BAR COUNCIL SEMINAR

DRIVING UNDER THE INFLUENCE

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TOPICS:

A. A PRACTICAL GUIDE TO THE DEFENCE OF DRUNKEN DRIVING CASES

B. RECENT UPDATES IN DRUNKEN DRIVING LAW

C. REMOVAL OF A DISQUALIFICATION FROM DRIVING -A PRACTICAL GUIDE

PART A:

DRUNKEN DRIVING – A PRACTICAL GUIDE

TAKING INSTRUCTIONS:

Blood Urine offence: take a specimen?

If your client is being prosecuted for a blood or urine offence it is always worth establishing if your client took a specimen, and is in possession of a specimen. You often discover when you see the specimen, prior to trial, that the specimen has not been dated with the date of its provision on the outer container, which is a statutory requirement. (See the DPP v Tate Croom Carroll, and the discussion of same in Mr De Blacam’s book on drink driving. )

Mistakes in terms of following the correct procedure in processing the specimens by the Doctor and the Gardai are now much more common than they were in the past. This is because the majority of cases are now proceeded with under the intoxiliser procedure and the doctors now employed for the purpose of taking blood or urine specimens are ordinary general practitioners on call rather than specialist Garda Doctors.

Similarly, Gardai are now giving evidence in these cases much less frequently than they were in the past and are much more likely to forget when they are giving evidence their obligation to give evidence of compliance with the proper procedures set out in section 18 of the Road Traffic Act.
Always ask your client whether he recalls receiving a notice of rights, a pink slip in the case of blood or urine specimens or a section 17 statement in the Garda station in the course of his detention.

Finally, you must have a clear picture of your client’s previous convictions before offering any advice as to whether your client should contest the charge. Make sure to check with the Garda prior to trial what the real position is as regards convictions. There is no more horrifying experience than to discover following conviction that your client has some undisclosed conviction which may have the effect of doubling the disqualification and possibly resulting the imposition of a criminal sentence together with a monumental fine.

As a general rule, and on the assumption that your client has no previous convictions for similar offences, there is no particular purpose or advantage to be gained for your client in pleading guilty to the charge. The reason for this subject to one statutory exception which is yet to be brought into force is that the periods of disqualification, which is what will most likely concern your client most, are identical whether you are convicted following a trial or plead guilty. Always be in a position to advise your client in a consultation what the appropriate minimum period of disqualification is and in the event of previous convictions, whether the current conviction is likely to result in a minimum doubling of the period of disqualification.

The frequency with which you discover that your client has previously been incorrectly advised as to the appropriate period of disqualification by your instructing solicitor is disturbing and you should not take it on trust that your client has necessarily received accurate and sensible advice before meeting you.

OTHER PRE – TRIAL STEPS:

Make sure that at a preliminary stage in the district court, that a witnesses statement order, otherwise known as a Gary Doyle order, together with a copy custody record has been made and has been complied with. While it is possible to defend section 49 cases without the benefit of Garda statements, it makes you task much more difficult and you may end up losing out on opportunities to exploit inaccuracies, anomalies or otherwise interesting information contained in the statements. You have to remember that many solicitors that generally practice in civil law but who may occasionally have a criminal client may have very little knowledge of the functioning and processes of the criminal District Courts, and you should be in a position to advise your solicitor as to the Court procedure from beginning to end and the likely dates for trial.

You should also be in a position to advise your instructing solicitor as to the processes and requirements of appealing District Court order to the Circuit Court and, in particular, you should be in a position to supervise and control the process so as to ensure that the appropriate papers are lodged with the Court within 14 days and that the disqualification does not come into enforce pending the hearing of the appeal.

Late appeals and misunderstandings as regards appeals is the single biggest source of controversy between clients and their legal representatives and I have now adopted the practice of writing to solicitors immediately after cases setting out the precise requirements of the appeal process in an individual case so there can be no misunderstanding as to where the blame should lie if the appeal is not lodged in time.
RUNNING THE CASE:

It is important to explain to clients that many legal issues or opportunities for the Defence may only arise in the course of evidence at trial and that you may only have sight of a Garda’s notebook for the first time whilst the Garda is giving evidence.

