purposes of article 10, and that the measures taken against them interfered with the exercise of their right of freedom of expression. The question was whether the finding that they had behaved *contra bonos mores*, and the binding-over order, were “prescribed by law” so as to justify the interference. The court found that a norm could not be regarded as a “law” unless it was formulated with sufficient precision to enable citizens to regulate their conduct. Conduct which was “wrong rather than right in the judgment of the majority of contemporary citizens” was not described at all, and failed the certainty test. The court distinguished *Steel* on the basis that in the present case the binding-over order had a purely prospective effect and was not (as in *Steel*) based on a finding that there had been a breach of the peace.

More recently, other statutory provisions have been struck down by the ECtHR as too broadly drafted. *Liberty v United Kingdom*⁴³ concerned the Interception of Communications Act 1985. Section 3(2) gave the British authorities a virtually unlimited discretion to intercept communications

⁴¹ (2000) 30 EHRR 241.

⁴² *Hughes v Holley* (1988) 86 Cr App R 130 (DC) 139.

⁴³ (2009) 48 EHRR 1.

between the United Kingdom and overseas. Section 6 required the Home Secretary to make arrangements for safeguards against abuse of power in the operation of the section and in the dissemination and storage of intercepted material. Such arrangements had been made but had not been made public. The court found that the law did not indicate with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of the exercise of the discretion. In particular, no indication of the procedure for examining, sharing, storing and destroying intercepted material had been made public. That was not in accordance with the law and amounted to a breach of article 8 (on the right to privacy).

Section 44 of the Terrorism Act 2000 was another example of powers conferred in broad terms. It allowed senior police officers to authorise the stopping and searching of people in designated areas, if expedient for the prevention of acts of terrorism. There was no requirement for any kind of prior suspicion in individual cases; “hunch” or “professional intuition” was sufficient. The powers had been used extensively, sometimes with no obvious connection to terrorism. They eventually came before the ECtHR in *Gillan v United Kingdom*.⁴⁴ The court found that the broad discretion conferred on individual officers (in respect of both authorisations and actual stops) was not moderated by adequate legal safeguards to protect individuals against arbitrary interference; it was not in accordance with law and breached article 8. The court reiterated that the law must indicate with sufficient clarity the scope of a discretion and the manner of its exercise.⁴⁵

The domestic courts

Turning to the case law of the domestic courts, Lord Diplock said,⁴⁶ speaking of the construction of statutory provisions, that the acceptance of the rule of law requires that a citizen, before committing to a course of action, should be able to know the legal consequences which will flow from it. Where those consequences are regulated by statute, the source of that knowledge is what the statute says. In construing a statute, the court must give effect to what the words of the statute would reasonably be understood to mean by those whose conduct it regulates.

Certainty is also required in relation to common law offences. In *R v Misra, R v Srivastava*,⁴⁷ the question was whether the definition of

⁴⁴ (2010) 50 EHRR 45.

⁴⁵ [77].

⁴⁶ In *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) 638.

⁴⁷ [2004] EWCA Crim 2375.

manslaughter by gross negligence was sufficiently certain to comply with article 7 of the European Convention on Human Rights.⁴⁸ The court found that it was; the gross nature of the negligence which had to be shown to establish the offence embraced the obviousness of serious harm to the victim. The judgment highlights the long history of the link between justice and certainty, and provides a useful review of the case law,⁴⁹ including decisions that:

- an individual must be able to foresee the consequences of his actions, in particular to avoid incurring the sanction of the criminal law;⁵⁰
- rules binding the citizen must be ascertainable (or more realistically, ascertainable by a competent lawyer advising the citizen);⁵¹
- in criminal matters, clarity and certainty are important.⁵²

Following *Misra*, it was said that challenges based on lack of certainty pursuant to article 7 were less and less likely to succeed in the domestic courts in the light of a number of cases in which the certainty test has been found to be met.⁵³ The ECtHR's position has been described as leaving a "penumbra of uncertainty" surrounding its own principle of certainty,⁵⁴ and the case of *Uttley*⁵⁵ – where the House of Lords upheld a provision on penalties which was in force at the time of sentencing but not when the

⁴⁸ No punishment without law: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations." Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, <http://echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

⁴⁹ [32]–[33].

⁵⁰ *SW v United Kingdom* (1996) 21 EHRR 363 [44].

⁵¹ *Fothergill v Monarch Airlines* [1981] AC 251 (HL) 279.

⁵² *Warner v Commissioner of Police for the Metropolis* [1969] 2 AC 256 (HL) 296. There is nothing in the passage from which this remark is quoted to suggest that certainty is any less important in the civil law.

⁵³ Clare Barsby, DC Ormerod, 'Manslaughter: Manslaughter Through Gross Negligence – Whether Sufficient Certainty as to Ingredients of Offence' [2005] Crim LR 234, 237.

⁵⁴ Ben Emmerson and others, *Human Rights and Criminal Justice* (3rd edn, Sweet and Maxwell 2012) para 16–10.

⁵⁵ *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38.

offence was committed – has been said severely to curtail the protection afforded by article 7.⁵⁶

These predictions appeared to be borne out by the House of Lords in *R v Rimmington*, *R v Goldstein*,⁵⁷ another case concerning the definition of an offence, and whether or not it was sufficiently clear. Lord Bingham reiterated⁵⁸ that no one should be punished under a law unless the law is sufficiently clear and certain to enable the person to know what conduct is forbidden before doing it, and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. But the House of Lords rejected an argument that the common law offence of public nuisance did not meet the test of legal certainty because it was defined in terms which were too vague. The House reviewed the case law and concluded that the offence consists in doing an act not warranted by law, or omitting to discharge a legal duty, the effect of which was to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone. That definition was clear, precise, adequate and based on a rational discernible principle and so met the requirements for certainty and predictability.

On the other hand, the Court of Appeal was prepared to find an offence too widely defined in *R v Zafar and Others*,⁵⁹ which concerned the Terrorism Act 2000. Section 57 makes it an offence to possess an article in circumstances which give rise to a reasonable suspicion that possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. The Court held that the phrase “for a purpose connected with” was so imprecise as to give rise to uncertainty. If it was to have the certainty of meaning which the law requires, it had to be interpreted so as to require a direct connection between the object possessed and an act of terrorism. Section 57 was therefore to be read as making it an offence to possess an article in circumstances which give rise to a reasonable suspicion that the person “intends it to be used for the purpose of” the commission, preparation or instigation of an act of terrorism. Since that had not been made plain to the jury which convicted the appellants, their convictions were overturned.

⁵⁶ Simon Atrill, ‘Nulla Poena Sine Lege in Comparative Perspective: Retrospectivity under the ECHR and US Constitution’ [2005] PL 107, 127.

⁵⁷ [2005] UKHL 63.

⁵⁸ [33].

⁵⁹ [2008] EWCA Crim 184.

Finally, in relation to the offence of failing to provide specimens for analysis,⁶⁰ the Divisional Court said that:

The provisions of this legislation must, as has been said on numerous occasions, be interpreted so as to be easily applied in a common sense way by police officers and easily understood by defendants who may be subject to their requirements.⁶¹

It is not entirely clear whether these words refer to all the provisions on drink- and drug-driving, but the context seems to suggest that they do.

OTHER ASPECTS OF CERTAINTY

The cases described above give something of the flavour of the provisions which the courts have scrutinised for certainty. A number of other aspects of the principle of certainty emerge from the literature and the case law. They are mentioned here for the sake of completeness, but are not examined in detail unless pertinent to the drink- and drug-driving offences.

Accessibility

At its simplest, perhaps, the principle of certainty requires that the texts of legislation should be readily accessible.⁶² The higher courts have had to grapple with this practical issue.

In *R (L and Another) v Secretary of State for the Home Department*,⁶³ the Court of Appeal held that it is an aspect of the rule of law that individuals and those advising them should have access to the law in authentic form, since they are presumed to know the law. The case concerned section 115 of the Nationality, Immigration and Asylum Act 2002. The Act had received Royal Assent on 7 November 2002 and was brought into immediate effect, but was not published by the Queen's Printer until 28 November 2002. Asylum claims were dealt with between those two dates, and the question was whether the Home Secretary was entitled to invoke section 115 at a time when the Act could not be read or its contents known with certainty.

⁶⁰ Contrary to RTA 1988, s 7(6); see also pp 102–105 and 151–155.

⁶¹ *DPP v Darwen* [2007] EWHC 337 (Admin) (DC) [19].

⁶² See, for example, Robert A Duperron, 'Interpretation Acts – Impediments to Legal Certainty and Access to the Law' (2005) 26 Stat LR 26; Andrew Ashworth, 'Ignorance of the Criminal Law and Duties to Avoid it' (2011) 74 MLR 1, 21.

⁶³ [2003] EWCA Civ 25.

The court found that the applicants' ignorance of the effects of section 115 might have caused them injustice, but the availability to them of judicial review remedied any such injustice. While this conclusion may appear somewhat contrived, a different approach might have been taken if the problem of the non-availability of the provisions in question had not been remedied by publication.

In *R v Chambers*,⁶⁴ a case concerning excise duty, the prosecutor was unaware that the relevant regulations had been amended, because of a defect in the website of the Office of Public Sector Information. The prosecutor had in turn given erroneous information to the court. This came to light only at the last minute. The Divisional Court acknowledged the maxim that ignorance of the law is no excuse,⁶⁵ but found it profoundly unsatisfactory that the law had not been accessible. It recognised progress in the development of the Statute Law Database,⁶⁶ but considered the inaccessibility of the relevant legislation was a problem of substantial constitutional importance.⁶⁷

In these two cases, the non-availability of the texts of legislation caused serious problems, but in both the courts found a way to rescue the elusive provisions. In *R*, the availability of judicial review was relied on, while in *Chambers*, an adjournment for further argument was granted. Although the drink- and drug- driving provisions have a long statutory history, there have been many amendments over the years,⁶⁸ yet a comprehensive up-to-date text remains unavailable from official sources.

Offences Framed in Vague Terms

Certainty is compromised in offences defined by reference to broad terms such as reasonableness, which are not capable of precise definition in advance. Simester and Sullivan⁶⁹ give as an example the offence of driving without due care and attention. A person drives without due care and

⁶⁴ [2008] EWCA Crim 2467.

⁶⁵ See below, p 188 *et seq.*

⁶⁶ www.statutelaw.gov.uk. – the official revised edition of the primary legislation of the United Kingdom. Now at <<http://www.legislation.gov.uk>> accessed 27 November 2013.

⁶⁷ Statutory Instruments Act 1946, s 3(2) in fact affords a defence in proceedings for a contravention of a statutory instrument, if the defendant can show that the instrument had not been published at the date of the alleged contravention, or that reasonable steps to bring it to the notice of the public, or to persons likely to be affected by it, have not been taken.

⁶⁸ See the footnotes to Appendix 1.

⁶⁹ AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 29.

attention if (and only if) the manner of driving falls below what would be expected of a competent and careful driver.⁷⁰ Drivers must do their best to drive competently and carefully, but if something goes wrong, a court will decide, after the event, whether the standard of driving fell below that required. Broad terms referring to the quality of behaviour may compromise certainty, but they do allow for flexibility. They may be acceptable in respect of driving where it would be virtually impossible to list in a statute every variety and nuance of incompetence and carelessness when driving.⁷¹

Ashworth and Horder likewise acknowledge that unless the law occasionally adopts terms such as “reasonable” and “dishonest”, which are open to differing interpretations, statutory provisions would have to be longer and more detailed than is practicable.⁷²

It has been argued that legislating by reference to legal standards, norms or principles,⁷³ rather than by laying down detailed rules, may make for greater certainty in some circumstances. There is a considerable body of scholarship on the differences and relationships between principles and rules,⁷⁴ and it is beyond the scope of this work to examine that literature in any detail. The offences of unfitness to drive, however, are (like driving without due care and attention, mentioned above) examples of laws incorporating a principle – the standard of (un)fitness – and individual cases are then interpreted by applying that principle. The prescribed limit,⁷⁵ on the other hand, is a fixed rule. I argue in Chapter 9⁷⁶ that in these examples, at least, greater certainty attaches to unfitness to drive than to the prescribed limit. The latter, I will suggest, embodies “the wrong kind of certainty”.

⁷⁰ RTA 1988, s 3ZA.

⁷¹ See also, on the interpretation of the standard of due care and its relationship to the need for certainty, HLA Hart *The Concept of Law* (3rd edn, OUP 2012) 132.

⁷² Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 65.

⁷³ Such as that in Children Act 1989, s 1, providing that the welfare of the child is to be the court’s paramount consideration when dealing with a child’s upbringing or property.

⁷⁴ For example, William Twining and David Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 81–88, 111; Christopher J Newman and Ben Middleton, ‘Any Excuse for Certainty: English Perspectives on the Defence of “Reasonable Excuse”’ (2010) 74 JCL 472.

⁷⁵ Or, when RTA 1988, s 5A is in force (see pp 8–9), a specified limit.

⁷⁶ See pp 290–294.

No Crime Without Law

The principle of legal certainty is closely linked to the concept of *nullum crimen sine lege*, or no crime without law, sometimes also called the principle of legality or of non-retroactivity. A person is not to be convicted of a criminal offence unless the person has done something which constitutes a crime. Nor should legal measures be retroactive, in the sense that conduct which did not constitute an offence at the time should not attract censure even if it is later made an offence.⁷⁷ While the question of non-retroactivity is a significant aspect of the principle of certainty, it is not relevant to the drug- and drink-driving offences, and is not pursued further.

The Thin Ice Principle

Allied to the concept of foreseeability is the “thin ice” principle.⁷⁸ The proposition is that those who know that what they do is on the borderline of illegality take the risk that their actions will later be held to be criminal. The origin of the principle is the case of *Knulier v DPP*,⁷⁹ which concerned the offence of conspiracy to corrupt public morals and outrage public decency. Lord Morris said that he knew of no procedure under which someone could be told with precision just how far he might go before incurring liability. Those who skate on thin ice can hardly expect to find a sign denoting the precise spot where they may fall in.

Ashworth and Horder have little sympathy with the suggestion that the courts might rely on this principle to extend the criminal law,⁸⁰ but recognise that the ECtHR has left some scope for so doing by virtue of its decision in *SW v United Kingdom*.⁸¹

Duff suggests that the thin ice principle may extend beyond the question of the boundaries of offences, to acts constituting the commission of offences. He proposes that the offence of driving with excess alcohol promotes certainty and consistency in that the limit is defined. While it may be difficult to know the point at which another drink would put a person over the limit, the thin ice principle is engaged – once a person starts to

⁷⁷ See, for example, AP Simester and others, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 22.

⁷⁸ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 62.

⁷⁹ [1973] AC 435 (HL) 463.

⁸⁰ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 59.

⁸¹ (1996) 21 EHRR 363, where the ECtHR based its decision on the reasonable foreseeability of the development of the law. See p 187.

drink, the person is on thin ice and takes the risk of exceeding the limit.⁸² In Chapter 9, I challenge the suggestion that the offence of driving with excess alcohol promotes certainty, but agree that the “thin ice” principle is a useful tool in seeking to justify the deficit of certainty.

The Doctrine of Precedent

The principle of legal certainty also underlies the doctrine of precedent or *stare decisis*. Pursuant to the doctrine, courts follow the decisions of higher courts, and the High Court, the Court of Appeal and the Supreme Court consider themselves bound, subject to certain exceptions, by their own decisions.⁸³ In its 1966 Practice Statement on judicial precedent, the House of Lords recognised that the use of precedent provides a degree of certainty upon which individuals can rely in conducting their affairs. While the House would depart from one of its own previous decisions if it appeared right to do so, the special need for certainty in the criminal law was acknowledged.⁸⁴

Certainty as a Procedural Notion

Berteau⁸⁵ acknowledges the traditional theory of certainty as described above, but suggests that it applies not only to the terms in which the law is expressed, but to the procedure for law-making, enforcement, interpretation, and decision-making. It is, on this argument, primarily a procedural notion and these procedures should be pre-determined. By way of example, he suggests that a process leading to job allocation may be regarded as certain if the steps involved and the criteria for selecting the successful candidate are known in advance; certainty is not about the contents of the process or its outcomes but about the process itself.

There is some support for this approach in that the ECtHR has held that legal certainty is an element of the right to a fair hearing. Where a judgment has become final, it should be accepted as final and should not be susceptible to an application for a rehearing (as opposed to a process of appeal to correct a judicial error or miscarriage of justice). In *Salov v Ukraine*,⁸⁶ the applicant had been charged with interfering with the exercise of citizens’ rights to vote. He was committed for trial, but some months later the district court adopted a resolution ordering an additional investigation as

⁸² RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 167 and fn 83.

⁸³ See, for example, Ormerod, *Smith and Hogan’s Cases & Materials* (10th edn, OUP 2009) 1.

⁸⁴ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (HL).

⁸⁵ Stefano Berteau, ‘Towards a New Paradigm of Legal Certainty’ (2008) 2 Leg 25.

⁸⁶ (2007) 45 EHRR 51.

there was no evidence upon which to base a conviction. A month later, that resolution was quashed by the regional court, and the district court went on to convict the applicant. The ECtHR held that the decision to set aside the resolution could be described as arbitrary and capable of undermining the fairness of the proceedings, and was in breach of the principle of legal certainty.

In Chapter 9,⁸⁷ I demonstrate that the concept of certainty as a procedural norm is borne out in the strict procedures for investigating and prosecuting the drink- and drug-driving offences.

THE LIMITATIONS ON CERTAINTY

While fundamental to the rule of law, the principle of certainty is complex, and its boundaries not always easy to identify. Some of the limitations to the principle have already been noted.⁸⁸ The expression “maximum certainty” has been adopted to suggest the elusiveness of absolute certainty.⁸⁹ The requirement is for sufficient, rather than absolute, certainty.⁹⁰

Impossibility of Legislating for All Situations

Wade⁹¹ recognised that certainty in drafting legislation is an ideal which is probably unattainable, because of the difficulty of legislating for every circumstance. Hart refers to the “penumbra of uncertainty” and to the open texture of the language of the law. He points out the impossibility of rules sufficiently detailed to provide in advance for all cases which may arise, and the inevitability of having, at some point, to choose between alternative interpretations.⁹² Likewise, Twining and Miers list, as one of several situations which gives rise to doubt, the application of a rule to a given factual situation.⁹³

⁸⁷ See pp 297–300.

⁸⁸ *Kokkinakis v Greece* (1994) 17 EHRR 397, p 176; *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, p 176; Jeffrey Barnes, ‘Sources of Doubt and the Quest for Legal Certainty’ (2008) 2 Leg 119, p 172.

⁸⁹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 62.

⁹⁰ *R v Misra, R v Srivastava* [2004] EWCA Crim 2375 [34].

⁹¹ HWR Wade, ‘The Concept of Legal Certainty: A Preliminary Skirmish’ (1941) 4 MLR 183, 194.

⁹² HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 123. See also, for example, Brian Flanagan, ‘Revisiting the Contribution of Literal Meaning to Legal Meaning’ (2010) 30 OJLS 255, 259.

⁹³ William Twining and David Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 177.

Popelier⁹⁴ points out that uncertainty is inherent in the legal order because the words used in a statute may be ambiguous and because, in drafting legislation, it is impossible to provide for every situation. Judicial interpretation is necessary to clarify doubt or to adapt provisions to changing circumstances. As society grows in complexity, more laws are required, covering new areas of regulation, and these laws are increasingly complex, make accessibility more difficult. Certainty may have to be balanced against other interests.

The ECtHR has recognised that the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.⁹⁵ The level of precision required of domestic legislation cannot provide for every eventuality and depends on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.⁹⁶

The ECtHR has also ruled that article 7 of the ECHR⁹⁷ cannot be read as outlawing the gradual clarification of law on criminal liability and the development of the criminal law through judicial interpretation, providing the development is consistent with the essence of the offence and sufficiently foreseeable.⁹⁸

The Role of Advice

It has been recognised that advice and/or interpretation may sometimes be needed to understand statutory provisions. It has been acknowledged, in principle, that the test of certainty is satisfied if an individual can know from the wording of the provision, and if need be, with the court's interpretation of it, what will make the individual liable.⁹⁹

⁹⁴ Patricia Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker' (2008) 2 Leg 47.

⁹⁵ *Kokkinakis v Greece* (1994) 17 EHRR 397 [40].

⁹⁶ *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241 [31].

⁹⁷ No punishment without law <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 November 2013.

⁹⁸ *R on the Application of International Association of Independent Tanker Owners & Others v Secretary of State for Transport* [2009] Env LR 14 [AG148].

⁹⁹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 63, quoting from *Kokkinakis v Greece* (1994) 17 EHRR 397.

The case law confirms the role of legal advice:¹⁰⁰

- the citizen must be able – with appropriate advice if necessary – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail;¹⁰¹
- legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him);¹⁰²
- the test of foreseeability may be satisfied even where expert advice is needed, as by persons carrying on a professional activity, such as marine transport, who are used to having to proceed with a high degree of caution when pursuing their occupation.¹⁰³

In Chapter 9,¹⁰⁴ I question whether it is appropriate, in relation to an everyday activity such as driving, that drivers should need professional advice on the law. I also question, in relation to the prescribed limit, whether most lawyers would be able to provide competent advice.

IGNORANCE OF THE LAW

As will be seen in later chapters, drivers are profoundly ignorant of the true nature of the offences of unfitness to drive through drink and drugs and driving with excess alcohol. The common law presumption is that ignorance of the law is no excuse for breaching it. Although widely acknowledged,¹⁰⁵ the rule has insecure foundations.¹⁰⁶ It may simply be that there is no generally accepted reason to suppose that knowledge is necessary, or that ignorance *should* provide a defence. Or it may be that if ignorance were to

¹⁰⁰ In support of the view that legal advice is necessary to appreciate the meaning of a statutory provision, see also Francis Bennion, ‘Confusion over Plain Language Law’ <<http://www.francisbennion.com/pdfs/fb/2007/2007-018-plain-language-actual-article.pdf>> accessed 27 November 2013, above, p 173.

¹⁰¹ *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 [49].

¹⁰² *Fothergill v Monarch Airlines* [1981] AC 251 (HL) 279.

¹⁰³ *R on the Application of International Association of Independent Tanker Owners & Others v Secretary of State for Transport* [2009] Env LR 14 [AG 147].

¹⁰⁴ See pp 301–303.

¹⁰⁵ See, for example, AP Simester and others, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (5th edn, Hart 2013) 103; *Rahman and Bilal v R* [2008] EWCA Crim 1465, “Ignorance of the law is no defence, but it can sometimes amount to mitigation” [43]; David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, OUP 2011) 141.

¹⁰⁶ Andrew Ashworth, ‘Ignorance of the Criminal Law, and Duties to Avoid it’ (2011) 74 MLR 1, 24.

be a defence, it would be too easy to invoke and too difficult to disprove, and there would be an incentive not to know.¹⁰⁷ The concept that ignorance of the law is no excuse has been called a “legal fiction”, most offenders having, at best, a limited knowledge of the law; its legitimacy depends on the simplicity and clarity of the law in question.¹⁰⁸

The maxim has been said to be based on the duty of citizens to inform themselves. Husak questions the existence of any such duty, saying that its nature and extent are obscure, and that it is not clear how a citizen would come to be aware of any such duty. Nor would breach of such a duty necessarily be blameworthy. He argues that ignorance of law should frequently be recognised as an excuse from criminal liability.¹⁰⁹

Ashworth¹¹⁰ agrees that it is unjust to convict people of crimes of which they are unaware, but argues that citizens should make a reasonable effort to find out what the law is. The basis for the proposition is a hypothetical contract arising out of the democratic process, under which the citizen agrees to the authority of the state in exchange for various benefits, including the provision of security. The hypothetical contract provides not only for the citizen’s duty to make reasonable efforts to ascertain the law, but a reciprocal duty on the state to provide information about the law. He cites the publicity given to the introduction of the offence of driving with excess alcohol as having enhanced law abidance. He says that motorists have a duty to familiarise themselves with obligations concerning offences of omission stated in the Highway Code. In formulating an argument in favour of a limited defence of ignorance of the law he highlights the difficulty that would arise where a person knows that his conduct is close to the borderline of crime but is unsure which side of the line it falls. He does not mention drivers who have taken drink or drugs, but clearly many could fall into this group, and on Ashworth’s argument, they would have the defence of reasonable ignorance. Elsewhere,¹¹¹ Ashworth and Horder suggest that ignorance and mistake of law might be less acceptable in a person engaging in an activity, such as driving a car, which is known to have changing rules.

¹⁰⁷ Douglas N Husak ‘Ignorance of Law and Duties of Citizenship’ (1994) 14 Legal Studies 105, 106.

¹⁰⁸ Michael Watson, ‘Ignorance of the Law is No Excuse’ (2006) 170 JPN 10.

¹⁰⁹ Douglas N Husak “Ignorance of Law and Duties of Citizenship” (1994) 14 Legal Studies 105, 107, 108.

¹¹⁰ Andrew Ashworth, ‘Ignorance of the Criminal Law, and Duties to Avoid it’ (2011) 74 MLR 1, 5. See also Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 218.

¹¹¹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 220.

The question of special responsibilities of those who drive, first raised in relation to reverse burdens of proof in Chapter 3,¹¹² is taken further in Chapter 10.¹¹³

Having set out the contours of the idea of legal certainty as delineated in the literature and the case law, I postpone further discussion of its relationship to the drug- and drink-driving offences until Chapter 9. The next three chapters demonstrate the extraordinary extent to which drivers are ignorant of the relevant law.

¹¹² See pp 85–86.

¹¹³ See pp 315–319.

Chapter 6: The Scientific Background and the Law

INTRODUCTION

In Chapter 5, I reviewed the principle of certainty in the law. Before moving on to relate that principle to the drug- and drink-driving offences, I further set the scene by explaining the scientific background to the offences which underpins the relevant law. This chapter therefore concerns the scientific and legal aspects of two concepts:

- unfitness to drive through drink or drugs (also known as impairment), and
- the prescribed alcohol limit.

These concepts are fundamental to the offences of driving, attempting to drive, or in charge when unfit through drink or drugs, or while over the prescribed limit.¹ They are also constituents of the offence of causing death by careless driving when unfit or over the limit.² The scientific basis for these two concepts, and the proposed specified limits for certain drugs³ are briefly described. The statutory definitions of unfitness and the prescribed limit, and their interpretation in the case law, are then reviewed. How these matters are in practice understood by drivers is the subject of later chapters.

THE SCIENTIFIC BACKGROUND

Unfitness to Drive

To drive safely, a driver needs to have effective and reliable control of the vehicle, capacity to respond to many external factors, together with a knowledge of the rules of the road and a willingness to follow them. Driving has been likened to a continuous loop in which information about the road, other drivers and the vehicle is processed by the brain, leading the driver to take action to adjust the speed and direction of the vehicle and to direct the eyes to likely danger areas. The results of these actions feed into a further round of adjustments. Timing is critical, as are visual and other perceptions

¹ Contrary to Road Traffic Act (RTA) 1988, ss 4, 5.

² RTA 1988, s 3A; see p 9.

³ Essential to the new offences under RTA 1988, s 5A; see pages 8–9.

which convey information about matters such as speed, the locations of vehicles and other obstacles, and the anticipated behaviour of others. Any condition that impairs perception, cognition (including alertness, attitude to risk, recall) or motor functions has the potential to interfere with the loop and thus impair driving. A wide range of matters can influence the functioning of the loop.⁴ For present purposes, the most significant are alcohol and drugs.

Alcohol

Effects

The chemical name for the alcohol in social beverages is ethyl alcohol or ethanol. It is a depressant drug, and its effects have been widely described.⁵

It is undisputed that alcohol impairs driving and may render a person unfit to drive. The pioneering Grand Rapids Survey conducted in the United States in the early 1960s was the first large-scale, detailed investigation of the relationship between alcohol and driving. It reported that, once blood alcohol concentration reaches the equivalent of half the current UK drink-drive limit, the risk of causing an accident increases compared with that of a driver who has taken no alcohol, and rises sharply as blood alcohol concentration rises.⁶ Later studies indicate that driving is impaired at well below the prescribed limit.⁷ There is no clear threshold

⁴ For the facts set out in this paragraph, see Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) 3–4.

⁵ See, for example, Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) 110–111; Vivian Emerson, ‘Alcohol Analysis’ in PC White (ed), *Crime Scene to Court: Essentials of Forensic Science* (2nd edn, Royal Society of Chemistry 2004) 351; Global Road Safety Partnership, *Drinking and Driving: A Road Safety Manual for Decision-makers and Practitioners* (2007) para 1.2.1.

⁶ RF Borkenstein and others, ‘The Role of the Drinking Driver in Traffic Accidents. The Grand Rapids Study’ (1974) 11 *Blutalkohol* 1, 101–104.

⁷ See, for example, H Moskowitz and CD Robinson, ‘Effects of Low Doses of Alcohol on Driving-related Skills: A Review of the Evidence’ (US National Highway Traffic Safety Administration 1988) <<http://ntl.bts.gov/lib/25000/25700/25752/DOT-HS-807-280.pdf>> accessed 27 November 2013; Barbara Sabey, *Road Safety: Back to the Future* (AA Foundation for Road Safety Research 1999) 5; H Moskowitz and others, ‘Driver Characteristics and Impairment at Various BACs’ (US National Highway Traffic Safety Administration 2000) <<http://ntl.bts.gov/lib/9000/9500/9512/impairment.pdf>> accessed 27 November 2013; RD Blomberg and others, ‘The Long Beach/Fort Lauderdale Relative Risk Study’ (2007) 40 *Jnl of Safety Research* 285; Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 18; Amanda Kiloran and others, *Review of Effectiveness of Laws Limiting Blood Alcohol Concentration Levels to Reduce Alcohol-related Road Injuries and Death* (Centre for Public Health Excellence NICE 2010) <<http://www.nice.org.uk/media/3fe/1a/bloodalcoholcontenteffectivenessreview.pdf>> accessed 27 November 2013, Chapter 3, containing a useful review of the literature on this point.

below which alcohol does not impair driving.⁸ There is strong evidence to suggest that ability to drive is affected by any amount of alcohol in the body, however small.⁹

Absorption and elimination

The rate at which alcohol is absorbed depends on a number of factors. When drunk on an empty stomach, it is usually absorbed more quickly than when accompanied by food. The alcohol concentration in the drink also affects the speed of absorption – the alcohol in drinks with an alcohol concentration of twenty per cent is absorbed most quickly. Carbonated drinks are absorbed more quickly than still drinks.

Alcohol is soluble in water but not in fat. Because women have a higher proportion of fatty tissue in their bodies than men, women require less alcohol than men to reach a particular blood alcohol concentration. Women also eliminate alcohol more quickly than men. For both men and women, blood alcohol concentration depends on size and body build, and previous exposure to alcohol.

Peak alcohol concentration may be reached while drinking continues, or after it ends. Elimination starts as soon as there is alcohol in the bloodstream, and a person may be absorbing and eliminating alcohol simultaneously. Alcohol is eliminated far more slowly than it is absorbed. The average hourly elimination rate is about fifteen mg in blood, but varies quite widely. Elimination is fairly constant until the concentration drops to about one quarter of the limit, but then slows, and alcohol may remain present in the blood the morning after a drinking session. Regular, heavier drinkers recover more quickly than others.¹⁰

⁸ EJD Ogden and H Moskowitz, 'Effects of alcohol and other drugs on driver performance' (2004) 5 *Traffic Injury Prevention* 185, 186; Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) 111; Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 3.29. On the effects of lack of sleep combined with alcohol, see JA Horne and others, *Interactions Between Sleepiness and Moderate Alcohol Intake in Drivers* (Department for Transport Road Safety Research Report no 62, 2006).

⁹ Amanda Kiloran and others, *Review of Effectiveness of Laws Limiting Blood Alcohol Concentration Levels to Reduce Alcohol-related Road Injuries and Death* (Centre for Public Health Excellence NICE 2010) 45.

¹⁰ The facts recited in these three paragraphs are based on Alex Paton, 'Alcohol in the Body' (2005) 330 *BMJ* 85 and a conversation with Dr Paul Williams, Head of Forensic Support, Lion Laboratories Ltd (the manufacturers of the Lion Intoxilyser evidential breath testing instruments) on 21 October 2013. See also, for example, Peter Marks, 'Blood Alcohol Level: The Law and Medicine' (1996) 64 *Medico-Legal Journal* 186, 187; Ronald C Denney, *None for the Road: Understanding Drink-Driving* (Shaw 1997) Ch 2; Vivian Emerson, 'Alcohol Analysis' in PC White (ed), *Crime Scene to Court: Essentials of Forensic Science* (2nd edn, Royal Society of Chemistry 2004) para 13.2; Global Road Safety Partnership, *Drinking and Driving: A Road Safety Manual for Decision-makers and Practitioners* (2007) Appendix 1.

The degree of impairment at a given blood alcohol concentration may be greater during the absorption phase than during elimination.¹¹

A blood alcohol concentration of 400 or more is commonly fatal.¹²

The length of time alcohol remains in the body is also influenced by the period of time over which the alcohol was consumed, the individual's age and any medication being taken.¹³

All these factors in turn affect the alcohol level found in a specimen of breath, blood or urine, and are well known to forensic scientists called upon to calculate blood alcohol concentration. Such calculations may include "back-calculating" to show that at the time of an offence the defendant's blood-alcohol was higher than shown by the specimen.¹⁴ Statistics on how frequently prosecutions are based on back-calculations are not available, but there are suggestions that it is rare. The *pro formas* used by investigating officers refer to back-calculation as a process employed in "serious or unusual cases",¹⁵ although these terms are not defined. Such calculations are practicable only where there is a substantial time interval between the end of pre-incident drinking and the incident itself; each case is to be treated on its own merits, based on the circumstances of the case; and the uncertainties of such calculations are emphasised.¹⁶ Prosecutors are advised to rely on such

¹¹ The "Mellanby Effect". See, for example, Min Qi Wang and others, 'Proprioceptive Responses under Rising and Falling BACs: A Test of the Mellanby Effect' (1993) 77 *Perceptual and Motor Skills* 83.

¹² The Times, 27 October 2011, 'After Cleaning up Her Act, Winehouse Drank Herself to Death in Final Binge', reported that the singer Amy Winehouse had a blood alcohol level of 416 at the time of her death in October 2011.

¹³ See, for example, NHS Choices, 'How Long does Alcohol Stay in Your Blood? (last reviewed 5/10/2011)' <<http://www.nhs.uk/chq/Pages/853.aspx?CategoryID=87&SubCategoryID=871>> accessed 27 November 2013.

¹⁴ See p 106. See also, for example, the Crown Prosecution Service's advice to prosecutors on the information needed to make such calculations: <http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_drink_driving/index.html#Post_Driving_Consumption> heading 'Information Required by the Expert'> accessed 27 November 2013. That information is: the weight, height, build, age and sex of the subject; details of any food consumed from six hours before the incident to the provision of the specimen; any known medical condition; details of any medication taken regularly, or within four hours prior to drinking; the type and quantity of alcohol consumed before the offence and, if possible, the times at which individual units of alcohol were consumed; the same information concerning any alcohol said to have been consumed after the incident but before providing a specimen.

¹⁵ Form MG DD/A, Drink/Drugs Station Procedure General, version 5.2.1 December 2012, para A31 <<http://www.homeoffice.gov.uk/publications/police/road-traffic-documents/drink-drug-driving-forms/form-a-mgdd?view=Binary>> accessed 15 April 2014.

¹⁶ Form MG DD/D, Alcohol Technical Defence Form, para D1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117040/form-d-mgdd.pdf> accessed 15 April 2014.

calculations only if they are “easily understood and clearly persuasive of the presence of excess alcohol at the time of the alleged offence”.¹⁷

In Chapters 7 and 8, I demonstrate that some drivers are aware of some or all the factors which bear on the absorption and elimination of alcohol, but that any such knowledge is too superficial to enable them to know whether, having consumed alcohol, they would be fit to drive or within the prescribed limit. In Chapter 9,¹⁸ I argue that the difficulty of understanding exactly how alcohol affects an individual is such that the prescribed limit fails the test for certainty in the law, described in Chapter 5. I also suggest that, since alcohol affects different people (notably men and women) in different ways, the prescribed limit is variable in its application, again offending the principle of certainty.

Drugs

Driving skills may be impaired not only by alcohol, but by drugs, by combinations of alcohol and drugs, or by combinations of different drugs. The Road Traffic Act defines a drug as including any intoxicant other than alcohol,¹⁹ while the dictionary definition is:

- a. ... a natural or synthetic substance used in the prevention or treatment of disease, a medicine; (also) a substance that has a physiological effect on a living organism.
- b. A substance with intoxicating, stimulant, or narcotic effects used for cultural, recreational, or other non-medicinal purposes.²⁰

Drugs can be divided into medicinal drugs, which are either prescribed by a medical practitioner or available over the counter (“OTC”), and recreational drugs, used for their narcotic or stimulant effects. Recreational drugs include legitimate substances such as nicotine and caffeine. Illegal drugs include heroin, cocaine, amphetamines, ecstasy (or MDMA²¹), LSD²² and cannabis. There is considerable overlap between them.²³

¹⁷ Crown Prosecution Service, *Drink Driving Offences, Post Driving Consumption and Back Calculations* <https://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_drink_driving/#a03> accessed 15 April 2014.

¹⁸ See pp 292–294.

¹⁹ RTA 1988, s 11(2).

²⁰ *Oxford English Dictionary Online* <<http://www.oed.com.eresources.shef.ac.uk/view/Entry/57982?rskey=2Mhrul&result=1#cid>> accessed 27 November 2013.

²¹ The scientific name is 3,4-methylenedioxy-n-methylamphetamine.

²² Lysergic acid diethylamide.

²³ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) figure 6.1.

The effects on driving of drugs other than alcohol have received much less attention than the effects of alcohol.²⁴ These other drugs affect driving skills in different ways and pose varying challenges for road safety. The mere presence of a drug in the body does not necessarily mean that the driver is impaired. Certain drugs may assist high risk drivers to be safer. These include drugs for those with epilepsy or diabetes.²⁵ For most drugs, there is no critical level above which impairment is present or below which no impairment can be demonstrated.²⁶ The House of Commons Transport Committee has recognised the complexity of the problem of drug-driving, arising from the increasing number of substances which may impair driving ability and the difficulty of detection and measurement.²⁷

The effects of drugs may include slower reaction times, erratic and aggressive behaviour, poor concentration, distorted perception, poor coordination, blurred visions, over-confidence leading to unnecessary risk-taking, nausea, hallucinations, panic attacks, paranoia, tremors, dizziness and fatigue.²⁸ The drugs (both legal and illegal) of greatest concern in relation to impairment of driving have been identified as opiates, amphetamines, methamphetamine, ecstasy, cocaine, benzodiazepines, cannabinoids (including cannabis) and methadone.²⁹

Medication

A recent study concerning prescription medications recognised that such drugs may both impair and improve driving, but acknowledged the lack of research in this area. As in the case of alcohol, the effects of medication depend on many factors, including the way the drug works, the driver's age, sex, general health and driving ability, the dose, whether or not the

²⁴ For a useful overview of the research which has been carried out, and the shortcomings, see J Michael Walsh and others, 'Drugs and Driving' (2004) 5 *Traffic Injury Prevention* 241.

²⁵ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 6.8.

²⁶ EJD Ogden and HM Moskowitz, 'Effects of alcohol and other drugs on driver performance' (2004) 5 *Traffic Injury Prevention* 185, 191, quoting G Starmer and others, 'A Coordinated Approach to the Drugs and Traffic Safety Problem' in DM Burley, Trevor Silverstone (eds), *Medicines and Road Safety* (CNS Publishers 1988).

²⁷ Transport Committee, *First Report, Drink and Drug Driving Law*, 2010, para 57 <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtran/460/46002.htm>> accessed 27 November 2013.

²⁸ NHS Choices, 'What Happens if I Take Drugs and Drive?' <<http://www.nhs.uk/chq/Pages/2387.aspx?CategoryID=87&SubCategoryID=871>> accessed 27 November 2013.

²⁹ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 6.35.

prescription instructions are followed accurately, and the time between taking the drugs and driving.³⁰

Products which affect the central nervous system and which interfere with cognition and arousal are most associated with impairment from the use of medication, whether prescribed or over-the-counter. Such impairment usually takes the form of drowsiness or detachment, sometimes with effects on coordination. A few agents impair visual performance, but interference with other aspects of driving performance is unusual.³¹ The medications most commonly associated with affecting driving skills are certain anti-epileptics, narcotic analgesics (painkillers), anti-depressants, bupropion (used as an aid to smoking cessation), anti-emetics, anticholinergics,³² antihistamines, antihypertensives, some benzodiazepines, certain stimulants, insulin, and certain medications containing atropine or hyoscine.³³

In the case of anti-depressants, there is reliable evidence that older types of drug impair driving performance, but there has been insufficient research into the effects on driving skills of newer drugs.³⁴

Benzodiazepines (most often in the form of temazepam) were the most frequently detected drugs in a survey of drivers suspected of driving when under the influence of drink and/or drugs in Scotland.³⁵

³⁰ T Vandrevalla and others, *Medication and Road Safety: A Scoping Study* (Department for Transport Road Safety Research Report no 116, 2010).

³¹ Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) 103 *et seq.*

³² Drugs used to counter the side-effects (usually “the shakes”) of certain medications given to those with schizophrenia, psychosis and other conditions, and to treat the symptoms of Parkinson’s disease and movement disorders: <http://www.candi.nhs.uk/_uploads/documents/medicines/medicines-ANTICHOLINERGICS.PDF> accessed 27 November 2013.

³³ Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) 104–106. See also J Michael Walsh and others, ‘Drugs and Driving’ (2004) 5 *Traffic Injury Prevention* 241, 245–6, identifying six groups of drugs which have so far been the focus of research for their effects on driving skills – benzodiazepines and related drugs; opioids; amphetamines, cocaine and other stimulant drugs; cannabis; antihistamines; and antidepressants; T Vandrevalla and others, *Medication and Road Safety: A Scoping Study* (Department for Transport Road Safety Research Report no 116, 2010) 9, identifying the following as most likely to impair driving: tricyclic antidepressants, benzodiazepine anxiolytics, neuroleptics and compounds used to treat Parkinson’s Disease. See also Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 6.44.

³⁴ JA Horne and PR Barrett, *Anti-Depressants and Road Safety: A Literature Review and Commentary* (Department for Transport Road Safety Research Report no 18, 2002).

³⁵ Alison Seymour and John S Oliver, ‘Role of Drugs and Alcohol in Impaired Drivers and Fatally Injured Drivers in the Strathclyde Police Region of Scotland, 1995–1998’ (1999) 103 *Forensic Science International* 89.

Over-the-counter drugs

It has been reported that over one hundred over-the-counter medicines contain ingredients (usually antihistamines) which may cause drowsiness. These include cough medicines and decongestants, anti-allergy medications, analgesics and anti-nausea preparations, and preparations to treat gastrointestinal disturbances. The warnings on the packaging, however, are inconsistent and often poorly presented. Further, the degree of impairment caused by the recommended doses of at least two over-the-counter drugs is greater than that caused by being over the prescribed alcohol limit for driving.³⁶

Illicit drugs

The illegal nature of many non-therapeutic drugs limits the scope for research. Cannabis is the most common of the illicit drugs found in drivers and victims of fatal road accidents.³⁷ It has been demonstrated that cannabis impairs driving skills.³⁸ Unlike users of other drugs, however, cannabis-users seem aware of the impairment and may compensate for it.³⁹ There is no way to measure the concentration of cannabis compounds to produce an estimate of cannabis-induced impairment of driving skills.⁴⁰

Different drugs have different impairing effects. Opiates give rise to a range of potential impairments. Stimulants sometimes appear to enhance certain skills, but it seems that the overall effect is detrimental. There is little

³⁶ JA Horne, PR Barrett, *Over-the-counter Medicines and the Potential for Unwanted Sleepiness: Assessment of Package Warnings* (Department for Transport Road Safety Research Report no 24, 2003).

³⁷ NJ Dye, L Ward, *Cannabis and Driving: A Review of the Literature and Commentary* (Department for Transport Road Safety Research Report no 12, 1999) Ch 1; RJ Tunbridge and others, *The Incidence of Drugs and Alcohol in Road Accident Fatalities* (Transport Research Laboratory Report 495, 2001) Table 2; PG Jackson and CJ Hilditch, *A Review of Evidence Related to Drug Driving in the UK: A Report Submitted to the North Review Team* (Department for Transport 2010) para 3.5. In relation to Scotland, see Alison Seymour and John S Oliver, 'Role of Drugs and Alcohol in Impaired Drivers and Fatally Injured Drivers in the Strathclyde Police Region of Scotland, 1995–1998' (1999) 103 *Forensic Science International* 89; Dave Ingram and others, *Recreational Drugs and Driving* (Scottish Executive, Research Findings no 102, 2001) Table 1.

³⁸ NJ Dye, L Ward, *Cannabis and Driving: A Review of the Literature and Commentary* (Department for Transport Road Safety Research Report no 12, 1999) Ch 11; JG Ramaekers and others, 'Marijuana, Alcohol and Actual Driving Performance' (2000) 15 *Human Psychopharmacology: Clinical and Experimental* 15; BF Sexton and others, *The Influence of Cannabis on Driving* (Transport Research Laboratory Report 477, 2000) 1.

³⁹ BF Sexton and others, *The Influence of Cannabis on Driving* (Transport Research Laboratory Report 477, 2000) 2; Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) 112.

⁴⁰ EJD Ogden and HM Moskowitz, 'Effects of Alcohol and Other Drugs on Driver Performance' (2004) 5 *Traffic Injury Prevention* 185, 193, quoting G Chesher and others, *The Interaction Between Alcohol and Marijuana* (Federal Office of Road Safety, Canberra, Report CR40, 1986).

evidence on the effects of hallucinogenic drugs, although the expectation is that they would seriously impair driving skills.⁴¹

Although the effects of drugs on driving are less well researched than those of alcohol, government is proceeding to introduce offences of driving, attempting to drive or in charge with an excess over a specified limit of certain controlled drugs. These are discussed later in this chapter.

Recognising and Proving Unfitness

Police officers who suspect that a person is unfit to drive – usually as a result of having seen the person driving badly – may carry out preliminary impairment testing.⁴² This comprises physical tests, usually at the roadside, such as asking the subject to stand on one leg, touch the tip of the nose, and walk in a straight line. These powers are available whether the officer suspects either alcohol or drugs, although in practice, if alcohol is suspected, a roadside screening test is preferred for its speed, simplicity and objectivity.⁴³ Officers also look for other indicators of impairment – dilated pupils, poor coordination or slurred speech.

There is a statutory power to conduct a preliminary drug test, either at the roadside or at a police station, on a specimen of sweat or saliva, by means of an approved device.⁴⁴

Proof of unfitness usually consists of evidence of the manner of driving and what took place at the roadside, the analysis of a blood specimen⁴⁵ to show that it contained alcohol or a drug, and, in the case of a drug, expert evidence that the drug was capable of affecting the ability to drive.

⁴¹ Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) 112.

⁴² Under RTA 1988, s 6B and Department for Transport *Code of Practice for Preliminary Impairment Tests 2004* <http://webarchive.nationalarchives.gov.uk/20080508201452/police.homeoffice.gov.uk/publications/operational-policing/code_of_practice_order.pdf> accessed 27 November 2013. Officers must be trained and approved to conduct such tests.

⁴³ In due course, roadside screening for drugs may be preferred to unfitness testing, when RTA 1988, s 5A (see below) comes into force, and subject to the development and approval of roadside drug screening devices. As at November 2013, no devices have been approved for roadside testing for drugs.

⁴⁴ RTA 1988, s 6C. At the time of writing (December 2013), one device has been approved for preliminary testing for drugs: the Draeger Drug Test 5000, which tests for THC, the main ingredient of cannabis. It is non-portable and is for use at police stations only. See the Preliminary Drug Testing Device Approval 2012.

⁴⁵ Provided pursuant to RTA 1988, s 7(3)(c). Before requiring a blood specimen for analysis, the officer must have been advised by a medical practitioner that the suspect's condition may be due to a drug; see p 148.

The procedure for requiring specimens of blood or urine is set out in the Road Traffic Act.⁴⁶ Police forces have packs containing the necessary equipment for taking both types of specimen. The specimen phials contain preservative to prevent bacterial activity which could raise or lower the alcohol content, while packs for blood specimens also contain anti-coagulant.⁴⁷

Blood specimens are analysed for the presence of alcohol or drugs in approved laboratories. When testing for drugs, in the absence of any information supplied with the specimen which might point to a particular drug, specimens are subjected to a standard set of tests which detect the commoner drugs. If the results are negative, it is at the discretion of the laboratory whether or not to test for other drugs.⁴⁸

There are many fewer prosecutions for unfitness to drive than for excess alcohol offences; in 2012, there were just under 2,500 charges of unfitness, compared with 49,000 charges of excess alcohol.⁴⁹

The Prescribed Limit for Alcohol

While a person may be unfit to drive through drink regardless of the amount of alcohol actually in the system, the prescribed limit is a fixed level. It is an offence to drive, attempt to drive or be in charge of a vehicle while above that limit.⁵⁰ Ability to drive properly is irrelevant.

The limit is set individually in respect of breath, blood or urine. In each case, the limit is expressed as a weight of alcohol in a 100 millilitre specimen – 35 microgrammes in breath, 80 milligrammes in blood and 107 milligrammes in urine.⁵¹ These three provisions are considered to be equivalent, although, at least in respect of equivalence between blood and

⁴⁶ RTA 1988, s 7, discussed at pp 144–151.

⁴⁷ See the notes to para B20 of standard form MG DD/B, 'Drink/Drugs Station Procedure: Specimens/Impairment Supplement', version 5.2.1, December 2012 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229617/MGDD_B_Ver_5_2_1_Dec_2012__2_.pdf> accessed 27 November 2013.

⁴⁸ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 6.74.

⁴⁹ Ministry of Justice, *Criminal Justice Statistics Quarterly - December 2012*, 30 May 2013, vol 6, Motoring, Table 6.1 <<https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>> accessed 27 November 2013.

⁵⁰ RTA 1988, s 5.

⁵¹ RTA 1988, s 11(2); see p 14.

breath, the matter is not without controversy.⁵² Blood and breath specimens are considered to provide more satisfactory indications of alcohol concentration than urine specimens.⁵³

Instruments of measurement

Proof of exceeding the prescribed limit may be by the analysis of breath, blood or urine. Breath is the most common, although blood or urine specimens are sometimes taken.⁵⁴ Breath specimens are taken using approved devices. Different devices are used for preliminary screening (usually at the roadside, to ascertain whether or not a person is likely to be over the limit), and then (at a police station⁵⁵) to obtain a reliable reading of the alcohol concentration in the breath for evidential purposes. Until recently, the devices used for preliminary screening were considered less accurate than the evidential breath testing devices used following arrest, although this may be less so in respect of those most recently developed. The Home Office's Centre for Applied Science and Technology is responsible for testing and approving devices.

A number of devices have been type approved for preliminary (or roadside) breath testing. These are hand-held devices designed to detect the presence and measure the concentration of alcohol. They provide an indication of the level of alcohol in the specimen by means of lights or an alphanumeric display. The results show in bands: zero, pass, air-fail,⁵⁶ warn⁵⁷ or fail, sometimes accompanied by a digital reading of alcohol

⁵² See, for example, Alan Wayne Jones, *The Relationship Between Blood Alcohol Concentration (BAC) and Breath Alcohol Concentration (BrAC): A Review of the Evidence* (Department for Transport Road Safety Web Publication 15, 2010, para 2.2 <<http://assets.dft.gov.uk/publications/research-and-statistical-reports/report15.pdf>> accessed 27 November 2013. See also Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) 8–9 and Recommendation 12.

⁵³ Because the urine in the bladder at the time it is passed reflects the average blood alcohol concentration over the period during which the urine was excreted by the kidneys into the bladder, rather than the blood alcohol concentration at the time of testing. See Vivian Emerson, 'Alcohol Analysis' in PC White (ed), *Crime Scene to Court: Essentials of Forensic Science* (2nd edn, Royal Society of Chemistry 2004) 356; Alan Wayne Jones, *The Relationship Between Blood Alcohol Concentration (BAC) and Breath Alcohol Concentration (BrAC): A Review of the Evidence* (Department for Transport Road Safety Web Publication 15, 2010, para 1 <<http://assets.dft.gov.uk/publications/research-and-statistical-reports/report15.pdf>> accessed 27 November 2013).

⁵⁴ See p 147 for the reasons.

⁵⁵ Until portable devices come into use, when evidential testing at the roadside or in a hospital will be possible; see p 12.

⁵⁶ For purposes of the lower limit (9 µg) applying to pilots under Railways and Transport Safety Act 2003, s 93.

⁵⁷ This represents a breath alcohol concentration of about 30µg.

concentration. Once ready for use, they allow between three and ten minutes for a satisfactory specimen to be provided.⁵⁸

There are three approved devices for evidential analysis of breath specimens: the Camic Datamaster, the Intoximeter EC/IR and the Lion Intoxilyzer 6000UK.⁵⁹ They accurately measure the concentration of alcohol in breath, and provide a result which can be used as evidence in drink-driving cases. They are non-portable and installed at police stations.⁶⁰ Once ready for use, the devices allow three minutes to perform the testing cycle in relation to each of two specimens. The cycle comprises a number of stages. The device first automatically purges the system and resets to zero, performs a calibration check and purges again, before taking and analysing a first specimen. A further purge takes place before the device receives and analyses a second specimen. There is a final purge and second calibration check, and a printout is produced. The printout shows the instrument identification number and its location, the date of the test, the name and date of birth of the subject, the detailed results of the test (which includes a record of the purges and calibration checks and the times at which each stage of the procedure took place), and the name of the operator. It concludes with a certificate, by the operator, to the effect that reading 1 relates to the first specimen of breath provided by the subject, and reading 2, to the second. There is provision for both the subject and operator to sign the printout. The two readings must be separated by no more than 15 per cent of the lower reading, or by 5µg in 100 ml breath, whichever is the greater, up to 200 µg in 100 ml; any greater difference gives rise to the possibility of error (in which case an alternative specimen may be taken; see below). If a second breath specimen is not performed, the instrument indicates that the cycle has not been completed. The instruments are designed to detect substances (such as acetone, certain cleaning fluids and

⁵⁸ Home Office and Forensic Science Service, *Breath Alcohol Screening Devices: A Guide to Type-approval Procedures for Breath Alcohol Screening Devices Used for Law Enforcement in Great Britain*, version 1, 30/6/2004, paras 5.1, 5.4.5 <<https://www.gov.uk/government/publications/breath-alcohol-screening-devices-a-guide-to-type-approval-procedures>> accessed 27 November 2013.

⁵⁹ Breath Analysis Devices Approval 2004, Home Office, 30 March 2004. The procedures for approval are set out in Home Office and Forensic Science Service, *Breath Alcohol Screening Devices: A Guide to Type-approval Procedures for Breath Alcohol Screening Devices Used for Law Enforcement in Great Britain*, version 1, 30/6/2004 (above) and Home Office and Forensic Science Service, *A Guide to Type Approval Procedures for Evidential Breath Alcohol Testing Instruments Used for Road Traffic Law Enforcement in Great Britain* (HMSO 1994). On the workings of the Lion Intoxilyzer, see for example, Linda Dobbs, 'Lion Intoxilyzer 6000UK' (1998) Road Traffic Indicator 1.

⁶⁰ Although RTA 1988, s 7 has been amended in anticipation of the type-approval of evidential breath testing devices for use at the roadside and in hospitals rather than at the police station (see p 12). At the time of writing (December 2013), no such device has been approved.

fumes from paint or glue) which might be on the subject's breath and which could give a false result.⁶¹

Both types of device – those for preliminary screening and those for evidential testing – test “end expiratory air”, also known as “deep lung air” or “alveolar air”, that is, air from the end of a forced expiration from the lungs.⁶² This air is closest to the point at which the exchange of gases and fluids (including alcohol) between breath and blood takes place, and provides the most accurate indication of the amount of alcohol in the blood.⁶³

Both types must be capable of verifying their calibration when in use. The acceptable range is 32.00 to 37.9 µg alcohol in 100 ml breath.⁶⁴

In some cases, (including where the difference between two breath readings is unacceptably high⁶⁵) a blood or urine specimen, rather than breath specimens, is taken for laboratory analysis, as described above.⁶⁶

The Widmark formula

It is possible to calculate blood alcohol concentration using what is known as the “Widmark formula”, developed by a Swedish scientist of the same name in the 1920s. The basic formula has been widely accepted and remains in use by forensic scientists worldwide. The formula may be applied to calculate the theoretical highest possible peak of blood alcohol concentration that could result from the consumption of a known amount of alcohol. The formula is:

$$c = \frac{a}{p \times r}$$

where:

- c is the peak concentration of alcohol in the blood;
- a is the amount of alcohol taken in grammes;
- p is the subject's body weight in kilogrammes;

⁶¹ These characteristics of the devices are set out in Home Office and Forensic Science Service, *A Guide to Type Approval Procedures for Evidential Breath Alcohol Testing Instruments Used for Road Traffic Law Enforcement in Great Britain* (HMSO 1994).

⁶² *Ibid*, paras 4.1, 4.2.

⁶³ Vivian Emerson, ‘Alcohol Analysis’ in PC White (ed), *Crime Scene to Court: Essentials of Forensic Science* (2nd edn, Royal Society of Chemistry 2004) 356–7.

⁶⁴ Home Office and Forensic Science Service, *Evidential Breath Alcohol Testing Instruments: A Guide to Type Approval Procedures for Evidential Breath Alcohol Testing Instruments Used for Road Traffic Law Enforcement in Great Britain* (HMSO 1994) paras 5.8, 5.9.

⁶⁵ See above and p 147, fn 138.

⁶⁶ See p 147.

- r is the “Widmark factor”, derived from the proportion of the total body mass over which the alcohol can be distributed. The mean values adopted by Widmark were 0.68 for men and 0.55 for women.

For example, a basic calculation adopting the original formulation of r for a male weighing 80 kg who drank a single unit (8 grammes of alcohol) would be $8 \div (80 \times 0.68) = 0.147\%$, or 14.7 milligrammes of alcohol in 100 millilitres of blood.⁶⁷

The formula is conservative in that it assumes that all alcohol is absorbed before any elimination takes place (in fact, as noted above, elimination begins very soon after ingestion), and that the alcohol is evenly distributed throughout all the water in the body.⁶⁸

The original Widmark values have been greatly developed over the years and would now be calculated individually for each subject, taking into account a range of individual characteristics, producing far more accurate results.⁶⁹

Certain websites provide on-line blood alcohol calculators, based on the Widmark formula or a variant of it. These are discussed in Chapter 7.⁷⁰

Measures of intake

While unfitnes to drive is defined by reference to the effects of alcohol, and the prescribed limit by reference to the concentration of alcohol in the body, drivers naturally think in terms of the drinks they consume. This leads to a consideration of how amounts of alcohol are measured.

Pints, litres and centilitres are simple measures of volume without reference to their alcohol concentration. “A drink” or “a glass” likewise says little about the amount of alcohol it contains. Measures used in pubs were originally devised so that different drinks would contain the same amount of

⁶⁷ For other examples, see Department of Forensic Medicine, University of Dundee, Lecture Notes ‘Alcohol and Alcoholism’ (2011) <<http://www.dundee.ac.uk/forensicmedicine/notes/alcohol.pdf>> accessed 27 November 2013.

⁶⁸ See Vivian Emerson, ‘Alcohol Analysis’ in PC White (ed), *Crime Scene to Court: Essentials of Forensic Science* (2nd edn, Royal Society of Chemistry 2004) 353–354.

⁶⁹ See, for example, Patricia E Watson and others, ‘Prediction of Blood Alcohol Concentrations in Human Subjects: Updating the Widmark Equation’ (1981) 42 *Jnl of Studies on Alcohol* 547; ARW Forrest, ‘The Estimation of Widmark’s Factor’ (1986) 26 *Jnl of the Forensic Science Society* 249; Alan D Barbour, ‘Simplified Estimation of Widmark “r” Values by the Method of Forrest’ <<http://home.lightspeed.net/%7Eabarbour/jfss.htm>> accessed 27 November 2013; US National Highway Traffic Safety Administration, *Computing a BAC Estimate* (2005), described in Robert Solomon and Erika Chamberlain, ‘Calculating BACs for Dummies: The Real-World Significance of Canada’s 0.08% Criminal ABC Limit for Driving’ (2003) 8 *Canadian Criminal Law Review* 219, 230–233.

⁷⁰ See p 227.

alcohol; half a pint of beer was intended to be the equivalent of a single measure of spirits, or a glass of wine or sherry.⁷¹

The unit of alcohol is now a standard measure, although its origin and status are unclear.⁷² It may be that, as originally formulated, a unit was intended to equate to a single drink – a measure of spirit or a glass of wine.⁷³ A unit of alcohol is defined as 10 millilitres, or 8 grammes, of pure alcohol. Over the years, both the alcohol concentration and the size of many drinks have increased, so that most drinks now account for far more than a single unit of alcohol.⁷⁴ One small study indicated that when people pour their own drinks, they contained, on average, 2.05 units.⁷⁵

The number of units in a drink can be calculated using the formula:

$$\frac{(\text{alcohol by volume} \times \text{size of drink in millilitres})}{1000}$$

1000

For example, a standard (750 millilitre) bottle of wine having 12 per cent alcohol by volume (“ABV”) contains 9 units.⁷⁶ Again:

- 25 ml spirits, ABV 40 = 1 unit;
- 175 ml wine, ABV 13.5 = 2.4 units;
- a pint (568 ml) of beer, ABV 4 = 2.3 units;
- a 330 ml bottle of strong lager, ABV 5.2 = 1.7 units.

⁷¹ Vivian Emerson, ‘Alcohol Analysis’ in PC White (ed), *Crime Scene to Court: Essentials of Forensic Science* (2nd edn, Royal Society of Chemistry 2004) 351.

⁷² David Ball and others, ‘In Celebration of Sensible Drinking’ (2007) 14 *Drugs: Education, prevention and policy*, 97, 99.

⁷³ Deborah Lader and Matthew Steel, *Drinking: Adults’ Behaviour and Knowledge in 2009* (Office for National Statistics, Opinions Survey Report No. 42, 2010) 104.

⁷⁴ See, for example, Caroline Ritchie and others, ‘How Can I Drink Safely? Perception Versus the Reality of Alcohol Consumption’ (2009) 29 *The Service Industries Jnl* 1397, 1399.

⁷⁵ Jan Gill and Fiona O’May, ‘Practical Demonstration of Personal Daily Consumption Limits: A Useful Intervention Tool to Promote Responsible Drinking Among UK Adults?’ (2007) 42 *Alcohol and Alcoholism* 436.

⁷⁶ $(12 \times 750) \div 1000 = 9$.

This definition of a unit has been widely adopted by organisations including the Department of Health,⁷⁷ the National Health Service⁷⁸ and the charity Alcohol Concern.⁷⁹

The Specified Limits for Specified Controlled Drugs

At the time of writing (December 2013), a new section 5A of the Road Traffic Act awaits being brought into force. It will introduce offences of driving, attempting to drive or being in charge with a concentration of any one of certain controlled drugs above a specified limit. Government commissioned an expert panel to make recommendations concerning limits for certain groups of drugs. The panel considered estimates of accident risk associated with the drugs, and their known effects, and reported in March 2013.⁸⁰ Government is now consulting on regulations to be made to give effect to section 5A. The draft regulations set out proposed specified limits,⁸¹ as follows:

<i>Controlled drug</i>	<i>Limit (µg per litre of blood)</i>
Amphetamine	[TBC]
Benzoylcegonine*	50
Clonazepam	50
Cocaine*	10
Delta-9-tetrahydrocannabinol*	2
Diazepam	550
Flunitrazepam	300
Ketamine*	20
Lorazepam.....	100
Lysergic acid diethylamide*	1
Methadone	500
Methamphetamine*	10
Methylenedioxymethamphetamine (MDMA – Ecstasy)*	10
6-Monoacetylmorphine (heroin and morphine)*	5
Morphine	80
Oxazepam	300
Temazepam	1000

⁷⁷ For example, Department of Health, *Sensible Drinking, The Report of an Inter-Departmental Working Group*, December 1995, 6 <http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4084702.pdf> accessed 27 November 2013.

⁷⁸ <<http://www.nhs.uk/Livewell/alcohol/Pages/alcohol-units.aspx>> accessed 27 November 2013.

⁷⁹ How Much is Too Much? <<http://www.alcoholconcern.org.uk/concerned-about-alcohol/how-much>> accessed 27 November 2013.

⁸⁰ K Wolff, *Driving under the Influence of drugs. Report from the Expert Panel on Drug Driving* (Department for Transport 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/167971/drug-driving-expert-panel-report.pdf> accessed 27 November 2013.

⁸¹ Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013, para 14.1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013.

Government intends to consult further before proposing a limit for amphetamine. Otherwise, the limits listed above reflect a “zero tolerance” approach to eight controlled drugs (marked with asterisks in the list above) which are mostly associated with illegal use. To avoid catching those who have inadvertently consumed a very small amount of these drugs, the proposed limits are set at the lowest concentration at which a valid and reliable analytical result can be obtained, yet above which issues such as passive consumption or inhalation can be ruled out – a “lowest accidental exposure limit”. In relation to the remaining drugs, which have medical uses, the proposed limits are based on a “road safety risk” approach, in most cases being pitched at a level higher than would be expected of a person taking therapeutic dosages. The idea is to reduce the risk of catching drivers who have taken medicine which has been properly prescribed or supplied, and who have taken it as directed or otherwise in accordance with the supplier’s instructions.⁸² Limits for urine are not proposed; the Consultation Document recites that it is not possible to establish evidence-based concentrations of drugs in urine which would indicate an effect on the nervous system, or which could be related to an increased risk of road traffic accident. Nor is there any way of translating the concentration of a drug in blood to a concentration of that drug in urine.⁸³

The scientific background to the prescribed and specified limits illustrates the complexity for the driver wishing to interpret those limits in particular circumstances. I demonstrate these difficulties, in relation to alcohol, in Chapters 7 and 8, and examine their significance for legal theory on certainty in Chapter 9. The way the scientific background underpins the statutory provisions is considered next.

THE SCIENTIFIC PRINCIPLES IN THE LAW

It has been seen that unfitness to drive is based on the effects on driving skills of drink or drugs, while the prescribed limit⁸⁴ is a fixed concentration in the body regardless of its effects. The origins of the two concepts in statute further illuminate the distinction between them. Early attempts to deal with the dangers posed by those who had consumed alcohol date back to the

⁸² *Ibid*, paras 1.9, 1.11, 14.1.

⁸³ *Ibid*, para 10.6.

⁸⁴ And, in due course, the specified limits for drugs in RTA 1988, s 5A; see above.

nineteenth century.⁸⁵ The idea of unfitness to drive, whether through either drink or drugs, was introduced by the Road Traffic Act 1930, which made it an offence to drive, attempt to drive, or be in charge of a motor vehicle on a road or other public place when under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle.⁸⁶ The word “unfit” was first used to describe such a condition in the Road Traffic Act 1956.⁸⁷

Basing the prohibition on unfitness was problematic,⁸⁸ and remains so.⁸⁹ Partly for that reason, but also in response to increasing concern about the danger of the drinking driver, and advancing scientific knowledge,⁹⁰ a fixed limit of 80 milligrammes of alcohol in 100 milligrammes of blood was introduced by the Road Safety Act 1967, with an equivalent in urine of 107.⁹¹ It became an offence to exceed this prescribed limit, regardless of any question of fitness or unfitness to drive.⁹² With the introduction of evidential breath testing in 1981,⁹³ the prescribed limit is now expressed as 35 microgrammes of alcohol in 100 milligrammes of breath, with the blood and urine levels remaining as alternatives. As noted above,⁹⁴ most prosecutions are based on exceeding the prescribed alcohol limit, although

⁸⁵ Licensing Act 1872, s 12 made it an offence to be drunk while in charge of any carriage, horse, cattle or steam engine on a highway or other public place.

⁸⁶ RTA 1930, s 15(1).

⁸⁷ RTA 1956, s 9.

⁸⁸ See, for example, the speech of Lord Griffiths in *Cracknell v Willis* [1988] AC 450 (HL) 456–7, concerning the reluctance of juries to convict (the right to trial by jury for the drink-drive offences was removed by the Criminal Law Act 1977); and Roy Light, *Criminalizing the Drink-Driver* (Dartmouth 1994) on the vagueness of the terminology (46–47) and on evidential problems (49). See also Peter Amey, ‘Drink/Drive – A New Initiative’ (1982) 146 JP 480, acknowledging that only those who were manifestly intoxicated were likely to be convicted.

⁸⁹ In 2012, of 2,464 proceedings for unfitness to drive, 1,017 (41%) were withdrawn or dismissed. This compares with 7% for the drink-drive offences as a whole: Ministry of Justice, *Criminal Justice Statistics Quarterly – December 2012, England and Wales*, 30 May 2013, vol 6, Motoring, Table 6.1 <<https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>> accessed 27 November 2013.

⁹⁰ See the American ‘Grand Rapids’ Study, above, p 192.

⁹¹ Road Safety Act 1967, ss 1, 7(4).

⁹² See, for example, *Delaroy-Hall v Tadman* [1969] 2 QB 208 (QB) 214, also emphasising the element of certainty effected by introducing a fixed limit.

⁹³ By the Transport Act 1981.

⁹⁴ See p 9.

unfitness to drive remains a feature of the legislation,⁹⁵ and is the basis for prosecutions based on unfitness through drugs.

The current situation, therefore, is that the original offences based on unfitness to drive (whether through drink or drugs) remain, but have been supplemented by the offences based on exceeding the prescribed limit for alcohol, and will be further supplemented, in due course, by offences based on exceeding specified limits for certain drugs. Unfitness to drive concerns the effects of alcohol or drugs on a person's ability to drive properly; the *degree* of unfitness is not relevant. The offences of unfitness are not defined by reference to any particular drug, or any amount, consumed. By contrast, the ability to drive properly is irrelevant to an offence of being over the prescribed (or, in due course, specified⁹⁶) limit, and again these offences are not defined by reference to an amount consumed.

Unfitness To Drive

It is an offence, when driving or attempting to drive a mechanically propelled vehicle on a road or other public place, to be unfit to drive through drink or drugs.⁹⁷ It is likewise an offence to be in charge of such a vehicle on a road or other public place while in such a condition.⁹⁸ Unfitness to drive is also one of the constituents of the offence of causing death by careless driving when under the influence of drink or drugs.⁹⁹ Unfitness to drive means that ability to drive properly is impaired,¹⁰⁰ a concept which has been subject to much judicial interpretation.

The meaning of unfitness

There is no further statutory definition of "unfit to drive". The terms "unfitness" and "impairment" appear to be interchangeable, but they are imprecise and each case turns on its own facts. Fitness to drive may depend on many circumstances, and the amount of alcohol which makes one person unfit to drive does not necessarily make another person unfit.¹⁰¹ Facts which have been found to amount to unfitness to drive include:

⁹⁵ Under RTA 1988, s 4; see below.

⁹⁶ When RTA 1988, s 5A comes into force; see pp 8–9.

⁹⁷ RTA 1988, s 4(1).

⁹⁸ RTA 1988, s 4(2).

⁹⁹ Contrary to RTA 1988, s 3A.

¹⁰⁰ RTA 1988, ss 3A(2) and 4(5).

¹⁰¹ *R v Richards* [1975] 1 WLR 131 (CA (Crim)) 137.

- driving down a well-lit road on a fine night with a clear view of one hundred yards, and running into the back of a parked car. The defendant drove with the brake on and when he got out of his car, he was swaying, his eyes were glazed and his speech was slurred;¹⁰²
- for no apparent reason, colliding with a stationary van which should have been plainly visible;¹⁰³
- where, immediately after an accident, the defendant's breath smelt reasonably strongly of alcohol, his actions and speech were slow and his speech was slurred;¹⁰⁴
- a diabetic suffering a hypoglycaemic attack as a direct result of an injection of insulin;¹⁰⁵
- driving too fast and badly, admitting having smoked cannabis and being in possession of cannabis. The defendant's eyes were red and glazed, his speech slurred and his answers to questions slow;¹⁰⁶
- driving erratically, going through two sets of red traffic lights, the breath smelling of alcohol, the speech slurred and the eyes glazed.¹⁰⁷

It is the state of incapacity, whether caused by drink or drugs,¹⁰⁸ which constitutes the impairment.

Where the driver's alcohol concentration was nearly two and a half times the prescribed limit, it could be inferred, without medical evidence, that the defendant was likely to be substantially intoxicated and that that was responsible for his impaired driving.¹⁰⁹

That a person may be unfit to drive while not above the limit was acknowledged by the Divisional Court when it upheld a finding that three

¹⁰² *R v Lanfear* [1968] 2 QB 77 (CA).

¹⁰³ *R v Hunt (Reginald)* [1980] RTR 29 (CA (Crim)).

¹⁰⁴ *Hurst v DPP*, unreported, 6 May 1998 (DC). There was expert evidence that slurred speech was consistent with intoxication, rather than with the injuries suffered in the accident.

¹⁰⁵ *R v Ealing Magistrates' Court ex p Woodman* [1994] RTR 189 (QBD), although, on the facts, there was no evidence that any insulin remained in the applicant's body at the relevant time so as to lead to such an attack, or that any failure by the defendant to follow medical advice had caused the attack. In the earlier case of *Watmore v Jenkins* [1962] 2 QB 572, the Queen's Bench Division had also found, on the facts, that it was open to justices to decide that injected insulin was no more than a predisposing or historical cause, and not the immediate cause, of a hypoglycaemic episode.

¹⁰⁶ *Leatham v DPP* [1999] RTR 29 (DC).

¹⁰⁷ *Willicott v DPP* [2001] EWHC 415 (Admin) (DC), although the prosecution failed on another point.

¹⁰⁸ *Thomson v Knights* [1947] KB 336 (DC).

¹⁰⁹ *R v Hunt (Reginald)* [1980] RTR 29 (CA (Crim)).

large glasses of wine would not have put the driver over the limit but would have impaired his ability to drive.¹¹⁰

The law does not recognise degrees of impairment – to constitute the offence, it is sufficient that the defendant was unfit to drive.

A number of cases concerning European arrest warrants are of interest in this context. For the UK courts to grant a request for extradition pursuant to such a warrant, the offence must be an “extradition offence” within the meaning of the Extradition Act 2003. To constitute an extradition offence, among other preconditions, the conduct complained of by the state seeking extradition of a person from the UK must constitute an offence under the law of the relevant part of the UK if it occurred there.¹¹¹ The Queen’s Bench Division had no difficulty in finding that the words “driving a car ... while being in the state of inebriation” in a Latvian arrest warrant would amount to the offence of being unfit to drive.¹¹²

The meaning of “drug”

“Drug” includes any intoxicant other than alcohol.¹¹³ It has been further defined for present purposes as “a medicament or medicine, something given to cure, alleviate or assist an ailing body”, including insulin.¹¹⁴

The Divisional Court has found that, as a general rule, a substance taken into the body by whatever means – for example by inhalation, injection or by mouth – which is not a drink or food, but which does affect the control of the human body, is to be treated as a drug. This includes substances having a narcotic effect, such as toluene, found in glue which the defendant had been sniffing. The court dismissed schedule 2 to the Misuse of Drugs Act 1971 (list of controlled drugs) as a guide to the meaning of the word “drug” for road traffic purposes. Substances which are taken as medicines may be drugs, but equally substances not taken as medicines may be drugs.¹¹⁵ Thus, “drugs” include prescription and over-the-counter medicines, as well as illegal substances.

¹¹⁰ *Macphail v DPP*, unreported, 1 July 1996 (DC).

¹¹¹ Extradition Act 2003, s 65(3)(b).

¹¹² *Wars v Lublin Provincial Court, Poland* [2011] EWHC 1958 (Admin) (DC).

¹¹³ RTA 1988, s 11(2).

¹¹⁴ *Armstrong v Clark* [1957] 2 QB 391 (DC) 394.

¹¹⁵ *Bradford v Wilson* (1984) 78 Cr App R 77 (DC) 81.

Proof of unfitness through drink or drugs

To secure a conviction, it must be proved not only that the defendant was unfit to drive, but that the unfitness was caused by drink or drugs,¹¹⁶ rather than by, for example, illness.

Unfitness is a matter of fact for the court and is usually proved by evidence of the manner of driving, the defendant's appearance and demeanour at the roadside, and the outcome of any preliminary impairment test. Typically, a defendant said to be unfit through drink is described in terms such as, "his breath smelled of alcohol, his eyes were glazed, his speech was slurred and he was unsteady on his feet".

Proof of the presence of alcohol or a drug is by the analysis of a specimen as explained above.¹¹⁷ That the unfitness was caused by the drink or drugs is usually proved by medical or other expert evidence. On the facts in *Leetham*,¹¹⁸ however, the Divisional Court ruled that justices were entitled to find unfitness through drugs without evidence from the doctor who took the blood specimen, or other medical evidence. A blood sample confirmed the presence of cannabis. The scientist who analysed the blood gave evidence of the effects of cannabis and that it might adversely affect driving. The Divisional Court found that, in the circumstances of the case, that evidence was sufficient for a finding of guilty.

The Prescribed Limit

It is an offence to drive, attempt to drive, or 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 the breath, blood or urine exceeds the prescribed limit.¹¹⁹ As already noted, the prescribed limit is:

- 35 microgrammes of alcohol in 100 millilitres of breath, or
- 80 milligrammes of alcohol in 100 millilitres of blood, or
- 107 milligrammes of alcohol in 100 millilitres of urine.¹²⁰

¹¹⁶ *R v Hawkes* (1931) 22 Cr App R 172 (CCA).

¹¹⁷ See pp 199–203.

¹¹⁸ *Leetham v DPP* [1999] RTR 29 (DC), see p. 210.

¹¹⁹ RTA 1988, s 5(1).

¹²⁰ RTA 1988, s 11(2); see p 14.

Breath specimens are preferred and are most commonly taken, because they can be taken quickly,¹²¹ at a police station, using a device approved for the purpose,¹²² and the results of the analysis are available immediately. Nevertheless, blood or urine specimens for laboratory analysis may sometimes be taken instead.¹²³

While the prescribed limit is scientifically precise, its meaning in practice is not straightforward. The Divisional Court has described the limit as universal and pragmatic, recognising that different people are able to consume the same quantities of alcohol with different physical and legal effects, the variables including age, size, gender and metabolic rate.¹²⁴ They also include the time at which, or over which, alcohol is consumed.¹²⁵ The courts have acknowledged the processes of absorption¹²⁶ and elimination¹²⁷ of alcohol. Indeed, the principle that there is to be no delay in taking specimens from a suspect¹²⁸ is based on the fact that in the period between the alleged offence and the taking of the specimen, the suspect's alcohol concentration is changing. In the context of a defendant who argued that he would not have driven until he was no longer over the limit, the Divisional Court remarked that a person who was well over the limit would have no way of knowing when he would be below that limit.¹²⁹ The Divisional Court has also said that it would be difficult to say whether being told that the

¹²¹ By the time a suspect has been arrested and brought to the police station, the alcohol in the body has usually started to be eliminated, and it is therefore desirable to avoid delay so as to produce a result as close as possible to the alcohol concentration at the time of the incident under investigation; see further, pp 105–106.

¹²² Pursuant to RTA 1988, s 7(1)(a). For the approved devices, see pp 201–203.

¹²³ Where, for example, the officer believes there are medical reasons why breath specimens cannot be provided or should not be required, or the breath analysis device is not working; RTA 1988, s 7(3); see further, p 147.

¹²⁴ *Woolfe v DPP* [2006] EWHC 1497 (Admin) (DC) [7]. On the courts' recognition of such individual factors, see also *DPP v Spurrier* [2000] RTR 60 (QBD) 66.

¹²⁵ *Williams (John Robert) v DPP* [2001] EWHC Admin 932 (DC) [13].

¹²⁶ *Griffiths v DPP* [2002] EWHC 792 (Admin) [18].

¹²⁷ See, for example, *Smith (Dennis Edward) v DPP* [1989] RTR 159 (DC) 164.

¹²⁸ *DPP v Billington* [1988] 1 WLR 535 (QBD).

¹²⁹ *CPS v Thompson* [2007] EWHC 1841 (Admin) (DC) [10].

breath alcohol did not exceed 50 would signify much to the average motorist arrested on suspicion of driving with excess alcohol.¹³⁰

The Court of Appeal has also acknowledged the factors which affect alcohol concentration in the body, referring to the amount drunk, the rates of absorption and elimination, and body weight.¹³¹

The need for expert evidence

The prescribed limit is measured to a high degree of accuracy in each case investigated. Opportunities to challenge an analysis are rare, largely because of the statutory assumption that the alcohol concentration at the time of the alleged offence was not less than in the specimen later analysed.¹³² There are, however, some circumstances in which defendants may raise arguments concerning the effects of consuming particular amounts of alcohol over certain periods, or about the rate of elimination of alcohol consumed. These cases are informative because they illustrate the situations in which the courts have found that such matters may be decided only with the assistance of medical or scientific evidence. This raises the question of how an individual can be expected, before the event, to decide, for example, the effect of a certain amount of alcohol drunk over a certain period, if the courts need expert help to do so after the event. The cases in point concern the issues of:

- no likelihood of driving: a defendant can avoid conviction for being in charge when unfit, or in charge with excess alcohol, by proving that, at the time in question, there was no likelihood of driving while remaining unfit or over the limit;¹³³
- the “hip flask” defence, or “post-incident consumption”: the statutory assumption that the proportion of alcohol in the body at the time of the alleged offence was not less than in the specimen is not made if the defendant proves having consumed alcohol after ceasing to drive, and that otherwise the defendant would not have been over the limit. A defendant who can prove this again cannot be convicted;¹³⁴ and

¹³⁰ *R v Bolton Justices ex p Zafer Alli Khan*, unreported, 4 November 1998 (QBD) concerning the statutory option in RTA 1988, s 8(2), allowing a suspect to choose to replace a breath specimen by a blood or urine specimen if the breath reading is over the prescribed limit but no higher than 50.

¹³¹ *R v Drummond* [2002] EWCA Crim 527 [31].

¹³² RTOA 1988, s 15(2), discussed at pp 105–111.

¹³³ RTA 1988, ss 4(3) and 5(2), discussed in detail in Chapter 3; see pp 90–94.

¹³⁴ RTOA 1988, s 15(2) and (3), discussed in detail in Chapter 3; see pp 111–114.

- “laced drinks”: a person who has been convicted of a drink-drive offence may invoke the court’s discretion not to disqualify from driving, or to disqualify for a shorter period than would otherwise be appropriate, upon proof of a “special reason”.¹³⁵ The addition of alcohol to the defendant’s drinks without the defendant’s knowledge (“lacing” or “spiking”), where the added alcohol caused the defendant to be over the limit, is such a special reason. A special reason does not amount to a defence, but may result in a lower penalty than would otherwise apply.

The case law is to the effect that these matters may sometimes be obvious and the court may reach its own conclusion. But if the matter is not obvious, medical or scientific evidence, of the effects of the amount consumed in the circumstances of the case, is needed.

In an early laced drinks case,¹³⁶ the Divisional Court ruled that there may be circumstances in which it obvious to a lay person that the alcohol added to a defendant’s drink, once its nature and quality are known, caused the offence. The court gave as an example the situation where the defendant is only marginally over the limit and the amount of drink added by lacing was substantial. But unless the case was a really obvious one in which a lay person could reliably and confidently say that the added liquor must explain the excess alcohol, the only way to discharge the burden of proof was to call medical evidence.

The Divisional Court has applied the same principle to the ousting of the statutory assumption, stressing the dangers of those who are not scientifically qualified, including those who sit on the bench, dabbling in science.¹³⁷ It recognised the multiplicity of factors which determine the effect of alcohol on a particular individual and concluded that, in most cases, expert assistance is needed before a conclusion is drawn.

The requirement for expert evidence may differ according to whether the allegation is of being in charge when unfit, or of being in charge when over the limit. A defendant who had been found asleep in his car was accused of both, but argued that he would no longer have been in either condition by the time he intended next to drive. It was accepted that he had not been going to drive for some five and a half hours after a breath alcohol reading just short of three times the limit. The Queen’s Bench Division ruled that justices may be able, without expert evidence, to form an opinion

¹³⁵ RTOA 1988, s 34(1); see p 16, fn 83.

¹³⁶ *Pugsley v Hunter* [1973] 1 WLR 578 (QBD).

¹³⁷ *Dawson v Lunn* [1986] RTR 234 (QBD).

on when the defendant would have ceased to be unfit. But the question of exceeding the prescribed limit is not within their experience and medical or scientific evidence would be needed in support of this aspect of the argument.¹³⁸ If the driver had been only marginally over the limit when tested, and the court was satisfied that he would not have driven for a long time, it may be proper for a court to find there was no likelihood of driving while over the limit. Where, however, the defendant is well over the limit and the time lapse is a few hours, the court cannot rely on general knowledge or personal experience, but must have clear, cogent and reliable evidence of the rate at which the individual would have eliminated the alcohol.¹³⁹

Other circumstances in which the appellate courts have said that the situation is not obvious, and/or that expert evidence is necessary include where:

- a defendant whose breath-alcohol was 50 argued that he would be below the limit by the time at which he next intended to drive, some four and a half hours later;¹⁴⁰
- a defendant whose breath-alcohol was 127 said he had drunk one and a half pints of beer before driving, and two cups of whisky after driving, and sought to argue that it was the whisky which had taken him over the limit;¹⁴¹
- a defendant argued that three half pints of beer and a large vodka, consumed between 8.30 p.m. and 11 p.m., were sufficient to explain a reading in breath of 58 at 12.30 a.m.;¹⁴²
- a defendant who had drunk three pints of lager topped up with lemonade, over five hours and fifty minutes, argued that he would not be over the limit;¹⁴³
- a defendant said he had had a shot of vodka after finishing work at 6 p.m. and a lager at 11.00 p.m. Police came upon him standing next to his car in a lay-by at 3.15 the next morning. The defendant said he had taken a mouthful of vodka as police approached him. The Divisional Court held that expert evidence was needed, not only to test the argument that it was the mouthful of vodka which caused his breath-alcohol reading

¹³⁸ *DPP v Frost* [1989] RTR 11 (QBD).

¹³⁹ *Ibid*, 23, concurring judgment of Lord Bingham.

¹⁴⁰ *DPP v O'Connor and Others* [1992] RTR 66 (QBD).

¹⁴¹ *DPP v Singh* [1988] RTR 209 (DC).

¹⁴² *DPP v Allatt* [1992] RTR 66 (QBD).

¹⁴³ *DPP v Bolton* [2009] EWHC 1502 (Admin).

to be 51, but also to test the truth of his version of events as a whole.¹⁴⁴

Taking perhaps a rather less robust stance, the Queen's Bench Division has declined to interfere with decisions of the courts below that:

- it was obvious that one and three quarter pints of lager would not have taken a motorist over the limit;¹⁴⁵
- by contrast, it was not obvious that a person would remain below the limit having drunk one and a half pints of lager.¹⁴⁶

While these two cases at first sight appear irreconcilable, the first decision was cited in the second, and both were based on the fact that there was nothing to suggest that the decisions of the courts below were perverse. The High Court stressed that each case depends on its own facts, again illustrating the difficulty of formulating any general rule of interpretation.

Even where expert evidence is adduced, it must be treated with appropriate caution. In a laced drinks case, the expert evidence related to the principles only, and it was the parties who sought to apply the principles to the facts of the case. The Divisional Court held that courts should not be drawn into detailed calculations of such a nature. It is not practicable to work back to the alcohol level at the time of driving unless the evidence is reasonably clear, straightforward and relatively simple.¹⁴⁷ Again, where justices found that a hip flask argument failed because, if the defendant had been telling the truth about how much he had drunk after driving, the breath reading would have been even higher than it was, the Divisional Court held that assessments of this sort were matters of expert evidence depending on the facts and the defendant, and were not for the justices to make themselves.¹⁴⁸

The Queen's Bench Division has also ruled that there is no limit on the circumstances in which justices may make a finding on the basis that a situation is obvious to a lay person.¹⁴⁹

In all these cases the courts have recognised the complexity of interpreting the prescribed limit and applying it to particular sets of circumstances. In

¹⁴⁴ *DPP v Dukolli* [2009] EWHC 3097 (Admin) (DC).

¹⁴⁵ *DPP v Younas* [1990] RTR 22 (QBD).

¹⁴⁶ *Smith (Ian Philip) v DPP* [1990] RTR 17 (DC).

¹⁴⁷ *Smith v Geraghty* [1986] RTR 222 (DC).

¹⁴⁸ *Lonergan v DPP* [2002] EWHC 1263 (Admin).

¹⁴⁹ *DPP v O'Connor and Others* [1992] RTR 66, 80 (QBD).

Chapter 9, I cite them in support of my argument that the prescribed limit cannot be reconciled with the principle of legal certainty discussed in Chapter 5.¹⁵⁰

The responsibility of the driver

While the case law provides many examples of circumstances in which expert assistance is needed to assess the effects of alcohol, the courts have nevertheless emphasised the responsibilities of drivers. The Court of Appeal has stressed that drivers who decide to mix drink and driving do so at their peril, and have a heavy responsibility to watch with extreme care the amount they are drinking, and to see that they do not take more than is likely to keep them within the statutory limit.¹⁵¹

Even where the defendant could show that alcohol was added to his drinks without his knowledge, but the alcohol level in his body was high, or his driving was erratic, he should have known he was not fit to drive.¹⁵² Where the blood alcohol content was 127, it was highly unlikely that the driver was not aware that he had had too much to drink.¹⁵³ Likewise where it was 180 in blood.¹⁵⁴

Where a driver was offered what he thought was a fruit drink but was in fact alcoholic punch, and he made no inquiry, he took the risk that he was drinking alcohol. A special reasons argument failed. The driver had to show that he had done all that could reasonably be expected to avoid the risk of committing the offence. His alcohol level in breath was 83.¹⁵⁵

A motorist who had consumed some 800 millilitres of mouthwash, which contained 26.9 per cent alcohol, said he was unaware that the mouthwash contained alcohol and argued that there was therefore a special reason for not disqualifying. While driving, he swerved, failed to take a bend correctly and crossed to the wrong side of the road. His breath-alcohol was 94. The Divisional Court found that the defendant had long known that taking the mouthwash gave him “a lift”. On the day in question he had

¹⁵⁰ See p 294.

¹⁵¹ *R v Newton* [1974] RTR 451 (CA) 457. See also *Alexander v Latta* [1972] RTR 441 (QBD) 445 and *Adams v Bradley* [1975] RTR 233 (QBD) 236.

¹⁵² *R v Newton* [1974] RTR 451 (CA); *Pridige v Gant* [1985] RTR 196 (QBD); *DPP v O'Connor and Others* [1992] RTR 66 (QBD) 81.

¹⁵³ *R v Newton* [1974] RTR 451 (CA).

¹⁵⁴ *Pridige v Gant* [1985] RTR 196 (QBD).

¹⁵⁵ *Robinson (Lloyd) v DPP* [2003] EWHC 2718 (Admin) (DC). See also *DPP v Anderson (Marilyn)*, unreported, 29 June 1998 (DC).

taken a considerable amount of it and he drove erratically. He should have realised he was not fit to drive.¹⁵⁶

Thus, despite the difficulty of knowing the precise effects of alcohol consumed, drivers have not been absolved of responsibility. The alcohol levels in the cases mentioned above range from just over one and a half times the limit in blood, to nearly three times the limit in breath. The effect of this series of decisions is that, certainly at these levels, it must be obvious to an individual that it would not be within the law to drive. In Chapter 10,¹⁵⁷ I argue that drivers do have a special responsibility in relation to the law.

This brief review of the case law illustrates the difficulty of interpreting the prohibition on unfitness and the prescribed limit. Whether or not a person is unfit to drive through drink or drugs depends, as has been seen, on all the circumstances of each case. Although largely a matter of common sense in which expert evidence is not usually necessary, nevertheless a definitive assessment in any particular instance is not made until after the event, and then only if there is a prosecution.

The prescribed limit was introduced with the intention of promoting certainty. While there can be little doubt that the position after the event is now more certain, the position before the event may be less certain than when the only test was of fitness to drive. I pursue this point in Chapter 9.¹⁵⁸

The next chapter addresses the question of how the restrictions are actually understood by drivers themselves.

¹⁵⁶ *CPS v Jowle*, unreported, 30 October 1997 (DC).

¹⁵⁷ See pp 318–319.

¹⁵⁸ See pp 292–295.

Chapter 7: The Driver's Perspective

INTRODUCTION

Having reviewed the concept of legal certainty in Chapter 5, the scientific facts underlying the drug- and drink-driving legislation, and the legislation itself (Chapter 6), I now turn to drivers and how they interpret the statutory restrictions. This chapter contains a review of the literature on drivers' understanding of the law, while Chapter 8 reports on my own empirical work on the same theme. The literature shows, and the empirical study confirms, that there is widespread ignorance and confusion.

It is clearly lawful to consume alcohol and/or certain drugs and then to drive, attempt to drive or be in charge, as long as the individual remains fit to drive and/or below the prescribed limit,¹ or waits until the effects have sufficiently worn off. In the case of alcohol, the overlap between unfitness and exceeding the prescribed limit – the fact that a person may be unfit to drive but not over the limit² – makes for confusion. The confusion is exacerbated by the fact that there are relatively few prosecutions for driving when unfit through drink,³ with the result that it is easy to overlook that it may be unlawful to drive even when far below the prescribed limit. The effects of the many drugs in use – both medicinal and illicit – are widely diverse, some adversely affecting driving skill, some not.

Importantly, all the offences are couched in terms of the result of the intake of alcohol or drugs, not in terms of what is consumed.⁴ Thus a driver either abstains entirely and takes no risk of breaking the law, or needs an adequate understanding of the effects of consuming particular substances in particular circumstances. This question of interpreting the legal restrictions is of real practical significance – how is a person who has consumed alcohol or taken a drug to know whether or not it is lawful to drive? One answer might be to introduce “zero tolerance”, such that the presence of any alcohol or impairing drug would be an offence, yet that would still leave the

¹ Or, in due course, below a specified limit for a specified controlled drug; see pp 8–9 on the new offences under RTA 1988, s 5A.

² See p 9.

³ See the figures quoted on p 200.

⁴ A point sometimes missed even in scholarly commentary. See, for example, Sally Cunningham, *Driving Offences Law, Policy and Practice* (Ashgate 2008) 59, “An upper legal limit for the amount of alcohol permitted to be consumed before driving was first introduced . . .”.

problem of knowing when, after consuming alcohol or a drug, the body would be free of its effects.

ALCOHOL

Public ignorance of how much can lawfully be drunk before exceeding the prescribed limit has been widely documented and is considered in detail below. In the British Social Attitudes Survey for 2012, seventy-five per cent of respondents agreed or strongly agreed that most people do not know how much alcohol they can drink before being over the legal drink-drive limit.⁵ Many of those who gave evidence to the North Review⁶ in 2010 thought that the success of the drink drive legislation was at least in part attributable to the confusion about how much can be drunk before reaching the limit, which gives rise to a very cautious approach. The confusion may be the greater because official education campaigns often refer to units of alcohol – a measure of the amount of alcohol before consumption – while the law is concerned with the effects, not the amount consumed. Not only that, but official advice about units of alcohol is given in two different contexts – general health⁷ and road safety.⁸ In addition, there is evidence that units of alcohol are poorly understood.⁹ These difficulties are widely recognised by the British Medical Association,¹⁰ as well as by academic commentators¹¹

⁵ British Social Attitudes Survey 2012 (NatCen Social Research 2013) Self-Completion Questionnaire Version B, Question 6 <http://www.bsa-30.natcen.ac.uk/media/24859/bsa_30_annotated_questionnaire_2012.pdf> accessed 27 November 2013.

⁶ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 3.111.

⁷ For example, *NHS Advice on Drinking Limits* <<http://www.drinking.nhs.uk/questions/recommended-levels/>> accessed 27 November 2013.

⁸ For example, NHS, *How Much Alcohol Can I Drink Before Driving* <<http://www.nhs.uk/chq/Pages/2096.aspx?CategoryID=87&SubCategoryID=871>> accessed 27 November 2013.

⁹ See, for example, Caroline Ritchie and others, ‘How Can I Drink Safely? Perception Versus the Reality of Alcohol Consumption’ (2009) 29 *The Service Industries Jnl* 1397, 1402–4. The National Statistics Omnibus Survey in 2009 showed that 63 per cent of respondents said a half a pint of beer represented a single unit, and 27 per cent said that a small glass of wine represented a unit: Deborah Lader and Matthew Steel, *Drinking: Adults’ Behaviour and Knowledge in 2009* (Office for National Statistics, Opinions Survey Report No. 42, 2010) 56–57, but see pp 231–232 below for reservations concerning the terminology used.

¹⁰ See British Medical Association, *Driving - Drinking and Driving, briefing paper*, 19 February 2009.

¹¹ For example, David J Giacopassi and Preston M Stein, ‘To Err is Human: Estimating Alcohol Content and Its Effects’ (1989) 5 *Jnl of Contemporary Criminal Justice* 102.

and researchers.¹² As a result, people may drink-drive without knowing it, or think they are committing the crime when they are not.¹³ Calculating alcohol concentration has been likened to a mystery to many policy makers, legal professionals and the general public.¹⁴ The courts too have difficulty; the circumstances in which they will not proceed without expert evidence of the effects of alcohol have been described in Chapter 6.¹⁵ Perhaps most telling is the fact that, in 2010, the House of Commons Transport Committee, in rejecting a recommendation to reduce the drink-drive limit from 80 mg to 50 mg in 100 ml blood, recognised the lack of public understanding about the present limit and what it means in terms of drinks which may be consumed before driving. The introduction of a 50 limit would, the Committee decided, be likely to increase such confusion, given that the amounts and measurements in which drinks are served and consumed are not easily converted into units of alcohol, let alone into microgrammes of alcohol in the blood. The committee preferred a long term aim of a reduction to 20, but only after an extensive education campaign.¹⁶

Official Guidance

It might be thought that official guidance would assist, but there are inherent difficulties in formulating any such advice. The influential Blennerhasset Committee, reporting in 1976,¹⁷ considered that to give guidance on how much a person could drink before being over the prescribed limit might give rise to an erroneous assumption that people can safely drink up to that

¹² For example, Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001) 26.

¹³ Donald S Kenkel and Steven F Kock, 'Deterrence and Knowledge of the Law: the Case of Drunk Driving' (2001) 33 *Applied Economics* 845, 847.

¹⁴ R Solomon, E Chamberlain, 'Can Simplifying BAC Calculations Affect Public Attitudes and Awareness?', paper presented to the 17th International Conference on Alcohol Drugs and Traffic Safety, Glasgow, 2004.

¹⁵ See pp 213–217.

¹⁶ Transport Committee, *Drink and Drug Driving Law*, 2010, paras 37–38 <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/inquiries/parliament-2010/drink-and-drug1/>> accessed 27 November 2013.

¹⁷ Department of the Environment, *Drinking and Driving: Report of the Departmental Committee* ('the Blennerhasset Report') (HMSO 1976). The committee was appointed to review the law, in light of the fact that the reduction in road deaths through alcohol since the introduction of the fixed limit in 1967 had not been sustained, and in light of the case law which was allowing a small number of guilty drivers to escape conviction. Many of its recommendations were implemented in the Transport Act 1981.

level.¹⁸ Such an assumption would be misleading in the sense that a person who is below the limit may nevertheless be unfit to drive. The Committee recognised the difficulties in formulating guidance on what the blood alcohol concentration might be following given numbers of drinks, and concluded that the only general advice that could safely be given was that drink and driving do not mix. That has largely remained the official position, the guidance often advocating, in effect, a zero limit. Although appearing to relate to the prescribed limit, the advice not to drink at all before driving seems more appropriate to the offences of unfitness to drive, given that, as noted above,¹⁹ a person's fitness to drive is impaired (to some extent at least) after any amount of alcohol. The Highway Code advises against drinking at all when planning to drive.²⁰ The Department for Transport's road safety website likewise concludes that "it's better to have none for the road".²¹ The Department emphasised this approach in a consultation paper published in November 2008.²² The NHS and directgov websites,²³ however, go as far as to say that men should drink no more than four units of alcohol before driving, and women, no more than three, but both emphasise that it is impossible to be sure.

¹⁸ See also Nason W Russ and others, 'Estimating Alcohol Impairment in the Field: Implications for Drunken Driving' (1986) 47 *Jnl of Studies on Alcohol* 237, 240, suggesting that those who feel impaired may choose to drink more upon learning that they have not reached the legal limit.

¹⁹ See pp 192–193.

²⁰ Highway Code, 2007, para 95 <<https://www.gov.uk/rules-drivers-motorcyclists-89-to-102/alcohol-and-drugs-95-to-96>> accessed 27 November 2013. For the legal status of the Highway Code, see <http://www.direct.gov.uk/en/TravelAndTransport/Highwaycode/DG_070236> accessed 27 November 2013, reciting that many of the rules in the Code are legal requirements. Failure to comply with the other rules of the Code does not, in itself, lead to prosecution.

²¹ <<http://think.direct.gov.uk/drink-driving.html>> accessed 27 November 2013.

²² Department for Transport, *Road Safety Compliance Consultation*, November 2008 <<http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/consultations/closed/compliance/roadsafetyconsultation.pdf>> accessed 27 November 2013.

²³ <<http://www.nhs.uk/chq/pages/2096.aspx>> <<https://www.gov.uk/drink-drive-limit>> both accessed 27 November 2013.

The difficulties are acknowledged in drink-drive rehabilitation courses,²⁴ one course provider remarking, “you can make an educated guess, but you cannot know for sure until you blow into that tube”.²⁵

The Driving Standards Agency's standard for safe and responsible driving²⁶ advises that drivers should, before driving, assess whether their ability to drive is impaired by illegal or controlled substances, medicines or alcohol. It goes on to say that, to do this, drivers need to know and understand not only what the law says about driving with such substances in the system, but also a number of scientific aspects such as how drugs and alcohol are metabolised and how they impair the ability to drive safely. In view of the widespread ignorance of such matters, revealed later in this chapter and in Chapter 8, it seems wholly unrealistic to expect drivers routinely to assess their fitness to drive in the informed manner contemplated by the standard.