Always ask the judge if the Garda seeks permission to refresh his memory from his contemporaneous notes to examine the notebook.

Whilst you are generally confined to looking at the notes applicable to the case you may become suspicious from the position of the notes in the notebook or its relative youth, that the notes were not made contemporaneously.

I am certainly aware of at least one case where an allegedly contemporaneous note was immediately proceeded in the Garda’s notebook by notes relating to an incident which took place some six months later and which resulted in an immediate dismissal of the case on the grounds that the judge could not accept the Garda’s sworn evidence that his note was a contemporaneous one.

Secondly, look for alterations in the notebook and whether at any stage difference biros have been used to make notes without going into any great detail you can often discover anomalies in notebooks which raise serious questions about a Garda witnesses credibility on which can turn what is a superficially poor legal point into a compelling one.

What must be remembered about drunk driving prosecutions is that Garda evidence has a certain similarity in most cases. Gardai generally like to give evidence in a rapid and stultifying monotone which can lull judges into a sleepy complacency. This is a tactic which must be disrupted and if the Garda’s evidence is being given at a too rapid pace you should object to the pace, demand that the Garda slow down, and further demand that the Garda should not simply read his evidence from his notebook, he must simply use it to refresh his memory if necessary.

This often has the additional beneficial effect of unsettling the Garda by getting him to depart from his normal script and pace.

You should also be alert as to what the Garda has taken into the witness box with him. Has he his open statement? Or has he written his essential proofs on his file covering? (which is a much more regular practice than one might imagine.) It is always beneficial to the accused to establish in the course of evidence that the Garda has been relying on ‘cognotes’ or other documents on which he isn’t titled to rely to refresh his memory.

DIRECT EXAMINATION BY THE PROSECUTOR OF GARDA WITNESSES

In Dublin, prosecutions are usually conducted by the District Court prosecution panel of solicitors. However, outside of Dublin, prosecutions are generally lead by inspectors or superintendents who vary, very considerably, in their legal knowledge and standard of advocacy. It is worth while putting together a template or checklist of essential points which must be covered by the prosecution on direct examination.

I would suggest the following
1. Evidence of time, date and public place.

2. If the accused has been stopped at a mandatory alcohol breathtesting checkpoint, established under section 4 of the 2006 Act, has the authority, or copy thereof, been handed in as evidence?

   Have a very close look at the authorisation. Is it dated? Is the location of the checkpoint accurately specified? Are the times correct? Has it been signed by the appropriate person? You often discover a defect in the authorisation which renders the checkpoint unlawful thus securing an acquittal. In Courts down the country there is sometimes an assumption on behalf of the prosecution that it isn't necessary to hand in the authorisation. Wait until the prosecution case has been closed if no authorisation has been handed in and apply for a direction at the close of the prosecution case. Do not look for the authorisation, if none has been produced, in the course of the prosecution case.

3. If the accused was breathalysed at the side of the road, was any statutory power invoked by the Garda? And if so, was it the correct power and was the necessary underlying opinion justifying its invocation given in evidence?

4. What evidence, if any, has been given by the Garda of the physical condition of the accused which may justify his arrest.

5. Is there any variation between the physical description of the accused between the statement, the Garda’s notebook, or his direct evidence.

6. Has the Garda given any evidence at all of the formation of an opinion prior to the arrest.

7. Has he informed the accused of that opinion and has he told him in ordinary language that he is being arrested and the offence for which he is being arrested?

8. In the case of a section 50 drunk in charge, you will often discover that the Garda gives no evidence of forming an opinion that the accused intended to drive the vehicle. In my view, it is necessary for the Garda to give this evidence, notwithstanding the existing the existence of a presumption to this effect in the RTA’s.