Media Reporting

The reliability of the media as a source of information on interpreting the prescribed limit seems open to considerable doubt. For example, in December 2009, the then Secretary of State for Transport, Lord Adonis, commissioned advice on the legal framework for drink and drug driving.²⁷ The terms of reference included investigating the possibility of reducing the prescribed limit from 80 milligrammes of alcohol in 100 millilitres of blood to 50. In reporting the announcement, a number of newspapers gave an interpretation of the present limit. *The Times* described it as roughly two pints of normal strength beer for most men.²⁸ *The Guardian* said it was equivalent to one and a half small glasses (175 ml) of wine or one and a half

²⁴ Such courses are provided pursuant to RTOA 1988, ss 34A, B and C, which contain provisions under which the period of disqualification may be reduced if the offender satisfactorily completes an approved course.

²⁵ Conversation between Judith Stamper of Drivewise and the author, 21 November 2011. The Driving Standards Agency's syllabus for the courses does not address the question of how much a person may drink without breaching the limit: Driving Standards Agency, *Drink Drive Rehabilitation Scheme Course Syllabus*, version 1.1, June 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226646/dsa-drink-drive-rehabilitation-syllabus.pdf> accessed 27 November 2013.

²⁶ Driving Standards Agency, *Safe and Responsible Driving (Category B)*, V 4.0, 2012, 4 <<http://assets.dft.gov.uk/publications/dsa-national-driving-riding-standards/dsa-driving-standard.pdf>> accessed 27 November 2013.

²⁷ The result of the advice was published as Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010).

²⁸ *The Times*, 4 December 2009, 'Drivers Face Lower Drink-Drive Limit'.

pints of normal strength beer,²⁹ while *The Telegraph* reported that, for a man of average height and weight, the present limit is equivalent to three units, or a pint and a half of normal strength lager, or three small glasses of wine.³⁰ While it might be expected that the serious press would provide reliable information, these three reports were inconsistent among each other, only one mentioned height and weight, none mentioned the time over which the drinks are consumed (let alone the many other factors which influence the concentration of alcohol in the body³¹), and, as will be seen below,³² there is evidence that all three estimates are highly conservative. The *Daily Mail*, meanwhile,³³ suggested that lowering the limit to 50 would mean that drivers could be over the limit after drinking less than a pint of beer or a glass of wine. The report which followed this investigation itself criticised such press coverage as exaggerated.³⁴ Even so, the front page headline of the *London Evening Standard* on the day that report was published was, “Just One Pint or You’re Over Limit”.³⁵

Nor is the legal press immune to the difficulties of definition. In an article published as recently as 2007,³⁶ the prescribed limit was said to be, for a healthy man of average weight, the approximate equivalent of consuming five units of alcohol, which were in turn equated to five glasses of wine or two and a half pints of normal strength beer. While this statement is acknowledged to be a broad generalization, and that many factors may be relevant, it is yet another example where the use of terms such as “glass” of wine, and “normal strength” beer may mislead rather than illuminate.

²⁹ *The Guardian*, 3 December 2009 <<http://www.guardian.co.uk/politics/2009/dec/03/drink-drive-limit-lower>> accessed 27 November 2013.

³⁰ *The Telegraph*, 3 December 2009 <<http://www.telegraph.co.uk/motoring/news/6716849/Drink-driving-law-change-would-ban-motorists-from-having-single-glass-of-wine.html>> accessed 27 November 2013.

³¹ See pp 193–194.

³² See pp 240–248.

³³ *Daily Mail*, 3 December 2009 <<http://www.dailymail.co.uk/news/article-1257871/Drink-drive-limit-lowered-just-pint-cut-56-deaths-road-year.html#ixzz0snqYRhBS>> accessed 27 November 2013.

³⁴ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) 7.

³⁵ *London Evening Standard*, 16 June 2010, 1.

³⁶ Michael Watson, ‘Drinking and Driving’ (2007) 171 JPN 572.

Self-Testing and BAC Calculators

It might be thought that, at least in respect of the prescribed limit, drivers would be assisted if they could test themselves.³⁷ Since speedometers assist drivers in avoiding speeding offences, there would seem no reason why they should not have an equivalent tool to measure alcohol concentration, but this has not been encouraged. The Blennerhasset Committee³⁸ considered that giving access to breath-testing equipment would not be helpful, because, for example, it would give misleading results if used too soon, while the person is still absorbing alcohol and may have alcohol in the mouth.³⁹ The Committee also warned that self-testing might encourage drivers to continue drinking until just below the limit. This danger was also recognised in recent American research concerning a personal saliva-based alcohol test.⁴⁰

A number of websites⁴¹ provide methods for estimating alcohol concentration in blood. The data to be inputted include age, gender, height and weight, the time over which alcohol has been drunk, and the amount and type of drinks consumed. The resulting calculations are, quite rightly, subject to caveats about their accuracy. More recently, such calculators have become available as applications for smartphones and other devices.⁴²

Occasionally, tables and graphs have been published showing estimated alcohol concentration after consuming certain amounts of

³⁷ M Johnson and R Voas 'Potential Risks of Providing Drinking Drivers with BAC Information' (2004) 5 *Traffic Injury Prevention* 42.

³⁸ Department of the Environment, *Drinking and Driving: Report of the Departmental Committee* ('the Blennerhasset Report') (HMSO 1976).

³⁹ See p 193 for the reasons why a false reading could result in these circumstances. The dangers of self-testing before peak blood alcohol level is reached, and the temptation to continue drinking after a test showing the limit has not been reached, was also recognised in David Riley, *Drivers' Beliefs About Alcohol and the Law* (1984) Home Office Research & Planning Unit Bulletin No 17, 32.

⁴⁰ Mark B Johnson and others, 'The Consequences of Providing Drinkers with Blood Alcohol Concentration Information on Assessments of Alcohol Impairment and Drunk-Driving Risk' (2008) 69 *Jnl of Studies on Alcohol and Drugs* 539. Although the saliva test was found not to be particularly accurate, the results did enable users better to assess whether or not they were within the legal limit for driving, but was not particularly useful in assessing impairment.

⁴¹ See for example <www.rupissed.com> and <http://www.drinkdriving.org/drink_driving_information_bloodalcoholcontentcalculator.php> accessed 27 November 2013. The following data were inputted: male aged 35 years, weighing 77 kg, 175 cm tall (for the rupissed calculator only), who had drunk three pints of beer of 3.5 per cent alcohol by volume over three hours. The two calculators both gave results of 0.049.

⁴² For example, JRB Computer Services, *Drink Counter* <<https://itunes.apple.com/gb/app/drink-counter/id291208184?mt=8>> accessed 27 November 2013.

alcohol.⁴³ Their value is, however, limited since such tables are usually compiled making assumptions about many of the factors which have a bearing, with the result that it is extremely complex to apply them accurately to an individual set of circumstances. Such a table⁴⁴ was referred to in a case before the Queen's Bench Division in 1986,⁴⁵ when the court pointed out the danger of seeking to adapt such tables to individual sets of circumstances.

How Much Drivers Think they Can Drink Before Driving Lawfully

The observations above indicate the factors which may influence how people interpret the prohibitions on drinking and driving. A number of studies investigating drivers' actual understanding of the law are described next. Most deal with how the prescribed limit is interpreted. (Un)fitness to drive is addressed in some of the studies, but has received less attention than the prescribed limit.

The results show a wide variation in views. There are also reasons to treat the results with caution. Responses given in interviews give the flavour:

- We don't know what the limit is ... all the different strengths out there ... You can't really specify for every single person.⁴⁶
- It's like we're getting mixed messages from the government in terms of the law because I've never gone into a pub and seen it on a sign saying you're allowed to have this much alcohol. ... I think two pints is about the limit ... or is that four units? I'm not sure.⁴⁷
- I don't know quite how much I can drink so it's not my fault if I creep over the limit.⁴⁸
- It is confusing for people – is it ten units, is it five?⁴⁹

⁴³ See, for example, (unattributed) 'Recognition of Intoxication' (1954) 1 BMJ 753; 'Alcohol and Road Accidents: Report of Special BMA Committee' (1960) 1 BMJ 269; 'Table of metabolic losses for breath and blood analyses with time' in PJ Halnan and PS Wallis (eds), *Wilkinson's Road Traffic Offences* (13th edn, Sweet & Maxwell 1987) 1/869 (not reproduced in later editions); Global Road Safety Partnership, *Drinking and Driving: A Road Safety Manual for Decision-makers and Practitioners* (2007) 140.

⁴⁴ Taken from JB Saunders, A Paton, 'Alcohol in the Body' (1981) 283 BMJ 1380.

⁴⁵ *Dawson v Lunn* [1986] RTR 234 (QBD) 238.

⁴⁶ Emma Collins and others, *Drinking & Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008) para 6.49.

⁴⁷ *Ibid.*, para 7.21.

⁴⁸ Davies McKerr, *Anti-Drink Drive Adcept Research Debrief, March 2007*, 26 <<http://www.docstoc.com/docs/13834601/Drink-Drive-Adcept-Debrief-March-2007>> accessed 27 November 2013.

⁴⁹ Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 29.

As noted earlier, assessing perceptions of the legal provisions in terms of amounts consumed is erroneous, since the restrictions are expressed in terms of the effects of that consumption. Evaluating those effects involves many considerations in addition to the amount consumed. Nevertheless, the questions and answers featuring in the research have often been expressed by reference to consumption. When individuals were asked how much they could drink while remaining fit to drive, and/or within the legal limit, responses have been expressed:

- as units – from two or fewer, to as many as ten;⁵⁰

⁵⁰ David Riley, *Drivers' Beliefs About Alcohol and the Law* (1984) Home Office Research & Planning Unit Bulletin No 17, 35, in which it is reported that almost 40 per cent of 3,000+ male drivers in England and Wales believed they would remain within the limit after consuming five units of alcohol.

R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990) 24. Fifty-two per cent of 1,521 respondents in a postal questionnaire sent to UK driving licence holders believed they would remain within the prescribed limit after one to three units, consumed over two hours. A further 40 per cent gave limits of between four and six units consumed over two hours. The replies were broadly similar when respondents were asked how many units they could drink and still drive safely.

JT Everest and others, *Roadside Surveys of Drinking and Driving: England and Wales 1990* (Transport and Road Research Laboratory Research Report 319, 1991) 16, reporting that, in a roadside survey of 13,500 drivers in England and Wales in 1990, 88 per cent thought the legal limit would be reached, and 85 per cent thought they would be unfit to drive, after four or fewer units consumed over two hours.

Claire Corbett and Frances Simon, 'Decisions to Break or Adhere to the Rules of the Road, Viewed from the Rational Choice Perspective' (1992) 32 *Brit J Criminology* 537, 546. Seven per cent of 226 respondents in a survey of pub patrons who were drinking and intending to drive said they could drink ten or more units and remain within the limit. Fourteen per cent said they would be below the limit having drunk six or more units.

Ian P Albery and Andrew Guppy, 'Drivers' Differential Perceptions of Legal and Safe Driving Consumption' (1995) 90 *Addiction* 245, 248. Among more than 900 drivers who completed a questionnaire, 2.97 units was the mean perception of the legal limit.

Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001) 26, 27. The subjects of qualitative interviews were asked what they thought the legal limit is, and typically replied, "two units", "two drinks, or "two pints". Fifty-two per cent of a separate sample surveyed said they would not feel comfortable driving after having anything to drink; 34 per cent said they would not feel comfortable driving after having more than one beer or one glass of wine; and nine per cent said they would not feel comfortable driving after more than two beers or two glasses of wine.

Laura Brasnett, *Drink-driving: Prevalence and Attitudes in England and Wales 2002* (Home Office Research, Development and Statistics Directorate, Findings 258, 2004) 3. Among 1,648 interviewees, two units was most commonly thought (by 34 per cent) sufficient to be over the limit.

Emma Collins and others, *Drinking & Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008) paras 7.6–7.7. Eleven per cent of 1,034 respondents thought a single unit was a safe amount to drink before driving, while 21 per cent said two units were safe, but 63 per cent said they would not drink at all before driving.

- as pints – from half a pint to four pints;⁵¹ and
- as “drinks” – from no drinks to two drinks.⁵²

Perceptions not only vary widely, but appear to have become more conservative over the years. For example, in an early study (1984),⁵³ almost forty per cent of more than 3,000 male drivers in England and Wales

⁵¹ AB Clayton and others, *Drinking and Driving Habits, Attitudes and Behaviour of Male Motorists* (Transport and Road Research Laboratory Supplementary Report 826, 1984) para 3.8. Of 88 drivers interviewed, 58 per cent thought the maximum they could drink in two hours and remain within the limit was two pints of beer, 20 per cent said two and a half to three pints, and 12 per cent said a single pint.

R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990) 35, in which 27 per cent of respondents agreed (either strongly or slightly) with the statement that some people can drive perfectly safely after drinking three or four pints of beer.

Audience Selection for the Portman Group: *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished). When asked to define the legal drink drive limit in terms of drinks, two thirds of respondents from an initial sample of 1,062 eighteen- to thirty-year-olds, gave a number of pints, ranging from half a pint to three pints. See p 239.

MORI for the Portman Group: *Alcohol and Society: A Report on what the British Public Thinks About Alcohol and the Part it Plays in their Lives* (unpublished, research conducted in 2000). In face-to-face interviews with 1,511 members of the general public, when asked what the limit was in terms of beer, 67 per cent answered two pints or less. When asked the same question in relation to glasses of wine, 55 per cent thought the limit equated with one or two “pub glasses” of wine.

Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001) 27.

RAC Report on Motoring 2003, *Drink, Drugs and Driving* (RAC Motoring Services 2003) 14. Eighty per cent of an unstated number of respondents thought an average man would be over the limit after two pints of strong lager; 41 per cent thought the average man would be over the limit after two pints of ordinary lager, while 22 per cent thought the average man would be over the limit after one pint of strong lager.

⁵² Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001) 27.

Churchill Insurance Press Release, *Four Million Drivers Set to Hit the Road ‘Smashed’ this Christmas*, 1 December 2006, supplemented by data kindly supplied by RBS Insurance in August 2008. When asked how many drinks respondents would tend to have and still feel confident driving, 48 per cent (of about 2,000) said none, 32 per cent said one, and 13.33 per cent said two. A drink was defined as half a pint, a small glass of wine, or one measure of spirit.

Davies McKerr, *Anti-Drink Drive Adcept Research Debrief*, March 2007, 23 <<http://www.docstoc.com/docs/13834601/Drink-Drive-Adcept-Debrief-March-2007>> accessed 27 November 2013. Most respondents (the sample size is not reported) believed they were to safe to drive if they observed their own personal limits, usually one to three drinks.

Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 37, reporting that, among 50 drivers interviewed, two drinks was a rough rule of thumb as a guide to the legal limit.

⁵³ David Riley, *Drivers’ Beliefs About Alcohol and the Law* (1984) Home Office Research & Planning Unit Bulletin No 17, 35. For an earlier survey of views on how much could be drunk before driving lawfully, conducted in anticipation of the coming into force of the fixed alcohol limit in blood in 1967 (see p 7), see D Sheppard, *The 1967 Drink and Driving Campaign – A Survey Among Drivers* (Ministry of Transport Road Research Laboratory Report LR 230, 1968).

believed they would remain within the limit⁵⁴ after consuming five units of alcohol. The figure was two units or fewer in 2002.⁵⁵ A similar trend had been noted in a review covering the years 1976/77 to 1992/93: 4.6 units was seen as equating with the legal limit in 1976/77, but by 1992/93 this had gone down to 3.52 units.⁵⁶

The accuracy of these estimates, and therefore the accuracy of respondents' understanding of the legal prohibitions, depend on a number of factors. These include understanding the measures used and the factors which influence how alcohol affects the body and the speed at which it is absorbed and eliminated, the accuracy of the assumptions made by researchers and the objectivity of respondents' replies to questions.

Terminology

Because simple measures of volume do not provide any information about the amount of alcohol they contain, the unit of alcohol was adopted as a standard measure.⁵⁷ The accepted definition is given above.⁵⁸ While public awareness of measuring alcohol in units is increasing,⁵⁹ there is much to suggest that the unit is still not well understood.⁶⁰ This has been referred to as an area of confusion and uncertainty.⁶¹ One interviewee, when asked about the legal limit, said:

⁵⁴ Expressed in the report as 'would not fail a breathalyser', *ibid*, 33.

⁵⁵ ONS Omnibus Survey, March 2002, module 303 <<http://nesstar.esds.ac.uk/webview/index.jsp?v=2&mode=documentation&submode=abstract&study=http%3A%2F%2Fnesstar.esds.ac.uk%3A80%2Fobj%2FStudy%2F4701&top=yes>> accessed 27 November 2013. Seventy-two per cent of 1,283 respondents said they could drink two or fewer units and remain within the limit.

⁵⁶ COI Research Unit and Research International for the Department of Transport, *An Overview of Trends in Drinking and Driving Behaviour and Attitudes 1979–1993* (undated) para 3.15. Approximately 450 men, who drove and drank away from home, were interviewed in each of the years reviewed.

⁵⁷ See p 205.

⁵⁸ At p 205.

⁵⁹ Deborah Lader and Matthew Steel, *Drinking: Adults' Behaviour and Knowledge in 2009* (Office for National Statistics, Opinions Survey Report No. 42, 2010) 56, reporting that 90 per cent of respondents had heard of measuring alcohol in units.

⁶⁰ See, for example, Jan Gill and Fiona O'May, 'Practical Demonstration of Personal Daily Consumption Limits: A Useful Intervention Tool to Promote Responsible Drinking Among UK Adults?' (2007) 42 *Alcohol and Alcoholism* 436; Deborah Lader and Matthew Steel, *Drinking: Adults' Behaviour and Knowledge in 2009* (Office for National Statistics, Opinions Survey Report No. 42, 2010) Chapter 4.

⁶¹ Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 23. See also Laura Brasnett, *Drink-driving: Prevalence and Attitudes in England and Wales 2002* (Home Office Research, Development and Statistics Directorate, Findings 258, 2004) 2, acknowledging the difficulty of measuring units.

It doesn't say on your glass this is one unit, it says 175 ml, but what is a unit? What does it measure?⁶²

As already noted, the distinction between the numbers of units recommended as maxima from the points of view of general health and the drink drive limit seems blurred.⁶³ Nor are units well understood for the purposes of safe drinking in general.⁶⁴

Despite the confusion, researchers have posed questions referring to units of alcohol without defining the unit. For example, in a roadside survey in England and Wales in 1990,⁶⁵ drivers were asked to estimate the number of units they could drink in two hours and remain (a) within the limit and (b) safe to drive, but no explanation of a unit of alcohol was given. Other studies which refer to units of alcohol sometimes included a definition,⁶⁶ sometimes not.⁶⁷ In one, examples of drinks converted into units were given to assist respondents. A pint of "normal strength beer, cider, lager, etc." was referred to as two units, and a pint of "strong/continental beer, cider, lager etc." as three units.⁶⁸ While this approach is at least an attempt to deal with the difficult question of definition, the examples cannot be more than approximations unless alcohol strength is also taken into account.

It may be that researchers have avoided defining the unit of alcohol because its complexity might confuse participants. In a report based on

⁶² Emma Collins and others, *Drinking and Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008) para 7.21.

⁶³ See, for example, Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 23–24.

⁶⁴ Caroline Ritchie and others, 'How Can I Drink Safely? Perception Versus the Reality of Alcohol Consumption' (2009) 29 *The Service Industries Jnl* 1397, 1399, 1402–1403.

⁶⁵ JT Everest and others, *Roadside Surveys of Drinking and Driving: England and Wales 1990* (Transport and Road Research Laboratory Research Report 319, 1991) 16.

⁶⁶ As in Laura Brasnett, *Drink-driving: Prevalence and Attitudes in England and Wales 2002* (Home Office Research, Development and Statistics Directorate, Findings 258, 2004), reporting on ONS Omnibus Survey, March 2002, Module M303_4: <<http://nesstar.esds.ac.uk/webview/index.jsp?v=2&mode=documentation&submode=abstract&study=http%3A%2F%2Fnesstar.esds.ac.uk%3A80%2Fobj%2FStudy%2F4701&top=yes>> accessed 27 November 2013, which refers to a show card giving definitions of units of alcohol, but does not reproduce the definitions.

⁶⁷ Claire Corbett and Frances Simon, 'Decisions to Break or Adhere to the Rules of the Road, Viewed from the Rational Choice Perspective' (1992) 32 *Brit J Criminology* 537; R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990).

⁶⁸ Emma Collins and others, *Drinking and Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008) Annex A, Q60.

annual research by the Office for National Statistics,⁶⁹ it is estimated that the average ABV of beer, lager and cider of “normal strength” is 4 per cent, and, in strong beer, lager and cider, 6.5 per cent. Nevertheless, respondents were asked about their understanding of units in “beer/lager/cider” without reference to strength. Sixty-three per cent of 1,210 respondents thought half a pint of beer/lager/cider represented a single unit, and this is reported as a “correct answer”. Using the accepted formula,⁷⁰ half a pint would equate to a single unit only if the alcohol content is 3.5 per cent. Many popular beers⁷¹ are in fact much higher in alcohol. Again, the report acknowledges that the smallest (125 millilitres) glass of wine sold on licensed premises probably now contains more than 1.5 units (assuming an ABV of 12.5 per cent) and may contain over three units,⁷² leading to the awkward situation that the correct answer to a question about what constitutes a single unit in wine had to be “less than” a small glass. In fact, only 27 per cent of respondents selected this answer.

There are other instances of imprecise terminology, which must cast doubt on the accuracy of participants' responses. Reporting on a recent survey,⁷³ it was said that most respondents had a rule of thumb that they could have “two drinks” without exceeding the limit, but the term “two drinks” was not explored.

Influencing factors

Unfitness to drive and reaching the prescribed drink-drive limit are influenced not only by the volume and strength of alcohol consumed, but by the many other factors mentioned in Chapter 6.⁷⁴ Some of the studies illustrate that drivers are conscious of the importance of individual characteristics, and the factors which affect the rate of metabolism of alcohol:

⁶⁹ Deborah Lader and Matthew Steel, *Drinking: Adults' Behaviour and Knowledge in 2009* (Office for National Statistics, Opinions Survey Report No. 42, 2010) Chapter 4 and Appendix A.

⁷⁰ See p 205.

⁷¹ See, for example, the list on the website of the pub chain J D Wetherspoon: <<http://www.jdwetherspoon.co.uk/home/drink/beers-and-ciders>> accessed 27 November 2013, listing eight of the “world's top brands of lager” as having ABVs of 5.0, 5.0, 4.8, 4.6, 4.1, 4.0, 4.0 and 3.8 per cent. Appendix A to the ONS Report estimates an average ABV in “normal strength beer, lager or cider” as 4 per cent.

⁷² Deborah Lader and Matthew Steel, *Drinking: Adults' Behaviour and Knowledge in 2009* (Office for National Statistics, Opinions Survey Report No. 42, 2010) 56–57.

⁷³ Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 37.

⁷⁴ See pp 193–194.

Meals, size, speed of drinking and time between drinking and driving were all seen as playing a part in what is seen as an impossible calculation.⁷⁵

While many drivers seem aware that alcohol affects different people differently, they may be less sure of quite how. The published research suggests that their understanding of these issues is shallow and tentative.⁷⁶ While it is possible that respondents may, without prompting, have taken into account these factors when estimating how much they can drink without breaking the law, the research does not address whether or not they did so, let alone the accuracy of any such mental exercise. Issues such as the rates of absorption and elimination and the consumption of food with alcohol are largely ignored in the studies.

In some surveys, time has been taken into account. In one, respondents were asked how much they could drink over two hours and remain within the limit or safe to drive, although the reports contain no explanation of why this period was selected.⁷⁷

Research assumptions

In framing their research, some investigators have adopted assumptions about how much alcohol would take a driver over the limit. In studies designed to gauge the frequency of drink-driving, one early researcher, on the basis of information then published,⁷⁸ thought it reasonable to assume that five units would bring most people to the legal limit if drunk quickly and the person tested a short time later, although it was acknowledged that this would not apply to all drivers. The same assumption was made in a

⁷⁵ Davies McKerr, *Anti-Drink Drive Adcept Research Debrief*, March 2007, 25 <<http://www.docstoc.com/docs/13834601/Drink-Drive-Adcept-Debrief-March-2007>> accessed 27 November 2013. See also Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001) 26–27, 28, 29–30, 33–34; Emma Collins and others, *Drinking and Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008) para 7.18; Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 37–38, 60, 61.

⁷⁶ Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 37–38.

⁷⁷ AB Clayton and others, *Drinking and Driving Habits, Attitudes and Behaviour of Male Motorists* (Transport and Road Research Laboratory Supplementary Report 826, 1984) para 3.8; R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990) 24.

⁷⁸ David Riley, *Drivers' Beliefs About Alcohol and the Law* (1984) Home Office Research and Planning Unit Bulletin No 17, 32, giving as an example of published information *Health Education Council Leaflet AL5* (not traced by the present author).

roadside survey conducted in 1990.⁷⁹ More recent work has moved away from making such assumptions,⁸⁰ because of the clear difficulty of doing so accurately. Nevertheless, in a survey conducted in Scotland, reported in 2001,⁸¹ it is said that interviewees “operate with a relatively clear understanding of current limits, though this is typically expressed in terms of units or numbers of drinks, rather than blood alcohol measures”. The report goes on to quote two units, two drinks or two pints as typical of respondents’ perception of the current limit. The implication is that these estimates are accurate, but the question is simply not explored, leaving no basis for concluding that respondents had anything like a clear understanding of the legal limit. At the other end of the scale, where respondents in a pub said they could drink ten or more, or six or more, units without exceeding the limit, it was remarked that their assessments were “based more on hope than on a realistic assessment”.⁸² Again the accuracy of these estimates is not addressed. It seems simply to be assumed that they must be wrong. Yet, as will be seen below,⁸³ other studies suggest that two units, two drinks or two pints would leave many people well below the limit, while some may indeed be able to consume ten units and remain within it.

In relation to research conducted in 2002,⁸⁴ it was acknowledged that the same amount of alcohol can have a different effect on different individuals, but the prescribed limit was nevertheless equated to four units of alcohol, two pints of regular strength beer, four very small glasses of wine (7 per cent ABV) or four single measures of spirit. The complexity of the issue is such that assumptions must be made if research is to be feasible, yet some such assumptions seem to beg the question: how small is a “very small” glass

⁷⁹ JT Everest and others, *Roadside Surveys of Drinking and Driving: England and Wales 1990* (Transport and Road Research Laboratory Research Report 319, 1991) para 3.6, where it is said that this level was chosen because a man of average build would be unlikely to exceed the legal limit by drinking less than five units.

⁸⁰ See, for example, Laura Brasnett, *Drink-driving: Prevalence and Attitudes in England and Wales 2002* (Home Office Research, Development and Statistics Directorate, Findings 258, 2004) 3, acknowledging the difficulty of gauging the level required to be over the limit.

⁸¹ Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001) 26.

⁸² Claire Corbett and Frances Simon, ‘Decisions to Break or Adhere to the Rules of the Road, Viewed from the Rational Choice Perspective’ (1992) 32 *Brit J Criminology* 537, 546.

⁸³ See p 240–248.

⁸⁴ RAC Report on Motoring 2003, *Drink, Drugs and Driving* (RAC Motoring Services 2003) 14.

of wine. Others appear naïve, in that wine having an ABV as low as 7 per cent is unlikely to be available.⁸⁵

Personal interpretations

A further problem of interpreting the research findings is that of identifying subjective views. Respondents who are asked how much they can drink before driving and remain fit to drive or within the limit may, unless the question is framed so as to exclude the possibility, answer subjectively, bringing in personal considerations. Such answers may be influenced by the “don’t drink and drive” campaigns, by inaccurate media reporting, by the complexity of the calculation, and/or by individual caution, resulting in an under-estimate. On the other hand, although probably less likely, there may be over-estimates, possibly as a result of bravado.

Subjects asked about how much they would in fact drink before driving may give low estimations to appear in a positive light to researchers, to hide from the truth, because they are simply not aware of how much they drink,⁸⁶ or to appear more law-abiding than they in fact are. Although some studies refer to “personal limits”,⁸⁷ suggesting that these are individual interpretations rather than interpretations of the prescribed limit, many do not investigate whether responses have been influenced in ways such as these. Respondents adopting the “don’t drink and drive” mantra⁸⁸ are almost certainly erring on the side of caution as far as the prescribed limit is concerned.

⁸⁵ For example, the website of Majestic Wine <<http://www.majestic.co.uk/find/category-is-Wine/>>, when accessed on 18 August 2011, showed one wine having an ABV of up to 4.5 per cent; five wines having an ABV between 5 and 9.5 per cent, 54 with an ABV between 10 and 12 per cent; 531 in the range 12.5 to 14.5 per cent; and 13 having 15 per cent or more.

⁸⁶ Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) 23. See also David Riley, *Drivers’ Beliefs About Alcohol and the Law* (1984) Home Office Research and Planning Unit Bulletin No 17, 32; Emma Collins and others, *Drinking and Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008) paras 2.6–2.8; R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990) 24, 45.

⁸⁷ COI Research Unit and Research International for the Department of Transport, *An Overview of Trends in Drinking and Driving Behaviour and Attitudes 1979 – 1993* (undated) para 3.16; Davies McKerr, *Anti-Drink Drive Adcept Research Debrief*, March 2007, 25 <<http://www.docstoc.com/docs/13834601/Drink-Drive-Adcept-Debrief-March-2007>> accessed 27 November 2013.

⁸⁸ In the British Social Attitudes Survey for 2012, two thirds of respondents strongly agreed with the statement that “If someone has drunk any alcohol they should not drive”: British Social Attitudes Survey 2012 (NatCen Social Research 2013) Self-Completion Questionnaire Version B, Question 6 <http://www.bsa-30.natcen.ac.uk/media/24859/bsa_30_annotated_questionnaire_2012.pdf> accessed 27 November 2013.

(Un)fitness to drive

Some of the studies which address drivers' attitudes to drinking and driving omit the question of unfitness to drive altogether, concentrating only on the prescribed limit.⁸⁹ In others, researchers have used terms such as "fit to drive",⁹⁰ "able to drive safely"⁹¹ and fitness to drive⁹² without expressly relating these expressions to either the statutory test of unfitness and its interpretation in the case law⁹³ or to the prescribed limit. In one survey, respondents were asked how much they would "tend to have and still feel confident then driving",⁹⁴ without reference to whether still feeling confident to drive meant fit to drive, or within the legal limit, or neither. The result is that while people may have described the circumstances in which they thought they would be safe to drive, or fit to drive, it is difficult to know whether that means they believed they would be fit for legal purposes, below the legal limit, or neither. It may mean simply that they believed they could drive safely according to their own personal standards. If so, this leads to the unasked question of whether personal standards match the legal requirements.

While the scientific position is that a person may be unfit to drive on far less alcohol than would put the person over the limit,⁹⁵ some research suggests that this is not understood, and that respondents' ideas of ability to drive safely fall below the legal standard of fitness to drive. In one survey,

⁸⁹ For example, the two Scottish reports: Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001); Emma Collins and others, *Drinking and Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008).

⁹⁰ AB Clayton and others, *Drinking and Driving Habits, Attitudes and Behaviour of Male Motorists* (Transport and Road Research Laboratory Supplementary Report 826, 1984), para 3.8.

⁹¹ BE Sabey and others, *Roadside Surveys of Drinking and Driving 1988* (Transport and Road Research Laboratory Report No. 175, 1988); JT Everest and others, *Roadside Surveys of Drinking and Driving: Wiltshire* (Transport and Road Research Laboratory Research Report RR 285, 1991); JT Everest and others, *Roadside Surveys of Drinking and Driving: England and Wales 1990* (Transport and Road Research Laboratory Research Report 319, 1991) para 3.6; R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990); Ian P Albery and Andrew Guppy, 'Drivers' Differential Perceptions of Legal and Safe Driving Consumption' (1995) 90 *Addiction* 245.

⁹² Claire Corbett and Frances Simon, 'Decisions to Break or Adhere to the Rules of the Road, Viewed from the Rational Choice Perspective' (1992) 32 *Brit J Criminology* 537, 545, 546, referring to respondents in a pub study who believed they would be fit to drive even when over the limit.

⁹³ Explained in Chapter 6; see pp 209–211.

⁹⁴ Churchill Insurance Press Release, *Four Million Drivers Set to Hit the Road 'Smashed' this Christmas*, 1 December 2006, supplemented by data kindly supplied by RBS Insurance in August 2008.

⁹⁵ See pp 9, 192–193, 224.

there was little difference between the amounts respondents thought they could drink and remain within the limit and the amounts they thought they could drink and still drive safely,⁹⁶ while others suggests the opposite.⁹⁷ In a recent qualitative survey of fifty drivers,⁹⁸ many respondents thought impaired ability to drive would be evident to them, and that if they felt “alright”, they were probably not impaired. They could apparently “feel alright”, and so presumably consider themselves fit to drive, even if over the limit.

In a study among men under the age of forty, there was general surprise that drinking to a level which leaves the drinker below the limit could have any effect at all on driving ability. There seemed to be an assumption that the legal limit is set where it is because it is safe to drink to that level and that driving is not impaired when below the limit.⁹⁹ This bears out the fears of the Blennerhasset Committee decades earlier.¹⁰⁰ And respondents were sceptical that driving ability could be impaired following as little as half a pint.¹⁰¹ This compares with a survey in 1984 which showed that forty-seven per cent of respondents agreed with the statement than even one drink makes a person drive less safely.¹⁰² It seems that awareness of unfitness to drive may have receded since the introduction of the prescribed limit.

⁹⁶ R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990) 6.

⁹⁷ Claire Corbett and Frances Simon, ‘Decisions to Break or Adhere to the Rules of the Road, Viewed from the Rational Choice Perspective’ (1992) 32 *Brit J Criminology* 537, 545, 546, where more than three quarters of respondents in a survey of pub patrons who were planning to drive even though they expected to be over the limit believed they would nevertheless be fit to drive, although there is no definition of fitness to drive; Laura Brasnett, *Drink-driving: Prevalence and Attitudes in England and Wales 2002* (Home Office Research, Development and Statistics Directorate, Findings 258, 2004) 4, where almost half of drivers who drove when they thought they were over the limit said they did so because they felt safe to drive.

⁹⁸ Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) para 5.2.

⁹⁹ Davies McKerr, *Anti-Drink Drive Adcept Research Debrief*, March 2007, 41–42, 75 <<http://www.docstoc.com/docs/13834601/Drink-Drive-Adcept-Debrief-March-2007>> accessed 27 November 2013, where the sample consisted of men up to the age of thirty-nine; the number in the sample is not quoted.

¹⁰⁰ In 1976; see pp 223–224.

¹⁰¹ Davies McKerr, *Anti-Drink Drive Adcept Research Debrief*, March 2007, 63–64 <<http://www.docstoc.com/docs/13834601/Drink-Drive-Adcept-Debrief-March-2007>> accessed 27 November 2013.

¹⁰² R Lennox and A Quimby, *A Survey of Drink Driving Behaviour, Knowledge and Attitudes* (Transport and Road Research Laboratory Contractor Report 147, 1990) 36, 43.

Knowledge of the Statutory Definition

Only rarely have research subjects been directly asked to define the prescribed limit itself. An early study¹⁰³ indicated that forty-two per cent of respondents knew that the limit was 80 milligrammes in 100 millilitres of blood; forty-five per cent did not know. But from the report, it is unclear how the question was put; it is possible that the proportion 80 in 100 was quoted in the question.¹⁰⁴ A later study reports that no respondent could quote the limit in terms of blood alcohol concentration, most thinking of it in terms of units, but again it is not clear what question was actually asked.¹⁰⁵

More recent work indicates widespread ignorance of the prescribed limit as a concentration of alcohol in the body. In an unpublished study conducted in Great Britain in 1993,¹⁰⁶ 1,062 respondents aged eighteen to thirty were asked what they understood by the term the “drink drive limit”. Although the question did not mention units of alcohol or particular drinks, most respondents nevertheless interpreted the limit in those terms. Only fifteen per cent recognised it as relating to the concentration of alcohol in the body, and even fewer knew the actual limit:

- sixty-nine per cent answered by reference to an amount which may be drunk. Two thirds of these gave a number of units of alcohol, pints, measures of spirits or glasses of wine, ranging up to four units, three pints, three measures of spirits and three glasses of wine. The remaining third referred, more conceptually, to “the amount you can drink before driving”, “the amount you have to drink”, “the limit you can drink at which it is safe to drive” without specifying a particular amount;
- nine per cent said the limit refers to the amount or percentage of alcohol in the blood, without specifying an amount or percentage;
- six per cent quoted a limit in breath, blood or urine, two thirds of them getting it right and one third getting it wrong;
- six per cent referred to the variables, saying that the answer depends on size, weight, gender or that different people are affected differently;
- five per cent replied, “you shouldn't drink and drive”.

¹⁰³ AB Clayton and others, *Drinking and Driving Habits, Attitudes and Behaviour of Male Motorists* (Transport and Road Research Laboratory Supplementary Report 826, 1984) para 3.8.

¹⁰⁴ *Ibid*, table 7, first entry.

¹⁰⁵ Davies McKerr, *Anti-Drink Drive Adcept Research Debrief*, March 2007, 25 <<http://www.docstoc.com/docs/13834601/Drink-Drive-Adcept-Debrief-March-2007>> accessed 27 November 2013.

¹⁰⁶ Audience Selection for the Portman Group: *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished).

In another unpublished study¹⁰⁷ conducted in 2000, 1,511 respondents were asked to give the legal drink-drive limit in terms of milligrammes per 100 millilitres of blood. Only thirteen per cent gave the correct answer of 80. And in a recent poll conducted throughout the European Union, respondents were asked the legal blood alcohol level for drivers in their own countries. Seventy per cent of UK respondents simply did not know, while twenty-one per cent gave wrong answers. Only nine per cent put it within the band 60 to 100.¹⁰⁸

When told the definition of the prescribed limit, it meant little to interviewees, one saying that “it might as well be Swahili”, another saying that the limits “sound like medical terms”. Numbers of drinks which could be consumed before reaching the limit were of much greater interest.¹⁰⁹

It is not only the statutory limit which is ill-understood. An unpublished study in 1995 revealed widespread ignorance of the consequences of drink-driving, many respondents understating the penalties and failing to appreciate the additional cost of insurance after conviction.¹¹⁰

In Chapter 8, I describe my own study, which confirms the general lack of understanding of the drink-drive limit.

Drivers’ Estimates Enhanced by Calculations

The research projects described above give some indication of individuals’ perceptions of the prescribed limit and, to a lesser extent, of unfitness to drive. They do not, however, address the accuracy or otherwise of those perceptions. This is not necessarily to criticise the studies, rather to illustrate the complexity of the issue.

Studies conducted outside the UK have featured calculations to test the accuracy of respondents’ estimates, or to illustrate the relationship between amounts drunk and the resulting alcohol concentration in breath or

¹⁰⁷ MORI for the Portman Group: *A Report on what the British Public Thinks About Alcohol and the Part it Plays in their Lives* (unpublished, research conducted in 2000).

¹⁰⁸ European Commission, *Attitudes Towards Alcohol* (Special Eurobarometer 272, 2007) 26. It seems that the survey was not, however, confined to drivers.

¹⁰⁹ Wendy Sykes and others, *A Qualitative Study of Drinking and Driving: Report of Findings* (Department for Transport Road Safety Research Report no 114, 2010) para 5.3.

¹¹⁰ Audience Selection for the Portman Group, *Crime and Punishment: A Report on the Nation’s Understanding of the Drink-driving Laws* (unpublished report of research conducted in 2005). Police officers distributed a leaflet summarising the results of the study at Charing Cross Station over Christmas 1996. The study showed, for example, that three in five drivers did not realise that a drink driver not involved in an accident can be sent to prison; 70 per cent thought the maximum fine is less than £2,000 (in fact it is £5,000); only 6 per cent realised that an endorsement for drink-driving stays on the licence for eleven years (see RTOA 1988, sch 2). Only 7 per cent knew that insurance premiums were likely to increase five-fold following a conviction.

blood. Overall, these tend to confirm that it is extremely difficult for individuals accurately to estimate the effects of alcohol. An American study¹¹¹ concerned the role of alcohol in crime generally, and perceptions of how much alcohol it takes to become intoxicated. Intoxication was defined as having 100¹¹² milligrammes of alcohol in 100 millilitres of blood. 459 students were asked to assume that, after working all day, they ate a light meal at 6 p.m. and went to a party at 9 p.m. They estimated how many of various drinks, which were described, they would need to consume in an hour to become intoxicated. Widmark's formula¹¹³ was applied to calculate the amount it would actually take for each individual to become intoxicated to the defined level in one hour. Comparing the calculations with the students' responses showed that fewer than half of respondents said, to within 25 per cent, the number of drinks they could consume before reaching intoxication. Coining the expression "alcohol illiteracy", the authors concluded that the average citizen lacks accurate knowledge and explicit guidance as to the amount of alcohol he or she may drink without becoming functionally or legally impaired.

In a study in New Zealand in 2005,¹¹⁴ 1,564 students said how many "standard drinks" they could consume in one hour and remain within the legal limit.¹¹⁵ Standard drinks were defined as containing 10¹¹⁶ grammes of alcohol, and illustrations were given. The responses were then converted into blood alcohol concentration, taking into account sex and weight.¹¹⁷ The calculations showed that most respondents¹¹⁸ dramatically under-estimated how much they could drink and remain within the limit. Only 5.8 per cent of respondents over-estimated it.

¹¹¹ David J Giacomassi and Preston M Stein, 'To Err is Human: Estimating Alcohol Content and Its Effects' (1989) 5 *Jnl of Contemporary Criminal Justice* 102.

¹¹² The UK prescribed limit is 80; see p 14.

¹¹³ See p 203.

¹¹⁴ Kypros Kypri and Shaun Stephenson, 'Drink-Driving and Perceptions of Legally Permissible Alcohol Use' (2005) 6 *Traffic Injury Prevention* 219.

¹¹⁵ The limit in New Zealand is the same as in the UK.

¹¹⁶ A UK unit of alcohol is 8 grammes; see p 205.

¹¹⁷ Using the formula developed by the US National Highway Traffic Safety Administration; see p 204, fn 69.

¹¹⁸ The results are shown as graphs which are not entirely straightforward to interpret, but it seems that about 80 per cent of respondents gave estimates which would put their blood alcohol concentration at below 30 milligrammes of alcohol in 100 milligrammes of blood.

Calculating the Blood Alcohol Concentrations (BACs) of Hypothetical Subjects

Calculations published in 2003 in Canada¹¹⁹ are perhaps even more revealing. Researchers had been surprised when police officers told them how much a person had to consume before being charged with the offence of being over the limit. They decided to calculate the blood alcohol levels of hypothetical men and women, using the formula adopted by the American National Highway Traffic Safety Administration. The results were published as tables showing blood alcohol concentrations of both males and females assuming certain numbers of drinks consumed over two, three or four hours, and assuming certain body weights. An extract is quoted below.¹²⁰

The Blood Alcohol Concentrations of Males in Relation to Weight and Drinks Consumed in Three Hours

No. of "standard drinks" consumed over 3 hours	Equivalent in UK units	Resulting BAC in male weighing 170 lbs (= 77.1 kg or 12 st 2 lb)	Resulting BAC in male weighing 185 lbs (= 83.9 kg or 13 st 3 lb)	Resulting BAC in male weighing 200 lbs (= 90.7 kg or 14 st 4 lb)
2	3.36	3.5	0	0
3	5.05	27.8	21.9	16.9
4	6.73	52.1	44.2	37.5
5	8.41	76.3	66.5	58.1
6	10.09	100.6	88.8	78.7
7	11.77	124.8	111.1	99.4
8	13.46	149.1	133.4	120.0

These calculations are conservative in that they assume that the person is drinking on an empty stomach, and make no allowance for the elimination of any alcohol by metabolism.¹²¹ The figures highlighted in bold indicate results over the UK limit. It appears that people may remain within the limit even after consuming a great deal more than they think they can according

¹¹⁹ Robert Solomon and Erika Chamberlain, 'Calculating BACs for Dummies: The Real-World Significance of Canada's 0.08% Criminal ABC Limit for Driving' (2003) 8 Canadian Criminal Law Review 219.

¹²⁰ The tables published at (2003) 8 Can CLR 219 refer to weights in pounds only, and to "standard drinks". Pounds are here converted to stones and kg using Apple Macintosh Calculator version 4.2. The Canadian "standard drink" referred to by the authors contains 13.46 grammes of pure alcohol, while a standard UK unit contains only 8 grammes; standard drinks have here been converted to units on this basis. For example, 2 standard drinks contain (2 x 13.46 =) 26.92 grammes of alcohol, ÷ 8, gives 3.365 units.

¹²¹ Food would slow the absorption of alcohol and lower the peak alcohol concentration, as explained on p 193.

to the UK surveys. For example, men of all three weights could drink as much as eight units over three hours without exceeding the limit. Women weighing 120, 130 and 140 pounds (8 st 8 lb; 9 st 4 lb, 10 st; 54.4 kg, 58.97 kg, 63.5 kg) could, it was calculated, all drink the equivalent of 3.36 units and remain within the limit, whether they consumed the drinks over two, three or four hours. Women in the two heavier ranges could drink 5.05 units over two, three or four hours without exceeding the limit.

The calculations above may be compared with a table given by Denney.¹²² His table gives the approximate blood and breath alcohol levels resulting from drinking various amounts of beer having 3.6 per cent alcohol by volume, and from drinking various measures of whisky containing 40 per cent alcohol by volume. The following extract shows the resulting¹²³ blood alcohol concentration for men weighing 154 pounds (70 kg or 11 st). Again, the figures in bold indicate a BAC which exceeds the prescribed limit:

Beer – pints	Equivalent in units	Resulting BAC
1	2.04	34
2	4.08	67
2.5	5.1	84
3	6.12	101
4	8.16	134
5	10.2	168

On the face of it, it may seem that Denney's hypothetical subjects reach the limit on less alcohol than Solomon and Chamberlain's. But the tables can be reconciled by the fact that Denney's hypothetical subject is lighter than Solomon and Chamberlain's, and if it is assumed that Denney makes no allowance for the time over which the alcohol is taken (in fact he does not say whether or not he makes any allowance for time).¹²⁴ But Denney's

¹²² Ronald C Denney, *None for the Road: Understanding Drink-Driving* (Shaw 1997) 40.

¹²³ The author does not specify how the calculation is made.

¹²⁴ Applying the calculations set out in detail on pp 231 to 233 of Solomon and Chamberlain's article to Denney's hypothetical 70 kilo man drinking the amounts of alcohol Denney assumes, produces results which agree with those given by Denney. For example, a 70 kg man would have $(70 \times 58\% =)$ 40.6 litres of water in his body. If he has consumed 4.08 units of alcohol, that is the equivalent of $(4.08 \times 8 =)$ 32.64 grammes of alcohol. This produces a water-alcohol concentration in the body of $(32.64 \text{ divided by } 40.6 =)$.804. Converting the alcohol concentration in water to the alcohol concentration in blood gives $(.804 \times 80.6\% =)$.647. The figure given by Denney is in fact 67. The difference may be accounted for by the fact that Solomon and Chamberlain used the US NHTSA formula (see fn 66 above); Denney does not say how he made the calculations.

calculations are conservative in the same way as Solomon and Chamberlain's in making no allowance for the elimination of alcohol.

It seems surprising that calculations of the kind described above have not received greater attention, or that the simple method of applying a standard formula has not been used more widely in research into how the drink-drive limit works in practice. The technique gives a realistic estimate of the amounts of alcohol which would bring people to the limit, and suggests that drivers' own estimates may be extremely conservative. I discuss this further in Chapter 9.¹²⁵

Studies of the Effects of Specific Amounts of Alcohol

A small number of studies provide real-life examples of much alcohol would bring a person to the legal limit.

In an early Australian study,¹²⁶ experiments were carried out to investigate the relationship between the amount of alcohol consumed and the maximum blood alcohol concentration reached, and the time it took after the last drink to reach that maximum concentration. While these small-scale experiments were not in the context of driving offences, and did not take into account subjects' own views of the effects of what they drank, they are nevertheless revealing. Seventeen subjects drank the equivalent of thirteen units of alcohol within an hour. They reached their maximum blood alcohol concentration an average sixty minutes later. Blood specimens were taken and analysed. The levels ranged from 75 to 185 milligrammes per 100 millilitres.¹²⁷ While it is hardly surprising that most were over the limit having drunk so much so quickly, what may be surprising is that one person was not. He drank the equivalent of ten units, weighed 84 kilogrammes, and was aged thirty-nine.

In a second experiment, thirty-six subjects had a light breakfast¹²⁸ and drank at their own pace, over a period of three hours. On average they consumed the equivalent of a massive twenty units of alcohol and took 43 minutes to reach maximum blood alcohol concentration. Blood alcohol

¹²⁵ See pp 292–293.

¹²⁶ IEC Cameron and PA Donkin, 'Interpretation of Breathalyser Results for Medico-legal Purposes: An Investigation of the Blood Alcohol Concentration of Subjects Monitored in a Series of Controlled Drinking Experiments' in Ian R Johnston (ed), *Proceedings, Seventh International Conference on Alcohol, Drugs and Traffic*, 1979, 206.

¹²⁷ Blood alcohol concentration is expressed in the report as a percentage, but is here expressed in the same way as in RTA 1988.

¹²⁸ The report does not describe the food eaten in any further detail; nor does it state the time lapse between eating and starting to drink.

concentration ranged from 70 to 245. Only two were below the limit; both had had the equivalent of 13 units of alcohol. One was aged twenty-eight, the other thirty-five, and they weighed, respectively, 105 and 86 kilogrammes.

A small study into the meaning of “binge drinking”¹²⁹ was undertaken in the UK in 2003 at a cricket match. Twelve men, aged thirty-four to fifty-nine, who all said they were social drinkers, participated. The number of units of alcohol each drank before lunch (1 p.m.), from lunch to tea-time (3.30 p.m.), and from tea-time to end of play (6.00 p.m.) was recorded. All began drinking at 11.15 a.m., except one who began at 12.15. Breath alcohol was measured at lunch time, tea-time and end of play. All had had breakfast. One had a hot lunch; the others had a picnic. At the end of play, four were over the limit, with breath alcohol concentrations of 36, 54, 57 and 61 microgrammes. They had drunk, respectively, 16, 16.7, 19.5 and 21.7 units of alcohol over the course of the day. The number of units consumed by those who were below the limit at the end of the day ranged from 8.5 units to 18.9 units, suggesting that, at least when consumed over a relatively long period and with a meal, fairly substantial amounts may be drunk without reaching the drink-drive limit.

The issue has also been covered in the popular media, although in the absence of detailed published reports, the results are probably to be treated with some caution. They nevertheless support the view that it is extremely difficult to predict the effects of given amounts of alcohol. In a small experiment designed to illustrate the difference that age, sex, height and weight can make to alcohol concentration,¹³⁰ eight volunteers each drank either three or four measured units of alcohol and ate a sandwich. Blood specimens were taken when they finished the drinks, and a breath test was administered twenty minutes later. Further blood specimens were taken an hour and a half after they had finished drinking. The resulting alcohol concentrations were widely different. Among the five people who had consumed three units of alcohol, alcohol concentration in blood ranged from 16.6 to 74.9 milligrammes of alcohol per 100 millilitres of blood when drinking stopped, and from 26.2 to 58.1 an hour and a half later. Only one of the tests showed a participant over the limit – a nineteen-year-old woman weighing nine and a half stones, height 5 ft 4 in, who drank three units.

¹²⁹ Neil R Wright, ‘A Day at the Cricket: The Breath Alcohol Consequences of a Type of Very English Binge Drinking’ (2006) 14 *Addiction Research and Theory* 133.

¹³⁰ Sarah Edghill, ‘Why Alcohol Testing Doesn’t Tell You Whether You’re Fit to Drive’ (1998) *Good Food* 102.

Another rare example of a popular review of the position was a television broadcast¹³¹ which followed five people in a bar. One drank five pints, but was just under the limit at the end of the evening. Another drank six pints and his breath alcohol at the end of the evening was 44 microgrammes.

Estimated vs Actual Alcohol Concentration

Other experimental studies, all conducted outside the UK, have concentrated not on how much people think they can drink and still legally drive, but on comparing their own estimates of their alcohol concentrations with actual measured levels. Although the studies were conducted for a variety of purposes, and although the results are reported in different ways, what emerges is that most people are unable accurately to estimate their breath- or blood- alcohol concentration. At lower levels of consumption, people tend to over-estimate alcohol concentration, thinking that they will reach the limit on less alcohol than is the case. At higher levels, they are more likely to under-estimate alcohol concentration, believing they can stay within the limit on more alcohol than is the case.

In New Zealand in 1977,¹³² passers-by in a city centre late in the evening were asked to estimate their blood alcohol concentrations, and blood samples were taken and analysed for comparison. Only thirty-one per cent were right to within twenty per cent either way. Those with low blood alcohol tended to over-estimate it. Those with the highest concentrations were most accurate, but there was an increasing tendency to under-estimate at higher levels. A study conducted in Virginia in 1985, among students at a party,¹³³ also showed that subjects underestimated the amount of alcohol it took to reach their actual blood alcohol levels.

As part of a study conducted in Canada, reported in 1986,¹³⁴ seventy-two participants attended events designed to be as close as possible to ordinary social evenings. They were given a variety of alcoholic drinks and, at intervals, asked to estimate their blood alcohol concentrations. Their

¹³¹ ITV, *Police, Camera Action: Drink-Drive Special*, broadcast 17 December 2008.

¹³² JR Sharman and others 'Blood Alcohol Levels. How Accurately Can They be Guessed?' (1978) 87 *New Zealand Med Jnl* 438. This was an exercise by members of the bio-chemistry department of Christchurch University, New Zealand, to raise funds for charity. They offered to measure blood alcohol concentrations in return for a donation.

¹³³ Nason W Russ and others, 'Estimating Alcohol Impairment in the Field: Implications for Drunken Driving' (1986) 47 *Jnl of Studies on Alcohol* 237.

¹³⁴ Douglas J Beirness, 'Self-estimates of Blood Alcohol Concentration in Drinking-driving Context' (1987) 19 *Drug and Alcohol Dependence* 79.

actual blood alcohol concentrations were then measured and compared with the estimates. Just under forty-nine per cent of participants over-estimated their alcohol concentrations; 31.9 per cent under-estimated them; and 19.4 per cent revealed a mixed pattern of underestimating during the alcohol absorption phase and overestimating during the elimination phase.

In September 1990, a voluntary roadside survey of night-time drivers was carried out in Minnesota.¹³⁵ 483 drivers who said they had drunk alcohol within the preceding twelve hours, and whose measured blood alcohol levels were not less than the equivalent of 20 milligrammes in 100 millilitres of blood, were asked to estimate their blood alcohol concentrations, which were then compared with the results of analysing breath specimens. Only eighteen per cent were right to within 10 milligrammes. Thirty-two per cent over-estimated it, and fifty per cent under-estimated it. As in other studies,¹³⁶ those with lower concentrations (below 50 milligrammes) were more likely to over-estimate their alcohol concentration, while those with higher alcohol concentrations tended to under-estimate it. Of those who were actually over the limit, 94 per cent under-estimated their alcohol concentration.

More recent work in the United States¹³⁷ indicated that people drinking in bars were poor at estimating their blood alcohol concentrations. Of subjects who had been drinking before arriving at the bar, only 28.9 per cent could estimate their blood alcohol accurately.¹³⁸ The figure for those who had not been drinking before was higher, at 42.5 per cent.

Other studies, not all of them in the context of driving, and none of them particularly recent, have borne out the tendency to over-estimate the

¹³⁵ DJ Beirness and others, 'Drinking Drivers' Estimates of Their Own Blood Alcohol Concentration' (1993) 21 *Jnl of Traffic Medicine* 73.

¹³⁶ For example, Christopher S Martin and others, 'Estimation of Blood Alcohol Concentrations in Young Male Drinkers' (1991) 15 *Alcoholism: Clinical and Experimental Research* 494.

¹³⁷ John D Clapp and others, 'Predictors of Error in Estimates of Blood Alcohol Concentration: A Replication' (2009) 70 *Jnl of Studies on Alcohol and Drugs* 683.

¹³⁸ To within 2 grammes per 100 milligrammes.

effect on blood alcohol concentration of alcohol at lower levels of consumption and under-estimate it at higher levels.¹³⁹

All the studies referred to above illustrate the difficulty for drivers to estimate their own blood alcohol concentration, and the widely varying effects of personal characteristics and circumstances. I refer to these studies again in Chapter 9, in support of my argument that the prescribed limit cannot be reconciled with the principle of legal certainty discussed in Chapter 5.

DRUGS

By comparison with alcohol, there has been little research into the driving public's understanding of how drugs affect driving skills, or on the relevant law.¹⁴⁰ As noted in Chapter 6, driving can be impaired by a wide range of drugs, both legal (whether or not prescribed) and illegal. In due course there will also be offences of driving, attempting to drive or in charge with an excess of a specified controlled drug.¹⁴¹

Applicants for provisional driving licences, and those who hold driving licences, have legal duties¹⁴² to declare whether they suffer from certain disabilities which might affect their fitness to drive. The disabilities to be declared include the persistent misuse of drugs or alcohol, whether or not such misuse amounts to dependency. The DVLA investigates such declarations and as a consequence, a licence may be refused, revoked or restricted. While this may mean that regular or heavy users of drugs or alcohol may not be licensed to drive at all, and indeed may flag up, at an early stage, the connection between drugs or alcohol and fitness to drive, it does not assist drivers in knowing about the effects of drugs or the law on fitness to drive.

¹³⁹ Robert Turrisi and James Jaccard, 'Judgment Processes Relevant to Drunk Driving' (1991) 21 *Jnl of Applied Social Psychology* 89; Dennis L Thombs and others, 'Field Assessment of BAC Data to Study Late-Night College Drinking' (2003) 64 *Jnl of Studies on Alcohol* 322; Jacques Wicki and others, 'Self-Estimates of Blood-Alcohol Concentration and Ability to Drive in a Population of Soldiers' (2000) 35 *Alcohol and Alcoholism* 104; Courtney L Kraus and others, 'Inconsistencies Between Actual and Estimated Blood Alcohol Concentrations in a Field Study of College Students: Do Students Really Know How Much They Drink?' (2005) 29 *Alcoholism: Clinical and Experimental Research* 1672; Jean-Pascal Assailly, 'Self-Estimates and Objective Measurement of BRAC in Young French Drivers: A Field Study and its Preventive Aspects' (1995) Thirteenth International Conference on Alcohol, Drugs and Traffic Safety.

¹⁴⁰ Acknowledged in Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 6.8.

¹⁴¹ When RTA 1988, s 5A comes into force; see pp 8–9.

¹⁴² Under RTA 1988, ss 92 and 94.

Medication: Over-the-Counter and Prescription Drugs

Sources of information about the effects of medication are the label or other printed information provided with the medication, the pharmacist, the doctor or other health professional. While advice on fitness to drive should be integral to many consultations between drivers and health professionals, very little research has been done in the UK on the extent to which such advice is given, understood, or put into practice.¹⁴³

There are statutory requirements concerning the labelling of medicines.¹⁴⁴ Medicines must also be accompanied by a product information leaflet, which must include a statement of any effects the medicine may have on the patient's ability to drive.¹⁴⁵ As noted elsewhere,¹⁴⁶ over one hundred over-the-counter medicines contain ingredients which may cause drowsiness, but the warnings on the packaging are inconsistent and often poorly presented. The Medicines and Healthcare Products Regulatory Agency is working with European regulators to strengthen information given with prescription and over-the-counter medicines.¹⁴⁷

The British National Formulary has promulgated recommended wordings for prescription medicines, which include warnings such as "This medicine may make you sleepy. If this happens, do not drive or use tools or machines."¹⁴⁸

The provision of advice is only one aspect of the complex matter of understanding the law on fitness to drive. It raises the further questions whether general advice applies in particular cases; whether the advice is assimilated and understood; and whether or not the driver acts on it. It seems that remarkably little is known about these issues. One piece of research showed that a large proportion of patients do read the product

¹⁴³ Tim Carter, *Fitness to Drive: A Guide for Health Professionals* (Royal Society of Medicine Press 2006) Ch 4.

¹⁴⁴ See the schedules to the Medicines (Labelling) Regulations 1976 SI 1976/1726 as amended, requiring that medicines be labelled with information on matters such as the name of the product and its active ingredients.

¹⁴⁵ The Medicines (Leaflets) Regulations 1977 SI 1977/1055 as amended, sch 2. See also Medicines and Healthcare Products Regulatory Agency, Committee on Safety of Medicines, *Always Read The Leaflet, Getting the best information with every medicine* (Stationery Office 2005) 14.

¹⁴⁶ See p 198.

¹⁴⁷ *The Government's Response to the Reports by Sir Peter North CBE QC and the Transport Select Committee on Drink and Drug Driving* (Cm 8050, 2011) paras 13.10–13.15

¹⁴⁸ <<http://www.medicinescomplete.com/mc/bnf/current/PHP9294-recommended-label-wordings.htm>> accessed 27 November 2013.

information leaflet accompanying prescription medicines.¹⁴⁹ But whether or not patients act on advice not to drive is unclear. A wide-ranging review¹⁵⁰ of research into the role and effectiveness of written information about medicines, reported in 2007, concluded that most patients read the leaflets, and were most interested in any possible adverse effects. Since the focus of the review was patients' knowledge and understanding of treatment and health outcomes, the report does not cover how patients reacted to warnings not to drive.

Only a single study extending to drivers' knowledge about medicinal drugs has been traced. It indicated that 75 per cent of over 2,000 drivers surveyed in 2002/03 knew it was illegal to drive when under the influence of medication which could impair driving ability, but fewer than 40 per cent knew that over-the-counter products such as hay fever remedies and cough medicines can impair.¹⁵¹

One of the few items of public information on driving after taking medication¹⁵² perhaps only illustrates the complexity of the problem, pointing out the absence of hard and fast rules and the need for advice from a doctor or pharmacist in individual cases.

Illicit Drugs

A little more is known about drivers' understanding of the effects of illicit drugs and fitness to drive. The RAC reported that 82 per cent of over 2,000 drivers surveyed in 2002/3 said it was extremely dangerous to drive while under the influence of "hard" drugs such as ecstasy, cocaine or heroin, while 65 per cent said it was extremely dangerous to drive while under the influence of cannabis or marijuana.¹⁵³

A small number of studies among drug-users themselves, however, reveals a more complex picture. As already noted,¹⁵⁴ cannabis has been

¹⁴⁹ DK Raynor and others, 'How Do Patients Use Medicine Information Leaflets in the UK?' (2007) 15 *International Jnl of Pharmacy Practice* 209.

¹⁵⁰ DK Raynor and others, 'A Systematic Review of Quantitative and Qualitative Research on the Role and Effectiveness of Written Information Available to Patients about Individual Medicines' (2007) 11 *Health Technology Assessment* i.

¹⁵¹ RAC Report on Motoring 2003, *Drink, Drugs and Driving* (RAC Motoring Services 2003) 30–31.

¹⁵² London Accident Prevention Council, *Don't Motor on Meds: It's Illegal* <<http://www.motoringassist.com/Assets/Documents/Leaflets/Web-Road-Safety-leaflets/GEM-Meds-leaflet>> accessed 27 November 2013.

¹⁵³ RAC Report on Motoring 2003, *Drink, Drugs and Driving* (RAC Motoring Services 2003) 25.

¹⁵⁴ See p 198.

shown to impair driving skills. In a qualitative study in Scotland,¹⁵⁵ 44 people who had driven within a few hours of taking cannabis gave mixed comments about its effects, both positive and negative, and individuals were sometimes inconsistent in what they said. Perceived positive effects included heightened perceptions, greater focus and less propensity to speed, take risks, or be impatient. The main negative effects were seen as reduced concentration and feeling out of control. Some said cannabis had no effect on driving. Among the smaller numbers who had driven after using ecstasy, amphetamines, cocaine or LSD, the proportions who thought their driving skills were thereby enhanced were far lower. Subjects who had taken drugs but not then driven had more negative views. There was a widespread perception that the effects of drugs depend on a range of factors, such as the type and amount of drug, its strength or purity, and interactions with other substances. Most thought drink-driving more dangerous than drug-driving.¹⁵⁶ Knowledge of roadside drug-testing was limited.

In an associated Scottish study on the prevalence of driving after using recreational drugs,¹⁵⁷ among 61 club-goers who were all users of illicit drugs, many thought cannabis had little or no impact on driving skills and performance; again, some thought it would enhance driving. Those who had driven after taking ecstasy reported effects such as blurred vision, impaired concentration, propensity to speed and slower reaction times. Some who had taken amphetamine felt their driving was little affected, while some were sure it had been impaired. The effects of driving after cocaine were described as mixed, but all thought that driving after LSD was extremely dangerous. Knowledge of the legal position was said to be very poor, although the report does not elaborate on this.

In a later survey, again in Scotland,¹⁵⁸ it emerged that, of 36 interviewees who admitted having driven while under the influence of drugs in the past, almost half believed the drugs had no effect on their driving, while nine per cent thought the drugs improved their driving. Ninety-two per cent knew they could be prosecuted for drug-driving.

Other studies confirm the perception, at least among young people, that, while alcohol reduces mental alertness and may increase aggression,

¹⁵⁵ Joanne Neale and others, *Recreational Drug Use and Driving: A Qualitative Study* (Scottish Executive Central Research Unit, 2000) paras 5.5–5.8, 15.19.

¹⁵⁶ *Ibid*, para 7.8.

¹⁵⁷ Dave Ingram and others, *Recreational Drugs and Driving* (Scottish Executive Central Research Unit, Research Findings no 102, 2001).

¹⁵⁸ Katherine Myant and others, *Illicit Drugs and Driving* (Scottish Executive Social Research 2006) fig 5.2.

cannabis has the opposite effect and improves driving.¹⁵⁹ In a study in the UK,¹⁶⁰ among 50 regular cannabis users who reported driving after consuming cannabis, 24 per cent thought their driving was improved by cannabis. Only 12 per cent believed their driving was very much impaired; 58 per cent believed it was only slightly impaired; and 6 per cent believed it was not impaired at all. On the other hand, all believed that alcohol impaired their driving. An earlier study of 58 UK drug-users who had driven after taking drugs had shown that those who sometimes or frequently did so thought that an accident would be more likely when driving after taking alcohol alone, rather than cannabis, methadone, stimulants or heroin.¹⁶¹

Research carried out for the Department for Transport,¹⁶² to inform its first major anti drug-driving campaign in the summer of 2009, revealed that young drug users¹⁶³ rarely acknowledge drug-driving as a problem. There was little concern about detection and little awareness of the legal penalties. It was generally accepted that driving after taking drugs is illegal, but usually on the basis that possessing the drugs is illegal. The effects of drugs on driving ability were only rarely acknowledged, and certain drugs were seen to have positive effects on driving. There was much greater awareness that drink-driving is an offence, and drink-driving was considered far worse than drug driving.¹⁶⁴ Most thought it far easier to measure whether or not they would be over the alcohol limit.

¹⁵⁹ Simon Christmas, *The Good, the Bad and the Talented: Young Drivers' Perspectives on Good Driving and Learning to Drive* (Department for Transport Road Safety Research Report No 74, 2007) 19.

¹⁶⁰ P Terry, KA Wright, 'Self-reported Driving Behaviour and Attitudes Towards Driving under the Influence of Cannabis Among Three Different User Groups in England' (2005) 30 *Addictive Behaviors* 619, 622, 623.

¹⁶¹ Ian P Albery and others, 'Illicit Drugs and Driving: Prevalence, Beliefs and Accident Involvement Among a Cohort of Current Out-of-treatment Drug Users' (2000) 58 *Drugs and Alcohol Dependence* 197.

¹⁶² Firefish Qualitative Research for the Department for Transport, *Drug Driving Campaign – Creative Development*, April 2009 <<http://webarchive.nationalarchives.gov.uk/20120606112243/http://www.dft.gov.uk/adobepdf/164386/711130/drug-driving-debrief.pdf>> accessed 27 November 2013. For the final report, see Department for Transport, *Drug Drive – August 2009 Post Campaign Report* <<http://assets.dft.gov.uk/publications/drug-driving/Drug-Drive-final-report.pdf>> accessed 27 November 2013.

¹⁶³ The sample size is not given in the report.

¹⁶⁴ In contrast, in a Scottish survey of young male drivers only three years earlier, 46 per cent of respondents agreed that taking drugs and driving was more dangerous than drunk driving; only 11 per cent disagreed: Katherine Myant and others, *Illicit Drugs and Driving* (Scottish Executive Social Research 2006) 34.

DISCUSSION

The studies described in this chapter illustrate little connection between, on the one hand, drivers' perceptions of the prohibitions on drink- and drug-driving and, on the other hand, the statutory provisions and the scientific realities.

The legal definition of the prescribed limit as the concentration of alcohol in the breath, blood or urine seems to be unknown to many drivers and poorly understood by most of the remainder. It is perfectly natural to seek to understand the limit by reference to what is consumed, especially in the absence of tools to measure it in any other way. It is not clear how drivers settle on their own versions of safe amounts to drink, but it seems likely that they do so without reference to the statutory prohibitions, instead taking into account various public health messages, road safety messages, and media reports. These are often, as has been seen, contradictory and in some cases misleading. Nevertheless, translating the prescribed limit into an amount which may be drunk is fraught with difficulty – it requires a proper consideration of the amount consumed, its strength, the time over which it was drunk, the time since it was drunk, and anything consumed with it, as well as many characteristics of the individual concerned.

Many drivers seem to adopt conservative interpretations, perhaps as a matter of caution in response to the inherent difficulties; perhaps, in the interview situation, from a desire to appear in a good light. Nor is it always clear whether the estimates are of what the individual believes he or she *could* drink and still drive within the law, or of what the individual *would* drink before driving.

As a result, surprising as it may seem, most drivers appear to think the drink-drive limit is a great deal more restrictive than it in fact is. No work has been done in the UK to assess the accuracy of drivers' estimates of how much they can drink before driving and remain within the law, but comparing such estimates with the calculated blood alcohol concentrations arrived at in studies such as that of Solomon and Chamberlain¹⁶⁵ suggests that drivers greatly under-estimate how much they may drink before reaching the prescribed limit. Experimental work in other jurisdictions, with people who had been drinking at the time of interview, also shows that at lower levels, people think they will reach the limit on far less alcohol than is in fact the case, although at higher levels, they think the opposite, over-estimating how much they can drink before reaching the limit.

¹⁶⁵ See p 242.

Ironically, of course, an over-estimate in relation to the prescribed limit is unlikely to be an over-estimate in relation to (un)fitness to drive.¹⁶⁶

In Chapter 9,¹⁶⁷ I argue that all these considerations make the prescribed limit so uncertain of interpretation that the principle of legal certainty is not met.

The studies which have been conducted concentrate on the prescribed limit with little reference to the offence of driving when unfit. Some refer to “safety to drive” without relating this expression to unfitness to drive. There seems to be little understanding that driving skill can be impaired after a very small amount of alcohol. In view of that, the “don’t drink and drive” message appears far more appropriate to the offence of driving when unfit than to driving while over the limit, yet there is greater awareness of the latter offence and it is far more commonly prosecuted. Despite this, in Chapter 9,¹⁶⁸ I defend the legal concept of (un)fitness to drive through drink as reconcilable with the principle of legal certainty.

Far less is known about drivers’ knowledge of the drug-driving prohibitions. It is unclear how widely the prohibition on driving when unfit through drugs, particularly prescription drugs, is understood. Among users of illegal drugs, there may be confusion between the offences of possession of illegal drugs and driving when unfit. There may be differences between the views of those who do, and those who do not, use various drugs.

While the exact effects of different drugs on driving skills are a complex issue, I argue in Chapter 9¹⁶⁹ that the relative simplicity of the term unfitness is such that most drivers should know whether or not, having consumed drugs, they are unfit to drive through drugs. Whether or not they will know if they are over the forthcoming specified limits¹⁷⁰ is, however, another matter.

Against this background, I conducted a piece of empirical work to explore drivers’ perceptions further. This were confined to alcohol and the prescribed limit, and is described in Chapter 8.

¹⁶⁶ Given that a person may be unfit to drive at a far lower blood alcohol concentration than the prescribed limit; see pp 9, 192–193.

¹⁶⁷ See pp 292–294.

¹⁶⁸ See pp 290–292.

¹⁶⁹ *Ibid.*

¹⁷⁰ Under RTA 1988, s 5A; see pp 8–9, 206.

Chapter 8: The Opinions Survey

INTRODUCTION

It has been seen in Chapter 7 that most drivers think of the prescribed drink-drive limit in terms of how much they can drink without falling foul of the law, rather than in the terms of the statute, which refers to the concentration of alcohol in the body. There is also much to suggest that drivers' ideas about how much they can drink before reaching the limit are inaccurate. These findings in turn have implications for the principle of legal certainty, described in Chapter 5, and discussed further in Chapter 9.

In many of the studies described in Chapter 7, drivers had simply been asked how much they could drink and remain within the limit.¹ Phrasing the question in this way would focus respondents' minds on how much may be drunk, to the exclusion of other possible ways of understanding the drink-drive limit. I decided to look for other interpretations by putting a more broadly-based question in a survey.

The Survey Question

To obtain a large number of answers in a fairly short time, I decided to take advantage of the established sampling, interviewing and data-collection techniques offered by the Opinions Survey² conducted by the Office for National Statistics ("ONS"). My question, together with a preliminary screening question (see below), was incorporated in the Opinions Survey in July 2009.

My survey question was:

Most drivers know something about the drink-drive law, but I am interested to know what drivers understand about the drink-drive limit itself. Please tell me, in a sentence or two, what the expression 'the drink-drive limit' means to you.

It was to be expected that the results would reflect the findings described in Chapter 7, but I hoped that the open-ended nature of the question would generate responses encompassing a wider range of issues, yielding greater insight into what the drink-drive limit means to drivers, and how their

¹ See pp 228–238.

² Now called Opinions and Lifestyle Survey, which "provides a fast, cost effective and reliable way of collecting data": ONS, *About the survey* <<http://www.ons.gov.uk/ons/about-ons/products-and-services/opn/about-the-survey/index.html>> accessed 27 November 2013.

understanding of it compares with the legal definition. Drafting the question in open terms would also allow respondents freedom to answer in their own words, and would avoid suggesting answers to them. An open question of this nature had previously been put in only one, unpublished, survey, sixteen years before.³

My question referred explicitly to the drink-drive limit, excluding from consideration the offence of unfitness to drive,⁴ or, since they were not in contemplation at the time, the new proposed offences of excess of a specified drug.⁵ Since resources were limited, it seemed expedient to confine the question to the better-known offence and avoid the risk of generating confusion between the two sets of offences.

The question was tested by ONS before being included in the Opinions Survey, and I piloted it informally using a small sample of friends and family (ten) to ensure it did not give rise to ambiguities or misunderstandings.

I expected the question to do no more than elicit respondents' perceptions, leaving open whether or not those perceptions were accurate.

Ethical Issues

The survey question received approval from the Research Ethics Committee of the University of Sheffield School of Law in May 2009. The resulting data is subject to a data access agreement in the ONS's standard form, restricting use of the data to statistical, research and analysis purposes, and providing for the confidentiality and security of the data.

The principles applied by ONS in conducting surveys are set out in its Survey Charter.⁶ The handling of data, and in particular the confidentiality of data, are subject to the ONS Code of Practice.⁷

³ Audience Selection for the Portman Group: *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished); see p 239.

⁴ As noted on p 8, RTA 1988, s 4 creates the offences of driving, attempting to drive or being in charge when unfit through drink or drugs, while s 5 creates the offences of driving, attempting to drive or in charge after consuming so much alcohol that the proportion in the breath, blood or urine exceeds the prescribed limit. The s 5 offence of driving with excess alcohol is the most commonly prosecuted (see p 200).

⁵ Under RTA 1988, s 5A; see pp 8–9.

⁶ <<http://www.ons.gov.uk/ons/search/index.html?newquery=Opinions+Survey>> accessed 27 November 2013.

⁷ UK Statistics Authority, *Code of Practice for Official Statistics*, edn 1.0 January 2009 <<http://www.statisticsauthority.gov.uk/assessment/code-of-practice/index.html>> accessed 27 November 2013. See Principle 5: Confidentiality.

Method

The sample comprised 1,200 adult individuals in private households in Great Britain. It was drawn from the Royal Mail's postcode address file of private households which receive fewer than fifty items of mail per day. From this population, a sample was drawn using statistical techniques which would ensure, as far as reasonably possible, that the sample was representative of the population as a whole. Sixty-seven postal sectors were selected, with the probability of selection being proportionate to the sizes of the sectors. Addresses within these sectors were stratified⁸ by region, by the proportion of households where the household reference person⁹ is in socio-economic categories 1 to 3,¹⁰ and by the proportion of people aged sixty-five or over. Thirty addresses in each postal sector were selected randomly, and one person per household was randomly selected to answer the survey.¹¹

The sample was drawn from Great Britain as a whole, reflecting the geographic application of the prohibition on driving while over the prescribed limit.

ONS wrote to each of the selected addresses in advance, describing the survey and explaining that an interviewer would be calling. Interviews were conducted face-to-face by trained interviewers.

The July 2009 Opinions Survey also included questions concerning tobacco consumption, the support available to help people to live independently in later life, and individual autonomy.¹² The two questions on drink-driving were introduced with the words, "The next questions are about drinking and driving, and are being asked on behalf of the University of Sheffield".

⁸ That is, the population was divided into groups (or strata) by region etc., to ensure that the sample was distributed among the groups in the same way as the population. On this technique, see, for example, Iain Crow and Natasha Semmens, *Researching Criminology* (Open University Press 2008) 47.

⁹ The "household reference person" is the member of the household in whose name the accommodation is owned or rented, or who is otherwise responsible for the accommodation. Where there are joint householders, the household reference person is the person with the higher or highest income, or, in the case of equal incomes, the elder or eldest: National Statistics, *Living in Britain 2001*, 171 <<http://webarchive.nationalarchives.gov.uk/20100520011438/statistics.gov.uk/lib2001/index.html>> accessed 27 November 2013.

¹⁰ Managerial and professional occupations, intermediate occupations, and routine and manual occupations: National Statistics, *Living in Britain 2001*, 205, Table E.1 <<http://webarchive.nationalarchives.gov.uk/20100520011438/statistics.gov.uk/lib2001/index.html>> accessed 27 November 2013.

¹¹ For the sampling techniques referred to in this paragraph, see, for example, Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) Ch 8; Iain Crow and Natasha Semmens, *Researching Criminology* (Open University Press 2008) 43–50.

¹² <<http://www.esds.ac.uk/findingData/snDescription.asp?sn=6826>> accessed 27 November 2013.

The survey question was restricted to persons holding valid driving licences and to those who answered yes to a screening question asking whether they drank alcohol at least once a month. This was to ensure that the question was put only to those to whom the drink-drive limit would be most relevant and who could most be expected to understand it.

The response rate was 57.8 per cent,¹³ resulting in 1,051 interviews. Of these, about a quarter (277) did not hold a valid licence to drive a car in Great Britain, while 185 said they did not drink alcohol at least once a month. This left 589 participants to whom the survey question was put and who answered it.

THE DATA

The data were received from ONS as a PASW¹⁴ Statistics File, which included not only the replies to my question, but data on a number of variables relating to the respondents. These covered demographic matters such as age and gender, marital status, ethnicity, level of education, income, health and employment status.¹⁵

Coding the Data

To facilitate analysis and comment, I coded the responses received from ONS as described below and throughout this chapter. A list of all codings is given in Appendix 2.

The replies were analysed on the basis of the answers as recorded by the interviewers, although they may not always have been recorded fully or wholly accurately,¹⁶ and on unweighted data. Where responses are quoted in this chapter, they are quoted verbatim.

In the tables appearing in this chapter, all percentages are rounded to the nearest whole number.

Nine key themes emerged from the analysis and the responses were coded accordingly:

¹³ In the remaining 42.2 per cent of cases, the person selected for interview declined to be interviewed or could not be contacted.

¹⁴ An IBM research software product. See <<http://www.spss.com/uk/>> accessed 27 November 2013.

¹⁵ Listed in full in Appendix 2.

¹⁶ For example, “hch alcohol, you have in your blood per millilitre it doesn't matter how much you think you have had to drink” (Appendix 3, response 482), where the opening word “hch” should probably have been “how much”.

1. *quantified amount*: replies giving a specified amount of alcoholic drink which may be consumed before driving;¹⁷
2. *unquantified amount*: replies defining the limit as an amount of alcoholic drink which may be consumed before driving, but without quantifying the amount;¹⁸
3. *“don’t drink and drive”*: replies stating “don’t drink and drive”;¹⁹
4. *concentration of alcohol*: replies referring to the concentration of alcohol in the body;
5. *consequences*: replies referring to the consequences of driving after drinking;²⁰
6. *variables*: replies mentioning, albeit sometimes obliquely, the variables which affect alcohol concentration;²¹
7. *“don’t know”*;²²
8. *refusals*: those who declined to answer;
9. *non-classifiable/circular*: responses which could not be classified or which simply repeated the question.²³

¹⁷ These included a small number of replies where the amount specified was vague, as in “a miniscule amount”, and “very little” (Appendix 2, responses 188, 195).

¹⁸ Replies were allocated to this category only if they referred to amounts consumed, for example, “the amount of alcohol you can drink and still drive safely” (Appendix 2, response 432). If drinking or consumption was not mentioned, as in “legal limit of alcohol before you break the law” (Appendix 2, response 571), replies were categorised as non-classifiable, in the sense that they were circular or simply repeated the question. The inclusion of the word “unit”, as in “allowed number of units” (Appendix 2, response 381), was, however, taken to imply consumption.

¹⁹ Included in this category were replies including the expression “don’t drink and drive” or words to that effect, even if the respondent then went on to suggest some other interpretation – often an amount which could be drunk before driving; see p 276.

²⁰ Deciding whether or not to allocate a reply to this category was not always straightforward. Broadly, responses were placed in this category only if they referred to some specific serious outcome of drink driving. Included, for example, were replies containing the words, “loss of license” (Appendix 2, response 528), and “you can kill somebody” (Appendix 2, response 531).

²¹ Including, for example, “2 units for a woman” (Appendix 2, response 33), suggesting the respondent is aware of the relevance of gender.

²² The “don’t knows” were confined to replies which offered no suggested interpretation at all. For example, “it means one glass of wine - know it means also a certain no. of milligrams allowed but not sure how many” (Appendix 2, response 101) was categorised as a quantified amount rather than as a “don’t know”.

²³ For example, “limit is too high should be brought down, it’s a level in law that is too high” (Appendix 2, response 576), “You are not allowed to drive over the limit” (Appendix 2, response 589).

Where more than one of the above categories featured in a single response, each category was coded individually, according to its position in the reply.²⁴

A number of other themes also emerged, cutting across the nine main categories. Many respondents referred to units of alcohol, while some replies included words suggesting an individual interpretation which might not necessarily align with the formal definition. The difficulty of understanding the limit was mentioned, while others emphasised that it is low. Although the question explicitly concerned the prescribed limit, some respondents talked of unfitness to drive or impairment. I created further variables and values to facilitate analysis of these responses.

In analysing the data, I systematically cross-tabulated the data in the variables I created against the variables provided by ONS (these related to the demographic characteristics of the respondents, as mentioned above). In some cases, notably variables relating to age and sex, I created additional variables for different age groups, or different age/sex groups, in order to find statistically significant associations. The statistically significant relationships revealed are reported below.

The Nine Main Categories

The numbers of people who gave answers falling into each of the main categories were:

Table 1: The Main Categories of Response²⁵

Category	First answer	Second answer	Third answer	Totals	%age of total 589
Quantified amount	199	21	2	222	38%
“Don’t drink and drive”	181	23	4	208	35%
Unquantified amount	79	1	1	81	14%
Concentration of alcohol	61	3	1	65	11%
Variables	7	41	5	53	9%
Non-classifiable/circular answers	32			32	5%
“Don’t know”	13	9	3	25	4%
Consequences	11	10		21	4%
Refusals	6			6	1%
Totals	589	108	16	713	

All the responses are listed in full in Appendix 3. Each of the categories is considered in more detail below.

²⁴ For example, “no drinking at all with driving. I dont know where they are with the present limits e.g. no. of units supposedly allowed” (Appendix 2, response 333) was coded as “don’t drink and drive” as the first answer, “don’t know” as the second, and “unquantified amount” as the third.

²⁵ Frequencies: Ans01, Ans02, Ans03.

QUANTIFIED AMOUNTS

A total of 222 (thirty-eight per cent) of the 589 respondents quoted an amount of alcohol or number of drinks in their replies, 199 as a first answer and twenty-three as a second or third answer. The 222 responses were further analysed to provide more details about the amounts and types of alcohol mentioned.

The Amounts

The 222 were broken down according to the amounts stated. At the lower end of the range, answers included “a miniscule amount”, half a pint of beer, a small glass of wine and a single unit of alcohol. At the upper end, three pints of beer and four units were mentioned. A number of responses included alternatives, but all were classified according to the first reply given:

Table 2: The Quantified Amounts Broken Down ²⁶

One pint of beer, lager or of unspecified content. Some respondents gave as alternatives to one pint, a glass of wine, a small glass of wine, a couple of shorts, and two small whiskies.	41 (19%)
Minimal: one drink or glass (of unspecified content), “a bottle”, “one or two drinks”, “a small drink”, “just one”, half a pint, a bottle, a bottle of beer, a small bottle of beer, one beer, a can of Stella, half a pint of beer, one glass of lager, “one or two” drinks, a “small amount”, “very little”, “a miniscule amount”.	40 (18%)
Two units including “a couple of units, one or two units”. The alternatives were a pint of beer, two small wineglasses/1 small spirits/1 pint, 4 units for men, and 2 small glasses of wine or a small beer, two halves.	39 (18%)
Two pints of beer, lager or of unspecified content. Some respondents gave as alternatives two glasses of wine, four units, 80 milligrammes in blood, and 80 millilitres in blood.	32 (14%)
One (glass of) wine. The alternatives were half of lager, one drink, a glass of beer, half a pint, and a pint for a man.	31 (14%)
One and a half pints of beer, lager or of unspecified content. Some respondents gave as alternatives three shorts, three units, and a glass of wine.	9 (4%)
One unit, including “one unit of wine and two unit of beer”, see below.	7 (3%)
Two (glasses of) wine, including the alternative of a pint of beer.	6 (3%)
One and a half units, including “1 or 2 units” and “1 - 2 units”.	5 (2%)
Two drinks or glasses (of unspecified content), including “a couple of drinks”, “about two drinks”, and two small drinks or two glasses of wine.	5 (2%)
Two and a half pints of beer, lager or of unspecified content. Alternatives were three glasses of wine, and 80 millilitres.	2 (1%)
Three pints of beer, lager or of unspecified content.	2 (1%)
Three units	2 (1%)
Four units	1 (0%)
Total	222 (100%)

²⁶ Frequencies: QAmBdown. The words shown in bold in the table are the values coded within the variable QAmBdown.

As expected, a large proportion of respondents gave amounts at the lower end of the scale in Table 2. To illustrate this further, I consolidated the categories of reply into two – those who said two drinks or less, and those who said more than two drinks. For this purpose, a unit was taken as equivalent to a single drink, and two units, to two drinks. While this is unsatisfactory in the sense that drinks and units can rarely be considered equivalent nowadays,²⁷ it may nevertheless reflect how respondents think, and facilitates comparison with earlier studies:

Table 3: The Quantified Amounts Reclassified into Two Groups²⁸

	Number
Less than two drinks	133 (60%)
Two drinks or more	89 (40%)
Total	222 (100%)

Six respondents in this group (together with three others who fell outside this group) specifically mentioned that the limit equates with a small amount of alcohol, for example:²⁹

- it doesn't take much to exceed limit...
- you are allowed a certain amount but it's a miniscule amount.

As noted elsewhere,³⁰ this is in keeping with the trend towards perceiving the drink-drive limit in terms of smaller and smaller amounts, in effect, moving further and further from the truth.

Men more often quoted higher amounts, although those who said less than two drinks were divided almost equally between men and women:

Table 4: Amount of Drink by Gender³¹

	Men	Women	Total
Less than two drinks	64 (48%)	69 (52%)	133 (100%)
Two drinks or more	57 (64%)	32 (36%)	89 (100%)
Totals	121 (54.5%)	101 (44.5%)	222 (100%)

The largest amount mentioned was three pints, by two respondents only.

²⁷ See p 205.

²⁸ Frequencies: QAmtSimp.

²⁹ Appendix 2, responses 98 and 188. See also responses 102, 115, 181, 195, 241, 481 and 533.

³⁰ See pp 230–231.

³¹ Cross tabulation QAmtSimp x RSEX; p = .020.

Types of Drink

Nearly two thirds of the 222 mentioned a type of drink in their replies, most commonly beer, followed by wine. Some gave alternatives (“a pint of beer or a glass of wine”, for example):

Table 5: Types of Drink³²

	Number (%age of the 222)
Beer	79 (36%)
Wine	32 (14%)
Alternatives	26 (12%)
Totals	137 (62%)

Spirits were mentioned by only three of these respondents, as an alternative to beer or wine, as in “no more than a pint or a couple of shorts or a glass of wine”.

Perhaps unsurprisingly, among this 137, men mentioned beer more often than wine, and women mentioned wine more often than beer. Men more often expressed themselves in terms of alternatives:

Table 6: Types of Drink by Gender³³

	Men	Women	Total
Beer	67 (85%)	12 (15%)	79
Wine	2 (6%)	30 (94%)	32
Alternatives	17 (65%)	9 (39%)	26
Totals	86 (63%)	51 (37%)	137

Again within these 137 respondents, among the men, older respondents were significantly more likely to mention beer than the younger men. Among the women, the older respondents more often mentioned wine than did the younger women. Older men seemed to be rather more descriptive, giving alternatives such as “one and a half pints of reasonable strength not strong beer, or a glass of wine” and “probably one pint of beer or two small whiskies”,³⁴ rather than a simple “two units” or “two glasses of wine”:

³² Frequencies: QAmTTypDrink.

³³ Cross-tabulation QAmTTypDrink x RSEX; p = .000.

³⁴ Appendix 2, responses 148, 170.

Table 7: Types of Drink by Age/Gender³⁵

	Men up to age 44	Men aged 45+	Women up to age 44	Women aged 45+	Total
Beer/lager/pints	18 (23%)	49 (62%)	6 (7.5%)	6 (7.5%)	79
Wine	0 (0%)	2 (6%)	11 (34%)	19 (60%)	32
Combinations/alternatives	5 (19%)	12 (46%)	5 (19%)	4 (15%)	26
Totals	23 (17%)	63 (46%)	22 (17%)	29 (21%)	137

Respondents who owned their own homes (whether outright or subject to mortgage) gave a quantified amount in reply to the question significantly more often than did those who rented their homes.³⁶

Finally, the higher the level of education, the more likely it was that respondents would give a quantified amount as their answer.³⁷

Discussion

In keeping with expectation, a common response to the survey question was to give an amount which the respondents believed they could drink before reaching the drink-drive limit. As noted elsewhere,³⁸ it seems natural that drivers should think of the limit in terms of what may be consumed, rather than the resulting concentration of alcohol in the body. They can, after all, keep track of what they drink, but have no means of measuring alcohol in the body. This approach is, however, at variance with the statutory definition, and raises the question whether drivers are aware of that variance, and of the scope for error. Alcohol concentration in the body depends on many factors over and above the amount consumed.³⁹ Some respondents in the survey did mention some of these factors,⁴⁰ but it is not possible to deduce how, if at all, they took them into account when providing a quantified amount of alcohol in reply to the survey question.

³⁵ Cross tabulation QAmtTypeDrink x Agesexgrp2.44; $p = .000$.

³⁶ Cross-tabulation TENgrp x QAmtPeople; $p = .035$, showing that 41% of those who owned their homes outright, and 40% of those who owned their homes subject to a mortgage, gave a quantified amount, compared with 28% of those renting privately, and 25% of those renting from a local authority or housing association.

³⁷ Cross-tabulation highed4 x QAmtPeople; $p = .049$, showing that 42% of those with higher educational qualifications below degree level gave a quantified amount, as did 40% of those with degrees; 33% of respondents with lower educational qualifications (such as GCSEs), and 27.5% of those without formal qualification, also gave this answer.

³⁸ See p 221.

³⁹ See pp 193–194.

⁴⁰ Discussed below, pp 282–283.

Indeed, the studies described in Chapter 7,⁴¹ comparing individuals' own estimates of their alcohol concentrations with actual measured levels, suggest that individuals cannot accurately allow for these matters.

Perhaps even more compelling is the question whether respondents were right in their statements of how much they could drink before reaching the limit. There is much to suggest that they may in fact have given serious under-estimates. Calculations have shown, for example, that a man weighing seventy-seven kilos could drink over eight units of alcohol over three hours and remain within the limit,⁴² and that a man weighing seventy kilos could drink four units and remain within the limit.⁴³ It is not, of course, possible to make individual calculations in relation to the respondents in the present survey, but it is telling that the highest number of units mentioned was four, and that by one person only, while only two people said three units; most thought the limit was below two drinks. The cricket match survey⁴⁴ showed that men could drink between eight and eighteen units over the course of a day yet remain below the limit. While the respondents in the present survey were perhaps unlikely to have contemplated drinking over a whole day, there is nevertheless reason to question the accuracy of their estimates.

As already noted, in only one earlier study⁴⁵ has a question been put in the same terms as in the present survey. There, some sixty-nine per cent of respondents answered by stating an amount which may be consumed before driving, two thirds of them quantifying the amount, the remaining third leaving it unquantified. Thus about forty-six per cent of all respondents in that study compares with thirty-eight per cent in the present study. The difference is possibly accounted for by the fact that in the present survey the proportion answering "don't drink and drive" increased substantially,⁴⁶ people perhaps moving away from thinking in terms of amounts towards espousing "don't drink and drive". Further, the 1993 survey was confined to persons aged eighteen to thirty.

⁴¹ See pp 240–241.

⁴² Robert Solomon and Erika Chamberlain, 'Calculating BACs for Dummies: The Real-World Significance of Canada's 0.08% Criminal ABC Limit for Driving' (2003) 8 *Canadian Criminal Law Review* 219; see p 242.

⁴³ Ronald C Denney, *None for the Road: Understanding Drink-Driving* (Shaw 1997) 40.

⁴⁴ Neil R Wright, 'A Day at the Cricket: The Breath Alcohol Consequences of a Type of Very English Binge Drinking' (2006) 14 *Addiction Research and Theory* 133; see p 245.

⁴⁵ Audience Selection for the Portman Group, *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished); see p 239.

⁴⁶ Discussed below, pp 274–275.

It is difficult to make direct comparisons with other studies, because of the different ways in which questions were phrased and the different assumptions implicit in those questions. There does, though, seem to be a distinct trend towards lower amounts. The present survey showed a clear majority (sixty per cent) of those who interpreted the limit as a quantified amount giving the amount as below two drinks. In a 1984 survey,⁴⁷ forty per cent of respondents thought they would be within the limit after five units.⁴⁸ In the present study, the maximum number of units mentioned by anyone was four; no-one mentioned as many as five, although in fact that may be nearer the truth. Other early interpretations in terms of higher amounts are noted elsewhere.⁴⁹ The 1993 study referred to above⁵⁰ showed that the vast majority of people who gave an amount quoted two or more drinks. Although that study was confined to eighteen to thirty-year olds, even in the present study, people in that age bracket favoured less than two drinks by fourteen to nine. The results of the present study are more in keeping with recent work. For example, in 2004, most respondents, when asked how many units of alcohol they could personally drink before exceeding the limit, said less than two units; thirty-four per cent said two units would take them over the limit.⁵¹

The wording of twenty-nine of the 222 responses (thirteen per cent) suggests that these respondents had adopted a subjective interpretation which did not necessarily reflect the drink-drive limit, perhaps instead indicating the amounts they *would* drink before driving, rather than how much they *could* drink and remain within the limit. For example, “I limit myself to one pint when driving”, “I wouldn’t have more than two glasses of wine and the drive”, “no more than 1 pint if driving myself”.⁵² These responses of course leave open the significant question of how long before driving these drinks might be consumed.

⁴⁷ David Riley, *Drivers’ Beliefs About Alcohol and the Law* (1984) Home Office Research & Planning Unit Bulletin No 17, 35.

⁴⁸ A threshold adopted by the researcher: drivers were asked if they thought they would pass a breathalyser test after drinking five units of alcohol; *ibid.*, 32.

⁴⁹ See p 229, fn 50.

⁵⁰ Audience Selection for the Portman Group: *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished); see p 239.

⁵¹ Laura Brasnett, *Drink-driving: Prevalence and Attitudes in England and Wales 2002* (Home Office Research, Development and Statistics Directorate, Findings 258, 2004) 3.

⁵² Appendix 2, responses 84, 91, 131.

Two respondents seemed to think the limit has changed. Perhaps they had heard about proposals to lower the limit⁵³ and thought, in error, that there has been some change:

- no drinking at all. 2 pints limit years ago, but there's never been a limit (this respondent may of course have meant that the limit was once understood as two pints);
- I know it's changed hasn't it ...⁵⁴

The associations between this response and social characteristics such as housing status and levels of education are discussed below.⁵⁵

Beer and wine were the drinks most often mentioned. Spirits did not feature greatly, and cocktails and alcopops did not feature at all. This may be because the respondents in the sample were unfamiliar with these drinks, because most public education campaigns refer to wine and beer, or because it is even more difficult to know the alcohol content of these drinks.

UNQUANTIFIED AMOUNTS

The Results

In addition to the 222 who replied to the survey question by giving a specific amount of alcohol, eighty-one respondents⁵⁶ (fourteen per cent of the sample) referred to amounts which could be drunk, but in a more conceptual way, without quantifying the amounts. Most used words such as:⁵⁷

- how much you can drink and still drive legally;
- maximum amount that you can drink before driving a car.

Others were less clear, for example:⁵⁸

- it is a formal limit of alcohol you can drink before exceeding limit to drive;
- limit the amount of alcohol that you are allowed before exceeding the limit to drive.

⁵³ See pp 14 (fn 69) and 225 for more recent proposals to lower the limit.

⁵⁴ Appendix 2, responses 334, 449.

⁵⁵ See p 287.

⁵⁶ 79 as a first answer, one as a second answer and one as a third answer; see Table 1.

⁵⁷ Appendix 2, responses 394, 415.

⁵⁸ Appendix 2, responses 399, 411.

Despite occasional difficulties of classification, I included responses in this category if they clearly contemplated the *consumption* of alcohol.⁵⁹

One third of the eighty-one referred to units of alcohol, for example:

- amount of units that can be consumed before driving;
- it's so many units.

Two expressly said they did not know how much they could drink:⁶⁰

- ... I don't know where they are with the present limits ...;
- so many units to consume before it's over the limit. I don't know the quantities.

Thirteen of these respondents referred to standards of driving – safety, fitness to drive, and ability to drive, some giving their definitions in terms of such standards. For example:⁶¹

- amount of alcohol you can drink without causing any serious disability on your driving;
- how much you are allowed before you can not drive safely.

Significantly more women than men gave this answer – 17.5 per cent of the women in the sample, compared with ten per cent of the men.⁶² It was also favoured by younger respondents – eighteen per cent of all respondents aged up to forty-four gave this answer, compared with eleven per cent of those aged forty-five or over.⁶³

Discussion

In view of the confusion about measures of alcohol and its effects, and the variety of strengths and sizes of drinks, it is hardly surprising that some people, while interpreting the limit as an amount which may be consumed, did not go on to specify the amount. Indeed, apart from indicating their perception of the drink-drive limit as an amount which may be consumed, the responses in this group do little more than restate the question.

Again, there is only one other study with which to make a direct comparison.⁶⁴ There, the proportion giving an unquantified amount was twenty-three per cent, compared with fourteen per cent in the present study.

⁵⁹ See, for example, Appendix 2, responses 385, 402.

⁶⁰ Appendix 2, responses 333, 423.

⁶¹ Appendix 2, responses 383, 393.

⁶² Cross-tabulation RSEX x UnqAmtPeople; $p = .012$.

⁶³ Cross-tabulation Age2.44.45 x UnqAmtPeople; $p = .010$

⁶⁴ Audience Selection for the Portman Group: *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished); see p 239.

As mentioned above,⁶⁵ it is possible that people who might then have thought in terms of amounts which may be drunk now respond in terms of “don’t drink and drive”.⁶⁶

It seems unlikely that any firm conclusion can be drawn from the fact that this response was favoured by younger people. It may simply be that interpretations become more detailed as people mature, although this would not explain why women favoured this answer more than men.

The difficulty of interpreting the limit and the propensity to think of it in terms of units of alcohol are discussed next.

UNITS OF ALCOHOL

Among those who gave both quantified and unquantified amounts in their replies, many referred to units of alcohol. A total of ninety-seven of all 589 respondents (sixteen per cent of the whole sample) mentioned units of alcohol.⁶⁷ Fifty-three of the ninety-seven (fifty-six per cent) gave a quantified amount as their first answer; indeed an answer couched in terms of units was the second most frequent among those who gave a quantified amount. Twenty-nine of the ninety-seven (thirty per cent) gave an unquantified amount as their first answer.⁶⁸

The extent to which respondents understood the alcohol content of a unit is unclear. Eight responses included something to suggest a conversion of units into drinks. As explained elsewhere,⁶⁹ a unit was originally intended to equate to a single small drink, but this equivalence no longer applies as drinks have become larger and stronger. Some survey respondents who attempted to convert units into drinks seemed to be working on the outdated formula:⁷⁰

- ... no more than 2 units of alcohol which equates to one pint of beer;
- maximum two units (two halves).

⁶⁵ See p 265.

⁶⁶ See p 271.

⁶⁷ Frequencies: Other, yielding 95 from value 1 (unit of alcohol mentioned) and 2 from value 2 (difficulty of interpretation mentioned).

⁶⁸ Cross-tabulation: Other x Ans01; $p = .000$.

⁶⁹ See p 205.

⁷⁰ Appendix 2, responses 76, 118.

Others came closer to an accurate conversion:⁷¹

- 2 units of alcohol=2small wineglasses/1 small spirits/1pint;
- probably 2 units of drink =2 small glasses of wine or a small beer ...

Some thought the limit is defined in units but could not quote a number, for example:⁷²

- the units you are allowed to consume. ... I wouldnt know how many ...

One respondent demonstrated stark misunderstanding:⁷³

- one unit of wine and two unit of beer.

Another referred directly to the difficulty of understanding:⁷⁴

- ... people don't know what a unit is - it's not marketed very well.

Some respondents seemed not to appreciate that units of alcohol are measures of drinks before consumption, not of the resulting alcohol in the blood:⁷⁵

- if you are breathalised it's the number of units in your blood - and there is a cut off point - DK what it is;
- Number of units of alcohol in bloodstream.