ARRIVAL AT THE GARDA STATION:

The custody record is potentially a very rich source of useful information to a defence counsel. Any variation or discrepancy between the times recorded in the custody record and the oral evidence of the Gardai may be exploited to raise question marks over the lawfulness of the accused’s detention and over the credibility of the prosecution Gardai. Generally speaking, it is not the practice of the prosecution to call the person responsible for completing the custody record as a
witness for the prosecution, and evidence of compliance with the custody regulation is generally given by the arresting Garda, as an exception of the hearsay rule, as it is done in the presence of the accused. However, the arresting Garda may not have scrutinised the custody record, and may not be in a position to explain discrepancies or peculiarities.

The practice has grown up since the decisions in both DPP v Finn & DPP V McNiece, to detain an arrested person subject to a breath test to detain a person for the purposes of observation for a period of 20 minutes prior to the test. Invariably, either the arresting Garda or the intoxilising Garda will give evidence of this period of observation, and that the accused has consumed nothing by mouth.

Timings in the custody record and in the statements are sometimes of great assistance in attacking the credibility of Garda evidence that the accused was kept under observation. For instance it may appear in the custody record that the accused spoke to a solicitor or went to the toilet in the course of the observation, while the evidence of the Garda conducting the observation may not recall any such event during the 20 minutes while giving evidence.

It also maybe the case that the notes in the Garda’s notebook is set out in such a way that a large proportion of the observation period must have been spent compiling notes rather than keeping the accused under observation.

The purpose of these inquiries is to find evidence or to establish circumstances which may give the trial judge some serious concern that in fact the accused was being kept under constant observation and thus undermine the lawfulness of the accused’s detention.

Remember that simply establishing a period of unexplained delay in the conduct of the procedures in the Garda station isn’t sufficient to render an accused person’s detention unlawful. Following the decision of Mr Justice Quirke in DPP v Tim O’Conner 2005 IEHC 422, the accused must establish, first, that the period of the delay is sufficient to constitute delay which must be explained and that the accused requires in the course of the trial the prosecution to adduce evidence justifying or explaining the delay.

It is also worth remembering that the failure by the prosecution to give evidence that the accused consumed nil by mouth after the period of observation had concluded but before he provided the breath specimens is not fatal to the prosecution case. The DPP v Brendan Walsh [IEHC –16/03/05] is authority for that proposition.

THE PROCEDURE IN THE INTOXILISER ROOM:

Before undertaking any intoxiliser defences, you should obtain from the issue desk, a copy of the Garda / medical bureau of road safety Operators manual for the lion intoxiliser machine. You should familiarise yourself in a basic way with how the machine operates, and in particular the general operating procedures for the device. You will note that the machine should be operated within acceptable ranges of humidity and temperature, and also note that the Gardai are instructed to record those values on a contemporaneous basis in their notebooks, prior to the administration of the test.

The mere fact that the machine may have been operated outside of the temperature / humidity range may not be enough to defeat the statutory presumption of accuracy of the section 17 statement. You have to set up the point in advance by getting the
Garda to accept that the purpose of the instruction is to ensure that the machine produces an accurate reading and that he would not have carried out a test if he had realised that the machine was to be operated outside these parameters. DPP v John Leverier {relatively recent unreported judgement of the High Court}

You will note from the updated operators manual that the instructions to the Gardai as to how many operating cycles of the machine are to be given to the accused in order to provide two specimens of breath has changed from February 2006. The new instruction is that the accused is to be afforded just a single cycle in which he is obliged to provide just two specimens of breath.

A cycle for your purposes is 2 periods of three minutes. During the first period, the accused must provide a specimen of breath which is registered and analysed by the machine. If he fails to do so, that constitutes a failure to fulfil his legal requirement and the procedure comes to an end. If he provides the first specimen he is then given an additional time period of three minutes in which he may provide the second specimen. If he fails to do so the procedure will also come to an end and his failures will be treated as a failure or refusal offence under section 13 unless he can establish a special or substantial reason which justifies and explains his failure.

You must analyse what actually happened in the intoxiliser room with enormous care if your client has been charged with a failure or refusal offence under section 13. For instance, you may discover evidence that the Garda has made the requirement at a particular time and discover that time is half way through an operation cycle of the machine, thereby establishing that the accused was not afforded the proper contemplated opportunity to provide a sample.

If your client has provided two specimens of breath the procedure for what is to happen next is set out in section 17 of the 1994 Road Traffic Act.

The order of signature of the statements is mandatory and if mistaken evidence is given that the accused person signed before the Garda, the statements will be inadmissible in evidence, See the decision of Murphy J in DPP v Thomas Keogh [[IEHC 09/02/04]

One final piece of advice in intoxiliser cases and in particular in failure or refusal cases, always check the charge sheet or summons. Quite frequently the section 13 charge sheet will contain mistakes such as confusing the arresting Garda with the Garda making the requirement, or bizarrely, due to some form of computer glitch, the location of the offence is expressed to be the location of where the accused was arrested as opposed to the location of the Garda station where he refused to give the sample.

**BLOOD OR URINE SPECIMENS:**

Although less numerous than previously, blood or urine specimen cases provide much more scope for making legal points. First, there is often an issue of delay from the time the Doctor is contact to the time of his arrival at the Garda Station. A passage from the Judgement of Hardiman J in the DPP v Finn [2002] ILM 32 which is set out in Mr De Blacam’s book at page 76, can be relied on. It makes it clear that the onus in explaining a delay in the Doctor’s arrival rests on the prosecution. However, this decision has been somewhat qualified in practice by a decision of Charleton J, DPP V David O’Neill 2007 IEHC 83 [15/03/07] which suggests that a delay of 1 hour from first contact to arrival is not a period which requires any
explanation or justification. Clearly this is now a point confined to delays in excess of an hour.

THE EXERCISE OF THE OPTION:

It is always worth examining the circumstances surrounding the exercise of the option by the accused and the actual provision of the specimen.

For instance if an accused person exercises the option to provide a urine specimen but fails to do so, it may well be that the opportunity in terms of time to provide the specimen was insufficient with the result that the contemplated statutory option was not, as a matter of fact, afforded to the accused. There was no time limit set for the provision of a urine specimen. Two cases on the area, DPP V O’Conner [2000] I ILRM 60, and DPP v Peadar Malone [IESC – 28th June 2006] suggest that while there was no specific time limit for the provision of a urine specimen, some reasonable opportunity has to be afforded to the accused to exercise his option, thus if you are confronted with a case in which the accused was given less than perhaps five minutes to provide his urine specimen, it should be possible to argue on the authority of Malone that the opportunity was so insufficient as to undermine the accused’s right of election.

COMPLIANCE WITH THE SECTION 18 REQUIREMENTS BY THE DOCTOR AND BY THE GARDA:

Frequently in drunk driving cases, a Garda will simply give evidence that the provisions of Section 18 of the Road Traffic Act have been complied with by the Doctor and by himself. You are entitled, and you must, test that assertion by asking the Garda HOW the doctor complied with his obligations, and generally, and usually more fruitfully how the Garda complied with his obligations. In particular, the Garda may well give evidence that he offered a choice of specimen to the accused but he may forget to say that he offered a statement in writing, indicating that the accused may take either specimen, to the accused (pink slip).

You must be careful how you set up this point in applying for a direction. You must be seen to have given the Garda every opportunity of giving in evidence everything that he recalls about what he did to comply with Section 18 without making any direct reference to the issue of whether he handed him a slip of paper.

It doesn’t matter that the accused may have suffered no prejudice as a result of the failure as case law, McCarron V Groarke HC Kelly J 4/04/00 as applied in the DPP V Revile O’Caomh J [21/12/00], provides, that a finding of fact that the accused wasn’t offered the slip is fatal to the admissibility of the evidence.