Discussion

As noted elsewhere,⁷⁶ a unit of alcohol is 10 millilitres, or 8 grammes, of pure alcohol. A considerable proportion of respondents were clearly aware of the system of measuring alcohol in units, but it is not possible to draw any conclusions about the extent to which they understood it. The replies of a small number suggest they did not, but there are no grounds for drawing the same conclusion in respect of the majority of these ninety-seven. The limitations of the survey were such that the question was not investigated.

⁷¹ Appendix 2, responses 37, 168.

⁷² Appendix 2, response 449.

⁷³ Appendix 2, response 161.

⁷⁴ Appendix 2, response 346.

⁷⁵ Appendix 2, responses 484, 508.

⁷⁶ See p 205.

“DON’T DRINK AND DRIVE”

“Don’t drink and drive” was a common response, given by 181 as their first answer, by twenty-three as a second answer, and by four as a third answer – a total of 208, or thirty-five per cent of the 589 respondents.⁷⁷

The Results

The replies in this group were further broken down, illustrating that this response may sometimes have embraced more subtle approaches:

Table 8: Breakdown of the “Don’t Drink and Drive” Responses⁷⁸

Simple “don’t drink and drive”	71 (34%)
Personal rule	51 (24%)
Emphasis added	41 (20%)
Advocating a general zero limit	25 (12%)
Other observations	20 (10%)
Totals	208 (100%)

- *the simple “don’t drink and drive”*: the seventy-one in this category simply repeated the mantra, “don’t drink and drive”, or words to similar effect (such as “either drink or drive”, “leave the car at home if you’ve had a drink” and “none for the road”⁷⁹), without adding anything further;
- *personal rule*: fifty-one gave answers suggesting that not drinking and driving was a personal code of behaviour, and did not necessarily match the legal position. These responses included:⁸⁰
 - for me personally it would be never to drink and drive;
 - do not know but never drink and drive;
- *emphasis added*: forty-one added some words of emphasis to the “don’t drink and drive” response, perhaps indicating a strongly held view. Typical of these replies were:⁸¹
 - don’t drink and drive at all;
 - ... better to be safe than sorry;

⁷⁷ See Table 1.

⁷⁸ Frequencies: DDDDBdown.

⁷⁹ Appendix 2, responses 258, 306, 336.

⁸⁰ Appendix 2, responses 260, 539.

⁸¹ Appendix 2, responses 239, 280, 303.

- ... if you drive you do not drink alcohol, none at all that's it.

One respondent went further, remarking:

- very important-not to drink and drive as it casues (*sic*) havoc on the roads-teenagers especially using roads like a race track-should be stamped down on;⁸²
- *advocating a zero limit*: twenty-five respondents said words indicating that they were aware that it is permissible to drink something before driving but effectively advocated a zero limit, for example:⁸³
 - ... they should change it to no drinking whilst driving;
 - ... there should be a total ban nil alcohol;
- the remaining twenty responses comprised a variety of observations in addition to the “don't drink and drive” message:
 - ▶ two respondents mentioned designated drivers, in the sense of one person agreeing to drive but not to drink.⁸⁴
 - if we go out one of us will stay alcohol free;
 - in essence if driving never drink, use a designated driver;
 - ▶ two acknowledged the significance of time:⁸⁵
 - if you are going to drive do not drink including from night before;
 - no drinking alcohol twelve hours before driving;
 - ▶ three expressed their disapproval of drinking and driving, mentioning safety, seriousness and danger;⁸⁶
 - ▶ six specifically conceded that a certain amount of alcohol is permitted, for example:⁸⁷
 - don't drink and drive or just have one & it depends on what drink;
 - shouldn't drink and drive at all-shouldn't overdrink and drive - but shouldn't do it at all;

⁸² Appendix 2, response 366.

⁸³ Appendix 2, responses 203, 257.

⁸⁴ Appendix 2, responses 283, 298.

⁸⁵ Appendix 2, responses 286, 328.

⁸⁶ Appendix 2, responses 275, 348, 361.

⁸⁷ Appendix 2, responses 361, 240.

- ▶ two advocated no drinking *while* driving,⁸⁸ although this may have been a simple error of language;
- ▶ three mentioned the difficulty of understanding the limit, as in:⁸⁹
 - no drinking at all. 2 pints limit years ago, but there's never been a limit;
 - ... it's very vague;
- ▶ two mentioned the varying effects of alcohol on different individuals:⁹⁰
 - ... it is what the body can take;
 - ... you don't know the effect of alcohol on individuals.

Women were significantly more likely to give this answer than men. Forty-two per cent of the women in the sample of 589 said “don't drink and drive”, compared with only twenty-nine per cent of the men.⁹¹

While there were no significant differences by age alone, the data were further classified into four groups, identifying younger men and younger women (up to and including age thirty-four⁹²), and older men and older women. This revealed that those in the higher age groups more often said “don't drink and drive”, while younger men least often said so:

Table 9: “Don't Drink and Drive” by Age/Gender Group⁹³

	Men	Women	Total
Aged up to 34	13 (6.5%)	29 (14%)	42 (20%)
Aged 35+	76 (36.5%)	90 (43%)	166 (80%)
Totals	89 (43%)	119 (57%)	208 (100%)

There appeared to be certain differences by region.⁹⁴ Fifty-six per cent of respondents in Wales gave a “don't drink and drive” response, as did fifty-four per cent in the South West, compared with the thirty-five per cent overall.

Other significant associations were:

⁸⁸ Appendix 2, responses 200, 203.

⁸⁹ Appendix 2, responses 334, 535.

⁹⁰ Appendix 2, responses 307, 376.

⁹¹ Cross-tabulation RSEX x DDDPeople; $p = .001$.

⁹² This age was chosen because it gave statistically significant differences.

⁹³ Cross-tabulation x Agesexgrp1.34 x DDDPeople; $p = .004$.

⁹⁴ Cross-tabulation GorA x DDDPeople; $p = .008$.

- by housing status: those who rented their homes from a local authority or housing association more often said “don’t drink and drive” than did those who rented privately or owned their homes;⁹⁵
- by whether or not respondents were parents of children under sixteen. Those who were (forty-two per cent of the 208) more often said “don’t drink and drive” than those who were not (thirty-three per cent of the 208);⁹⁶
- level of education: the higher the level of education, the less likely it was that a respondent would say “don’t drink and drive”;⁹⁷
- socio-economic group: those in higher socio-economic groups were less likely to give the “don’t drink and drive” response than were people in lower groups.⁹⁸

Discussion

It was expected that, because of the difficulties of translating the drink-drive limit into how much may be consumed while remaining within it, people would err on the side of caution and adopt the “don’t drink and drive” approach. This expectation was borne out. Indeed, the proportion of people answering “don’t drink and drive” is far higher than in the only other study where respondents were asked for their own interpretations of the drink-drive limit.⁹⁹ There, only five per cent answered “you shouldn’t drink and drive”. The earlier study was conducted in 1993 and it may simply be that views have changed, possibly in response to official campaigns. Further, in the 1993 study, the question, “What do you understand by the term the ‘drink drive limit’?” was the ninth of eighteen questions on drink-driving, so it is possible that the preceding questions may have concentrated

⁹⁵ Cross-tabulation TENGp x DDDPeople; $p = .001$, showing that 59% of the 208 who rented from a local authority or housing association said “don’t drink and drive” – almost twice as many as among those who owned their homes or rented privately.

⁹⁶ Cross-tabulation Parent x DDDPeople; $p = .033$, showing that 42% of the 208 who were parents of under-16s said “don’t drink and drive”, compared with 33% of those who were not parents of under-16s.

⁹⁷ Cross-tabulation highed4 x DDDPeople; $p = 0.000$, showing 54% of those without formal qualification saying “don’t drink and drive”, dropping to 21% of those with a degree or equivalent.

⁹⁸ Cross-tabulation DDDPeople x NSECAC3; $p = 0.000$, showing that 25% of those in managerial and professional occupations fell into the “don’t drink and drive” group, compared with 43% of those in routine and manual occupations.

⁹⁹ Audience Selection for the Portman Group, *Drinking and Driving: Consumer Attitudes Survey*, November 1993 (unpublished); see p 239.

respondents' minds on drinking and driving to the exclusion of "don't drink and drive". While the earlier study was confined to eighteen- to thirty-year olds, that does not explain the difference, because, in the present survey, thirty-five per cent of respondents within that age bracket – the same as in the sample as a whole – gave the "don't drink and drive" answer.

Other studies, however, show large proportions of respondents adopting the "don't drink and drive" stance. In a study in Scotland,¹⁰⁰ fifty-five per cent of a sample of 1,004 said their own safe limit of drink before driving was nothing, although the high proportion may be attributable to the fact that "nothing" was the first of seven options offered to interviewees.

In a survey of approximately 2000 drivers in 2006,¹⁰¹ an insurance company asked, "how many drinks would you tend to have and still feel confident then driving your car?" Forty-eight per cent replied none. Again, "none" was the first answer in the list of alternatives given.

In Scotland in 2007, sixty-three per cent of 1,034 respondents said they would not drink anything before driving.¹⁰² This was in response to being offered a guide to calculating units, and asked how many units they would consider safe for them to drink before driving. No reason for so high a proportion is suggested. It is not entirely clear from the report whether not drinking at all was offered as an option in response to the question, but it seems unlikely that it was. It may be that the complexity of calculating the number of units encouraged the "no drinking" answer, or that the series of questions which preceded this one predisposed respondents to say they would not drink before driving.

The mantra "don't drink and drive" does not reflect the statutory definition, in that most people would not exceed the limit by consuming some alcohol within a few hours before driving. There are, however, suggestions that respondents may have been aware that they were giving a stricter interpretation than the law requires. Seventeen per cent of respondents in this group¹⁰³ used words such as, "if I go out for a drink I never take the car". The implication is that they were adopting a personal code, possibly out of caution, or because of the difficulty of interpreting the

¹⁰⁰ Simon Anderson and Dave Ingram, *Drinking and Driving: Prevalence, Decision-Making and Attitudes* (Central Research Unit, Scottish Executive 2001) Table 3.1.

¹⁰¹ Churchill Insurance Press Release, *Four Million Drivers Set to Hit the Road 'Smashed' this Christmas*, 1 December 2006, supplemented by data kindly supplied by RBS Insurance in August 2008.

¹⁰² Emma Collins and others, *Drinking & Driving 2007: Prevalence, Decision Making and Attitudes* (Scottish Government Social Research 2008) para 7.7.

¹⁰³ Appendix 2, responses 203, 260–275 inc, 277–283 inc, 301, 302, 304, 311, 313, 318, 346, 365, 367–370 inc.

limit, or because they personally believed that any amount of alcohol is dangerous. Other responses may likewise have been personal interpretations even in the absence of words to suggest that; for example, the response recorded as “don’t drink at all” might have meant that that particular respondent chooses not to drink and drive.

There is further support for the view that these respondents realise that the limit does not equate with drinking nothing before driving, in that twenty-three of the 208 respondents¹⁰⁴ went on to add that a driver may in fact drink something before driving.

Where the response was a simple “don’t drink and drive” without further elaboration, it is not clear whether this is an admonition, or a statement of a personal policy, or a simple repetition of the public education campaigns.

Other possible reasons for saying “don’t drink and drive” may be that the official campaigns have convinced drivers that the limit in fact is zero, or that it is an ideal to be aspired to. Or the response may have been given to appear in a good light to the interviewer. The ONS’s Survey Charter,¹⁰⁵ supplied to all participants, includes the words “Participation in our surveys of people and households is not required by law, so we seek to give you a good understanding of why taking part is worthwhile and an act of good citizenship”. These words may suggest an element of obligation short of a legal requirement, which in turn may suggest to participants that they should appear to behave responsibly and within the law.

A further difficulty with the “don’t drink and drive” answers is that they beg the question of the period of time during which a person should refrain from drinking before driving. Only two respondents mentioned time.

I have suggested¹⁰⁶ that the “don’t drink and drive” campaigns are far more appropriate to the offences of unfitness through drink than to the offences of exceeding the prescribed limit, yet there are far more prosecutions for the latter than the former. While small amounts of alcohol adversely affect fitness to drive, most people remain within the limit after consuming greater amounts than would make them unfit through drink. This major difficulty is discussed further in Chapter 9.

The fact that older people more often espoused the “don’t drink and drive” approach may simply reflect greater caution with age.

¹⁰⁴ Appendix 2, responses 203, 238, 240, 241, 257, 259, 262, 266, 269, 271, 273, 278, 307, 313, 317, 319, 333, 334, 341, 346, 360, 365, 375.

¹⁰⁵ Office for National Statistics, *Survey Charter*, 3 <<http://www.ons.gov.uk/ons/search/index.html?newquery=%22Survey+Charter%22>> accessed 27 November 2013.

¹⁰⁶ See p 224.

In relation to regional differences, the higher percentage of people in Wales (and possibly also the South West of England) saying “don’t drink and drive” may be because breath-testing in Wales in 2009 was far more extensive than elsewhere.¹⁰⁷ At the other end of the scale, only thirteen per cent of respondents in the North East gave this reply. Responses in the remaining regions¹⁰⁸ ranged from twenty-six per cent to thirty-seven per cent.

Those living in the private sector, those who were educated to higher levels, and those in higher socio-economic groups were all less likely than others to say “don’t drink and drive”. Again, there is no obvious explanation, but it may be that people at higher levels of achievement in these areas are more likely to perceive the limit in scientific or statutory terms, and less likely to resort to the simpler “don’t drink and drive” option.

SUBJECTIVE REPLIES

Eighty-five respondents (ten per cent of the sample) gave replies which suggested that they were personal to them rather than an accurate understanding of the prescribed limit. Half of these eighty-five came from those who said “don’t drink and drive” (above), while thirty-four per cent came from respondents who gave a quantified amount as their main answer. I coded answers as “subjective” if they included words such as “personally”, “as far as I’m concerned”, or comprised sentences such as “I don’t drink if I am driving”. This classification was not always straightforward, but the principle adopted was to treat a reply as subjective if there was a suggestion that it applied only to the particular respondent, rather than to drivers in general. So, for example, I took “It’s fair but I drink at home but if I drink out 2 pints is enough”¹⁰⁹ to be a subjective answer.

As the survey question was about what the limit means “*to you*”, it was to be expected that responses would be subjective. Nevertheless, there are suggestions that respondents resorted to personal interpretations because of

¹⁰⁷ Home Office Breath Test Statistics 2010, Table BT.02 <<https://www.gov.uk/government/publications/breath-tests>> accessed 27 November 2013, showing that in Wales, in 2009, 41 in 1,000 were breath-tested, compared with 13 per 1,000 in England. The figures for the English regions range from 8 per 1,000 (West Midlands) to 20 per 1,000 (Yorkshire and the Humber).

¹⁰⁸ North West, Yorkshire and the Humber, East Midlands, West Midlands, East of England, London, South East, and Scotland.

¹⁰⁹ Appendix 2, response 108.

the elusiveness of the statutory limit, perhaps indicating hesitation or uncertainty about the real meaning of the drink-drive limit:¹¹⁰

- for me it means only drinking one glass of wine when you go out;
- I'm never sure so I don't do both.

Almost twenty per cent of the women in the sample gave a subjective reply, compared with only ten per cent of the men.¹¹¹ Nearly three quarters of the women who gave personal answers were over the age of thirty-five.¹¹² There is no obvious reason why personal replies should have been favoured by women, or by older women.

CONCENTRATION OF ALCOHOL

The Results

Sixty-five participants (eleven per cent of the total sample of 589) gave answers referring not to the amount consumed, but to the resulting concentration of alcohol in the body, sixty-one as a first answer, three as a second answer, and one as a third answer.¹¹³ These responses were further broken down to show more details about how respondents were thinking:

Table 10: Breakdown of "Alcohol Concentration" Responses¹¹⁴

Answer included the word "blood"	44 (68%)
Answer included a number only, or a partial formula	10 (15%)
Answer included the word "breath"	6 (9%)
Answer included the word "system"	5 (8%)
Total	65 (100%)

Almost half the respondents in this group did not elaborate their responses beyond a basic conceptual level, typically saying:¹¹⁵

- amount of alcohol as a percentage of blood;
- the legal maximum (*sic*) blood alcohol level that is acceptable to drive;
- statutory breath test limit.

¹¹⁰ Appendix 2, responses 70, 546.

¹¹¹ Cross-tabulation RSEX x Subjective; p = .001.

¹¹² Cross-tabulation Subjective x AgeSexgrp1.34; p= .001.

¹¹³ See Table 1.

¹¹⁴ Frequencies: AlcConBdown.

¹¹⁵ Appendix 2, responses 473, 488, 510.

Eleven¹¹⁶ of those who did go further gave only partial formulae – answers that were correct as far as they went but were not complete, for example, quoting 80 milligrammes in blood, without giving the volume of blood (100 millilitres), or giving the wrong volume, as in “80 milligrams of alcohol to 50 millilitres of blood”.¹¹⁷

The limit in breath is thirty-five microgrammes of alcohol in 100 millilitres of breath. Four respondents mentioned thirty-five, but again gave incomplete formulae, or thought the limit was expressed in milligrams rather than microgrammes:¹¹⁸

- about 35 per cent I think . . .
- cannot exceed 35ml in breath;
- it's 35 milligrammes in your breath;
- it's 35 . . .

Others confused the limit of thirty-five in breath with the limit of eighty in blood and vice versa:¹¹⁹

- 35mg of alcohol per 100ml of blood;
- 35mils of alcohol in 100 mills of blood;
- driving whilst having 70 or 80 on breathaliser scale;
- it means you can't have more than 35mg of alcohol per 100 mg of blood.

A single person mentioned a limit of fifty – which applies throughout most of Europe:

- 50 mg of alcohol per, about a glass of wine or beer.¹²⁰

The respondent who came nearest the full legal definition said:

- 35 in breath, 80 in blood, possibly 107 in urine.¹²¹

Even this was incomplete, in failing to state the measures of alcohol (microgrammes or milligrammes) or the relevant volumes of breath, blood or urine.

Some of the answers again illustrated confusion about units of alcohol, three respondents answering in terms of the number of units of alcohol *in the blood*.¹²²

¹¹⁶ Appendix 2, responses 124, 147, 465–468 inc, 472, 487, 489, 504, 507.

¹¹⁷ Appendix 2, response 467.

¹¹⁸ Appendix 2, responses 471, 477, 494, 495.

¹¹⁹ Appendix 2, responses 461, 463, 479, 493.

¹²⁰ Appendix 2, response 464.

¹²¹ Appendix 2, response 460.

¹²² Appendix 2, responses 484, 508, 518.

One respondent, although apparently confused about how it is measured, was clear that what matters is the alcohol concentration, not how much has been consumed:

- hch (*sic*) alcohol, you have in your blood per millilitre it doesn't matter how much you think you have had to drink.¹²³

Men were more likely to refer to alcohol in the body than were women – fifteen per cent of the men in the sample of 589, compared with six per cent of the women.¹²⁴

By age alone, there was no significant difference between those who gave this answer and those who gave other answers. But there was a significant difference when age and gender were both taken into account, the data suggesting that among both men and women, this response was favoured by older people:

Table 11: Alcohol Concentration Responses by Age/Gender Group¹²⁵

	Men	Women	Total
Aged up to 44	13 (20%)	7 (11%)	20 (31%)
Aged 45+	34 (52%)	11 (17%)	45 (69%)
Totals	47 (72%)	18 (28%)	65 (100%)

Again, there was a significant relationship between this answer and respondents' level of education, those having been educated to higher levels more often referring to alcohol concentration.¹²⁶

Discussion

Since roadside breath-testing is often depicted in road safety campaigns, and in view of public debate concerning the lowering of the limit from eighty to fifty in blood,¹²⁷ drivers should be aware that the drink-drive limit is measured by reference to breath or blood. At the same time, earlier studies¹²⁸ have shown an extraordinary degree of ignorance of the limit in breath, blood or urine, so it was expected that few would be able to quote accurate figures. The results confirmed this.

¹²³ Appendix 2, response 482.

¹²⁴ Cross-tabulation AlcConPeople x RSEX; p = .001.

¹²⁵ Cross-tabulation AlcConPeople x AgeSexgrp2.44; p = .004.

¹²⁶ Cross-tabulation AlcConPeople x highed4; p = .000, showing that 20% of those with degrees or the equivalent answered in terms of alcohol concentration, tapering down to 4.5% of those having no formal qualifications.

¹²⁷ See pp 225–226.

¹²⁸ See p 239.

The responses falling within this group are closer to the statutory definition of the prescribed limit than any others elicited in the survey. Nevertheless, at eleven per cent, the proportion of people who recognised the drink-drive limit as a level of alcohol concentration in the body was low – even lower than in the 1993 study¹²⁹ asking respondents what they understood by the drink-drive limit, when fifteen per cent referred to alcohol in the blood, breath or urine. The low proportion may be a consequence of the predisposition to think in terms of what is consumed, and/or the increasing influence of the “don’t drink and drive” campaigns.

The degree of confusion about the formula itself, and the fact that no single person gave it fully and correctly, is not surprising in light of the earlier studies.¹³⁰ It might be thought that the recurring public debate about whether or not the limit should be lowered from eighty to fifty¹³¹ might have increased awareness of the limit as a concentration of alcohol in blood, but there seems to be no evidence to support such a view. On the other hand, more respondents in this group referred to blood rather than to breath, even though breath testing rather than blood testing has been the usual method of investigating drink-driving for many years, and even though road safety campaigns often depict roadside breath-testing.

Perhaps less surprising is the fact that older respondents and those educated to higher levels more often gave this response, although there is no obvious reason why proportionately more men than women should have done so.

Knowing the limit in terms of breath or blood alcohol concentration of course begs the question of interpreting it into the practical matter of how much (and of what, and when) a person can drink before driving without reaching the limit. This in turn highlights the circularity of the problem of knowing what behaviour will lead to a breach of the prohibition on driving when over the prescribed limit, and bears on the difficult question of legal certainty in this context. I discuss this further in Chapter 9.¹³²

¹²⁹ Audience Selection for the Portman Group: *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished); see p 239.

¹³⁰ MORI for the Portman Group: *A Report on what the British Public Thinks About Alcohol and the Part it Plays in their Lives* (unpublished, research conducted in 2000), showing that only 13 per cent of respondents who were asked to give the drink-drive limit in milligrammes per 100 millilitres of blood, said 80; European Commission, *Attitudes Towards Alcohol* (Special Eurobarometer 272, 2007) 26, reporting that only 9 per cent of UK respondents who were asked the legal blood alcohol level put it within the band sixty to 100, although it seems that the survey was not confined to drivers. See p 240.

¹³¹ For example, Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) 6.

¹³² See pp 292–295.

VARIABLES

The Results

While only seven respondents gave a first answer in terms of the variables which affect alcohol concentration, a further forty-six acknowledged such aspects as second or third answers – a total of fifty-three, or nine per cent of all 589 respondents.¹³³ The factors mentioned, and the numbers who did so, were:

Table 12: Breakdown of Factors Mentioned¹³⁴

Personal differences in general , for example, “amount varies from person to person”, “there’s no set limit, differs from person to person”.	14 (26%)
Gender , for example, “2 units for a woman”, “varies for women and men”.	12 (23%)
Strength/amount of drink . These replies included references to “normal strength beer”, and “beer no more than 3.8% alcohol”.	7 (13%)
The complexity of the issue , for example, “more complicated depending on the person”, “you never know how it [alcohol] might affect you.”	7 (13%)
Time , for example, “no drinking alcohol twelve hours before driving”, “if you are going to drive do not drink including from night before”.	6 (11%)
Multiple factors , mentioning two or more of the other factors listed. One also referred to the effect of fatigue.	4 (8%)
Whether food taken with alcohol , such as “two glasses of wine over the meal”.	2 (4%)
Weight/mass , for example, “depends on body type and mass”.	1 (2%)
Total	53 (100%)

There were no statistically significant associations between these responses and any of the demographic data deriving from the ONS variables.

Discussion

In line with earlier studies, it was expected that some respondents would refer to some, although probably not all, of the many factors which influence the concentration of alcohol in the body. These are described in Chapter 6,¹³⁵ and include not only the amount of alcohol consumed, but its strength, the time over which it is drunk and whether or not it is accompanied by food. Individual differences, such as gender, build and age, and the degree of habituation to alcohol, are also influential.

¹³³ See Table 1.

¹³⁴ Frequencies: VarBdown.

¹³⁵ See pp 193–194.

Respondents who acknowledged the significance of factors of this kind all implicitly recognised that the drink-drive limit is a measure of the effects of alcohol rather than the amounts consumed. It might be expected that knowledge of how these factors interact would be fairly superficial, but as respondents were asked only a single question, their depth of understanding was not investigated.

Those who pointed out the difference by gender may have been influenced by general health messages advocating different maximum numbers of units for men and women, but again this was not investigated. There is other evidence,¹³⁶ however, to suggest the difficulty of taking proper account of these matters.

More respondents in the present survey mentioned the variables which influence alcohol concentration in the body than in the comparable 1993 survey in which respondents were asked for their interpretations of the drink-drive limit.¹³⁷ There, only six per cent mentioned the variables. It is, of course, possible that awareness has increased over time, or is higher among the general population than among the younger respondents (eighteen- to thirty-year-olds) in the 1993 survey.

THE CONSEQUENCES

Twenty-one respondents (3.5 per cent of the sample) talked about consequences,¹³⁸ covering both the legal penalties and the social consequences. Some referred to the consequences of the act of drink-driving, others to the consequences of conviction. Eleven were first answers, and ten were second answers. Although these are not strictly answers to the question put, they are not without interest. The matters mentioned, and the numbers who mentioned them were:

¹³⁶ See pp 228, 234.

¹³⁷ Audience Selection for the Portman Group: *Drinking and Driving: Consumer Attitudes Study*, November 1993 (unpublished); see p 239.

¹³⁸ See Table 1.

Table 13: Breakdown of Consequences¹³⁹

Danger , as in “it puts other lives in danger”, “it’s dangerous”, “a car is a lethal weapon...”	7 (33.5%)
Effects on the quality of driving , for example, “any alcohol affects your brain and your reactions”, “being incapable of controlling a vehicle properly through alcohol”	7 (33.5%)
The consequences of conviction , including loss of liberty, loss of job, loss of licence, and “it curbs your social activities”.	3 (14%)
Other consequences , such as “diverts police activity from more serious crime”, “people very aware of consequences but still do it”.	3 (14%)
Multiples of the above : “you can kill somebody plus you lose your license plus you could get jailed”.	1 (5%)
Total	21 (100%)

The references to danger of course bring to mind the underlying purpose of the legislation – road safety. Drivers who mentioned the effects of alcohol on the quality of driving may likewise have had in mind the road safety considerations. But they may have been thinking about unfitness to drive rather than exceeding the prescribed limit, perhaps confusing the two offences. It is not possible to draw any firm conclusion.

Five respondents¹⁴⁰ from the full sample mentioned unfitness to drive and impairment, for example:

- the amount of alcohol above which your abilities to drive would be significantly impaired (*sic*).

References to the penalties in terms of loss of licence, the possibility of imprisonment and loss of employment all indicate the seriousness attached to conviction, perhaps arising out of the anti-drink-drive campaigns. It may be that increasing awareness of the consequences explains the increasing number of drivers who say “don’t drink and drive”, discussed above. On the other hand, the idea that, in dealing with drink-driving, police are being diverted from more serious matters¹⁴¹ suggests that drink-driving is seen as less serious, although this was the only response of this kind.

One other consequence mentioned was that “it curbs your social activities”. This may be a reference to the consequences of disqualification from driving following conviction, or to the restrictions arising from the statutory provisions themselves.

¹³⁹ Frequencies: ConsBdown.

¹⁴⁰ Appendix 2, responses 426, 448, 500, 560, 570.

¹⁴¹ Appendix 2, response 159.

THE “DON’T KNOWS”, THE REFUSALS AND THE NON-CLASSIFIABLE

The first answer of thirteen respondents was that they did not know, and another twelve added a “don’t know” element as a second answer.¹⁴² Most of the thirteen were simple “don’t knows” or variations of that. They may have some importance for the principle of legal certainty and merit consideration. Some clearly reflect the complexity of the question, suggesting that the respondent has resorted to the “don’t know” response for lack of anything better:¹⁴³

- I don't know what the exact limits are;
- I'm never sure so I don't do both.

Eleven of the total 589 respondents explicitly pointed out the difficulty of interpretation, for example:¹⁴⁴

- I dont think they have yet found a satisf. way that the ord. man in the street can understand how that figure relates to his own consumption;
- nobody knows what the drink drive ruling is.

Responses of this kind, in which respondents articulate the gulf between the statutory provisions and their own understanding, encapsulate the problem of reconciling the drink-drive offences with the principle of legal certainty. I come back to this in Chapter 9.¹⁴⁵

Thirty-two responses did little more than repeat the question, or were otherwise unclassifiable.¹⁴⁶ These answers demonstrated that the respondents were aware of the existence of a prohibition, but provided little further insight. For example:¹⁴⁷

- don't drive if you are over the limit;
- legal limit of alcohol before you break the law.

Some of these responses may have been incorrectly or incompletely recorded, as in:¹⁴⁸

¹⁴² See Table 1.

¹⁴³ Appendix 2, responses 266, 546, 549.

¹⁴⁴ Frequencies: Other. See Appendix 2, responses 519, 549. See also responses 8, 486, 487, 532, 534, 535, 536, 538, 546.

¹⁴⁵ See pp 292–293.

¹⁴⁶ See Appendix 2 for the list.

¹⁴⁷ Appendix 2, responses 561, 571.

¹⁴⁸ Appendix 2, responses 559, 573.

- amount of alcohol per unit;
- level of responsible driving.

One person clearly appreciated that it is permissible to drink before driving, saying:

- I dont think that if you are driving you couldn't drink.¹⁴⁹

Six respondents refused to answer the survey question. Again, it is possible that some of the refusals were consequences of the difficulty of answering, but this cannot be verified.

CONCLUSION

I had expected that many respondents, as in earlier studies, would interpret the drink-drive limit in terms of what may be consumed before driving, and that “don't drink and drive” would feature in the replies. Matters such as the strength of drink consumed and the time over which it is consumed would possibly be mentioned, although not by many. In view of the widespread ignorance of how the prescribed limit is formulated, few respondents were expected to mention alcohol concentration in the body. Even fewer were expected to describe the limit accurately. All these expectations were borne out.

As planned, the survey revealed a wider range of interpretations of the drink-drive limit than had been elicited in many of the earlier studies, providing a more comprehensive overview than had been available before. In some respects, the results bear out the findings from earlier research. The trend towards greater caution seems to be confirmed, in that the amounts which people think they can drink before driving continues to fall, and the proportion of people saying “don't drink and drive” was surprisingly high.

The findings are to be interpreted against the background of the widespread confusion about the limit, the difficulties of providing reliable advice to drivers, the variations in official advice and inaccurate media reporting.¹⁵⁰ They may well have had a bearing on respondents' answers in the present survey, although there is no way of estimating the extent of any such influence. The fact that two people in the present survey apparently thought the limit has been changed¹⁵¹ is just one small indicator of the confusion.

¹⁴⁹ Appendix 2, response 565.

¹⁵⁰ See pp 223–225.

¹⁵¹ Appendix 2, responses 334, 449.

The study revealed certain characteristics of those adopting various views, although none of the relationships causes any great surprises. For example, men rather than women, older respondents and those educated to higher levels were more likely to reply referring to alcohol concentration in the body, so coming close to the statutory definition, rather than giving an amount or simply saying “don’t drink and drive”. While more detailed knowledge is understandable in those of greater age or education, there is no obvious explanation for the fact that men came closer to the statutory definition than did women, or for the fact that women more often seemed to give subjective interpretations.

As in earlier studies, there is much here to indicate uncertainty about the law. A large proportion of respondents answered the survey question by stating an amount of alcohol, whether quantified or unquantified, which could be consumed before reaching the drink-drive limit. This is an erroneous, although understandable, interpretation of the limit, as discussed above. Likewise, the large group whose answers amounted to “don’t drink and drive” were adrift of the legal definition.

Respondents who answered the survey question by quantifying the amount they believed they could drink before reaching the limit may have been greatly understating how much they can drink before reaching the limit.¹⁵² But if the question had been about respondents’ understanding of unfitness to drive through drink, there would have been a high degree of accuracy in the replies – those quoting low amounts and the “don’t drink and drive” responses would have been very close to accurate, given that people become unfit to drive on far less alcohol than would put them over the limit.¹⁵³ The further twist is that drivers are nowadays far less likely to be prosecuted for driving when unfit than for driving when over the limit.¹⁵⁴

Only a very small proportion of respondents answered in terms of the concentration of alcohol in the body – an answer coming close to the statutory definition, but raising the question whether these individuals would know how to interpret the limit into what they can drink before driving.

A further indication of confusion is the fact that sixteen per cent of respondents referred to units of alcohol. Units of alcohol are not well understood,¹⁵⁵ and indeed have little to do with the formal definition of the

¹⁵² See p 253.

¹⁵³ See pp 192–193.

¹⁵⁴ See p 200.

¹⁵⁵ See pp 231–232.

limit. It may be that general public health messages are being confused with public education initiatives concerning road safety.

While the survey was useful, it had limitations. Only a single question was put, without the opportunity to explore respondents' views further or to seek elucidation of answers which were not entirely clear or which otherwise gave rise to further questions. Nevertheless, it did call on respondents to think about the drink-drive more broadly than in earlier studies, and there is reason to believe that their responses provide a more accurate picture of their overall views than had previously been available.

In Chapter 9 I draw conclusions for the concept of legal certainty from my own small study, and on my research project as a whole.

Chapter 9: The Wrong Kind of Certainty

INTRODUCTION

The principle of legal certainty, described in Chapter 5, requires that citizens must be able to know what they are to do, or not to do, to avoid breaking a criminal law. In this chapter, I examine whether or not the two concepts fundamental to the drug- and drink-driving offences – unfitness to drive through drink or drugs, and exceeding the prescribed limit¹ – comply with the principle of certainty. The same question will arise in relation to the specified limits for specified controlled drugs, when the new offences are introduced.² While drivers demonstrably have a poor understanding of both unfitness to drive and the prescribed alcohol limit,³ that does not of itself lead to the conclusion that the principle of certainty is breached. The question is not whether drivers in fact understand the provisions, but whether the provisions are of sufficient clarity that drivers *could* understand them well enough to know what they must do to avoid committing offences.⁴

I contend that unfitness to drive is within this principle, but that the prescribed limit is not. Nor can uncertainty about the prescribed limit be remedied by advice. As noted elsewhere,⁵ there are many more prosecutions for exceeding the prescribed limit than for unfitness to drive through drink or drugs, with the result that the serious question of uncertainty affects the majority of the drink- and drug-driving cases brought before the courts. Certainty in relation to the new offences of exceeding specified limits for certain drugs may well be greater in some respects than in relation to the prescribed alcohol limit, but there is scope for new uncertainties in other ways.

On the other hand, the procedure for investigating the offences is, I say, sufficiently certain to meet the principle, despite one important difficulty.

¹ The statutory definitions and their interpretation in the case law are described in Chapter 6, pp 209–217.

² Under RTA 1988, s 5A; see pp 8–9.

³ As demonstrated in Chapters 7 and 8.

⁴ Daniel Greenberg, ‘The Volume and Complexity of United Kingdom Legislation Today’ in *Halsbury’s Laws of England Centenary Essays 2007* (LexisNexis 2007) 55; see p 172.

⁵ See p 200.

UNFITNESS TO DRIVE

As already noted,⁶ it is an offence to drive, attempt to drive, or be in charge of a vehicle when unfit to drive through drink or drugs.⁷ A person is unfit to drive if the person's ability to drive properly is impaired.⁸ The interpretation of the term "unfitness" is discussed above,⁹ and gives rise to the question whether this concept of unfitness passes the test of certainty.

Whether or not a particular set of circumstances amounts in law to unfitness is a matter which does not arise for formal decision until after the event, and then only if a prosecution is brought and the issue raised. The question is decided by the court on the facts of each case. To assess the certainty of the concept, however, the position of the driver *before* the event must be considered.

Drivers who were swaying,¹⁰ whose speech was slow or slurred,¹¹ who had glazed eyes,¹² who smelt of alcohol,¹³ who drove with the brake on¹⁴ or who drove badly when under the influence of cannabis¹⁵ have all been held to be unfit to drive. A driver in any of these circumstances would surely realise that he or she would be unfit to drive. The fact that *any* degree of impairment is sufficient to make out the offence should make matters simpler to predict. A driver need not consider how much he is swaying, or how heavily she is slurring her words; it is enough that this is happening. While the very fact of having taken drink or drugs might reduce the individual's capacity to recognise the indications, the point, for the purposes of the clarity of the concept of unfitness, is that they are capable of recognition as signs of unfitness to drive.

⁶ See p 8.

⁷ RTA 1988, s 4(1).

⁸ RTA 1988, s 4(5).

⁹ See pp 209–211.

¹⁰ *R v Lanfear* [1968] 2 QB 77 (CA).

¹¹ *Hurst v DPP*, unreported, 6 May 1998 (DC); *Leetham v DPP* [1999] RTR 29 (DC); *Willcott v DPP* [2001] EWHC 415 (DC).

¹² *R v Lanfear* [1968] 2 QB 77 (CA); *Leetham v DPP* [1999] RTR 29 (DC); *Willcott v DPP* [2001] EWHC 415 (DC).

¹³ *Hurst v DPP* unreported, 6 May 1998 (DC); *Willcott v DPP* [2001] EWHC 415 (DC).

¹⁴ *R v Lanfear* [1968] 2 QB 77 (CA).

¹⁵ *Leetham v DPP* [1999] RTR 29 (DC).

The circumstances amounting to unfitness to drive have also included running into parked vehicles for no apparent reason.¹⁶ It may be more difficult to predict such a matter, since it is a consequence of the unfitness rather than a symptom of it, but it seems plausible to suggest that if such an event were to occur a driver who has taken drink or drugs should not be surprised by a suggestion that he or she was not fit to drive.

The unfitness may be caused not by alcohol but by a drug, whether legal or illegal. It was seen in Chapter 7 that drivers' understanding of the effects of various drugs is limited, and that even the word "drug" is not uniformly understood. Nevertheless, in most cases, it seems reasonable to assume that a driver who has knowingly taken a drug, whether medicinal or otherwise, and is in one of the conditions described above, would be on notice that the drug may have caused the unfitness. There may be exceptions which require the clarification of the court after the event, as where, say, a prescribed drug has an unusual and unexpected effect, or where a diabetic suffers a hypoglycaemic attack.¹⁷

Like driving without due care and attention,¹⁸ the term "unfit" denotes a standard by reference to which behaviour is evaluated after the event. While it has been said that crimes should not be defined by reference to underlying values or principles, because citizens should not have to apply their own standards to gauge the legality of their behaviour,¹⁹ provisions of this nature are sometimes necessary because it is impossible to legislate for all circumstances.²⁰ The range of circumstances which have given rise to appeals on the meaning of unfitness²¹ is enough to demonstrate this point.

On the other hand, unfitness has a meaning in ordinary language which largely aligns with the legal interpretation, but which requires clarification in marginal, perhaps exceptional, circumstances. The same is true of many other terms in sections 4 and 5 – "drive", "attempt to drive",

¹⁶ *R v Lanfear* [1968] 2 QB 77 (CA); *R v Hunt (Reginald)* [1980] RTR 29 (CA).

¹⁷ *R v Ealing Magistrates' Court ex p Woodman* [1994] RTR 189 (QBD), where the court found that the offence of unfitness to drive may be made out where a diabetic suffers a hypoglycaemic attack as a direct result of an injection of insulin, but that such an attack may be triggered by something else – skipping a meal, for example – which would not fall within the offence. See also the earlier case of *Watmore v Jenkins* [1962] 2 QB 572 (QBD), another case of a hypoglycaemic episode, where the QBD found that the court below was entitled to find that the injected insulin was not the immediate cause of the attack.

¹⁸ Contrary to RTA 1988, s 3.

¹⁹ See p 171.

²⁰ See pp 186–187.

²¹ See pp 209–210.

“mechanically propelled vehicle”, “road or other public place”— which have been subject to extensive interpretation. In relation to unfitness, while there may be difficulties in borderline cases, it is submitted that these fall within the normal process by which the guidance of the higher courts is sought to clarify the law through judicial interpretation, a process endorsed by the ECtHR.²² For these reasons, I conclude that the concept of unfitness to drive is sufficiently comprehensible to drivers to meet the test of certainty.

THE PRESCRIBED LIMIT

Introduction

It is an offence to drive, attempt to drive, or be in charge of a vehicle when the proportion of alcohol in the breath, blood or urine exceeds the prescribed limit.²³ The prescribed limit is defined²⁴ by reference to weights of alcohol in 100 millilitres of breath, blood or urine.

How is this provision to be tested for legal certainty? Is it enough that a driver knows not to exceed the “prescribed limit”? Must the driver know how the prescribed limit is defined in the legislation? To what degree of accuracy must the driver be able to interpret the statutory definition? Must the driver be able to calculate the effects of drinks of different strengths consumed in different quantities over different times, given the individual driver’s own physiological characteristics? Is it enough to adopt the “don’t drink and drive” approach, or a rule of thumb featuring just one or two small drinks?

One of the advantages of the prescribed limit is that it facilitates conviction on the basis of the measured amount of alcohol in the system, avoiding the more complex and difficult task of proving unfitness. While there can be little doubt that the position after the event is now a great deal simpler than it was, the position before the event is less certain than ever.

The definition of the prescribed limit is at once scientifically precise, but wholly incomprehensible to most people. I contend that this is “the wrong kind of certainty”. Drinkers can monitor their own sensations, behaviour and speech for signs of impairment, but cannot measure their

²² See p 187.

²³ RTA 1988, s 5(1).

²⁴ In RTA 1988, s 11(2); see p 14.

blood-alcohol concentration. The limit has been described as “meaningless to lay people”.²⁵

In Chapters 7 and 8 I demonstrated the extraordinary lack of understanding about what the drink-drive limit means in practice, most drivers believing it is far more restrictive than it in fact is.²⁶ This very confusion may have contributed to the view that drink-driving is not acceptable. The North Review²⁷ records views that confusion about how much can be drunk before reaching the limit has led to a very cautious approach, and has unexpected beneficial effects. The drink-drive law may be an instance where misperception of a public health message serves the public good.²⁸ All this suggests a degree of approval of the lack of certainty. The Scottish Government, on the other hand, has adopted a realistic approach, saying that its “don’t drink and drive” message is based on the fact that people cannot accurately estimate a safe level of alcohol consumption and it is better not to drink at all.²⁹ Rather less transparently, the Department of Transport declared that its advice is not to drink and drive, but that changing the prescribed limit would raise questions and concerns about how many drinks could be consumed prior to driving.³⁰ The lack of clarity may indeed have beneficial effects, but the principle of law – certainty – is nevertheless breached, and it is deeply troubling that a criminal law should be effective because it is confusing.

I contend that the prescribed limit for alcohol defies the language of certainty used in the scholarship – uniformity, clarity, foreseeability, stability, consistency of application, advance guidance on what not to do, the ability to know the extent of the rule. It is clear only to those with special knowledge, and not to the general body of motorists.

²⁵ Roy Light, *Criminalizing the Drink-Driver* (Dartmouth, 1994) 72.

²⁶ See pp 240–248, 265.

²⁷ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 3.111.

²⁸ Kypros Kypri and Shaun Stephenson, ‘Drink-Driving and Perceptions of Legally Permissible Alcohol Use’ (2005) 6 *Traffic Injury Prevention* 219, 223.

²⁹ Scottish Government, *Reducing the Drink Driving Limit in Scotland, A Scottish Government Consultation*, September 2012, para 3.04 <<http://www.scotland.gov.uk/Resource/0040/00401340.pdf>> accessed 27 November 2013.

³⁰ Department for Transport, *Enforcement Procedures against Drink Drivers and Other Offenders – A Consultation Document, Proposed Changes in Legislation for Testing Procedures for Drink and Drug Driving and in Other Transport Sectors and for Remedial Training for Road Traffic Offenders*, November 2012, para 3.14 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/14959/drink-driving-consultation.pdf> accessed 27 November 2013.

Expert Evidence

If an individual who has consumed alcohol is to know with certainty whether or not, in given circumstances, he or she is within the prescribed limit and therefore within the law, then understanding the effects of all the variables which influence alcohol concentration in the body³¹ is crucial. Yet, as the cases referred to in Chapter 6³² bear out, the courts themselves have recognised the difficulty of so doing, often insisting on expert evidence to assist them. It is only in the most obvious of cases – where a defendant is only just over the limit and his drink was heavily laced,³³ for example – that the courts have been prepared to make decisions without expert assistance. If the courts cannot assess these matters for themselves, except in the most obvious of cases, it seems extraordinary to expect that drivers can do so.

Uniformity of Application

The principle of certainty calls for uniformity in the application of the law. Since alcohol affects different people in different ways, the prescribed limit is variable in its application, in that different people may consume different amounts of alcohol before reaching the prescribed limit.³⁴ Not only does this further illustrate the complexity of interpreting the limit, but, since many of the differences in the effects of alcohol depend on whether the drinker is male or female, the limit is discriminatory. It has been put this way:

Given differences in individual size, shape, age, maturity, experience with alcohol, and drinking contexts, how can this legal prohibition be formulated as a neutral, objective standard amenable to routine, predictable, uniform enforcement?³⁵

Technical Language

The language in which the prescribed limit is couched itself militates against certainty for drivers. The results of my survey make a nonsense of the ruling that a court must give effect to the words of a statute as the statute would reasonably be understood by those whose conduct it regulates.³⁶ The prescribed limit is barely understood at all. It is technical and its

³¹ See pp 193–194.

³² See pp 213–217.

³³ See p 215.

³⁴ See pp 193–194.

³⁵ James B. Jacobs, *Drunk Driving: An American Dilemma* (University of Chicago Press 1989) 66.

³⁶ *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) 638.

interpretation is a matter for specialists. It is not amenable to explanation in ordinary language except, possibly, at such length as would be unsuitable for inclusion in the statute.

The Court of Justice of the European Union³⁷ ruled some time ago that legal certainty could be prejudiced if a decision is notified to a person in a language that person cannot understand.³⁸ Although the case concerned the use of the appropriate official Community language to notify a decision on social security, the prescribed limit may as well be in an unknown foreign language for all it means to most drivers. As a survey respondent once said, the drink-drive limit “might as well be Swahili”.³⁹

The prescribed alcohol limit, both as defined in the RTA 1988 and as it applies in practice to individual drivers in individual circumstances, is probably unique in road traffic law in the challenge it presents to drivers. While we have speed limits, we are obliged to have working speedometers in our vehicles. We are obliged to have a minimum amount of tread on our tyres, again something fairly easy to measure. It has been said that the law assumes people can monitor their blood alcohol levels in order to conform,⁴⁰ but this is far from so, as I have demonstrated, and as the higher courts have recognised. I find no way of reconciling the prescribed limit for the drink-drive offences with the principle of legal certainty.

THE SPECIFIED DRUG OFFENCES

Throughout this work I have referred to the new offences of driving, attempting to drive, or in charge with a concentration of a specified controlled drug above a specified limit.⁴¹ They are expected to be brought into force in 2014 and, at the time of writing,⁴² government is consulting⁴³

³⁷ Known, at the time, as The European Court of Justice.

³⁸ *Farruato v Bau-Berufgenossenschaft Case 66/74* [1975] ECR 157.

³⁹ See p 240.

⁴⁰ Lonan Lanza-Kaduce, Donna M Bishop, ‘Legal Fictions and Criminology: The Jurisprudence of Drunk-Driving’ (1986) 77 *Jnl of Criminal Law & Criminology* 358, 370.

⁴¹ Under RTA 1988, s 5A, introduced by Crime and Courts Act 2013, s 56.

⁴² December 2013.

⁴³ Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013.

on specifying the drugs and the limits for the purposes of the new offences. As noted in Chapter 6,⁴⁴ the draft regulations propose limits for eight illegal controlled drugs, setting limits at the lowest level at which a reliable analytical result can be obtained, but above which accidental exposure can be ruled out.⁴⁵ In relation to these drugs, this “virtual zero” limit may well be easier to interpret than the prescribed limit for alcohol. It should be fairly clear that it will be illegal to drive with any amount of these drugs in the body, just as it is illegal to possess them. The consultation document recites that this “zero tolerance” approach has been adopted in part to avoid the view that “it’s ok to drive on illegal drugs as long as you don’t have too much of it”⁴⁶ – exactly the problem in relation to alcohol. Of course, even on the zero tolerance basis, there is the question of how long after consumption it is once again legal to drive.

The proposal also includes limits for eight further controlled drugs which have therapeutic, as well as illegal, uses. The limits for most of these drugs are set at a level higher than would result from a normal therapeutic dose.⁴⁷ The idea is to avoid bringing into the net people who are using drugs legitimately. Such people should be fairly confident that if they take their medication as instructed they have nothing to fear, although it is not impossible that someone taking a prescribed drug as directed may nevertheless be unfit to drive under the existing section 4.

While the relatively low limits may make for greater certainty than is the case in relation to alcohol, other aspects of the new offences may increase the potential for confusion. These include the fact that there are to be two sets of limits⁴⁸ – one set at virtually zero and the other somewhat higher. Likewise, the very fact that the new offences embrace drugs which have both legal and illegal uses may confuse the boundaries between licit and illicit drugs, and between drugs covered by the new offences and those which are not. The proposed regulations anticipate setting limits for seventeen drugs in total (the eight illegal substances, the eight having therapeutic uses, and amphetamine, on which consultation about the limit continues). They will all be specified by their scientific names. It is not clear how drivers will know which drugs are on the list, given that many of them

⁴⁴ See p 206.

⁴⁵ Para 14.1.

⁴⁶ Para 14.36.

⁴⁷ Para 14.1.

⁴⁸ Set out at p 206.

have alternative names, including street names for illegal drugs and brand names for therapeutic drugs. Not only that, but, according to the draft regulations, the specified limits will vary from drug to drug, from 1 µg in one litre of blood (for LSD) to 1,000 (for temazepam). As in the case of alcohol, it seems unlikely that the numerical limits will have any meaning at all for most drivers, and the distinction between the “zero tolerance” drugs and the rest may likewise be elusive. The consultation document anticipates a public education campaign. While such campaigns have been highly successful in relation to drink-driving,⁴⁹ the message in relation to the new drug-driving offences seems considerably more complex.

Overall, it seems that the challenges to understanding the new offences, assuming the regulations are made in the same terms as in the consultation document, given their range and complexity, will be great.

CERTAINTY OF PROCEDURE

In Chapter 5, the idea of certainty as relating to the procedure for law-making, enforcement, interpretation, and decision-making,⁵⁰ rather than to legislative provisions themselves, was mentioned. Most of these elements engage topics which are far beyond the scope of the present work, but the idea of the certainty of the procedure for enforcing the drink- and drug-driving legislation does strike a chord. Lord Hutton said that it is clearly desirable that, as far as possible, the law governing the procedure for taking specimens of blood or urine should be simple and free from complexity,⁵¹ while the Divisional Court has found that the provisions of the legislation must be interpreted “so as to be easily applied in a common sense way by police officers and easily understood by defendants who may be subject to their requirements”.⁵²

It has been shown throughout this work that the investigatory process is closely regulated,⁵³ but that there has been a high number of appeals,⁵⁴ many of them quite possibly arising out of the reluctance of drivers to accept the consequences of conviction and/or their readiness to fund weak

⁴⁹ See p 22.

⁵⁰ See p 185.

⁵¹ *DPP v Jackson, Stanley v DPP* [1999] 1 AC 406 (HL) 411.

⁵² *DPP v Darwen* [2007] EWHC 337 (Admin) (DC) [19]; see p 181.

⁵³ See pp 10–14, 15–16, 105–111 and 143–151.

⁵⁴ See p 2.

cases,⁵⁵ In recent years, many of these appeals have been condemned as unmeritorious. There have, nevertheless, been some issues of real difficulty relating to procedure, calling for clarification of the statutory provisions.⁵⁶

Nor has the courts' insistence on the statutory procedure been without controversy. Michael Hirst⁵⁷ asserts that the courts have put themselves into a straightjacket by insisting on full compliance with the statutory procedure, and that drivers who have clearly committed drink-driving offences often escape conviction or have their convictions overturned on appeal as a result of inconsequential procedural errors by the police. In fact, as has been seen, the conviction rate is high, and the majority of appeals on points of law fail.⁵⁸ Despite that apparent error of perspective, there is some attraction in his argument that the better approach to insisting on the statutory procedure would be to follow the general rule that evidence is admissible despite any illegality in obtaining it, subject only to the courts' discretion to exclude it under section 78 of the Police and Criminal Evidence Act 1984.⁵⁹ This approach might reduce certainty, in that the court's discretion would have priority over the rules which have been developed over the years, but, ten years later, the case of *Carless*⁶⁰ provided support for the view that excess alcohol may be proved by means other than the statutory procedure. The case also provides a vivid illustration of the fact that the provisions are still subject to significant points of interpretation. The case is worth reviewing in some detail here. It turned on section 15(2) of the Road Traffic Offenders Act 1988:

Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by or taken from the accused shall, in all cases (including cases where the

⁵⁵ See p 3.

⁵⁶ A recent example is *DPP v Chajed* [2013] EWHC 188 (Admin) (DC), on whether or not failure to comply with a certain element of the procedure as set out in the *pro forma* (see p 14 on the *pro formas*) rendered unlawful a requirement for a breath specimen.

⁵⁷ Michael Hirst, 'Excess Alcohol, Incorrect Procedures and Inadmissible Evidence' (1995) 54 CLJ 600.

⁵⁸ It may of course be that cases are not brought to court because some error in procedure is discovered early on, but there are no statistics on those.

⁵⁹ Pursuant to which a court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

⁶⁰ *DPP v Carless* [2005] EWHC 3234 (Admin) (DC).

specimen was not provided or taken in connection with the alleged offence), be taken into account ...

The words in brackets were introduced by the Road Traffic Act 1991, and had, it seems, gone unnoticed since. In *Carless*, police took samples of blood from inside a car which had been involved in a traffic accident. They analysed it for DNA and alcohol, matching the specimen to the defendant and showing excess alcohol. The Divisional Court ruled that the words “(including cases where the specimen was not provided or taken in connection with the alleged offence)” created a new set of circumstances in which specimens may be admitted in prosecutions for excess alcohol offences. This seems to be exactly the development which Hirst wished for. It gives rise, however, to the question whether Parliament intended, by the addition of these words, to provide an alternative to the statutory regime for taking specimens. The words were added to section 15(2) by provisions⁶¹ headed “Minor and Consequential Amendments”. But the effect of the words was far from minor in the case of *Carless*. Further, there seems to be nothing in the 1991 Act upon which the addition of these words to section 15(2) is consequent. The 1991 Act modified the substantive drink-drive provisions only by inserting section 3A,⁶² and by substituting, in section 4, the words “mechanically propelled vehicle” for “motor vehicle”.⁶³ Stranger still, a year later, the Transport and Works Act 1992 introduced a set of provisions on drink-driving in respect of railways, tramways and other guided transport systems, which mirrors the provisions of the Road Traffic Act, but omits the words which gave rise to the decision in *Carless*. The approach adopted in *Carless* was endorsed, albeit *obiter*, in *R v Coe*,⁶⁴ where the Court of Appeal said that, by virtue of the bracketed words in section 15(2), section 15 is capable of applying not only to a specimen taken pursuant to the procedure laid down in the Act, but to a specimen of blood taken as a matter of routine by a member of the hospital staff.

The point in *Carless* is one of genuine concern about the procedure and is a vivid example of serious uncertainty, suggesting that there may be circumstances in which the investigation can be conducted entirely outside the regime in the Road Traffic Act. For example, if there were reliable evidence of what a person had eaten and drunk before driving, at what

⁶¹ RTA 1991, s 48 and sch 4.

⁶² Introducing the offence of causing death by careless driving when under influence of drink or drugs; RTA 1991, s 3.

⁶³ RTA 1991, s 4.

⁶⁴ [2009] EWCA Crim 1452 (CA (Crim)) [33].

times, and of the person's personal characteristics such as height and weight, it would be possible to calculate fairly accurately the person's blood alcohol concentration when driving, and a prosecution could, conceivably, succeed even though no specimen at all was taken. In *Barclay v Richardson*,⁶⁵ however, the Scottish High Court of Justiciary, without reference to *Carless* or *Coe*, ruled, by a majority of three to two, that any conviction under section 5 requires to be founded on an analysis of a specimen of breath, blood or urine provided in accordance with the statutory procedures.⁶⁶ In the two dissenting judgments, on the other hand, it was opined that the legislation did not limit the manner of proof; all that was required was that any such proof demonstrated beyond reasonable doubt that the accused had a breath alcohol level in excess of the limit.⁶⁷ It is worrying that there seems to be a difference of some significance between the jurisprudence of England and Wales and of Scotland on this point.

While it is difficult to reach an overall conclusion on the question whether or not the drink- and drug-driving investigation procedure is sufficiently certain, I conclude that, overall, it probably is. Where alcohol is suspected, the investigation is often quick and simple. The kind of situation which arose in *Carless* is rare, and, to avoid challenge, investigators would doubtless opt for the conventional procedure if at all possible. The new offences under section 5A⁶⁸ will be subject to investigative procedures in the same terms as for the excess alcohol offences and, no doubt, new challenges will arise. A drink-drive investigation may be lengthy if the full process of moving from requiring breath to blood, to urine, has to be invoked. Unfitness investigations are more complicated, often requiring a medical opinion.⁶⁹ But length or complexity should not be confused with uncertainty. The procedure for all the drink- and drug-driving investigations is set out in detail⁷⁰ in the legislation and has been greatly elaborated by the decisions of the higher courts over the years, and is further explained in the *pro formas* used by investigating officers.⁷¹ While it is sometimes difficult, I contend that it is sufficiently clear to meet the test of legal certainty.

⁶⁵ [2012] HCJAC 168.

⁶⁶ Lord Eassie [21]

⁶⁷ Lord Carloway [49], Lord Hardie [57].

⁶⁸ See pp 295–297, identifying a number of issues which may require clarification.

⁶⁹ See p 212.

⁷⁰ In RTA 1988, ss 6–9 and RTOA 1988, s 15.

⁷¹ See p 14.

THE ROLE OF ADVICE

As noted elsewhere, it has been said that the law should be expressed so as to communicate directly and effectively with as much of its intended audience as possible.⁷² While it might be assumed that the audience for road traffic legislation is those who use the roads, another view is that the law is written for lawyers and that the only audience is lawyers; others need advice on the law.⁷³ In Chapter 5,⁷⁴ I mentioned the role of advice as an aid to understanding legal provisions and enhancing their certainty. I cited a number of propositions to the effect that the requirement for certainty is met even if advice on the interpretation of a prohibition is needed in order to understand it.

It has been seen⁷⁵ that an investigation into a drink- or drug-driving offence may not be delayed for the suspect to take legal advice, so that if advice is to have any role in relation to the certainty or otherwise of the provisions, advice on certain important matters – significantly, on whether or not to provide a specimen if so required – would need to be taken at some point before the investigation starts. The prospect of someone who has consumed alcohol or a drug and then seeks legal advice about whether or not he or she could then lawfully drive is at best far-fetched.⁷⁶ In any event, given the ways in which alcohol and other drugs behave in the body,⁷⁷ scientific or medical advice, and even then of a specialised nature, would probably be far more useful than advice from a lawyer.

It might be said that those who drive should inform themselves in advance of the practical interpretation of the prohibitions. In Chapter 10, I argue that drivers do have certain special duties, but I do not think they

⁷² Office of the Scottish Parliamentary Counsel, *Plain Language and Legislation* 2006 <<http://www.scotland.gov.uk/Publications/2006/02/17093804/0>> 17 accessed 27 November 2013; see pp 172–173.

⁷³ Francis Bennion, ‘Confusion over Plain Language Law’ <<http://www.francisbennion.com/pdfs/fb/2007/2007-018-plain-language-actual-article.pdf>> accessed 27 November 2013; see p 173.

⁷⁴ See pp 187–188. See also *R on the Application of International Association of Independent Tanker Owners & Others v Secretary of State for Transport* [2009] Env LR 14 (pp 174–175 above), where the Court of Justice of the European Union held that the requirement for foreseeability may be met even if expert advice is needed; this was particularly true in relation to professional activities involving a high degree of caution.

⁷⁵ See pp 152 (third bullet and fns 177, 178 and 179), 154–155.

⁷⁶ See also Richard Buxton, ‘The Human Rights Act and the Substantive Criminal Law’ [2000] Crim LR 331, 334, speculating, in the context of legal certainty, on the equally unlikely possibility of consulting a solicitor before an act which might or might not amount to marital rape.

⁷⁷ See Chapter 6.

extend to a detailed understanding of how alcohol affects the individual; it is too complicated. The advice which is readily available is that given in public education campaigns. Sadly, this may only confuse matters. In Chapter 7, I described the limitations of official guidance,⁷⁸ and argued that the “don’t drink and drive” campaign is more appropriate to unfitness than to exceeding the prescribed limit.⁷⁹ The campaigns, however, make no clear distinction between the two offences, while the driving public seems more aware of the excess alcohol offences than of the unfitness offences, with the result that the campaigns seem far more likely to be understood, erroneously, as relating to the excess alcohol offences.

The role of advice about the effects of drugs is rather different. In relation to prescription and over-the-counter drugs, specific advice relating to the drug in question, and perhaps to the individual in question, is often given, but not consistently. As noted in Chapter 7,⁸⁰ however, very little is known about what, if anything, prescribers tell patients about the effects of a drug on driving. Likewise, little is known about whether people taking either prescription or over-the-counter drugs read and understand any warnings about driving given in the product information leaflet. Many warnings are generalised and may not apply to particular individuals in particular circumstances. Nevertheless, if a person really wanted to know if it would be unsafe to drive after a particular drug, there are plenty of sources of advice – the person who prescribed it, the pharmacist who dispensed or sold it, not to mention the vast resources of the internet – and it seems reasonable to assume that a fairly sound indication would be fairly easy to find in many cases. It would be enough for the purposes of unfitness to drive to know that a particular drug impairs driving skills, but possibly not enough if the advice is that a drug *could* impair, since that gives rise to questions of the circumstances in which it would have that effect.

In the case of illicit drugs, it is difficult to imagine where advice about the effects of particular drugs on driving might be found, except perhaps from specialist organisations who offer assistance to drug-users. While the internet does assist,⁸¹ the advice is necessarily generalised.

⁷⁸ See pp 223–224.

⁷⁹ See p 224.

⁸⁰ See pp 249–250.

⁸¹ For example <<http://www.talktofrank.com/drug/cannabis>> accessed 27 November 2013.

In relation to the drugs – both legal and illegal – which will be specified for the purposes of the new section 5A,⁸² advice may be needed not only concerning the effects of specific drugs, but also on whether or not a drug appears on the list, such that having an excess would be an offence regardless of fitness to drive. It is unclear how this will work. In the case of a specified prescription or over-the-counter drug, the pharmacy label or packaging may include a statement to that effect, or the prescriber may advise.

On balance, my conclusion is that the lack of certainty in the definition of the drink-drive limit cannot be off-set by taking advice except of a detailed, scientific kind which it is inappropriate to expect drivers to seek out. The opposite is, however, probably true of prescription and over-the-counter drugs where information about the effects of specific doses is available. It seems not unreasonable that those who drive should make inquiries if they are taking such medication. Advice is less readily available in relation to illegal drugs, yet here the very fact that possession is forbidden might be taken to suggest that having the drug in the body while driving constitutes an offence in itself. Of course, that may give rise to the question of how people know which drugs are illegal – a point far beyond the scope of this work.

CONCLUSION

The difficulties of understanding the drink-drive limit seriously compromise legal certainty in relation to the offence which is, in terms of the number of cases brought to justice, the most important of the drink- and drug-driving offences by a long way. Since the concept of the prescribed limit goes to the definition of the offence itself, this seems to me a far more fundamental breach of principle than those discussed in Chapters 2 to 4. Strict liability, reverse burdens and the presumption of innocence all go to matters of proof and the rights of individual defendants, but the prescribed limit determines whether or not an offence has been committed at all. In Chapter 10, I argue that we must find a way of accommodating this major breach of principle.

⁸² See p 206.

Chapter 10: Breaking the Rules or an Alternative Paradigm?

INTRODUCTION

In this closing chapter, I first recall my research questions, before drawing together conclusions from my project as a whole. My challenge was to elucidate:¹

- the nature of the drink- and drug-driving offences;
- the extent to which they comply with or breach the principles said to underlie the criminal law;
- whether any such breaches can be justified; and
- the consequences (if any) for legal theory of any such breaches.

My expectation was that the law would be complex and difficult, and that it would offend many of the traditional principles. Both these expectations were borne out.

On the nature and difficulty of the offences, I have, throughout this work, demonstrated the complexity of the provisions, describing them as technology-led, non-paradigmatic offences of endangerment.² I have examined the blameworthiness attaching to them.³ I have described the scientific background on which the offences are founded,⁴ and the closely regulated procedure for conducting investigations.⁵ I have delineated parts of the vast body of case law which has arisen.⁶

In this chapter, I draw together conclusions relating to the principles. I first recall my findings concerning derogations from the traditional criminal law paradigm. I place the derogations into the context of a more general move away from principle in the development of the criminal law. I argue that, at least in relation to the excess alcohol offences, the contribution to road safety has been so great that it is a compelling reason for accepting the derogations and finding justifications for them. This is not necessarily so in

¹ See pp 4–5.

² See pp 25–29.

³ See pp 65–66.

⁴ See pp 191–207.

⁵ See pp 10–14, 15–16, 105–111 and 143–151.

⁶ See pp 79–80, 91–94, 102–103, 106–107, 112–113, 117–118, 144–155 and 209–218.

respect of the drug-driving offences, and it has been much more difficult to reach firm conclusions in relation to those. Finally, I look forward, suggesting that the time may have come to recognise, and to begin to map out, an alternative paradigm.

I concluded in Chapter 2 that, although the drink- and drug-driving offences are offences of strict liability, strict liability is not appropriate to them. I next found, in Chapter 3, that the presumption of innocence is compromised in relation to the offences. In Chapter 4, I identified much to suggest that the privilege against self-incrimination should, although it does not, apply to requirements to provide specimens in drink- and drug-driving investigations.

In relation to all three principles I cited arguments that the derogations could nevertheless be accepted. These were, first, that road safety considerations might be given priority over the matters of principle, and, second, that driving is a special activity in which people engage voluntarily with the *quid pro quo* that drivers must accept some special responsibilities and forego certain legal protections which would otherwise be available. In relation to strict liability, I also argued that those who drive after drinking or taking drugs must realise they are at risk of breaking the law, and highlighted the difficulty of proving *mens rea* if it were to be a constituent of the offences. Ease of proof was relevant in relation to the presumption of innocence, while the need for enforceability called for an exception to the privilege against self-incrimination.

The principle of legal certainty, particularly in relation to the prescribed limit for alcohol, was a major focus of my research and I discussed it at length, exploring the theory in Chapter 5, the scientific background (Chapter 6) and drivers' confused perceptions of the law (Chapter 7). In Chapter 8 I described my own study, confirming that, in relation to the prescribed alcohol limit, drivers are greatly confused. I concluded, in Chapter 9, that the prescribed limit for alcohol (and possibly also, in due course, the specified limits for certain drugs⁷) is couched in terms which defy the principle of legal certainty, but that the same cannot be said of the unfitness offences.

⁷ For the purposes of the new offences under RTA 1988, s 5A; see p 206)

THE EROSION OF PRINCIPLE

I have highlighted a number of examples of the erosion of principle in the context of the drink- and drug-driving offences. James Jacobs, the American commentator, asserts that:

Jurisprudential and constitutional values, which have figured prominently in the evolution of criminal law and procedure, have been ignored or slighted in the case of drunk driving.⁸

In the UK, the departures from principle are such that the procedure in drink-driving cases clearly favours the prosecutor at the expense of the defendant, and the same will likely be true in relation to the excess drugs offences, when in force,⁹ since the statutory provisions are couched in the same terms. A suspect may not delay giving a specimen to take advice about whether or not to comply.¹⁰ If the suspect refuses to supply a specimen, a charge of failing without reasonable excuse to provide the specimen almost certainly ensues and the suspect is in much the same position as someone who supplies a specimen which shows an excess over the relevant limit.¹¹ The limited circumstances in which defendants have been found to have reasonable excuses for failing to provide specimens, and the broad powers to require specimens, are such that it is virtually impossible to avoid providing a specimen of some sort.¹² The prosecutor has the benefit of the statutory assumption that the alcohol or drug level at the time of an alleged offence was no lower than in the specimen taken later, and may even “backtrack” to show that it was in fact higher.¹³ The defendant may not make a similar calculation to show being below the limit at the critical time. I have argued that the supposed safeguards against self-incrimination are in reality no safeguards at all.¹⁴

The only concessions in a suspect’s favour are that it is the policy of the Crown Prosecution Service not to prosecute for drink-driving if the breath alcohol is below 40 microgrammes of alcohol in 100 millilitres of

⁸ James B. Jacobs, *Drunk Driving: An American Dilemma* (University of Chicago Press 1989) 90.

⁹ See pp 8–9.

¹⁰ See pp 152 (third bullet and fns 177, 178 and 179), 154–155.

¹¹ See p 16.

¹² See pp 151–154.

¹³ See p 106.

¹⁴ See pp 161–162.

breath, even though the prescribed limit is 35.¹⁵ Secondly, a margin of error is allowed in favour of suspects when blood specimens are analysed.¹⁶ The legislation contains some procedural safeguards for suspects. For example, suspects must be warned that failure without reasonable excuse to provide specimens is an offence, and a prosecution must fail if this requirement is not met.¹⁷

The fact that the drink-drive offences do not have their roots in the common law may be a reason for their non-compliance with the traditional principles. This may be true of many offences created by statute. Ashworth¹⁸ noted that, of thirty-nine new offences created by statute in 1997, most were regulatory in that they applied to spheres of social or commercial activity and were generally enforced by a regulatory authority rather than the police.¹⁹ Most were characterised by strict liability, liability for omissions and reverse onus defences. All these features were inconsistent with the rhetoric of the criminal law – the presumption of *mens rea*, that liability for omissions is exceptional, and that the prosecution bears the burden of proving guilt.²⁰ Ashworth highlights the proliferation of offences for purposes of political expedience, without reference to principle.²¹ I would not go as far as that in relation to the drink- and drug-driving offences, for they are inspired by principle, but the principle, as I explain further,²² is road safety rather than the traditional criminal law. I come back to the burgeoning of regulatory offences²³ in the context of a suggestion that the time may have come to recognise an alternative paradigm. For the moment, it is sufficient to note that the drink- and drug-driving offences are far from alone in departing from traditional principles.

¹⁵ Crown Prosecution Service, *Drink Driving Offences* <http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_drink_driving/#a13> accessed 27 November 2013.

¹⁶ It is a standard practice of analysts to allow a margin in favour of the suspect, of 6%, or 6 mg, whichever is lower, a practice recognised in *Walker v Hodgins* [1984] RTR 34 (DC).

¹⁷ *DPP v Jackson, Stanley v DPP* [1999] 1 AC 406 (HL); see p 56.

¹⁸ Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225. See also p 326.

¹⁹ This latter point does not of course apply to the drink- and drug-driving offences.

²⁰ Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 228.

²¹ *Ibid*, 253.

²² See pp 309–312.

²³ See pp 324–325.

JUSTIFYING THE BREACHES OF PRINCIPLE

I turn now to considering what we are to make of the departures from principle. My contention is that the remarkable contribution to road safety made by the drink-driving provisions is so compelling that it warrants accepting deviations from the normal paradigm. The literature and the case law provide much support for this proposition. My conclusions in relation to the drug-driving offences are necessarily more tentative. Nevertheless, I argue that, in relation to both drink- and drug-driving, drivers are in a position of special responsibility, and, as a *quid pro quo* for the freedom of the road, they must accept a regulatory regime which is more restrictive of their individual liberties than that envisaged by the traditional criminal law paradigm. I believe these to be strong and sufficient arguments for accepting the imperfections, from the point of view of legal theory, of the drink- and drug-driving offences. I find further support for my argument that the derogations from principle are to be accepted by invoking the “thin ice” principle and the need for enforceability.

Road Safety

The statistics

I have already noted²⁴ that road traffic fatalities in Great Britain attributed to drink-driving fell from 1,640 in 1979 to an estimated 290 in 2012. Serious injuries attributed to drink-driving fell from 8,300 to 1,210, and slight injuries from 21,490 to 8,500 over the same period. While fatalities have fallen to below one fifth of their level a third of a century ago, the total number of fatalities and injuries taken together has fallen to only one third of the 1979 level. Improvements in vehicle design, emergency service responses and life-saving techniques have surely contributed to the proportionately greater reductions in the numbers of fatalities. In 1979, drink-drive incidents accounted for about a quarter of all those killed on the roads; over the five years to 2012, the proportion has dropped to fifteen per cent.²⁵ Although the estimated figure for fatalities in 2012 shows a slight rise on the final figure for 2011, the general trend over the years is relentlessly downward. Thousands of lives have been saved and much suffering averted.

²⁴ p 1, fn 3.

²⁵ Department for Transport, *Reported Road Casualties in Great Britain: Estimates for Accidents Involving Illegal Alcohol Levels: 2012 (provisional) and 2011 (final)* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226068/accidents-involving-illegal-alcohol-levels-2011-2012.pdf> accessed 27 November 2013.

The statistics themselves do not, of course, prove any direct connection between the statutory provisions and the reductions in fatalities and injuries, but it seems unrealistic to think that the improvements can result from anything other than a combination of the statutory provisions, the public education campaigns and police enforcement. Because of this significant contribution to improving road safety, I contend that we must find a way of accommodating the offences in the framework of the criminal law.

There are no equivalent statistics on drug-driving, the extent of which is unknown,²⁶ although statistics on the new drug offences²⁷ will probably be kept once the provisions are in force. The consultation document contains an estimate of the likely reduction in casualties, but acknowledges the complexity of forecasting.²⁸ Unfitness to drive (whether through drink or drugs) is rarely before the courts.²⁹ It is not therefore possible to invoke with any certainty the road safety considerations to justify derogations from legal principle in relation to the law on drug-driving. Nevertheless, when the drink-driving offences were first introduced, the extraordinary success of the measures was not foreseen. History has proved their effectiveness. The same may well prove true of the new excess drug offences.

Balancing interests

I have alluded many times to the question of balancing society's interests in road safety against individual rights deriving from the traditional criminal law paradigm. I have outlined how road safety considerations underlie the drink- and drug-driving offences,³⁰ and noted that the public has come to view drink-driving as a serious offence.³¹ Except for the offence of causing death by careless driving when under the influence of drink or drugs, all the offences can be committed without any harm resulting.³² They are offences

²⁶ Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013, para 42 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013.

²⁷ See pp 8–9.

²⁸ Department for Transport, *Regulations to Specify the Drugs and Corresponding Limits for the New Offence of Driving with a Specified Controlled Drug in the Body Above a Specified Limit – A Consultation Document*, July 2013 53, para 52 *et seq* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211220/consultation-document.pdf> accessed 27 November 2013.

²⁹ See p 200.

³⁰ See pp 62–63.

³¹ See pp 22–23.

³² See pp 26–27.

of endangering the safety of others,³³ bringing additional risk to the inherently dangerous process of driving.

It has been said that the justice of creating such offences may be evaluated by balancing the seriousness of the possible harm and the likelihood of its occurrence, against the social value of the conduct in question (driving) and the degree of intrusion on the individual's life which would be caused by criminalising that conduct.³⁴ The drink and drug-driving offences surely pass this test. The increased likelihood of accident when driving with alcohol is well documented.³⁵ In 2012, there were 55,300 convictions for drink-driving in England and Wales³⁶ and, in 2011/12, 7,445 in Scotland.³⁷ In 2012 there were 10,000 casualties (fatalities and persons injured seriously or slightly) in Great Britain arising out of drink-drive incidents.³⁸ This approximates to one casualty for every 6.2 convictions. Although Clarkson says³⁹ that the potential harm of drink-driving is so great that, to justify criminalising it, the risk of its materialising need not be particularly high, these figures seem to suggest that the risk is indeed high.

On the other hand, the social value of freedom to drive is immense, in terms of individuals going about their daily activities, of transport infrastructure and of commerce in general. The degree of intrusion on the individual, in avoiding the drink- and drug-driving offences, is, I contend, slight. Given what is at stake, it can rarely be much of an inconvenience to refrain from alcohol or (most⁴⁰) drugs before driving, or to avoid driving after consuming such substances. The period of time for which one must do so is a matter of difficulty, as I have shown in Chapter 7,⁴¹ but it is not

³³ See pp 26–29.

³⁴ See pp 26–27.

³⁵ See p 192.

³⁶ See p 1, fn 5.

³⁷ Scottish Government, *Reducing the Drink Driving Limit in Scotland, A Scottish Government Consultation*, September 2012, 10 <<http://www.scotland.gov.uk/Resource/0040/00401340.pdf>> accessed 27 November 2013.

³⁸ Department for Transport, *Reported Road Casualties in Great Britain: Estimates for Accidents Involving Illegal Alcohol Levels: 2012 (provisional) and 2011 (final)* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226068/accidents-involving-illegal-alcohol-levels-2011-2012.pdf> accessed 27 November 2013.

³⁹ CMV Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 262, see pp 30–31.

⁴⁰ The position in relation to prescription drugs under the new specified drug offences is not, however, quite so clear; see pp 296–297.

⁴¹ See pp 221–222.

beyond drivers to adopt a safe margin of error – twenty-four hours, if necessary. This would be in line with the “don’t drink and drive” approach of so many respondents in my survey.⁴² It seems not unreasonable to expect drivers to exercise appropriate caution, as in many other driving situations, for example, waiting until sure that the way ahead is clear, or taking extra precautions in bad weather. Indeed, if the proposal to reduce the drink-drive limit in Scotland⁴³ comes to fruition, drivers in the North of England who think they may be below the English limit but possibly over the Scottish limit will need to take extreme care not to cross the border.

The case law

The suggestion that departures from principle may be acceptable in the broader public interest is supported by the case law of both the domestic courts and the ECtHR.

The Privy Council said that strict liability may be acceptable where it will advance the objects of a statute by encouraging greater vigilance to avoid committing an offence.⁴⁴ In the leading case of *Sheldrake*, the House of Lords ruled that, while the reverse burden of proving no likelihood of driving while remaining unfit through drink or drugs breached the presumption of innocence, the breach was justified because (among other reasons) it was aimed at the legitimate objectives of preventing death, injury and damage.⁴⁵ I have argued⁴⁶ that the real danger at which the “in charge” offences are aimed is the risk of driving, a road safety consideration. In upholding the statutory assumption that the alcohol level at the time of an alleged offence would have been no lower than in the specimen taken later, the Divisional Court emphasised that the legislation was aimed at preventing the consumption of large quantities of alcohol before taking control of a vehicle.⁴⁷ So too, the purpose of the legislation was invoked in relation to drinking after the event but before providing a specimen,⁴⁸ the Court of Appeal also referring to Parliament’s intention to minimise the social evil of

⁴² See pp 271–275.

⁴³ Scottish Government, *Reducing the Drink Driving Limit in Scotland*, A Scottish Government Consultation, September 2012, <http://www.scotland.gov.uk/Resource/0040/00401340.pdf> accessed 27 November 2013.

⁴⁴ *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1 (PC) 14; see p 40.

⁴⁵ *Sheldrake v DPP, Attorney General’s Reference (No 4 of 2002)* [2005] 1 AC 264 (HL); see pp 79–80.

⁴⁶ See pp 94–97.

⁴⁷ *Parker v DPP* [2001] RTR 16 (QBD); *Griffiths v DPP* [2002] EWHC 792 (Admin); see p 117.

⁴⁸ *R v Drummond* [2002] EWCA Crim 527; see p 116.

drink-driving. Road safety has been a consistent theme in the case law on reverse burdens, as described in Chapter 3.⁴⁹ Encroachments on the presumption of innocence have been found to be reasonable and proportionate.⁵⁰ The right against self-incrimination may be sacrificed in favour of protection against drunken drivers, for “good and pressing social reasons”.⁵¹ Foregoing the privilege may be proportionate and reasonable in relation to drink-driving offences.⁵²

The House of Lords has ruled that the nature of the threat to society addressed by a reverse burden of proof is relevant to deciding its legality.⁵³

Although the ECtHR court at first rejected arguments that the wider public interest might outweigh the right against self-incrimination, an important dissenting opinion in *Saunders*⁵⁴ is to the opposite effect, and the public interest question took on greater significance in the more recent case of *Jalloh*.⁵⁵

While it may be more difficult to justify breaches of principle if the offence is serious,⁵⁶ and I noted in Chapter 1 that drink-driving (if not drug-driving) is considered serious, I nevertheless conclude that the huge benefits to road safety brought about since the excess alcohol offences were introduced can be balanced against the convenience of freedom to drive and the relative inconvenience of avoiding committing the offences, such that, to the extent that drink-drive offences breach the principles of law described in this work, it is in the interests of road safety to accept those breaches.

Drawing the line

Arguing that the road safety considerations should take priority over established principles of law gives rise to problems of where to draw the line,

⁴⁹ See pp 116–117.

⁵⁰ See p 117–118.

⁵¹ *Morris v Beardmore* [1981] AC 446 (HL); *Murray v DPP* [1993] RTR 209 (QBD); see p 133.

⁵² *Brown v Gallacher* [2002] SLT 1135 (HCJ); *Brown v Stott* [2003] 1 AC 681 (PC); see pp 134–135.

⁵³ *R v DPP ex p Kebilene* [2000] 2 AC 326 (HL); see p 78. See also *R v Johnstone* [2003] UKHL 28, p 79.

⁵⁴ See p 166.

⁵⁵ See p 127.

⁵⁶ See pp 81–82, 84–85, 87.

a matter which is not without controversy.⁵⁷ I discuss this question below,⁵⁸ in relation to both the road safety considerations and the idea of a special duty on drivers.

A Special Duty

I next turn to the proposition that drivers are under a special duty in relation to each other and to others, such that they must accept departures from a number of the principles often featuring in the criminal law. I put forward this argument in relation to all the drink- and drug-driving offences, including the new excess drugs offences.

Co-operation between drivers

It is clear that many rules of the road – driving on the left, stopping at red signals, giving way to vehicles in accordance with the system of priorities – are based on the need for cooperation between drivers so that traffic can move in an orderly and safe fashion. It would be unrealistic to suggest that rules of this basic kind breach rights such as individual liberty.

That drivers have specific duties to others is reflected in the definitions of some road traffic offences. Examples are driving without reasonable consideration for others,⁵⁹ and using a vehicle in such a condition that there is a danger of injury to another.⁶⁰

This idea that drivers are in a special position vis-à-vis each other recurs throughout the literature. James Jacobs⁶¹ talks of the extraordinary interpersonal trust on which the highway transportation system depends, urging that responsible participation should be considered a major obligation of citizenship.

Duff⁶² points out that the reason we obey rules such as the prohibition on driving the wrong way down a one-way street is that doing so serves the convenience (and, to a degree, the safety) of drivers generally. He argues that drivers have a general responsibility to consider the convenience and safety of other road users. They owe it to each other not only to ensure they act safely, but to assure each other that they do so, by following rules such as

⁵⁷ See pp 44–46, 62, 63–64, 81–82, 117–118, 130–131, 140–143.

⁵⁸ See pp 327–328.

⁵⁹ Contrary to RTA 1988, s 3.

⁶⁰ Contrary to RTA 1988, s 40A.

⁶¹ James B Jacobs, *Drunk Driving: An American Dilemma* (University of Chicago Press 1989) 16.

⁶² RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 91–92.

speed limits,⁶³ and by proving competence to engage in the activity by taking the driving test.⁶⁴

Simester and von Hirsch⁶⁵ canvass the idea of obligations of co-operation among participants in common activity. The proscription of drink-driving (and speeding) falls within a group of rules designed to protect members of the group whose conduct is regulated – here, drivers. No man is an island, and the rules are for mutual protection.

Some further confirmation of the idea of drivers as a special community may perhaps be found in the penalty of disqualification – a period of forced withdrawal from the community of drivers, with all the consequent inconvenience and expense.

Special responsibilities

Taking the idea of the community of drivers a step further, drivers can be said to incur special responsibilities by virtue of membership of that community. In relation to a proposal that repeat convictions for drink-driving might lead to permanent disqualification from driving, the 2010 North Report referred to driving as a considerable responsibility, not an inalienable right.⁶⁶ These responsibilities, I argue, include not only the rules relating to how they drive, but extend to relinquishing some of the rights ordinarily afforded to those who come up against the criminal law. Throughout this work I have noted instances in which commentators have drawn on the idea of the special position of drivers to justify departures from principle.

Ashworth and Horder⁶⁷ acknowledge that higher standards in relation to the criminal law apply to drivers (as they do to certain corporations) since safety is a central issue and a licence is required. In Chapter 5,⁶⁸ in the context of ignorance of the law, I mentioned the suggestion that it is a duty of citizenship to know the law. While the existence of any such duty in

⁶³ *Ibid*, 170.

⁶⁴ *Ibid*, 173.

⁶⁵ AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 78.

⁶⁶ Sir Peter North, *Report of the Review of Drink and Drug Driving Law* (HMSO 2010) para 4.93.

⁶⁷ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 163.

⁶⁸ See p 189.

general is controversial,⁶⁹ it has been argued⁷⁰ that it is fair to expect people to make a reasonable effort to find out what the law is, and, in the specific context of motoring offences of omission, such as failing to comply with a traffic signal,⁷¹ drivers have a responsibility to familiarise themselves with duties such as these, which are set out in the Highway Code.

In relation to strict liability, Ormerod⁷² suggests that since driving is an activity of choice involving danger to others, strict liability is acceptable in relation to some road traffic offences, but does not specify which road traffic offences he would put within this bracket.

Again in support of the proposition that drivers incur special duties, Dennis,⁷³ writing about reverse burdens of proof, suggests a principle he calls the voluntary acceptance of risk, to the effect that people who benefit from taking part in a regulated activity accept responsibility for disproving assumptions of blame. Glover's licensing approach,⁷⁴ also argued in relation to reverse burdens of proof, is to the same effect.

Ashworth and Redmayne⁷⁵ also recognise, albeit with a degree of reservation, that vehicle owners do voluntarily enter into a clear regulatory regime.

In arguing that the outcome in *O'Halloran* would have been better reasoned by finding a limited exception to the privilege against self-incrimination, rather than by deciding it did not apply at all, Ashworth⁷⁶ suggests that one of the criteria for making an exception to the privilege might be that the social enterprise in question is, like driving, heavily regulated, to the extent of requiring a test to be passed and a licence obtained. While the drink- and drug-driving offences might fail on his other preconditions for an exception (relatively little at stake; provisions to be

⁶⁹ Douglas N Husak 'Ignorance of Law and Duties of Citizenship' (1994) 14 Legal Studies 105.

⁷⁰ Andrew Ashworth, 'Ignorance of the Criminal Law and Duties to Avoid it' (2011) 74 MLR 1, 5, 17, 26.

⁷¹ Contrary to RTA 1988, s 36.

⁷² David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 171.

⁷³ Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901, 921; see pp 85–86.

⁷⁴ Richard Glover, 'Regulatory Offences and Reverse Burdens: The "Licensing Approach"' (2007) 71 JCL 259; see p 86.

⁷⁵ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 150; see p 131.

⁷⁶ Andrew Ashworth, 'Self-incrimination in European Human Rights Law – a Pregnant Pragmatism?' (2008) 30 Cardozo LR 751, 770; see pp 142, 165.

excused if without fault), he nevertheless contemplates singling out driving by virtue of the degree of regulation.

On the basis that car ownership and driving are heavily regulated, requiring licences and the registration of vehicles, the Road Traffic Act 1988 can be seen as part of that regulatory structure, and those who own or drive cars can be said to accept the duties imposed by the structure, including the duty to account for their sobriety when they drive.⁷⁷

Not all commentators are, however, of one accord. Duff⁷⁸ specifically exempts drivers from special responsibility because he considers driving an ordinary rather than a special activity, although he agrees in principle that those who create risk of harms over and above those which are acceptable as features of normal life should bear some measure of special responsibility. Hamer⁷⁹ embraces exemptions from principle for regulatory regimes, but is unsure how to categorise driving, although he emphatically rejects any idea that it should go as far as a presumption of dangerous driving. These are, however, minority views, both writers' reservations being based, at least in part, on wishing to avoid making any presumptions of dangerous (Hamer) or careless (Duff) driving.

The case law

The case law also contains many references to special responsibilities on people who engage in certain activities, and, more recently, on drivers in particular.

The House of Lords has referred to a higher duty of care to avoid prohibited acts on those who choose to participate in certain activities. The context was, however, activities involving particular danger to public health, safety or morals.⁸⁰ Making the same point again in a later case,⁸¹ the House suggested that a requirement to have a licence to take part in an activity would indicate that strict liability might attach. The examples of such activities were those concerned with the promotion of health and safety and the avoidance of pollution, and other cases which might properly be seen as

⁷⁷ Mike Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 OJLS 209, 229–230.

⁷⁸ RA Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 139–140; RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 246. See p 86.

⁷⁹ David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 CLJ 142, 169.

⁸⁰ *Sweet v Parsley* [1970] AC 132 (HL) 163; see p 45.

⁸¹ *R v Lambert* [2001] UKHL 37; see p 45.

“not truly criminal”. This might encompass many road traffic offences, but not necessarily the drink- and drug-driving offences.

A more robust stance has been taken in cases concerning road traffic legislation. In *Brown v Stott*,⁸² the House of Lords articulated in the clearest of terms the fact that drivers and vehicle owners must accept a special regulatory regime because of the risk of grave injury from their activities. *Brown v Stott* concerned a statutory obligation to identify the person who had been driving on a particular occasion, but the language of the judgment – “all who own or drive motor cars know that by doing so they subject themselves to a regulatory regime” – suggests that the point applies in relation to all driving offences. The ECtHR case of *O’Halloran*⁸³ arose out of the same requirement to identify who had been driving. The court ruled that those who choose to keep and drive vehicles can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime. Such responsibilities include the obligation to identify a driver if a road traffic offence is suspected. Again the language suggests that these special obligations apply to motoring offences in general and are not confined to the narrower point of identifying the driver.

There can be little doubt that drivers single themselves out for voluntary participation in an activity which is inherently dangerous and heavily regulated. They must learn to drive, often taking expensive lessons, and pass both a theory test and a practical test. A number of commentators have referred to the requirement for a licence as one of the indicators of special responsibility. The Highway Code features in the driving test, and while it is by no means a comprehensive guide to road traffic law, it nevertheless puts learner drivers on notice of the many rules and regulations applying to them. These concern not only the manner of driving, but also safety measures such as wearing a seat belt or safety helmet, and specific duties such as the requirement to stop after and report an accident, to have insurance and to pay vehicle excise duty. Drivers thereby put themselves into a special category of citizen, with all the responsibility for what they do and how they do it, as the price of the freedom of the roads. Included in this range of responsibilities is, I argue, the relinquishment of a number of safeguards which have traditionally characterised the criminal law and which I have discussed at length. In relation to the drink-drive limit in particular, drivers are responsible not only for the state of the vehicles they

⁸² *Brown v Stott* [2003] 1 AC 681 (PC), 705; see pp 134–135.

⁸³ (2008) 46 EHRR 21 [57]; see pp 126–127.

drive,⁸⁴ but, as a consequence of accepting the breach of legal certainty inherent in the prescribed limit, they are also responsible for the condition in which they themselves drive.

Once it is agreed that drivers have a range of special duties, the question of the extent of those duties arises. I discuss this below.⁸⁵ But first, I revert to the “thin ice” principle and the question of enforceability, as further justifying, in more specific ways, derogations from the traditional criminal law paradigm in the drink- and drug-driving offences.

Thin Ice

The “thin ice” principle may come into play in relation to the drink- and drug-driving offences. As explained elsewhere,⁸⁶ the idea is that to do something, knowing it is on the borderline of illegality, gives rise to the risk that the action in question will later be held to be criminal. While the principle has been referred to in relation to the creation of new offences, and the extension of existing offences,⁸⁷ it may apply also to acts constituting the commission of offences. Duff⁸⁸ argues that, once a person starts to drink, the drinker is on thin ice and takes the risk of exceeding the limit. James Jacobs⁸⁹ cites a comment in an American case to the effect that anyone with common sense will know when consumption is approaching a meaningful amount; at that point he proceeds at his own risk.⁹⁰

The domestic courts, likewise, have placed the risk on the driver, who must:

observe the quantity and quality of what he drinks and if he makes a mistake and in fact takes more alcohol than is justified by the statutory limit, then he is guilty of the offence.⁹¹

⁸⁴ RTA 1988, s 40A, prohibiting the use of a vehicle in a dangerous condition.

⁸⁵ See pp 327–328.

⁸⁶ See pp 184–185.

⁸⁷ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 62.

⁸⁸ RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2009) 167 and fn 83; see pp 184–185.

⁸⁹ James B Jacobs, *Drunk Driving: An American Dilemma* (University of Chicago Press 1989) 74.

⁹⁰ *State v Muhlenberg* 347 NW 2d 914 (Wis App 1984).

⁹¹ *Adams v Bradley* [1975] RTR 233 (QBD) 236.

Other cases in which the higher courts have confirmed the risk on the driver are mentioned in Chapter 6.⁹² In Chapter 2,⁹³ I argued that taking this risk amounts to culpability such as to justify strict liability. Given widespread awareness of the dangers of driving after drinking, even though their exact nature is so elusive, there is a strong argument that those who take the risk must accept the consequences if the risk materialises.

It may be possible to say the same of drug-driving, although I do so only tentatively since so much less is known about drugs and driving than about alcohol and driving. Those who use illegal drugs must usually be aware, by virtue of how they came by them, that they should not be using them at all. If they then drive after consuming them, they take the risk of doubly falling foul of the law in the sense of both illegal possession and drug-driving. While it is easier to have sympathy for those who use prescribed or over-the-counter drugs, the very fact of having come into possession of such a drug surely puts a person, especially a driver, on notice to inquire about its effects beyond the immediate intended therapeutic purpose. This might be considered one of the constituents of the special duties of drivers, discussed above.

The thin ice principle may therefore be seen as offsetting the absence of legal certainty about the interpretation the prescribed limit (and, in due course, perhaps also about the specified drug limits also), by placing the risk on the individual.

Enforceability

The need for legislation to be enforceable has been put forward as a reason for accepting derogations from the principles of the criminal law. Roberts proposed⁹⁴ that reverse burdens of proof may be justified if the legislation in question would otherwise be unenforceable. I discussed reverse burdens of proof in Chapter 3, identifying three situations in which burdens allocated to defendants rather than to the prosecution appear to breach the presumption of innocence. The three situations were:

- proof, by a person in charge of a vehicle, that there was no likelihood of driving while remaining unfit through drink or drugs or over the limit;⁹⁵

⁹² See p 218.

⁹³ See pp 65–66.

⁹⁴ Paul Roberts ‘The Presumption of Innocence Brought Home? *Kebilene* Deconstructed’ (2002) 118 *LQR* 41, 63; see p 87.

⁹⁵ See pp 90–99.

- the irrebuttable statutory assumption that the concentration of alcohol or a drug at the time of an alleged offence was no lower than in the specimen taken at a later time;⁹⁶ and
- proof of “post-incident consumption” or the “hip flask defence” – that it was alcohol⁹⁷ consumed after the incident which caused the defendant to be over the limit.⁹⁸

The other two burdens of proof on defendants – to raise the question of reasonable excuse in response to an allegation of failing to provide a specimen⁹⁹ and the medical defence in relation to drugs¹⁰⁰ – are evidential burdens only and do not offend the presumption of innocence.

Of the three reverse burdens listed above, the first raises no issues of the enforceability of the legislation. It is exculpatory, referred to in the legislation as resulting in a deeming of having not been in charge,¹⁰¹ and as a defence.¹⁰²

The statutory assumption, on the other hand, plays a significant role in the enforcement of the legislation. Without it, it would be open to a defendant to claim that the analysis of the specimen does not accurately reflect the alcohol or drug concentration at the time of the alleged offence.¹⁰³ It would then be a complex and costly task, based on matters such as the personal characteristics of the defendant, detailed timings, and what is said to have been consumed (both food and drink)¹⁰⁴ for a prosecutor to undermine such a claim. As the law is framed, such exercises are unnecessary other than in the exceptional case where the analysis shows the person to be below the limit, but there is a compelling reason to back-

⁹⁶ See pp 105–111.

⁹⁷ Or, in due course, a specified drug; see pp 8–9.

⁹⁸ See pp 111–114.

⁹⁹ See pp 102–105.

¹⁰⁰ See pp 99–102.

¹⁰¹ RTA 1988, s 4(3); see pp 90–91.

¹⁰² RTA 1988, s 5(2); see p 91.

¹⁰³ See pp 105–106 on the significance of time in relation to offences and the taking of specimens.

¹⁰⁴ For the full details which, ideally, the prosecution would need, see Form MG DD/D: Alcohol Technical Defence Form <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117040/form-d-mgdd.pdf> accessed 27 November 2013.

calculate to show that at time the time of the offence the limit was in fact exceeded.¹⁰⁵

The reverse burden in the third of the situations listed above – where a person claims to have drunk after driving but before providing the specimen, and that the specimen would not otherwise have shown an excess, – engages an issue of enforceability. Without the reverse burden, it would be open to anyone who has the opportunity to take a drink between the time of an alleged offence and the time police make contact, to claim to have consumed alcohol¹⁰⁶ during that time which caused the excess over the limit. Indeed, it was to avoid exactly that problem that the burden of proof was first placed on the defendant,¹⁰⁷ so going some considerable way to resolving this difficulty of enforceability.

While Roberts suggested the enforceability test in relation to reverse burdens only, it may be illuminating to speculate on how it might apply to the other breaches of principle in the drink- and drug-driving offences. I have demonstrated in Chapter 2 that the offences do not meet the criteria for dispensing with *mens rea* and are instead offences of strict liability. Whether strict liability is necessary for the enforceability of the offences would probably depend on how *mens rea* were defined. If defined as intention, it would doubtless make the offences extremely difficult to prove, and, given the problems of interpreting the drink-drive limit, illustrated at length in Chapters 7 and 8, extremely easy to deny. Recklessness or even perhaps negligence (although negligence as *mens rea* is controversial)¹⁰⁸ might well be easier to prove. It might be enough to have consumed alcohol or a drug within a certain time before driving to give rise to the suggestion of recklessness or negligence, especially in view of what is said above¹⁰⁹ about risk-taking. I do no more here than raise the possibility that *mens rea* in the form of intention would likely impede enforcement, while other forms of *mens rea* might not be too great a challenge for a prosecutor.

I have already noted Dennis's proposition¹¹⁰ that the compulsory provision of information in defiance of the privilege against self-

¹⁰⁵ See p 106.

¹⁰⁶ Or, in due course, a drug; see s 8–9.

¹⁰⁷ See p 111.

¹⁰⁸ See pp 38–39.

¹⁰⁹ See pp 319–320.

¹¹⁰ Ian Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination' (1995) 54 CLJ 342, 375, discussed at pp 141–142.

incrimination might be permissible where there is a need to secure reliable evidence probative of guilt, and there are suitable procedures in place. This argument goes to the question of enforceability of the legislation, and might be invoked to justify the requirement to provide specimens, either in breach of the privilege or on the basis that the privilege is not engaged.¹¹¹ For the excess alcohol offences, there is certainly a need for evidence which cannot be obtained without the breaches of the privilege set out in Chapter 4, the whole purpose of requiring specimens being to obtain evidence not otherwise available.¹¹² To allow suspects to invoke the privilege against self-incrimination to decline to provide specimens would defeat the statutory regime for the excess alcohol offences (and in due course, the excess drugs offences), making proof virtually impossible. While it is theoretically possible to prove a drink-drive offence outside the investigative regime set out in the Road Traffic Act,¹¹³ the likelihood of so doing is remote.

The very practical problems which would ensue if the offences were framed within the traditional paradigm (with the tentative, possible exception of certain forms of *mens rea*), confirms, I suggest, that the breaches make a substantial contribution to the workability of the statutory regime.

While the thin ice principle and the question of enforceability offer some justification for the derogations from principle inherent in the drink- and drug-driving offences, the undeniable success of the road safety objectives and the concept of special duties on drivers seem to me overwhelming reasons for accepting the departures from the traditional paradigm exhibited by this special group of offences. Now that I have arrived at that conclusion, it remains to anticipate what questions may ensue.

A SECOND PARADIGM?

As noted above,¹¹⁴ the drink- and drug-driving offences are not alone in defying many supposedly established principles of the criminal law. There are suggestions in the literature that the traditional paradigm of the criminal law may not be quite as secure as the textbooks might lead us to think. I have had reason to quote Blake and Ashworth's survey of indictable offences

¹¹¹ See pp 166–167.

¹¹² *Brown v Stott* [2003] 1 AC 681, 705.

¹¹³ See pp 298–300 and the case of *DPP v Carless* [2005] EWHC 3234 (Admin) (DC).

¹¹⁴ See p 308.

listed in *Archbold*¹¹⁵ elsewhere.¹¹⁶ The authors noted that developments in recent years had cast doubt on the fundamental principles of the privilege against self-incrimination and the requirement for *mens rea*. The study showed that only four per cent of the 540 offences in question were common law offences, the remainder having been created by statute. No fewer than forty per cent of the 540 appeared to violate the presumption of innocence, while half included at least one element which did not require *mens rea* to be shown to establish guilt. Comparable figures relating to the less serious either-way and summary-only offences¹¹⁷ are not available, but Blake and Ashworth refer to a finding reported in 1980 that, of all offences in the 1975 edition of *Stone's Justices' Manual*, just over half could be regarded as offences of strict liability. Today, the proportion of offences which are regulatory in nature and which defy the traditional paradigm must surely be even greater, given the continuing stream of legislation creating new offences.¹¹⁸

Not only that, but Blake and Ashworth categorised the offences by reference to how they are defined, either by the statutory words, or by judicial interpretation, or both. The proportions might well be different if calculated on the basis of the numbers of charges, or convictions, for the various offences. Given that less serious offences are more likely to breach the principles,¹¹⁹ and given that the courts deal with relatively few serious offences and many more less serious ones, it may be that the offences which depart from the traditional principles are now in the majority, at least in terms of the numbers of proceedings and of persons charged. While it is well beyond the scope of this work to attempt any detailed calculation to support this idea, it may be significant that in 2012, 1.48 million defendants were proceeded against in the magistrates' courts, compared with fewer than

¹¹⁵ *Archbold Criminal Pleading, Evidence and Practice 1995* (Sweet & Maxwell 1995).

¹¹⁶ Meredith Blake and Andrew Ashworth, 'The Presumption of Innocence in English Criminal Law' [1996] *Crim LR* 306.; see pp 41 and 72.

¹¹⁷ "Either-way" offences are tried either in the Crown Court or the magistrates' court; "summary-only" offences are tried in the magistrates' courts. Both are less serious than indictable-only offences, which are tried in the Crown Court only; see p 41, fn 55.

¹¹⁸ See, for example, Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *LQR* 225; James Chalmers, Fiona Leverick, 'Tracking the Creation of Criminal Offences' [2013] *Crim LR* 543. See also pp 174, 308.

¹¹⁹ See pp 42, 59–61 and 81–82.

100,000 in the Crown Courts. About one third of the defendants before the magistrates' courts were charged with summary motoring offences.¹²⁰

The tenuous nature of the traditional paradigm is perhaps suggested by this comment:

the fact that we know so little about how many criminal offences exist might suggest that those of us who teach criminal law do so with a rather sketchy knowledge of what the criminal law actually is.¹²¹

The authors point to ignorance about the content of the multiplicity of statutory offences and the reasons for their creation. They found that most offences recently created are not of general application, but are targeted at people acting in some form of special capacity – a kind of regulatory criminal law which, they say, is all but ignored by most criminal law texts and journals, despite that fact that, in the two tranches of new enactments examined in the study, it dominated the criminal law.¹²² Other commentators have acknowledged the paucity of attention given to these lesser offences. Husak notes that legal theorists have paid little attention to *mala prohibita* offences,¹²³ instead concentrating on the central core of offences originating in the common law.¹²⁴

All these observations are leading to the possibility that there may be another paradigm altogether for certain offences. Simester and von Hirsch¹²⁵ refer to a paradigm of the criminal law as an archetype in the context of offences such as murder, rape and theft, and suggest there may be a separate paradigm for regulatory and administrative offences, although they recognise the difficulty of distinguishing which offences should fall into which group – the problem of deciding which offences are “truly criminal”

¹²⁰ Ministry of Justice, *Criminal Justice Statistics, Quarterly Update to December 2012, England and Wales*, 30 May 2013, 24 <<https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>> accessed 27 November 2013.

¹²¹ James Chalmers, Fiona Leverick, ‘Tracking the Creation of Criminal Offences’ [2013] Crim LR 543, 545.

¹²² *Ibid*, 543.

¹²³ Offences proscribing conduct which was not wrongful prior to, or independently of, the law that defined it as criminal; see p 30.

¹²⁴ Douglas Husak, ‘Malum Prohibitum and Retributivism’, in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 66.

¹²⁵ A P Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (2011, Hart) 7.

and which are not, or of the distinction between *mala in se* and *mala prohibita*, discussed elsewhere.¹²⁶

Ormerod¹²⁷ points out that when motor vehicles first came onto the roads, there were no driving tests, no requirement to register the ownership of vehicles and no requirement to insure; the only offences relating to driving were those which, by chance, happened to apply to motorists.¹²⁸ The common law could not deal with matters like this. Rules and regulations would prove necessary to control motor traffic in the interests of safety, and those rules, starting with the Criminal Justice Act 1925,¹²⁹ may well be an example of an early regulatory regime developing in parallel with the traditional criminal law.

There is much to suggest that road traffic offences are perceived as somehow “different” from other offences. This view may support the idea that they fall into a separate paradigm, whether a paradigm all their own, or one which they might share with other offences created by statute. The first North Report¹³⁰ remarked that road traffic law “appears to be widely perceived as different from the general criminal law”. In Chapter 1, I noted suggestions that road traffic offences fall outside the usual criminal law paradigm.¹³¹ I also noted that, in general, they are not regarded as serious, and many of the proffered reasons for this perception¹³² also help explain why they might be distinguished from the body of criminal offences as a whole. While the drink-driving offences are a notable exception to the view that road traffic offences are not serious, there is nevertheless a perception that road traffic offences are in a class of their own, distinct from the rest of the criminal law.

I leave it to others, if they think it worth their while, to take on the challenge of further investigating a possible alternative paradigm to the traditional view of *mens rea*, the presumption of innocence, the privilege against self-incrimination and legal certainty. I can do no more than highlight that the drink-and drug-driving offences is an important group of offences which would certainly be candidates for any such re-categorisation.

¹²⁶ See pp 30–31, 42–43, 59–61.

¹²⁷ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 1125.

¹²⁸ For example, driving a carriage on a pavement, contrary to Highways Act 1935, s 72.

¹²⁹ See p 7, fn 26.

¹³⁰ Department of Transport and Home Office, *Road Traffic Law Review Report* (HMSO 1988) [2.15].

¹³¹ See p 25.

¹³² Described on pp 20–22.

DRAWING LINES

Everything I have said above – about balancing the road safety considerations against traditional criminal law rights, about the special duties of drivers, about thin ice and enforceability, and about a possible alternative paradigm – begs the question of how far we might go. Are there any rights which must never be compromised? Are there certain offences in relation to which the traditional paradigm must never be modified? Is there a limit to how far the road safety considerations should be taken? Exactly how extensive are the special duties on drivers? What behaviour do they cover, and to whom are they owed? Which offences might fall within an alternative paradigm, and what rules might be drawn up to govern their admissibility to that paradigm? What would be the characteristics of the alternative paradigm? In what way would the general principles be modified for the alternative paradigm?

It is beyond the current research project to go any further than to argue, as I have done, that the lines must be drawn so as to forgive the drink- and drug-driving offences their transgressions of the traditional principles. Beyond that, I go no further than to list a number of possibilities. Thus, dividing lines might be by reference to:

- whether or not the offence in question existed at common law, or was created by statute, perhaps reflecting the divide between *mala in se* and *mala prohibita*;
- the seriousness of the offence as indicated by mode of trial. Offences triable summarily only might fall within the alternative paradigm, leaving the more serious either-way or indictable-only offences within the traditional paradigm. Thus, offences carrying a maximum penalty of six months' imprisonment¹³³ would come within the alternative. This would include the drink- and drug-driving offences in ss 4, 5 and 5A, but exclude the controversial¹³⁴ offences of causing serious injury by dangerous driving,¹³⁵ causing death by

¹³³ The maximum which may currently be imposed by a magistrates' court in relation to a single offence.

¹³⁴ Sally Cunningham, 'Punishing Drivers who Kill: Putting Road Safety First?' (2007) 27 *Legal Studies* 288; Sally Cunningham, 'Taking "Causing Serious Injury by Dangerous Driving" Seriously' [2012] *Crim LR* 261; GR Sullivan, AP Simester, 'Causation Without Limits: Causing Death while Driving Without a Licence, While Disqualified, or Without Insurance' [2012] *Crim LR* 753.

¹³⁵ RTA 1988, s 1A. Inserted by Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 143(2). For a critique of the offence, see Sally Cunningham, 'Taking "Causing Serious Injury by Dangerous Driving" Seriously' [2012] *Crim LR* 261.

careless or inconsiderate driving¹³⁶ and causing death while driving without a licence, while uninsured or without insurance;¹³⁷

- by reference to those whom the legislation in question seeks to regulate. Provisions addressed to particular groups of people would be prime candidates for allocation to the new paradigm.

Each of these possibilities would raise many further questions which I cannot pursue here.

OTHER IMPLICATIONS

My findings have a number of other implications, notably for self-reported drink-driving. In Chapter 7, I observed some limitations of the research projects I described there. It is clear that the drink-drive limit is so ill-understood that most drivers have no way of recognising the point at which they would reach it. One obvious consequence is that propositions based on self-assessments of having been under or over the limit should be treated with great caution. In one piece of research, the occurrence of drink-driving was counted by reference to answers to the question, “in the last twelve months have you driven a car when you had drunk enough to be in trouble if the police had stopped you?”¹³⁸ And in a large study into drinking and driving by university students in twenty-three countries, the incidence of drink-driving was measured from responses to the question, “over the last year, how many times did you drive when you felt that you had perhaps had too much to drink?” The shortcomings of relying on self-reporting have also been recognised in research conducted in Canada¹³⁹ and elsewhere.¹⁴⁰ On the other hand, the Department for Transport produces statistics on percentages of people who report having driven while they thought they

¹³⁶ Contrary to RTA 1988, s 2B.

¹³⁷ Contrary to RTA 1988, s 3ZB.

¹³⁸ TK Greenfield, JD Rogers, ‘Alcoholic Beverage Choice, Risk Perception and Self-reported Drunk Driving: Effects of Measurement on Risk Analysis’ (1999) 94 *Addiction* 1735, 1737.

¹³⁹ For example, DJ Beirness and CG Davis, ‘Driving After Drinking in Canada’ (2007) 98 *Revue Canadienne de Santé Publique* 476; RE Mann and others, ‘The Effects of Drinking-driving Laws: A Test of the Differential Deterrence Hypothesis’ (2003) 98 *Addiction* 1531.

¹⁴⁰ For example, MW Lewis and others, ‘Perceptions of Intoxication and Impairment at Arrest Among Adults Convicted of Driving Under the Influence of Alcohol’ (1995) 25 *Journal of Drug Issues* 141, 153.

were over the limit.¹⁴¹ The words “thought they were” give the correct perspective; these figures are unlikely to indicate with any reliability that those reporting having driven when they thought they were over the limit were in fact over the limit.

I had hoped that my research might produce findings of relevance to other debates concerning drink- and drug-driving – such as whether the alcohol limit should be lowered, whether self-testing should be encouraged, and whether or not greater understanding of the drink-drive limit would encourage greater compliance. In the end, I think all I can contribute to such arguments is to emphasise how poorly the drink-drive limit is understood. If the limit were to be lowered to zero, that might make it more comprehensible to drivers. Experience with the new “zero tolerance” specified limits for illegal drugs¹⁴² may provide useful points of comparison.

There may be some benefit in permitting, and even encouraging, self-testing, perhaps by making breath-testing devices available in public houses, restaurants and clubs, or for private purchase. The fear has been that people testing themselves might not realise that their breath-alcohol could be on the rise, so that, while a self-test might show them to be within the limit, they may be over it (and driving) not long afterwards. It does not seem beyond the bounds of possibility that self-testing devices could be designed so as to give ample warning of such risks. While it may well be that the success of the drink-drive limit has resulted in part from confusion about the limit,¹⁴³ it seems to me profoundly unsettling that compliance should be based in ignorance or confusion; it would be preferable for it to be based on at least some element of understanding of a complex process. Self-testing might lead to better understanding the relationship between what is eaten and drunk, over how long, and the breath-alcohol measurement. In time, the effect could be to reduce the numbers of people who drive over the limit – quite the opposite of what has been feared. In turn, greater understanding of how much can be drunk before reaching the limit might make a reduction of the limit more acceptable, or at least inform the debate.

Beyond these brief remarks, resolving these issues may well depend on aspects of the offences which I specifically excluded from my research, such as the reasons people risk driving with excess alcohol in the first place, the

¹⁴¹ Department for Transport, RAS51102, Percentage Reporting Driving Whilst Thinking they are over the Legal Alcohol Limit at Least Once in last 12 months, by Sex and Age (2009/10 and 2010/11) <<https://www.gov.uk/government/statistical-data-sets/ras51-reported-drinking-and-driving>> accessed 27 November 2013.

¹⁴² See p 206.

¹⁴³ See p 222.

kinds of people who do it, and what can be done to influence their behaviour.

CONCLUSION

The drink- and drug-driving offences are challenging in their complexity and technicality. The drink-driving offences and the associated public education and enforcement regimes have made a substantial contribution to the saving of life and limb. Yet this group of offences has been addressed in the legal literature only in the most cursory manner. I hope I have demonstrated that there is much to learn from them, and they could certainly contribute to defining an alternative paradigm of the criminal law. The advent of a new series of offences, based on an excess of specified controlled drugs, might provide just the opportunity.

Appendix 1: The Legislation

THE ROAD TRAFFIC ACT 1988, SS 3A–11

¹3A.—Causing death by careless driving when under influence of drink or drugs

- (1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and—
 - (a) he is, at the time when he is driving, unfit to drive through drink or drugs, or
 - (b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or
 - ²(ba) he has in his body a specified controlled drug and the proportion of it in his blood or urine at that time exceeds the specified limit for that drug, or
 - (c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, [or
 - (d) he is required by a constable to give his permission for a laboratory test of a specimen of blood taken from him under section 7A of this Act, but without reasonable excuse fails to do so,³] he is guilty of an offence.
- (2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.
- (3) Subsection (1)(b) [, (ba)⁴] [, (c) and (d)⁵] above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle.

4.— Driving, or being in charge, when under influence of drink or drugs

- (1) A person who, when driving or attempting to drive a [mechanically propelled vehicle⁶] on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.
- (2) Without prejudice to subsection (1) above, a person who, when in charge of a [mechanically propelled vehicle⁷] which is on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.

¹ Section 3A inserted by Road Traffic Act (“RTA”) 1991, s 3, in force 1 July 1992.

² Paragraph (ba) inserted by Crime and Courts Act 2013, sch 22, para 2(2), to come into force from a date to be appointed.

³ Words in square brackets inserted by Road Safety Act 2006, s 31(2), in force 24 September 2007.

⁴ Paragraph number in square brackets inserted by Crime and Courts Act 2013, sch 22, para 2(3), to come into force from a date to be appointed.

⁵ Words in square brackets substituted by Road Safety Act 2006, s 31(3), in force 24 September 2007.

⁶ Words in square brackets substituted by RTA 1991, s 4, in force 1 July 1992.

⁷ *Ibid.*

- (3) For the purposes of subsection (2) above, a person shall be deemed not to have been in charge of a [mechanically propelled vehicle⁸] if he proves that at the material time the circumstances were such that there was no likelihood of his driving it so long as he remained unfit to drive through drink or drugs.
- (4) The court may, in determining whether there was such a likelihood as is mentioned in subsection (3) above, disregard any injury to him and any damage to the vehicle.
- (5) For the purposes of this section, a person shall be taken to be unfit to drive if his ability to drive properly is for the time being impaired.

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5.— Driving or being in charge of a motor vehicle with alcohol concentration above prescribed limit

- (1) If a person—
 - (a) drives or attempts to drive a motor vehicle on a road or other public place, or
 - (b) is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.
- (2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.
- (3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle.

¹⁰5A.—Driving or being in charge of a motor vehicle with concentration of specified controlled drug above specified limit

- (1) This section applies where a person (“D”)—
 - (a) drives or attempts to drive a motor vehicle on a road or other public place, or
 - (b) is in charge of a motor vehicle on a road or other public place, and there is in D’s body a specified controlled drug.
- (2) D is guilty of an offence if the proportion of the drug in D’s blood or urine exceeds the specified limit for that drug.
- (3) It is a defence for a person (“D”) charged with an offence under this section to show that—
 - (a) the specified controlled drug had been prescribed or supplied to D for medical or dental purposes,
 - (b) D took the drug in accordance with any directions given by the person by whom the drug was prescribed or supplied, and with any accompanying instructions (so far as consistent with any such directions) given by the manufacturer or distributor of the drug, and
 - (c) D’s possession of the drug immediately before taking it was not unlawful under section 5(1) of the Misuse of Drugs Act 1971 (restriction of possession of controlled drugs) because of an exemption

⁸ *Ibid.*

⁹ Subsections (6) to (8), and an earlier version of s 4 applying to Scotland only, were repealed by Serious Organised Crime and Police Act 2005, sch 7(1), para 27(2), in force 1 January 2006.

¹⁰ Section 5A inserted by Crime and Courts Act 2013, s 56, to come into force from a date to be appointed.

- in regulations made under section 7 of that Act (authorisation of activities otherwise unlawful under foregoing provisions).
- (4) The defence in subsection (3) is not available if D's actions were—
 - (a) contrary to any advice, given by the person by whom the drug was prescribed or supplied, about the amount of time that should elapse between taking the drug and driving a motor vehicle, or
 - (b) contrary to any accompanying instructions about that matter (so far as consistent with any such advice) given by the manufacturer or distributor of the drug.
 - (5) If evidence is adduced that is sufficient to raise an issue with respect to the defence in subsection (3), the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
 - (6) It is a defence for a person ("D") charged with an offence by virtue of subsection (1)(b) to prove that at the time D is alleged to have committed the offence the circumstances were such that there was no likelihood of D driving the vehicle whilst the proportion of the specified controlled drug in D's blood or urine remained likely to exceed the specified limit for that drug.
 - (7) The court may, in determining whether there was such a likelihood, disregard any injury to D and any damage to the vehicle.
 - (8) In this section, and in sections 3A, 6C(1), 6D and 10, "specified" means specified in regulations made—
 - (a) by the Secretary of State, in relation to driving or attempting to drive, or being in charge of a vehicle, in England and Wales;
 - (b) by the Scottish Ministers, in relation to driving or attempting to drive, or being in charge of a vehicle, in Scotland.
 - (9) A limit specified under subsection (2) may be zero.

¹¹6.— Power to administer preliminary tests

- (1) If any of subsections (2) to (5) applies a constable may require a person to cooperate with any one or more preliminary tests administered to the person by that constable or another constable.
- (2) This subsection applies if a constable reasonably suspects that the person—
 - (a) is driving, is attempting to drive or is in charge of a motor vehicle on a road or other public place, and
 - (b) has alcohol or a drug in his body or is under the influence of a drug.
- (3) This subsection applies if a constable reasonably suspects that the person—
 - (a) has been driving, attempting to drive or in charge of a motor vehicle on a road or other public place while having alcohol or a drug in his body or while unfit to drive because of a drug, and
 - (b) still has alcohol or a drug in his body or is still under the influence of a drug.
- (4) This subsection applies if a constable reasonably suspects that the person—
 - (a) is or has been driving, attempting to drive or in charge of a motor vehicle on a road or other public place, and
 - (b) has committed a traffic offence while the vehicle was in motion.
- (5) This subsection applies if—
 - (a) an accident occurs owing to the presence of a motor vehicle on a road or other public place, and
 - (b) a constable reasonably believes that the person was driving, attempting to drive or in charge of the vehicle at the time of the accident.

¹¹ Sections 6 to 6E were substituted by Railways and Transport Safety Act 2003, sch 7, para 1, in force in part 29 March 2004, the remainder, 30 March 2004.

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- (6) A person commits an offence if without reasonable excuse he fails to co-operate with a preliminary test in pursuance of a requirement imposed under this section.
- (7) A constable may administer a preliminary test by virtue of any of subsections (2) to (4) only if he is in uniform.
- (8) In this section—
 - (a) a reference to a preliminary test is to any of the tests described in sections 6A to 6C, and
 - (b) “traffic offence” means an offence under—
 - (i) a provision of Part II of the Public Passenger Vehicles Act 1981 (c. 14),
 - (ii) a provision of the Road Traffic Regulation Act 1984 (c. 27),
 - (iii) a provision of the Road Traffic Offenders Act 1988 (c. 53) other than a provision of Part III, or
 - (iv) a provision of this Act other than a provision of Part V.

6A.— Preliminary breath test

- (1) A preliminary breath test is a procedure whereby the person to whom the test is administered provides a specimen of breath to be used for the purpose of obtaining, by means of a device of a type approved by the Secretary of State, an indication whether the proportion of alcohol in the person’s breath or blood is likely to exceed the prescribed limit.
- ¹²(2) A preliminary breath test administered in reliance on section 6(2) to (4) may be administered only at or near the place where the requirement to co-operate with the test is imposed.
- (3) A preliminary breath test administered in reliance on section 6(5) may be administered—
 - (a) at or near the place where the requirement to co-operate with the test is imposed, or
 - (b) if the constable who imposes the requirement thinks it expedient, at a police station specified by him.

6B.— Preliminary impairment test

- (1) A preliminary impairment test is a procedure whereby the constable administering the test—
 - (a) observes the person to whom the test is administered in his performance of tasks specified by the constable, and
 - (b) makes such other observations of the person’s physical state as the constable thinks expedient.
- (2) The Secretary of State shall issue (and may from time to time revise) a code of practice about—
 - (a) the kind of task that may be specified for the purpose of a preliminary impairment test,
 - (b) the kind of observation of physical state that may be made in the course of a preliminary impairment test,
 - (c) the manner in which a preliminary impairment test should be administered, and
 - (d) the inferences that may be drawn from observations made in the course of a preliminary impairment test.
- (3) In issuing or revising the code of practice the Secretary of State shall aim to ensure that a preliminary impairment test is designed to indicate—
 - (a) whether a person is unfit to drive, and

¹² Subsections (2) and (3) were added by Railways and Transport Safety Act 2003, sch 7, para 1, in force in part 29 March 2004, the remainder, 30 March 2004.

- (b) if he is, whether or not his unfitness is likely to be due to drink or drugs.
- (4) A preliminary impairment test may be administered—
 - (a) at or near the place where the requirement to co-operate with the test is imposed, or
 - (b) if the constable who imposes the requirement thinks it expedient, at a police station specified by him.
- (5) A constable administering a preliminary impairment test shall have regard to the code of practice under this section.
- (6) A constable may administer a preliminary impairment test only if he is approved for that purpose by the chief officer of the police force to which he belongs.
- (7) A code of practice under this section may include provision about—
 - (a) the giving of approval under subsection (6), and
 - (b) in particular, the kind of training that a constable should have undergone, or the kind of qualification that a constable should possess, before being approved under that subsection.

6C.— Preliminary drug test

- (1) A preliminary drug test is a procedure by which a specimen of sweat or saliva is—
 - (a) obtained, and
 - (b) used for the purpose of obtaining, by means of a device of a type approved by the Secretary of State, an indication whether the person to whom the test is administered has a drug [in his body and if so—
 - (i) whether it is a specified controlled drug;
 - (ii) if it is, whether the proportion of it in the person's blood or urine is likely to exceed the specified limit for that drug.¹³]
- (2) A preliminary drug test may be administered—
 - (a) at or near the place where the requirement to co-operate with the test is imposed, or
 - (b) if the constable who imposes the requirement thinks it expedient, at a police station specified by him.
- ¹⁴(3) Up to three preliminary drug tests may be administered.

6D.— Arrest

- (1) A constable may arrest a person without warrant if as a result of a preliminary breath test [or preliminary drug test the constable reasonably suspects that—
 - (a) the proportion of alcohol in the person's breath or blood exceeds the prescribed limit, or
 - (b) the person has a specified controlled drug in his body and the proportion of it in the person's blood or urine exceeds the specified limit for that drug.¹⁵]

¹³ Words in square brackets inserted by Crime and Courts Act 2013, sch 22, para 3(2), to come into force from a date to be appointed.

¹⁴ Subsection (3) inserted by Crime and Courts Act 2013, sch 22, para 3(3), to come into force from a date to be appointed.

¹⁵ Words in square brackets substituted by Crime and Courts Act 2013, sch 22, para 4, to come into force from a date to be appointed.

- (1A)¹⁶ The fact that specimens of breath have been provided under section 7 of this Act by the person concerned does not prevent subsection (1) above having effect if the constable who imposed on him the requirement to provide the specimens has reasonable cause to believe that the device used to analyse the specimens has not produced a reliable indication of the proportion of alcohol in the breath of the person.
- (2) A constable may arrest a person without warrant if—
- (a) the person fails to co-operate with a preliminary test in pursuance of a requirement imposed under section 6, and
 - (b) the constable reasonably suspects that the person has alcohol or a drug in his body or is under the influence of a drug.
- (2A)¹⁷ A person arrested under this section may, instead of being taken to a police station, be detained at or near the place where the preliminary test was, or would have been, administered, with a view to imposing on him there a requirement under section 7 of this Act.
- (3) A person may not be arrested under this section while at a hospital as a patient.

6E. Power of entry

- (1) A constable may enter any place (using reasonable force if necessary) for the purpose of—
- (a) imposing a requirement by virtue of section 6(5) following an accident in a case where the constable reasonably suspects that the accident involved injury of any person, or
 - (b) arresting a person under section 6D following an accident in a case where the constable reasonably suspects that the accident involved injury of any person.
- (2) This section—
- (a) does not extend to Scotland, and
 - (b) is without prejudice to any rule of law or enactment about the right of a constable in Scotland to enter any place.

7.— Provision of specimens for analysis

- (1) In the course of an investigation into whether a person has committed an offence under [section 3A, 4 or¹⁸] 5 of this Act a constable may, subject to the following provisions of this section and section 9 of this Act, require him—
- (a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State, or
 - (b) to provide a specimen of blood or urine for a laboratory test.
- ¹⁹(1A) In the course of an investigation into whether a person has committed an offence under section 5A of this Act a constable may, subject to subsections (3) to (7) of this section and section 9 of this Act, require the person to provide a specimen of blood or urine for a laboratory test.

¹⁶ Subsection 1A inserted by Serious Organised Crime and Police Act 2005, s 154(2), in force 1 July 2005.

¹⁷ Subsection 2A inserted by Serious Organised Crime and Police Act 2005, s 154(3), in force 1 July 2005.

¹⁸ Words in square brackets substituted by RTA 1991, sch 4, para 42(a), in force 1 July 1992.

¹⁹ Subsection (1A) inserted by Crime and Courts Act 2013, sch 22, para 5(2), to come into force from a date to be appointed.

- ²⁰(2) A requirement under this section to provide specimens of breath can only be made—
- (a) at a police station,
 - (b) at a hospital, or
 - (c) at or near a place where a relevant breath test has been administered to the person concerned or would have been so administered but for his failure to co-operate with it.
- (2A) For the purposes of this section “a relevant breath test” is a procedure involving the provision by the person concerned of a specimen of breath to be used for the purpose of obtaining an indication whether the proportion of alcohol in his breath or blood is likely to exceed the prescribed limit.
- (2B) A requirement under this section to provide specimens of breath may not be made at or near a place mentioned in subsection (2)(c) above unless the constable making it—
- (a) is in uniform, or
 - (b) has imposed a requirement on the person concerned to co-operate with a relevant breath test in circumstances in which section 6(5) of this Act applies.
- (2C) Where a constable has imposed a requirement on the person concerned to co-operate with a relevant breath test at any place, he is entitled to remain at or near that place in order to impose on him there a requirement under this section.
- (2D) If a requirement under subsection (1)(a) above has been made at a place other than at a police station, such a requirement may subsequently be made at a police station if (but only if)—
- (a) a device or a reliable device of the type mentioned in subsection (1)(a) above was not available at that place or it was for any other reason not practicable to use such a device there, or
 - (b) the constable who made the previous requirement has reasonable cause to believe that the device used there has not produced a reliable indication of the proportion of alcohol in the breath of the person concerned.
- (3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless—
- (a) 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
 - (b) [specimens of breath have not been provided elsewhere and²¹] at the time the requirement is made a device or a reliable device of the type mentioned in subsection (1)(a) above is not available at the police station or it is then for any other reason not practicable to use such a device there, or

²⁰ Subsections (2) to (2D) substituted for subs (2) by Serious Organised Crime and Police Act 2005, s 154(5), in force 1 July 2005.

²¹ Words in square brackets inserted by Serious Organised Crime and Police Act 2005, s 154(6)(a), in force 1 July 2005.

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- ²²(bb) a device of the type mentioned in subsection (1)(a) above has been used [(at the police station or elsewhere)²³] but the constable who required the specimens of breath 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, or
- ²⁴(bc) as a result of the administration of a preliminary drug test, the constable making the requirement has reasonable cause to believe that the person required to provide a specimen of blood or urine has a drug in his body, or
- (c) the suspected offence is one under [section 3A [, 4 or 5A²⁵]of this Act and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug;
- but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath.
- (4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine [and, in the case of a specimen of blood, the question who is to be asked to take it shall be decided (subject to subsection (4A)) by the constable making the requirement²⁶].
- ²⁷(4A) Where a constable decides for the purposes of subsection (4) to require the provision of a specimen of blood, there shall be no requirement to provide such a specimen if—
- (a) the medical practitioner who is asked to take the specimen is of the opinion that, for medical reasons, it cannot or should not be taken; or
- (b) the registered health care professional who is asked to take it is of that opinion and there is no contrary opinion from a medical practitioner;
- and, where by virtue of this subsection there can be no requirement to provide a specimen of blood, the constable may require a specimen of urine instead.
- (5) A specimen of urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine.
- (6) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence.
- (7) A constable must, on requiring any person to provide a specimen in pursuance of this section, warn him that a failure to provide it may render him liable to prosecution.

²² Paragraph (bb) inserted by Criminal Procedure and Investigations Act 1996, s 63(1), in force 1 April 1997.

²³ Words in square brackets substituted by Serious Organised Crime and Police Act 2005, s 154(6)(b), in force 1 July 2005.

²⁴ Paragraph (bc) inserted by Railways and Transport Safety Act 2003, sch 7, para 2, in force 30 March 2004.

²⁵ Section numbers in square brackets substituted by Crime and Courts Act 2013, sch 22, para 5(3), to come into force from a date to be appointed.

²⁶ Words in square brackets substituted by Police Reform Act 2002, s 55(1), in force 1 April 2003.

²⁷ Subsection (4A) inserted by Police Reform Act 2002 s 55(2), in force 1 April 2003.

287A. Specimens of blood taken from persons incapable of consenting

- (1) A constable may make a request to a medical practitioner for him to take a specimen of blood from a person ('the person concerned') irrespective of whether that person consents if—
 - (a) that person is a person from whom the constable would (in the absence of any incapacity of that person and of any objection under section 9) be entitled under section 7 to require the provision of a specimen of blood for a laboratory test;
 - (b) it appears to that constable that that person has been involved in an accident that constitutes or is comprised in the matter that is under investigation or the circumstances of that matter;
 - (c) it appears to that constable that that person is or may be incapable (whether or not he has purported to do so) of giving a valid consent to the taking of a specimen of blood; and
 - (d) it appears to that constable that that person's incapacity is attributable to medical reasons.
- (2) A request under this section—
 - (a) shall not be made to a medical practitioner who for the time being has any responsibility (apart from the request) for the clinical care of the person concerned; and
 - (b) shall not be made to a medical practitioner other than a police medical practitioner unless—
 - (i) it is not reasonably practicable for the request to be made to a police medical practitioner; or
 - (ii) it is not reasonably practicable for such a medical practitioner (assuming him to be willing to do so) to take the specimen.
- (3) It shall be lawful for a medical practitioner to whom a request is made under this section, if he thinks fit—
 - (a) to take a specimen of blood from the person concerned irrespective of whether that person consents; and
 - (b) to provide the sample to a constable.
- (4) If a specimen is taken in pursuance of a request under this section, the specimen shall not be subjected to a laboratory test unless the person from whom it was taken—
 - (a) has been informed that it was taken; and
 - (b) has been required by a constable to give his permission for a laboratory test of the specimen; and
 - (c) has given his permission.
- (5) A constable must, on requiring a person to give his permission for the purposes of this section for a laboratory test of a specimen, warn that person that a failure to give the permission may render him liable to prosecution.
- (6) A person who, without reasonable excuse, fails to give his permission for a laboratory test of a specimen of blood taken from him under this section is guilty of an offence.
- (7) In this section 'police medical practitioner' means a medical practitioner who is engaged under any agreement to provide medical services for purposes connected with the activities of a police force.

8.— Choice of specimens of breath

- (1) Subject to subsection (2) below, of any two specimens of breath provided by any person in pursuance of section 7 of this Act that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded.

²⁸ Section 7A inserted by Police Reform Act 2002, s 56(1), in force 1 October 2002.

- (2) If the specimen with the lower proportion of alcohol contains no more than 50 microgrammes of alcohol in 100 millilitres of breath, the person who provided it may claim that it should be replaced by such specimen as may be required under section 7(4) of this Act and, if he then provides such a specimen, neither specimen of breath shall be used.
- ²⁹(2A) If the person who makes a claim under subsection (2) above was required to provide specimens of breath under section 7 of this Act at or near a place mentioned in subsection (2)(c) of that section, a constable may arrest him without warrant.
- (3) [Regulations may³⁰] substitute another proportion of alcohol in the breath for that specified in subsection (2) above.
- ³¹(4) Regulations under subsection (3) may be made—
- (a) by the Secretary of State, in relation to cases where the suspected offence is an offence committed in England and Wales;
 - (b) by the Scottish Ministers, in relation to cases where the suspected offence is an offence committed in Scotland.

9.— Protection for hospital patients

- (1) While a person is at a hospital as a patient he shall not be required [to co-operate with a preliminary test³²] or to provide a specimen [under section 7 of this Act³³] unless the medical practitioner in immediate charge of his case has been notified of the proposal to make the requirement; and—
- (a) if the requirement is then made, [it shall be for co-operation with a test administered, or for the provision of a specimen, at the hospital³⁴], but
 - (b) if the medical practitioner objects on the ground specified in subsection (2) below, the requirement shall not be made.
- ³⁵(1A) While a person is at a hospital as a patient, no specimen of blood shall be taken from him under section 7A of this Act and he shall not be required to give his permission for a laboratory test of a specimen taken under that section unless the medical practitioner in immediate charge of his case—
- (a) has been notified of the proposal to take the specimen or to make the requirement; and
 - (b) has not objected on the ground specified in subsection (2).
- (2) The ground on which the medical practitioner may object is—
- (a) in a case falling within subsection (1), that the requirement or the provision of the specimen or (if one is required) the warning required

²⁹ Subsection (2A) inserted by Serious Organised Crime and Police Act 2005, s 154(7), in force 1 July 2005.

³⁰ Words in square brackets substituted by Scotland Act 2012, s 20(3), in effect 3 July 2012.

³¹ Subsection (4) inserted by Scotland Act 2012, s 20(4), in force 3 July 2012.

³² Words in square brackets substituted by Railways and Transport Safety Act 2003, sch 7, para 3(a), in force 30 March 2004.

³³ Words in square brackets substituted by Serious Organised Crime and Police Act 2005, s 154(8), in force 1 July 2005.

³⁴ Words in square brackets substituted by Railways and Transport Safety Act 2003, sch 7 para 3(b), in effect 30 March 2004.

³⁵ Subsections (1A)-(2) substituted for subs (2) by Police Reform Act 2002, s 56(2), in effect 1 October 2002.

- by section 7(7) of this Act would be prejudicial to the proper care and treatment of the patient; and
- (b) in a case falling within subsection (1A), that the taking of the specimen, the requirement or the warning required by section 7A(5) of this Act would be so prejudicial.

10.— Detention of persons affected by alcohol or a drug

- (1) Subject to subsections (2) and (3) below, a person required [under section 7 or 7A³⁶] to provide a specimen of breath, blood or urine may afterwards be detained at a police station [(or, if the specimen was provided otherwise than at a police station, arrested and taken to and detained at a police station) if a constable has reasonable grounds for believing³⁷ that, were that person then driving or attempting to drive a [mechanically propelled vehicle³⁸] on a road, he would [commit³⁹] an offence under section 4 [, 5 or 5A⁴⁰] of this Act.
- (2) [Subsection (1) above does not apply to the person if it ought reasonably to appear to the⁴¹] constable that there is no likelihood of his driving or attempting to drive a [mechanically propelled vehicle⁴²] [whilst—
- (a) the person's ability to drive properly is impaired,
- (b) the proportion of alcohol in the person's breath, blood or urine exceeds the prescribed limit, or
- (c) the proportion of a specified controlled drug in the person's blood or urine exceeds the specified limit for that drug.⁴³
- ⁴⁴(2A) A person who is at a hospital as a patient shall not be arrested and taken from there to a police station in pursuance of this section if it would be prejudicial to his proper care and treatment as a patient.
- (3) A constable must consult a medical practitioner on any question arising under this section whether a person's ability to drive properly is or might be impaired through drugs and must act on the medical practitioner's advice.

³⁶ Words in square brackets inserted by Railways and Transport Safety Act 2003, sch 7 para 4, in force 30 March 2004.

³⁷ Words in square brackets substituted by Serious Organised Crime and Police Act 2005, s 154(10)(a), in force 1 July 2005.

³⁸ Word in square brackets substituted by RTA 1991, sch 4 para 43, in force 1 July 1992.

³⁹ Words in square brackets substituted by Serious Organised Crime and Police Act 2005, s 154(10)(b), in force 1 July 2005.

⁴⁰ Section numbers in square brackets inserted by Crime and Courts Act 2013, sch 22, para 6(2), to come into force from a date to be appointed.

⁴¹ Words in square brackets substituted by Serious Organised Crime and Police Act 2005, s 154(11), in force 1 July 2005.

⁴² Words in square brackets substituted by RTA 1991, sch 4 para 43, in force 1 July 1992.

⁴³ Words in square brackets substituted by Crime and Courts Act 2013, sch 22, para 6(3), to come into force from a date to be appointed.

⁴⁴ Subsection (2A) inserted by Serious Organised Crime and Police Act 2005, s 154(12), in force 1 July 2005.

11.— Interpretation of sections 4 to 10

- (1) The following provisions apply for the interpretation of [sections 3A to 10⁴⁵] of this Act.
- (2) In those sections—
⁴⁶
⁴⁷ “controlled drug” has the meaning given by section 2 of the Misuse of Drugs Act 1971,
 “drug” includes any intoxicant other than alcohol,
 “fail” includes refuse,
 “hospital” means an institution which provides medical or surgical treatment for in-patients or out-patients,
 “the prescribed limit” means, as the case may require—
 (a) 35 microgrammes of alcohol in 100 millilitres of breath,
 (b) 80 milligrammes of alcohol in 100 millilitres of blood, or
 (c) 107 milligrammes of alcohol in 100 millilitres of urine,
 or such other proportion as may be prescribed by regulations [...⁴⁸].
⁴⁹ “registered health care professional” means a person (other than a medical practitioner) who is—
 (a) a registered nurse; or
 (b) a registered member of a health care profession which is designated for the purposes of this paragraph by an order made by the Secretary of State.
⁵⁰ “specified” in relation to a controlled drug, has the meaning given by section 5A(8).
⁵¹(2ZA) Regulations under subsection (2) may be made—
 (a) by the Secretary of State, in relation to driving or attempting to drive, or being in charge of a vehicle, in England and Wales;
 (b) by the Scottish Ministers, in relation to driving or attempting to drive, or being in charge of a vehicle, in Scotland.
⁵²(2A) A health care profession is any profession mentioned in section 60(2) of the Health Act 1999 (c. 8) other than the profession of practising medicine and the profession of nursing.
 (2B) An order under subsection (2) shall be made by statutory instrument; and any such statutory instrument shall be subject to annulment in pursuance of a resolution of either House of Parliament.

⁴⁵ Numbers in square brackets substituted by RTA 1991, sch 4 para 44, in force 1 July 1992.

⁴⁶ Definition of “breath test” repealed by Railways and Transport Safety Act 2003, sch 8 para 1, in force 30 March 2004.

⁴⁷ Definition of “controlled drug” inserted by Crime and Courts Act 2013, s 56(2)(a), to come into force from a date to be appointed.

⁴⁸ Words repealed by Scotland Act 2012, s 20(6), in force 3 July 2012.

⁴⁹ Definition of “registered health care professional” inserted by Police Reform Act 2002, s 55(3), in force 1 April 2003.

⁵⁰ Definition of “specified” inserted by Crime and Courts Act 2013, s 56(2)(b), to come into force from a date to be appointed.

⁵¹ Subsection 2(ZA) inserted by Scotland Act 2012, s 20(7), in force 3 July 2012.

⁵² Subsections (2A) and (2B) inserted by Police Reform Act 2002, s 55(4), in force 1 April 2003.

- (3) [A person does not co-operate with a preliminary test or provide a specimen of breath for analysis unless his co-operation or the specimen⁵³]—
 - (a) is sufficient to enable the test or the analysis to be carried out, and
 - (b) is provided in such a way as to enable the objective of the test or analysis to be satisfactorily achieved.
- ⁵⁴(4) A person provides a specimen of blood if and only if—
 - (a) he consents to the taking of such a specimen from him; and
 - (b) the specimen is taken from him by a medical practitioner or, if it is taken in a police station, either by a medical practitioner or by a registered health care professional.

THE ROAD TRAFFIC OFFENDERS ACT 1988, SS 15, 34; EXTRACT FROM SCH 2, PT 1

15.— Use of specimens in proceedings for an offence under [any of sections 3A to 5A⁵⁵] of the Road Traffic Act

- (1) This section and section 16 of this Act apply in respect of proceedings for an offence under [any of sections 3A to 5A⁵⁶] of the Road Traffic Act 1988 (driving offences connected with drink or drugs)⁵⁷; and expressions used in this section and section 16 of this Act have the same meaning as in [sections 3A to 10⁵⁸] of that Act.
- (2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by [or taken from⁵⁹] the accused shall, in all cases [(including cases where the specimen was not provided [or taken⁶⁰] in connection with the alleged offence)⁶¹], be taken into account [and—
 - (a) it is to be assumed, subject to subsection (3) below, that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen;

⁵³ Words in square brackets substituted by Railways and Transport Safety Act 2003, sch 7 para 5(b), in force 30 March 2004.

⁵⁴ Subsection (4) substituted by Police Reform Act 2002, s 55(5), in force 1 April 2003.

⁵⁵ Words in square brackets inserted by Crime and Courts Act 2013, sch 22, para 10(2), to come into force from a date to be appointed.

⁵⁶ Words in square brackets inserted by Crime and Courts Act 2013, sch 22, para 10(3), to come into force from a date to be appointed.

⁵⁷ Words in square brackets substituted by RTA 1991, sch 4 para 87(2), in force 1 July 1992.

⁵⁸ *Ibid.*

⁵⁹ Words in square brackets inserted by Police Reform Act 2002, s 57(1)(a), in force 1 October 2002.

⁶⁰ Words in square brackets inserted by Police Reform Act 2002, s 57(1)(b), in force 1 October 2002.

⁶¹ Words in square brackets inserted by RTA 1991, sch 4 para 87(3), in force 1 July 1992.

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- (b) it is to be assumed, subject to subsection (3A) below, that the proportion of a drug in the accused's blood or urine at the time of the alleged offence was not less than in the specimen.^{62]}
- ⁶³(3) [The assumption in subsection (2)(a) above^{64]} shall not be made if the accused proves—
- (a) that he consumed alcohol before he provided the specimen [or had it taken from him^{65]} and—
 - (i) in relation to an offence under section 3A, after the time of the alleged offence, and
 - (ii) otherwise, after he had ceased to drive, attempt to drive or be in charge of a vehicle on a road or other public place, and
 - (b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit 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.
- ⁶⁶(3A) The assumption in subsection 2(b) above is not to be made if the accused proves—
- (a) that he took the drug before he provided the specimen or had the specimen taken from him and—
 - (i) in relation to an offence under section 3A, after the time of the alleged offence, and
 - (ii) otherwise, after he had ceased to drive, attempt to drive or be in charge of a vehicle on a road or other public place, and
 - (b) that had he not done so the proportion of the drug in his blood or urine—
 - (i) in the case of a specified controlled drug, would not have exceeded the specified limit for that drug, and
 - (ii) if it is alleged that he was unfit to drive through drugs, would not have been such as to impair his ability to drive properly.
- (4) A specimen of blood shall be disregarded [unless—
- (a) it was taken from the accused with his consent and either—
 - (i) in a police station by a medical practitioner; or [a registered health care professional; or^{67]}
 - (ii) elsewhere by a medical practitioner;or
 - (b) it was taken from the accused by a medical practitioner under section 7A of the Road Traffic Act 1988 and the accused subsequently gave his permission for a laboratory test of the specimen.^{68]}

⁶² Words in square brackets inserted by Crime and Courts Act 2013, sch 22, para 10(4), to come into force from a date to be appointed.

⁶³ Subsection (3) substituted by RTA 1991, sch 4 para 87(4), in force 1 July 1992.

⁶⁴ Words in square brackets substituted by Crime and Courts Act 2013, sch 22, para 10(5), to come into force from a date to be appointed.

⁶⁵ Words in square brackets inserted by Police Reform Act 2002, s 57(2), in force 1 October 2002.

⁶⁶ Subsection (3A) inserted by Crime and Courts Act 2013, sch 22, para 10(6), to come into force from a date to be appointed.

⁶⁷ Words inserted by Police Reform Act 2002, s 57(3), in force 1 April 2003.

⁶⁸ Words in square brackets substituted by Police Reform Act 2002, s 57(3), in force 1 April 2003.

- (5) Where, at the time a specimen of blood or urine was provided by the accused, he asked to be provided with such a specimen, evidence of the proportion of alcohol or any drug found in the specimen is not admissible on behalf of the prosecution unless—
- (a) the specimen in which the alcohol or drug was found is one of two parts into which the specimen provided by the accused was divided at the time it was provided, and
 - (b) the other part was supplied to the accused.
- ⁶⁹(5A) Where a specimen of blood was taken from the accused under section 7A of the Road Traffic Act 1988, evidence of the proportion of alcohol or any drug found in the specimen is not admissible on behalf of the prosecution unless—
- (a) the specimen in which the alcohol or drug was found is one of two parts into which the specimen taken from the accused was divided at the time it was taken; and
 - (b) any request to be supplied with the other part which was made by the accused at the time when he gave his permission for a laboratory test of the specimen was complied with.

34.— Disqualification for certain offences

- (1) Where a person is convicted of an offence involving obligatory disqualification, the court must order him to be disqualified for such period not less than twelve months as the court thinks fit unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.
- ⁷⁰(1A) Where a person is convicted of an offence under section 12A of the Theft Act 1968 (aggravated vehicle-taking), the fact that he did not drive the vehicle in question at any particular time or at all shall not be regarded as a special reason for the purposes of subsection (1) above.
- ⁷¹(2) Where a person is convicted of an offence involving discretionary disqualification, and either—
- (a) the penalty points to be taken into account on that occasion number fewer than twelve, or
 - (b) the offence is not one involving obligatory endorsement, the court may order him to be disqualified for such period as the court thinks fit.
- (3) Where a person convicted of an offence under any of the following provisions of the Road Traffic Act 1988, that is—
- ⁷²(aa) section 3A (causing death by careless driving when under the influence of drink or drugs),
 - (a) section 4(1) (driving or attempting to drive while unfit),
 - (b) section 5(1)(a) (driving or attempting to drive with excess alcohol),
[...⁷³]

⁶⁹ Subsection (5A) inserted by Police Reform Act 2002, s 57(4), in force 1 October 2002.

⁷⁰ Subsection (1A) inserted by Aggravated Vehicle-Taking Act 1992, s 3(2), in force 1 April 1992.

⁷¹ Subsection (2) substituted by RTA 1991, s 29(2), in force 1 October 1992.

⁷² Paragraph (aa) inserted by RTA 1991, s 29(3), in force 1 October 1992.

⁷³ Words repealed by Police Reform Act 2002, s 56(3)(a), in force 1 October 2002.

- ⁷⁴(ba) section 5A(1)(a) and (2) (driving or attempting to drive with concentration of specified controlled drug above specified limit)
- (c) section 7(6) (failing to provide a specimen) where that is an offence involving obligatory disqualification,
- ⁷⁵(d) section 7A(6) (failing to allow a specimen to be subjected to laboratory test) where that is an offence involving obligatory disqualification; has within the ten years immediately preceding the commission of the offence been convicted of any such offence, subsection (1) above shall apply in relation to him as if the reference to twelve months were a reference to three years.
- ⁷⁶(4) Subject to subsection (3) above, subsection (1) above shall apply as if the reference to twelve months were a reference to two years—
- (a) in relation to a person convicted of—
- (i) manslaughter, or in Scotland culpable homicide, or
- (ii) an offence under section 1 of the Road Traffic Act 1988 (causing death by dangerous driving), or
- ⁷⁷(iia) an offence under section 1A of that Act (causing serious injury by dangerous driving), or
- (iii) an offence under section 3A of that Act (causing death by careless driving while under the influence of drink or drugs), and
- (b) in relation to a person on whom more than one disqualification for a fixed period of 56 days or more has been imposed within the three years immediately preceding the commission of the offence.
- (4A) For the purposes of subsection (4)(b) above there shall be disregarded any disqualification imposed under section 26 of this Act or [section 147 of the Powers of Criminal Courts (Sentencing) Act 2000⁷⁸] or section 223A or 436A of the Criminal Procedure (Scotland) Act 1975 (offences committed by using vehicles) and any disqualification imposed in respect of an offence of stealing a motor vehicle, an offence under section 12 or 25 of the Theft Act 1968, an offence under section 178 of the Road Traffic Act 1988, or an attempt to commit such an offence.
- ⁷⁹(4AA) For the purposes of subsection (4)(b), a disqualification is to be disregarded if the period of disqualification would have been less than 56 days but for an extension period added pursuant to—
- (a) section 35A or 35C,
- (b) section 248D of the Criminal Procedure (Scotland) Act 1995, or
- (c) section 147A of the Powers of Criminal Courts (Sentencing) Act 2000.

⁷⁴ Paragraph (ba) inserted by Crime and Courts Act 2013, sch 22, para 12, to come into force from a date to be appointed.

⁷⁵ Paragraph (d) inserted by Police Reform Act 2002, s 56(3)(b), in force 3 December 2012.

⁷⁶ Subsections (4) and (4A) substituted for subs (4) by RTA 1991, s 29(4), in force 1 July 1992.

⁷⁷ Paragraph (a)(iia) inserted by Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 27, para 5, in force 3 December 2012.

⁷⁸ Words in square brackets substituted by Powers of Criminal Courts (Sentencing) Act 2000, sch 9 para 121, in force 25 August 2000.

⁷⁹ Subsection (4AA) inserted by Coroners and Justice Act 2009, sch 2, para 90(2), to come into force from a date to be appointed.

- ⁸⁰(4B) Where a person convicted of an offence under section 40A of the Road Traffic Act 1988 (using vehicle in dangerous condition etc.) has within the three years immediately preceding the commission of the offence been convicted of any such offence, subsection (1) above shall apply in relation to him as if the reference to twelve months were a reference to six months.
- (5) The preceding provisions of this section shall apply in relation to a conviction of an offence committed by aiding, abetting, counselling or procuring, or inciting to the commission of, an offence involving obligatory disqualification as if the offence were an offence involving discretionary disqualification.
- (5A) In relation to Scotland, references in this section to the court include the [justice of the peace court⁸¹].
- ⁸²(6) This section is subject to section 48 of this Act.

Extract from Schedule 2: Prosecution and Punishment of Offences

Part 1: Offences under the Traffic Acts

<i>(1) and (2) Offence under RTA 1988</i>	<i>(3) Mode of prosecution</i>	<i>(4) Punishment</i>	<i>(5) Disqualification</i>	<i>(6) Endorsement</i>	<i>(7) Penalty points</i>
⁸³ s 3A, causing death by careless driving when under the influence of drink or drugs	On indictment	[14 years ⁸⁴] or a fine or both	Obligatory	Obligatory	3–11
s 4(1), driving or attempting to drive when unfit to drive through drink or drugs	Summarily	6 months or level 5 on the standard scale or both	Obligatory	Obligatory	[3–11 ⁸⁵]
s 4(2), being in charge of a mechanically propelled vehicle when unfit to drive through drink or drugs	Summarily	3 months or level 4 on the standard scale or both	Discretionary	Obligatory	10
s 5(1)(a), driving or attempting to drive with excess alcohol in breath, blood or urine	Summarily	6 months or level 5 on the standard scale or both	Obligatory	Obligatory	[3–11 ⁸⁶]
s 5(1)(b), being in charge of a motor vehicle with excess alcohol in breath, blood or urine	Summarily	3 months or level 4 on the standard scale or both	Discretionary	Obligatory	10

⁸⁰ Subsections (4B) and (5) inserted by Road Safety Act 2006, s 25(2), in force 24 September 2007.

⁸¹ Words substituted by Criminal Proceedings etc. (Reform) (Scotland) Act 2007, sch 1, para 7(d), coming into force on various dates in relation to different sheriffdoms.

⁸² Subsection (6) inserted by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (Powers of District and JP Courts) Order 2007, SI 2007 No 3480, art 2(1)(b), in force 10 December 2007.

⁸³ Entry inserted by RTA 1991, sch 2 para 7, in force 1 July 1992.

⁸⁴ Words in square brackets inserted by Criminal Justice Act 2003, s 285(4), in force 27 February 2003.

⁸⁵ Numbers substituted by RTA 1991, sch 2 para 8, in force 1 July 1992.

⁸⁶ Numbers substituted by RTA 1991, sch 2 para 10, in force 1 July 1992.

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⁸⁷ s 5A(1)(a) and (2), driving or attempting to drive with concentration of specified controlled drug above specified limit	Summarily	51 weeks ⁸⁸ or level 5 on the standard scale or both	Obligatory	Obligatory	3–11
s 5A(1)(b) and (2), being in charge of a motor vehicle with concentration of specified controlled drug above specified limit	Summarily	51 weeks ⁸⁹ or level 4 on the standard scale or both	Discretionary	Obligatory	10
s 6, [failing to co-operate with a preliminary test ⁹⁰]	Summarily	Level 3 on the standard scale	Discretionary	Obligatory	4
s 7, failing to provide a specimen for analysis or laboratory test	Summarily	(a) Where the specimen was required to ascertain ability to drive or proportion of alcohol at the time offender was driving or attempting to drive, 6 months or level 5 on the standard scale or both; (b) in any other case, 3 months or level 4 on the standard scale or both	(a) Obligatory in a case mentioned in column 4 (a) (b) Discretionary in any other case	Obligatory	(a) [3–11 in ⁹¹] a case mentioned in column 4(a) (b) 10 in any other case
⁹² s 7A, failing to allow specimen to be subjected to laboratory test	Summarily	(a) Where the test would be for ascertaining ability to drive or proportion of alcohol at the time offender was driving or attempting to drive, 6 months or level 5 on the standard scale or both (b) in any other case, 3 months or level 4 on the standard scale or both	(a) Obligatory in the case mentioned in column 4(a) (b) Discretionary in any other case	Obligatory	(a) 3–11 in the case mentioned in column 4(a) (b) 10 in any other case

⁸⁷ Entries in relation to s 5A inserted by Crime and Courts Act 2013, s 56(4), to come into force from a date to be appointed.

⁸⁸ On conviction in England and Wales, or 6 months on conviction in Scotland. The reference to 51 weeks is to be read as a reference to 6 months in relation to an offence committed before the commencement of Criminal Justice Act 2003, s 281(5) (Crime and Courts Act 2013, s 56(5)).

⁸⁹ On conviction in England and Wales, or 3 months on conviction in Scotland. The reference to 51 weeks is to be read as a reference to 3 months in relation to an offence committed before the commencement of Criminal Justice Act 2003, s 280(2) (Crime and Courts Act 2013, s 56(6)).

⁹⁰ Words in square brackets substituted by Railways and Transport Safety Act 2003, sch 7 para 8, in force 30 March 2004.

⁹¹ Numbers substituted by RTA 1991, sch 2 para 11, in force 1 July 1992.

⁹² Entry inserted by Police Reform Act 2002, s 56(5), in force 1 October 2002.

Appendix 2: Codings Used to Analyse the Opinions Survey Data

Listed below are the codings used to analyse the data generated by the Opinions Survey described in Chapter 8. They comprise variables, further broken down into values, and are divided into those which I created, and those applied by ONS.

MY VARIABLES AND VALUES

Age2.44.45: Ages to 44/45

- 1 Age up to 44
- 2 Age 45+

AgeSexgrp1.34: Age/sex34/35

- 1 Male to age 34
- 2 Male aged 35+
- 3 Female to age 34
- 4 Female aged 35+

AgeSexgrp2.44: Age/sex 44/45

- 1 Male to age 44
- 2 Male aged 45+
- 3 Female to age 44
- 4 Female aged 45+

AlcConBdown: Breakdown of alcohol concentration answers

- 1 Answer included the word “blood”
- 2 Answer included the word “breath”
- 3 Answer included the word “system” or “urine”
- 4 Answer included a number only
- 5 Answer did not quite make sense

AlcConPeople: Identifying people who answered/did not answer alcohol concentration

- 1 Replied alcohol concentration in the body
- 2 Did not reply alcohol concentration in the body

Ans01: 1st answer

- 1 Quantified amount
- 2 Don’t drink and drive
- 3 Unquantified amount
- 4 Concentration of alcohol
- 5 Consequences

- 6 Variables
- 7 Don’t know
- 8 Refused to answer
- 9 Non-classifiable/circular

Ans02: 2nd answer

- 1 Quantified amount
- 2 Don’t drink and drive
- 3 Unquantified amount
- 4 Concentration of alcohol
- 5 Consequences
- 6 Variables
- 7 Don’t know
- 8 Refused to answer
- 9 Non-classifiable/circular

Ans03: 3rd answer

- 1 Quantified amount
- 2 Don’t drink and drive
- 3 Unquantified amount
- 4 Concentration of alcohol
- 5 Consequences
- 6 Variables
- 7 Don’t know
- 8 Refused to answer
- 9 Non-classifiable/circular

ConsBdown: Consequences of drink-driving broken down

- 1 Effects on quality of driving
- 2 Danger
- 3 Consequences of conviction
- 4 Unspecified consequences
- 5 Multiples of the above
- 6 Other
- 7 None of the above

- ConsPeople:** Identifying people who answered Consequences
- 1 Mentioned the consequences of drink-driving
 - 2 Did not mention the consequences of drink-driving

- DDDBdown:** Breakdown of don't drink and drive replies
- 1 Simple "don't drink and drive"
 - 2 Personal rule is don't drink and drive
 - 3 Emphasis added, eg "simple", "full stop", "at all"
 - 4 Reply advocating a zero limit
 - 5 Other answers of interest (described in Chapter 8)

- DDDPeople:** Identifying people who answered don't drink and drive
- 1 Answered "don't drink and drive"
 - 2 Did not answer "don't drink and drive"

- Other:** Other themes of interest
1. Units of alcohol mentioned
 2. Difficulty of interpretation mentioned
 3. [deleted]
 4. Lowness of limit mentioned
 5. None of the above

- QAmtBdown:** Breakdown of amount which can be drunk before driving
- 1 Minimal
 - 2 One (glass of) wine
 - 3 One pint
 - 4 One unit
 - 5 One and a half pints
 - 6 One and a half units
 - 7 Two drinks or glasses
 - 8 Two (glasses of) wine
 - 9 Two pints
 - 10 Two units
 - 11 Two and a half pints
 - 12 Three pints
 - 13 Three units
 - 14 Four units

- QAmtPeople:** Identifying people who gave a quantified amount
- 1 Gave a quantified amount
 - 2 Did not give a quantified amount

- QAmtSimp:** Simplification of quantified amounts
- 1 Less than 2 drinks

- 2 Two or more drinks

- QAmtTypeDrink:** Type of drink mentioned by those who gave a quantified amount
- 1 Beer/lager/pints
 - 2 Wine
 - 3 Combinations/alternatives
 - 4 Units of alcohol
 - 5 Unspecified

- Safety:** References to safety
- 1 Mentioned safety or similar
 - 2 Did not mention safety or similar

- Subjective:** Subjective interpretation
- 1 Reply included words such as "I", "me", "personally", suggesting subjective/personal interpretation of the limit
 - 2 Reply did not suggest subjective/personal interpretation of the limit

- UnqAmtBdown:** Unquantified amounts broken down
- 1 Mentioned units
 - 2 Mentioned safety, impairment, unfitness
 - 3 Mentioned neither of the above

- UnqAmtPeople:** Identifying people who gave an unquantified amount
- 1 Respondents who gave an unquantified amount
 - 2 Respondents who did not give an unquantified amount

- VarBdown:** Breakdown of influencing factors
- 1 Gender
 - 2 Personal differences in general
 - 3 Strength/amount of drink
 - 4 Time
 - 5 Whether food taken
 - 6 The complexity of the issue
 - 7 Weight/mass
 - 8 Multiples of the above factors

- VarPeople:** Identifying people who answered influencing factors
- 1 Respondents who mentioned the variables
 - 2 Respondents who did not mention the variables

THE ONS CLASSIFICATORY VARIABLES

Household

GORA: Government Office Regions

- 1 North East
- 2 North West
- 3 Yorkshire and the Humber
- 4 East Midlands
- 5 West Midlands
- 6 East of England
- 7 London
- 8 South East
- 9 South West
- 10 Wales
- 11 Scotland

NUMADULT: Total number of adults

NUMCHILD: Total number of children (aged under 16)

N1TO4: Children 0-4

N5TO10: Children 5-10

N11TO15: Children 11-15

NumDepCh: Dependent children (aged under 16 or aged 16-18, never married and not a foster child)

DVHSIZE: Total number of people in the household

HHTYPB: Household Type B (Coded by interviewer)

- 1 One person only
- 2 HRP married cohabiting with dependent child
- 3 HRP married cohabiting no dependent child
- 4 HRP lone parent with dependent child
- 5 HRP lone parent no dependent child
- 6 All others

HHTYPA: Household Type A (Computed)

- 1 1 Adult aged 16 to 64
- 2 1 Adult aged 65 or more
- 3 2 Adults aged 16 to 64
- 4 2 Adults, 1 aged 65 or more
- 5 3 Adults
- 6 1 or 2 child
- 7 3+ children

HHTYPE: Household Type B - grouped

- 1 One person only
- 2 Married cohabiting with dependent child
- 3 Married cohabiting no dependent child
- 4 Lone with dependent child
- 5 All others

TENGRP: Grouped Tenure

- 1 Owns outright
- 2 Owns mortgage
- 3 Rents Local Authority/Housing Association
- 4 Rents privately
- 5 Squatting

TEN1: Tenure (questionnaire variable)

- 1 Own it outright
- 2 Buying it with the help of a mortgage or loan
- 3 Pay part rent and part mortgage (shared ownership)
- 4 Rent it
- 5 Live here rent free (including rent free in relative's/friend's property: excluding squatting)
- 6 Squatting

TIED: Does the accommodation go with the job of anyone in the household?

- 1 Yes
- 2 No

LLORD: Who is your landlord?

- 1 the local authority/council/Scottish Homes
- 2 a housing association, charitable trust or local housing trust
- 3 employer (organisation) of a household member
- 4 another organisation
- 5 relative/friend (before you lived here) of a household member
- 6 employer (individual) of a household member
- 7 another individual private landlord

FURN: Is the accommodation provided:

- 1 furnished
- 2 partly furnished
- 3 unfurnished

CARS: Car or van available to household?

- 1 Yes
- 2 No

NUMCAR: How many cars and or vans are available to the household?

CAR Car or van available to the household

- 1 None
- 2 One
- 3 Two
- 4 Three or more

DVPAIDJO: Number of members of the household who have a paid job?

THE DRINK- AND DRUG-DRIVING OFFENCES

Individual - demographic

RSEX: Sex of Respondent

- 1 Male
- 2 Female

RAGE: Age of Respondent

AGEX: Grouped Age

- 1 16 to 24
- 2 25 to 44
- 3 45 to 54
- 4 55 to 64
- 5 65 to 74
- 6 75 and over

AGEH: Grouped Age

- 1 16 to 17
- 2 18 to 19
- 3 20 to 24
- 4 25 to 29
- 5 30 to 34
- 6 35 to 39
- 7 40 to 44
- 8 45 to 49
- 9 50 to 54
- 10 55 to 64
- 11 65 to 74
- 12 75 or over

RELHRP: Relation to Household

Reference Person

- 0 Household Reference Person
- 1 Spouse
- 2 Co-habitee
- 3 Son/daughter
- 4 Step-son daughter
- 5 Foster child
- 6 Son daughter-in-law
- 7 Parent
- 8 Step-parent
- 9 Foster parent
- 10 Parent-in-law
- 11 Brother or sister
- 12 Step-brother sister
- 13 Foster brother sister
- 14 Brother sister-in-law
- 15 Grand-child
- 16 Grand-parent
- 17 Other relative
- 18 Other non-relative
- 20 Civil partner

RESPMAR: Marital status of respondent
(De Jure)

- 1 Single, never married
- 2 Married living with spouse
- 3 Married separated from spouse
- 4 Divorced
- 5 Widowed
- 6 Civil partner

7 Former/separated civil partner

LIVewith: Living with someone in the household as a couple

- 1 Yes
- 2 No

DEFACTO: Marital status of respondent
(De Facto)

- 1 Married
- 2 Cohabiting
- 3 Single
- 4 Widowed
- 5 Divorced
- 6 Separated
- 7 Same sex cohabiting
- 8 Civil partner
- 9 Former/separated civil partner

DEFACT1: Grouped marital status of respondent (De Facto)

- 1 Married/cohabiting
- 2 Single
- 3 Widowed
- 4 Divorced/separated
- 5 Same sex cohabiting
- 6 Civil partner
- 7 Former/separated civil partner

RESPHLDR: In whose name is the accommodation owned or rented

- 1 This person alone
- 2 This person jointly
- 3 NOT owner renter

PARENT: Are you or your spouse/partner the parent or guardian of any children aged under 16 in the household?

- 1 Yes
- 2 No

PARTOD: Can I just check, are you or your spouse/partner the parent or guardian of any child aged 0-4 in the household?

- 1 Yes
- 2 No

NATLD (E1 – 6) NATLD (S1 – 6) NATLD (W1 – 6)

National Identity

- 1 English
- 2 Scottish
- 3 Welsh
- 4 Irish
- 5 British
- 6 Other

ETHNIC_MER: Ethnicity

- 1 White British
- 2 Any other White background
- 3 Mixed – White and Black Caribbean

4	Mixed – White and Black African	limit your activities in any way?
5	Mixed – White and Asian	1 Yes
6	Any other Mixed background	2 No
7	Asian or Asian British – Indian	SUMGROSS Annual gross income
8	Asian or Asian British – Pakistani	(1) Up to £519
9	Asian or Asian British – Bangladeshi	(2) £520 up to £1039
10	Asian or Asian British – Any other Asian background	(3) £1040 up to £1559
11	Black or Black British – Black Caribbean	(4) £1560 up to £2079
12	Black or Black British – Black African	(5) £2080 up to £2599
13	Black or Black British – Any other Black background	(6) £2600 up to £3119
14	Chinese	(7) £3120 up to £3639
15	Any other ethnic group	(8) £3640 up to £4159
EDAGECOR: Age left full time education		(9) £4160 up to £4679
HIGHED1: Highest level of education qualification		(10) £4680 up to £5199
1 Degree or higher degree		(11) £5200 up to £6239
2 Higher education qualification below degree level		(12) £6240 up to £7279
3 A Levels or higher		(13) £7280 up to £8319
4 ONC/BTEC		(14) £8320 up to £9359
5 O Level or GCSE equivalent (Grade A – C)		(15) £9360 up to £10399
6 O Level or GCSE (Grade D – G)		(16) £10400 up to £11439
7 Other qualifications		(17) £11440 up to £12479
8 No formal qualifications		(18) £12480 up to £13519
HIGHED4: Highest level of education qualification (4 groupings)		(19) £13520 up to £14559
1 Degree or equivalent		(20) £14560 up to £15599
2 Below Degree level		(21) £15600 up to £16639
3 Other*		(22) £16640 up to £17679
4 None (no formal qualifications)		(23) £17680 up to £18719
* Including foreign qualifications (outside UK) and other qualifications.		(24) £18720 up to £10759
QHEALTH1: How is your health in general?		(25) £19760 up to £20799
1 Very good		(26) £20800 up to £23399
2 Good		(27) £23400 up to £25999
3 Fair		(28) £26000 up to £28599
4 Bad		(29) £28600 up to £31199
5 Very bad		(30) £31200 up to £33799
LSILL: Do you have any long-standing illness, disability or infirmity? By long standing I mean anything that has troubled you over a period of time or that is likely to affect you over a period of time?		(31) £33800 up to £36399
1 Yes		(32) £36400 up to £38999
2 No		(33) £39000 up to £41599
ILLIM: Does this illness or disability/do any of these illnesses or disabilities		(34) £41600 up to £44199
		(35) £44200 up to £46799
		(36) £46800 up to £49399
		(37) £49400 up to £51999
		(38) £52000 or more
		Individual – Employment related
		WRKING: Paid work last 7 days ending Sunday
		1 Yes
		2 No
		SCHM08: Govt. scheme for employment training
		1 Work based learning for young people
		2 New Deal
		3 Work based learning for adults
		10 Job skills

THE DRINK- AND DRUG-DRIVING OFFENCES

- 15 Work track
- 21 Entry into employment
- 50 Any other training scheme
- 66 None of these
- 97 Just 16 and no response
- JBAWAY: Did you have a job or business that you were away from last week?
- 1 Yes
- 2 No
- OWNBUS: Unpaid work, in that week, for a business that you own?
- 1 Yes
- 2 No
- RELBUS: Unpaid work, in that week, for a business that a relative owns?
- 1 Yes
- 2 No
- LOOK4: Looking for work in last 4 weeks?
- 1 Yes
- 2 No
- STAR: Able to start work within 2 weeks?
- 1 Yes
- 2 No
- NOLOWA 1-9: Main reason for not seeking work
- 1 Waiting for the results of an application for a job
- 2 Student
- 3 Looking after the family/home
- 4 Temporarily sick or injured
- 5 Long-term sick/disabled
- 6 Believes no job available
- 7 Not yet started looking
- 8 Other reasons
- EVERWK: Have you ever had a paid job?
- 1 Yes
- 2 No
- DVILO3a: DV for ILO in employment - 3 categories
- 1 In employment
- 2 Unemployed
- 3 Economically inactive
- (In employment includes people in a paid job, away from their job, on a government training scheme, doing unpaid work for their own/relative's business, during the last week.)
- DVILO4a: DV for ILO in employment - 4 categories
- 1 In employment
- 2 Unpaid family worker
- 3 Unemployed
- 4 Economically inactive
- FTPTW: Were you working...
- 1 Full-time
- 2 Part-time
- STAT: Employee or self-employed?
- 1 Employee
- 2 Self-employed
- SUPVISEe: Supervisory status
- 1 Yes
- 2 No
- SOL: Working on own or have employees?
- 1 On own with partner(s) but no employees
- 2 With employees
- EMPNO: How many employees at workplace (if employee)?
- 1 1-24
- 2 25 to 499
- 3 500 or more
- MPNE: How many people worked for your employer at the place where you work?
- 1 1-10
- 2 11-19
- 3 20-24
- 4 Don't know but under 25
- 5 25 - 49
- 6 Don't know but over 24 and under 500
- 7 50-499
- 8 500 or more
- MPNS: How many people did you employ at the place where you work?
- 1 1-10
- 2 11-19
- 3 20-24
- 4 Don't know but under 25
- 5 25 - 49
- 6 Don't know but over 24 and under 500
- 7 50-499
- 8 500 or more
- ES2000: Employment status
- 1 Self-employed: large establishment (25+ employees)
- 2 Self-employed: small establishment (1-24 employees)
- 3 Self-employed: no employees
- 4 Manager: large establishment (25+ employees)
- 5 Manager: small establishment (1-24 employees)
- 6 Foreman or supervisor
- 7 Employee (not elsewhere classified)
- 8 No employment status info given
- NSSECB NS-SECB - long version (Operational categories)
- 1.0 Employers in large organisations
- 2.0 Higher managerial

3.1 Higher professional (traditional) - employees	(Codes 1.0 to 13.5 are assigned to everyone who is currently employed OR who has ever worked – unless they are currently a full-time student. That is – ‘full-time student’ takes precedence over past employment.)
3.2 Higher professional (new) - employees	
3.3 Higher professional (traditional) - self-employed	
3.4 Higher professional (new) - self-employed	
4.1 Lower professional & higher technical (traditional) - employees	NSSECAC
4.2 Lower professional & higher technical (new) - employees	NS-SEC – Analytic classes
4.3 Lower professional & higher technical (traditional) - self-employed	1.1 Employers in large organisations & higher managerial occupations
4.4 Lower professional & higher technical (new) - self-employed	1.2 Higher professional occupations
5.0 Lower managerial	2.0 Lower professional and higher technical occupations
6.0 Higher supervisory	3.0 Intermediate occupations
7.1 Intermediate clerical and administrative	4.0 Small employers and own account workers
7.2 Intermediate sales and service	5.0 Lower supervisory and technical occupations
7.3 Intermediate technical and auxiliary	6.0 Semi-routine occupations
7.4 Intermediate engineering	7.0 Routine occupations
8.1 Employers (small organisations, non-professional)	8.0 Not classified
8.2 Employers (small - agriculture)	NSECAC5: NS-SEC – 5 classes
9.1 Own account workers (non-professional)	1 Managerial and professional occupations
9.2 Own account workers (agriculture)	2 Intermediate occupations
10.0 Lower supervisory	3 Small employers and own account workers
11.1 Lower technical craft	4 Lower supervisory and technical occupations
11.2 Lower technical process operative	5 Semi-routine and routine occupations
12.1 Semi-routine sales	6 Not classified
12.2 Semi-routine service	NSECAC3: NS-SEC – 3 classes
12.3 Semi-routine technical	1 Managerial and professional occupations
12.4 Semi-routine operative	2 Intermediate occupations
12.5 Semi-routine agricultural	3 Routine and manual occupations
12.6 Semi-routine clerical	4 Never worked and long term unemployed
12.7 Semi-routine childcare	5 Not classified
13.1 Routine sales and service	
13.2 Routine production	
13.3 Routine technical	
13.4 Routine operative	
13.5 Routine agricultural	
14.1 Never worked	
14.2 Long-term unemployed	
15.0 Full-time students	
16.0 Occupations not stated or inadequately described	
17.0 Not classifiable for other reasons	

Appendix 3: The Opinions Survey: Responses

The responses to the survey question described in Chapter 8 are listed below. They are quoted verbatim, and are sorted according to the classification of the first answer (see Chapter 8, Table 1).

Quantified Amounts of Alcohol

- | | | | |
|-----|--|-----|---|
| 1. | "One glass wine/half lager" | 34. | 2 units of alcohol |
| 2. | 1 drink of alcohol | 35. | 2 units of alcohol |
| 3. | 1 glass of alcohol is OK if you are eating at the same time | 36. | 2 units of alcohol |
| 4. | 1 glass of wine allowed before driving | 37. | 2 units of alcohol=2small wineglasses/1 small spirits/1pint |
| 5. | 1 glass of wine or 1 drink | 38. | 3 halves of bitter |
| 6. | 1 pint in 48 hrs is ok. | 39. | 3 pints of beer, I think you are allowed to drive |
| 7. | 1 pint is enough | 40. | 3 units of alcohol is the limit you can drink |
| 8. | 1 pint of beer /depends | 41. | a bottle of beer maximum. |
| 9. | 1 pint of lager | 42. | a couple of units, one or two units |
| 10. | 1 pint of lager is the drink drive limit | 43. | a glass of something, do one thing or the other (husband is teetotal) |
| 11. | 1 small glass of wine to be in limit | 44. | a glass of wine |
| 12. | 1 unit of alcohol is safe to drive | 45. | a pint of beer is ok with food, but no more same basis with wine |
| 13. | 1.5 pints of beer | 46. | About 2.5 pints or 3 glasses of wine. Should not be any higher. |
| 14. | 1.5 pints of lager | 47. | about a pint and a half is the limit |
| 15. | 1.5 units of alcohol | 48. | always known it as 2pts for a man |
| 16. | 1glass of wine my personal limit | 49. | anything in excess of 4 units or something like that |
| 17. | 2 glasses of wine | 50. | anything over a pint |
| 18. | 2 glasses of wine or a pint of beer | 51. | anything over one unit of alcohol means you cannot drive |
| 19. | 2 glasses of wine over a couple of hours | 52. | can have 1 drink & drive |
| 20. | 2 pints | 53. | can't drink more than 2 pints of beer |
| 21. | 2 pints but to me should not drink at all if you drive | 54. | can't have more than one drink if going to be driving |
| 22. | 2 pints of beer is the limit as far as I'm concerned | 55. | Consumsion of in excess of 2 units of alcohol is |
| 23. | 2 pints of lager/beer limit on driving a car | 56. | could have no more than one unit to be over the imit |
| 24. | 2 pints of normal strength beer is the limit-4 units of alcohol | 57. | do not drink more than 1 and a half units for women and 2 for men |
| 25. | 2 pints or something | 58. | do not drink or drive if you have had more than 1 glass of wine |
| 26. | 2 UK units allowed | 59. | does it matter that I am not a driver (have a licence but not driven for years) - 3 units of alcohol - maybe that is for women but I don't know |
| 27. | 2 units | 60. | don't drink anymore than a pint |
| 28. | 2 units | | |
| 29. | 2 units | | |
| 30. | 2 units | | |
| 31. | 2 units and allowed to drive. personally zero tolerance | | |
| 32. | 2 units but that depends on your weight and sex and what you can handle. | | |
| 33. | 2 units for a woman | | |

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- | | |
|--|---|
| <p>61. don't drink more than 1 glass of wine & drive</p> <p>62. don't drink more than 1 pint of beer before driving</p> <p>63. don't drive when you drunk more than 2 units</p> <p>64. don't drive when you've had more than 1 1/2 pints beer</p> <p>65. don't have more than one drink</p> <p>66. dont drink more than 2 pints of beer or 2 glasses of wine.</p> <p>67. drink no more than 2 pints of beer no more than 3.8% alcohol</p> <p>68. drinking more than 2 units of alcohol, and not in control of what you are doing</p> <p>69. for a female 1 glass of wine 125ml limit but depends on body type and mass</p> <p>70. for me it means only drinking one glass of wine when you go out</p> <p>71. for women 2 units and men 4? I dont know</p> <p>72. Generally just one drink I would say but I don't bother if I'm driving to be honest.</p> <p>73. gnly a couple of drinks, but everyone's limit is different.</p> <p>74. half a pint of beer or 1 glass of wine</p> <p>75. half pint of beer</p> <p>76. I believe it to be no more than 2 units of alcohol which equates to one pint of beer</p> <p>77. I believe it's 2 or a pint of beer</p> <p>78. I believe the limit don't know the expression I understaand is a pint would be alright but personally I don't think you should drive at all.</p> <p>79. I can have a small drink and drive.</p> <p>80. I can only have a can of stella, and it takes long for the body to get rid of it.</p> <p>81. I feel I could have one glass of wine and drive a car, but happily do it very seldom</p> <p>82. I have one drink only</p> <p>83. I know one glass of wine is the limit</p> <p>84. I limit myself to one pint when driving</p> <p>85. I never have more than one unit myself and know that keeps you under the limit</p> | <p>86. I think it's a pint of beer or a glass of wine</p> <p>87. I think you can have a pint and no more</p> <p>88. I will only drink 1 to 2 units when drivng but usually none</p> <p>89. I won't have more than one drink when I am driving</p> <p>90. I would never drink more than 2 pints & drive. It's 4 units</p> <p>91. i wouldn't have more than two glasses of wine and the drive</p> <p>92. I'm allowed up to 2 units, I think.</p> <p>93. if I have more than 2 units of alcohol I cannot drive</p> <p>94. if you drink over 1 glass of wine and drive you're liable to cause accidents or death</p> <p>95. if you have 1 pint you are ok</p> <p>96. if you have more than a glass of wine you could be over the drink drive limit</p> <p>97. in sense of what you actually have to drink, its a couple of glasses of wine</p> <p>98. it doesn't take much to exceed limit, will not drive after more than say one beer</p> <p>99. it isn't no drink - I'd have one drink but no more</p> <p>100. it means 2 pints of lager to me spirits or wine I dont know</p> <p>101. it means one glass of wine- know it means also a certain no. of milligrams allowed but not sure how many.</p> <p>102. it means quite a low level of alc. consumpt. for me I should not drive when I've had more than 1 glass of wine.</p> <p>103. it means there is a certain limit of 2 units per person before thay are classed as over the limit</p> <p>104. it means you can get away with having one drink but I think its safer not to have anything at all</p> <p>105. it means you can only drink I think men can drink about a pint before they drive and women is about the same I suppose</p> <p>106. it means you can only have 1 unit before you can drive</p> <p>107. it's about 1.5 pints of beer and a small glass of wine if I'm driving I don't drink anyway.</p> |
|--|---|

108. It's fair but I drink at home but if I drink out 2 pints is enough
109. it's no more than a pint for a woman so I dont drink and drive
110. its no more than 2 units and varies for women and men
111. less than 2 units
112. less than two units of alcohol
113. limit for me is 2 pints or more, but there's no set limit, differs from person to person
114. limit of one unit of alcohol before you shouldn't drive
115. low limit of a pint of beer
116. max of two pints beer normal strength
117. maximum of one drink
118. maximum two units (two halves)
119. means a glass of wine, can have one drink before you drive
120. Means that you should not have more than one glass of anything and drive, you should be aware that any alcohol affects your brain and your reactions
121. means you can have one or two units and that's it
122. More than 1 glass of wine
123. more than 1 small drink
124. more than 2 pints or over 80mg in your blood
125. more than one pint will be over the limit.
126. more than one pint you do not drive
127. more than three pints of beer puts you over the limit to drive
128. Mustn't exceed more that 1.5 pints of beer, 3 shorts
129. n more than 2 pints of beer. I never drink shorts out of the home. I think it depends on the individuals constitution. I know people who do not show any signs of having been drinking.
130. no more than 1 pint
131. no more than 1 pint if driving myself
132. no more than 2 pints
133. no more than 2 pints of average beer and driving
134. no more than 2 pints of beer.
135. no more than 2 units
136. no more than 2 wines
137. no more than a glass of wine
138. no more than a pint
139. no more than a pint
140. no more than a pint or a couple of shorts or a glass of wine
141. no more than one pint
142. no more than two pints of lager
143. not drink any more than a pint.
144. not have more than one drink when I was out and driving
145. not over one pint
146. not to drink more than 2 units of alcohol
147. officially I think it's two and a half pints of beer, that's 80 millilitres
148. one and a half pints of resonable strength not strong beer, or a glass of wine
149. one drink before you can drive safely
150. one drink is more than enough
151. one glass of lager is personal limit
152. ONE GLASS OF WINE
153. one glass of wine - even that is too much
154. one glass of wine or lager is the limit and still be able to drive. any more would over the limit
155. one or two drinks
156. one or two maximum drinks before you dirve or none
157. one pint
158. one pint
159. one pint and that's it; but diverts police activity from more serious crime
160. one pint is the limit if you're driving
161. one unit of wine and two unit of beer
162. only 1 drink acceptable
163. only 1 glass of wine will put you over the limit!
164. only one drink
165. only one pint and then you will be able to drive but no more over 1 pint of beer
166. pint for a girl
168. probably 2 units of drink =2 small glasses of wine or a small beer would deter me from driving
169. Probably about 2 pints ish and not really sure what exact limits are
170. probably one pint of beer or two small whiskies
171. roughly two pints.
172. safe to have one pint,

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173. shouldn't drink more than 2 pints of beer when driving
174. **SHOULDN'T HAVE MORE THAN ONE GLASS OF WINE OR HALF A PINT OF BEER BEFORE DRIVING**
175. small glass of wine -woman or pint - man. I don't drink and drive
176. that you shouldn't legally have more than 2 units and drive
177. the limit at which we can drink and still be able to drive, ie 2 pints
178. the limit which driver not go over - one small bottle of beer
179. the limit would be one & a half pints of bitter, I wouldn't drive with anything over that, which I think is 3 units
180. the number of units you drink 2
181. the small amount of alcohol you can consume and still be allowed to drive legally
182. there's a maximum amount you should drink, and it's two units
183. to be safe to other people, to be in control of your actions. have restraint. drink 1 glass or not drink at all to be in the limit
184. two drinks are a max if you are driving
185. two glasses of wine over the meal
186. two pints
187. under 2 units isn't it
188. you are allowed a certain amount but it's a miniscule amount
189. you are not allowed to drink more than 2 units of alcohol and drive
190. you can drink 1 glass of wine
191. you can drink 1 small glass of wine or 1/2 pint beer before driving
192. you can have a maximum of one drink if driving, but if I was driving I wouldn't touch any
193. you can have so many units before you can't drive I think it's about a pint
194. you can't exceed two units but I wouldn't exceed one unit as it is too high a risk
195. you have to drink very little
196. you have up to 2 pints depending on your build. over 2 pints is against the law.
197. you shouldn't drink more than 1 pint of beer and then drive
198. you shouldn't drive a vehicle after more than one or two units of alcohol depending on your physiology
199. you're only allowed 2 pints
- “Don't Drink and Drive”**
200. "Drinking any alcohol while driving is not acceptable."
201. absolutely no alcohol
202. any amount of drink and to drive is wrong
203. best thing to do is not drink anything at all-mostly I drink one glass of wine -they should change it to no drinking whilst driving
204. do not drink and drive
205. do not drink and drive
206. do not drink and drive
207. do not drink and drive
208. do not drink ANYTHING if you want to drive
209. do not entertain drinking and driving
210. doesn't drink and drive at all
211. don't do it
212. don't do it
213. don't drink
214. don't drink
215. don't drink
216. don't drink and drive
217. don't drink and drive
218. don't drink and drive
219. don't drink and drive
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236. don't drink and drive
237. don't drink and drive
238. don't drink and drive - one glass of wine max
239. don't drink and drive at all

Appendix 3: The Opinions Survey: Responses

240. don't drink and drive or just have one & it depends on what drink
241. don't drink anything and drive! even though you are able to drink a small amount and drive it's not wise
242. don't drink anything if planning to drive
243. don't drink at all
244. don't drink at all
245. don't drink at all when driving
246. don't drink at all when driving
247. don't drink if you are going to drive!
248. don't drink when you're driving
249. don't drive after drinking any alcohol
250. don't ever drink not even one glass
251. don't have a drink if you are drivig
252. dont drink and drive
253. dont drink and drive
254. dont drink when you go out driving
255. dont drive at all if drank something
256. drink nothing alcoholic if you are driving
257. drivers should never drink there should be a total ban nil alcohol.
258. either drink or drive
259. essentially shouldnt do it however there's a certain level of units which is acceptable a glass of wine or half a pint
260. For me personally it would be never to drink and drive
261. having lived abroad where zero tolerance is applied I keep to the formula drinking= NO driving.
262. I do not drink and drive and the limit should be zero
263. I do not drink at all if I am going to drive
264. I don't drink and drive at all.
265. I don't drink if I am driving
266. I don't drink if i'm going to drive - I don't know what the exact limits are.
267. I don't think you should drink at all if you are driving
268. I dont do it full stop
269. I dont drink and drive at all. you cant have morem than 2 pints for a fella. I dont know for a woman
270. I dont drink and drive I only drink at home
271. I dont drink and drive. It says you can have a pint or glass of wine and I really dont think you should be allowed anything.
272. I dont think you should drink anything if driving
273. I hink you shouldn't drink at all if you're driving, because you never know how it might affect you, for instance if you're tired or haven't eaten, and i don't think that's a risk i'd want to take
274. I would never have one drink and drive-people who drink often might not be affected by drink
275. I wouldn't drink at all and then drive - it puts other lives in danger. levels of alcohol intake affect people differently
276. I'm against drinking and driving
277. if I am going to drive I don't drink. not worth the risk
278. if I am going to drive I won't drive. I don't know the particular amount of units which would make it illegal
279. if I drive I don't drink
280. if I drive I dont drink. better to be safe than sorry
281. if I go out for a drink I never take the car
282. if I'm driving I dont drink
283. if we go out one of us will stay alcohol free
284. if you are driving it should be zero
285. if you are going to drive a car you shouldn't drive at all
286. if you are going to drive do not drink including from night before
287. if you drink don't drive
288. if you drink dont drive
289. if you drink you can't drive
290. if you drink you don't drive
291. if you drink you don't drive,
292. if you drink you don't drive. simple
293. If you drink you must not drive
294. if you drink you should not drive
295. if you drink you shouldn't drive full stop
296. if you habe a drink you dont drive at all
297. If you have any alcohol of any quantity that is drink driving in essence if driving never drink, use a designated driver
299. it is not acceptable to drink anything at all when driving
300. it means don't drink and drive, there is no safe limit
301. it means don't drink to me

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302. it means I wouldnt drink at all for simple reason that car is a lethal weapon, and to kill a child even with a small amout of alcohol-well they should be hung.
303. It means if you drive you do not drink alcohol, none at all that's it
304. it means no alcohol at all if I'm going to drive.
305. Just don't drink alchol and drive, full stop!!
306. leave the car at home if you've had a drink
307. limit is you should not drink at all but it is what the body can take
308. means complete abstinence when you are driving
309. means don't drink at all when driving
310. means I wouldn't have a drink if I was driving
311. means that you don't drink at all. I don't believe that you should drink any alcohol if you're going to drive.
312. means you shouldn't drink & drive
313. my limit is zero and I just wouldn't drink and drive the limit should be zero
314. never drink and drive
315. never drink and drive
316. never drink and drive
317. never drink and drive but I might have a small glass of wine that would be within the limit
318. Never drink and drive if I'm driving.
319. nil alcohol/should not be a limit
320. no alcohol
321. no alcohol at all
322. No alcohol at all
323. no alcohol if driving
324. no drink
325. no drink is acceptable.
326. no drink whatsoever
327. no drink while your driving
328. no drinking alcohol twelve hours before driving
329. no drinking and drive
330. no drinking at all when driving
331. no drinking at all when driving
332. no drinking at all when driving
333. no drinking at all with driving. I dont know where they are with the present limits e.g. no. of units supposedly allowed.
334. no drinking at all. 2 pints limit years ago, but there's never been a limit
335. none
336. none for the road
337. Not diving at all if you have had a sip of alcohol
338. Not drink and drive at all
339. not drink at all
340. not to drink
341. not to drink at all or very little
342. nothing
343. nothing
344. people should not drink and drive
345. people who drink should not drive
346. personally I don't drink and drive people don't know what a unit is - it's not marketed very well
347. safety and just don't drink and drive
348. serious shoudn't drink and drive
349. shoudn't drink and drive
350. should be no alcohol
351. should be zero
352. should be zero
353. should not drink and drive
354. should not drink and drive
355. should not drink at all & drive
356. should not drink at all when driving
357. should not drive after drinking
358. shouldn't be any drinking at all when driving
359. shouldn't drink & drive
360. shouldn't drink and drive at all- shouldn't overdrink and drive - but shouldn't do it at all
361. shouldn't drink and drive. Its dangerous
362. shouldn't drink at all if you are driving
363. shouldn't drink whilst driving
364. shouldn't drive at all
365. understanding of the laws, but as my attitude is that you should not drink and drive anyway it doesn't matter what the limit is because I wouldn't drink and drive. if pressed I would say no more than 2 units before driving
366. very important-not to drink and drive as it casues havoc on the roads-teenagers especially using roads like a race track-should be stamped down on
367. well I agree with it - I never drink and drive - would not entertain it
368. well I don't drink drive

369. well I just will not drive if I have had a drink - just wont have one drink
370. well I never have a drink when I drive
371. You can't drink & drive.
372. you don't drink and drive
373. You just don't drink and drive, you just don't do it
374. You must not drink & drive.
375. you shouldn't drink and drive at all, but if you do the limit is 2 pints
376. you shouldn't drink at all - you don't know the effect of alcohol on individuals
377. zero
378. zero alcohol before driving,
379. ZERO ALCOHOL IF I'M GOING TO DRIVE
380. zero limit
- Unquantified Amounts**
381. allowed number of units
382. amount allowed to drink to be able to drive
383. amount of alcohol you can drink without causing any serious disability on your driving
384. amount of units but more complicated depending on the person. Depends on alcohol levels in blood
385. amount of units that can be consumed before driving
386. an amount by which you could safely drink and safely drive
387. Don't drive after drinking a certain amount of units
388. how many units a person can take into their body before they are incapable of driving
389. how much alcohol is consumed that is legal and still be able to drive
390. how much alcohol we safely consume
391. how much alcohol you can consume before you are deemed unsafe to drive a car
392. how much u r allowed to drink & drive
393. how much you are allowed before you can not drive safely
394. how much you can drink and still drive legally
395. how much you can drink and still drive without putting yourself and others at risk
396. How much you have drunk and the amount you can drink within the limit
397. I'm very careful about drinking and driving - so many units
398. is amount of units you can have before you cant go on the road
399. it is a formal limit of alcohol you can drink before exceeding limit to drive
400. it is the amount of alcohol I drunk
401. it means however unit limit you are allowed before you can drive
402. it's so many units
403. it's the amount of units of alcohol that you can drink to enable you to drive safely
404. it's the amount of units you can have in milliletres; you have to limit them
405. It's the legal level of alcohol that you can consume
406. it's the number of units that men and women are permitted to drink and still be capable of driving
407. its the limit or boundary that a person should not cross upon consumption of alcohol
408. just the limit you can drink and shouldn't exceed when you are driving
409. keep consumption of alcohol below legal limit
410. limit set by the government which is a set number of units which they think are safe
411. limit the amount of alcohol that you are allowed before exceeding the limit to drive
412. limit to what you can drink and then drive properly
413. limit to what you can drink before it is illegal to do so
414. maximum amount a person can drink without being over the limit legally
415. maximum amount that you can drink before driving a car
416. means how many units allowed before over drink drive limit but don't drink and drive myself

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| <p>417. means the amount of alcohol you can have before you are unable to drive a car</p> <p>418. not to drink more than recommended limit before driving</p> <p>419. not to go over units</p> <p>420. number of units</p> <p>421. quantity of alcohol before it affects</p> <p>422. so many units before driving, I never drink before driving.</p> <p>423. so many units to consume before it's over the limit. I don't know the quantities.</p> <p>424. the acceptable level of drink one can have and still drive legally</p> <p>425. the amount of alcohol you able to drink before driving</p> <p>426. the amount of alcohol above which your abilities to drive would be significantly impaired depends of various factors weight, having eaten. how much you are drinking</p> <p>427. the amount of alcohol consumed without being over the top</p> <p>428. the amount of alcohol units consumed before being unsafe to drive</p> <p>429. the amount of alcohol you are allowed to consume before driving -</p> <p>430. the amount of alcohol you can drink and drive at</p> <p>431. the amount of alcohol you can drink and still be below legal limit</p> <p>432. the amount of alcohol you can drink and still drive safely</p> <p>433. the amount of alcohol you can drink before being over the limit</p> <p>434. the amount of alcohol you can drink to safely drive a car</p> <p>435. the amount of alcohol you can legally consume to stay within the law</p> <p>436. the amount of alcohol you can take before you are unable to drive</p> <p>437. the amount of alcohol you drink</p> <p>438. the amount of units of alcohol that you shouldn't be over to drive</p> <p>439. the amount that it is safe to drink and still drive</p> <p>440. the amount the amount of alcohol that you should not consume and then continue to drive</p> <p>441. the amounts of units you drink prior to driving</p> | <p>442. THE CERTAIN AMOUNT OF ALCOHOL YOU CAN DRINK AND STILL DRIVE -</p> <p>443. the legal limit of how much you can drink before driving</p> <p>444. the limit of alcohol you take then cannot drive</p> <p>445. the limit on the alcohol you can consume</p> <p>446. the maximum limit I could take before exceeding the limit to drive</p> <p>447. the number of units you are allowed to consume</p> <p>448. the point at which you have too much alcohol and are impaired to drive</p> <p>449. the units you are allowed to consume. I know it's changed hasn't it. I wouldn't know how many units it was. I think you're only allowed one pint or 1 small glass of wine.</p> <p>450. there is a limit of a given amount which if you exceed it is illegal I don't drink at all when driving and whoever exceeds it should be severely punished</p> <p>451. there is a limit, of how much you can drink and drive</p> <p>452. there's a limit to what you're able to drink if you're then going to drive and that limit's defined by units</p> <p>453. they should not go over the limited units</p> <p>454. units of alcohol allowed before driving</p> <p>455. units of alcohol you drink before you are over the limit</p> <p>456. what you are able to drink then not drive. but shouldn't drink and drive at all</p> <p>457. where you can drink so many units</p> <p>458. you can only consume a certain amount of units</p> <p>459. you get a limit that you're not supposed to drink more than and drive</p> <p>Concentration of Alcohol</p> <p>460. 35 in breath, 80 in blood, possibly 107 in urine</p> <p>461. 35mg of alcohol per 100ml of blood</p> <p>462. 35mgs of alcohol in 100ml of breath</p> <p>463. 35mils of alcohol in 100mills of blood</p> |
|--|---|

464. 50 mg of alcohol per, about a glass of wine or beer
465. 80 milligrams of alcohol (about 2 drinks)
466. 80 milligrammes of alcohol per something of blood
467. 80 milligrams of alcohol to 50 millilitres of blood
468. 80ml per 100ml blood
469. a certain volum of alcohol in your system that is unacceptable
470. a measure of alcohol in your blood
471. about 35 per cent I think I don't take the car out when I go for a drink
472. amount of alcohol in blood 80 mlg per litre of blood
473. amount of alcohol as a percentage of blood
474. amount of alcohol in blood above which you are considered to be a drunk driver
475. amount of alcohol permitted in yr blood or breath
476. amount of alcohol you can have in your body
477. cannot exceed 35ml in breath
478. certain amount of alcohol in blood
479. driving whilst having 70 or 80 on breathaliser scale
480. Driving with alcohol in your system
481. having only a small amount of alcohol in the blood to be able to drive
482. hch alcohol, you have in your blood per millilitre it doesn't matter how much you think you have had to drink
483. I know there is technical aspect I am not sure what it is..parts per ml etc we know not to have more than one.
484. if you are breathalised it's the number of units in your blood - and there is a cut off point - DK what it is
485. illegal blood alcohol limit over which you must not drink
486. in their system and still be allowed to leglly allowed to drive - about 2 units - though not sure what that means
487. is it 80 milligrams? oh no now it's on breath isn't it? don't know the number but 2 pints can put you over & need to account for last night's
488. it is the legal maximum blood alcohol level that is acceptable to drive
489. IT MEANS 80 MILLITERS OF ALCHOL, 2 SMALL DRINK, 2 GLASSES OF WINE
490. it means a limit of micrograms in a measured state in alcohol
491. it means the amount of alcohol in your blood when you're driving
492. it means the milligrams of alcohol per litre of blood
493. it means you can't have more than 35mg of alcohol per 100mg of blood
494. it's 35 milligrammes in your breath
495. it's 35... 2 units of alcohol
496. legal definition of a certain concentration of alcohol in the blood
497. level of alcohol in blood
498. level of alcohol in blood stream
499. level of alcohol in the blood which equates to approx 2 units
500. limit beyond where the alcohol in blood impairs safe driving
501. limit of alcohol in system at the time your stopped
502. Maximum permitted allowance of alcohol in the blood before it becomes punishable.
503. milligrams of alcohol in your blood. Content of alcohol in your blood stream
504. not allowed more than 80 milligrams of alcohol in your blood
505. not going over a specific amount of alcohol in the blood and not being capable of driving safety
506. not having a certain amount of alcohol in your blood before being charged with drink and driving
507. not more 80 mg in blood
508. Number of units of alcohol in bloodstream
509. set at the level of alcohol in your blood
510. statutory breath test limit
511. the amount of alcohol allowed in the blood
512. the amount of alcohol in blood
513. the amount of alcohol in your blood above which it's illegal to drive

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514. the amount of alcohol that can be present in your blood before you are over the limit
515. the amount of alcohol you can have in your blood stream whilst being in charge of a car
516. the drink drive limit means to me the set amount of alcohol you are allowed to have in your bloodstream if you drive. I dont drink and drive
517. the numer of milligrams per volume of blood depends on size and whether they have eaten, okay for one pint, but probably 2 pints may be ok - probably okay to drink
518. the units of alcohol in your blood system
519. trines the level of alch. in the blood. I dont think they have yet found a satisf. way that the ord. man in the street can understand how that figure relates to his own consumption.
520. You can only have a certain percentage of alcohol per blood
- Consequences**
521. being incapable of controlling a vehicle properly through alcohol
522. Dangerous
523. drinking too much alcohol to concentrate and be aware of own driving ability
524. if you drink too much you may loose liberty, job
525. if you get caught over the limit you lose your licence and perhaps job
526. It curbs your social activities
527. it is to still be capable normaly driving a car without loosing control
528. loss of license
529. people very aware of consequences of drink driving but still do it. I'm very against drink driving.
530. people who have died or have killed innocent because they have drank and exceeded legal limit
531. you can kill somebody plus you lose your license plus you could get jailed
- Variables**
532. does not take into account all the variabilities of the effect of alcohol on an individual basis and it does not allow any judgement on an individual basis
533. it means different things to different people but you can take a small amount and still drive
534. it varies and I'd rather not risk it
535. it's very vague, dont drink and drive
536. its very compicated I dont know its the units we were having this conversation awhile ago my husband can drink more he's a bigger build I don't drink at all if I'm drivin g
537. no limit - amount varies from person to person
538. you have to know how much you can drink to make you fit to drive
- “Don’t Know”**
539. do not know but never drink and drive
540. don't know
541. don't know drink drive limits but do not drink and drive.
542. don't know limit
543. don't know the limit
544. I really don't know - I never drink and drive
545. I wouldn't have a clue. I've never ever drank and drive.
546. I'm never sure so I don't do both
547. it just means you're over the limit to drive I don't know what the limits are
548. no idea
549. nobody knows what the drink drive ruling is
550. not allowed to drink & drive. not sure how much you can have to drink before over drink
551. not sure of limits
- Refusals to Answer**
552. 999999 Refusal
553. 999999 Refusal
554. 999999 Refusal
555. 999999 Refusal
556. 999999 Refusal
557. 999999 Refusal
- Non-classifiable**
558. acceptable to have a drink-drive limit
559. amount of alcohol per unit
560. appropriate to fitness for driving
561. don't drive if you are over the limit

- 562. ensuring you are below the legal limit when driving or in charge of a vehicle
- 563. good idea to stick to a limit
- 564. how comfortable you feel about getting into a car after having a drink
- 565. I dont think that if you are driving you couldn't drink.
- 566. I respect the limit and practice it
- 567. is level at which you are able or not to drive
- 568. it's a measure of alcohol which is considered safe to drive
- 569. It's out of proportion, the units are wrong.
- 570. it's the amount of alcohol which the law sets at which u become unfit to drive safely
- 571. legal limit of alcohol before you break the law
- 572. level of alcohol acceptable for safe driving
- 573. level of resposible driving
- 574. limit allowed to drink & drive. Don't know what it is.
- 575. limit at which you can safely drive
- 576. limit is too high should be brought down, it's a level in law that is too high
- 577. MAXIMUM DRINK AND DRIVE ACCORDING TO LEGAL UNITS
- 578. means not to drive over the drink limits set down -AE
- 579. no excess alcohol if driving
- 580. NOT BEING RESPONSIBLE IF YOU DRINK AND DRIVE
- 581. not driving whilst over the limit.
- 582. not to exceed more than the limit for driving
- 583. nothing because I don't drive anymore
- 584. over the limit of driving
- 585. The amount of alcohol I can legally drive
- 586. the amount of drink under the law
- 587. the limit that you can't drive over
- 588. there is a set limit for beyond which you cannot drive
- 589. you are not allowed to drive over the limit

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