The requirement imposed by section 18 that the Garda forwards the specimen to the Bureau as soon as practicable, is also a fruitful line of inquiry. Generally, any delay of a couple of days in the forwarding of the specimen may be sufficient to obtain an acquittal. Again, you must take some considerable care, in setting up the point. You must ask the Garda if he is aware of any practical reason from his own knowledge as to why the sample wasn’t sent on a particular day. If he cannot recall a reason you can generally convince a District Court judge that the obligation has been breached and that the case should be dismissed.
CONCLUDING REMARKS:

Like any other aspect of the law, the more experienced you get, the better you become. I would always suggest to younger barristers, that before running a drunk driving case, they should trot up to Court 54, where generally 4/5 contested drunk driving cases are listed for hearing on any given day. They will hear and see, the good, the bad and the ugly, not just how to do a case properly, but also what to avoid. The cardinal sin in running a drunk driving case is to be boring and to pursue a point which is clearly getting no where ad infinitum. On the other hand you do on occasion have to be brave and insist on making a worthwhile point in the teeth of judicial opposition, or opposition from the prosecution.

One of the striking things about the conduct of trial in the District court in comparison with other courts is their lack of formality and the occasional abandonment of the normal rules of advocacy. Generally, prosecution solicitors in Dublin take an extremely robust approach to these cases and may on occasion aggressively pursue the guilty verdict, irrespective of the strength of any legal submissions made by the Defence. Younger barristers may find this can be off putting and intimidating, however, you have to accept that the conduct of the case may not be appealing or familiar, and get on with it.

I will leave you with one last piece of advice that I received from my own Master, Mark de Blacam: remember, these people are paying you a lot of money. The very least they expect is a bit of roaring and shouting.
PART B:

RECENT UPDATES IN DRUNKEN DRIVING LAW

INTRODUCTION

Drink driving cases are by far the most litigated area of criminal law in the District Court. Over the past 40 years, a body of caselaw has developed to deal with the often novel and innovative submissions made by lawyers to have their clients acquitted. Inevitably though the Oireachtas and Superior Courts have attempted to close off as many loopholes and technical defences as possible. However, with each new change, new defences frequently arise.

This talk is unashamedly aimed at the defence of such cases with discussion on recent caselaw and legislative changes. The first point of call for all those who receive instructions in a drunk driving case is the preeminent text on the topic, "Drunken Driving and the Law", by Mark de Blacam (3rd Edition). Unfortunately, given developments over the past number of years, a 4th edition is required. Hopefully this talk will assist practitioners with an update, but by no means exhaustive analysis, on the area.

Summary of topics:

- Mandatory Alcohol Checkpoints under Section 4 Road Traffic Act 2006
- Section 1 of The Road Traffic and Transport Act 2006
- Power of arrest and alternative verdicts: Section 49 or 50?
- Rights in custody - Access to a solicitor
- The Section 17 Certificate
- Section 18 of The Road Traffic Act 1994
- Section 19 of The Road Traffic Act 1994
- Upcoming Superior Court decisions of relevance to drunken driving
- Updated periods of disqualification, Road Traffic Act 2006

MANDATORY ALCOHOL CHECKPOINTS UNDER SECTION 4 ROAD TRAFFIC ACT 2006

This was the first occasion where the Oireachtas enacted a statutory provision for Mandatory Alcohol Testing. The power of a Garda to stop an accused or to conduct checkpoints had previously been more limited in scope. There was, and remains, a statutory procedure for the administration of road side breath tests under Section 12 of the 1994 RTA as amended by Section 10 of the 2002 RTA in circumstances where:

1. The vehicle is involved in an accident, or
2. The Garda is of the opinion a person has consumed intoxicating liquor, or
3. The Garda is of the opinion a person is committing or has committed an offence under the Road Traffic Acts, 1961 to 2002 (other than sections 49, 50 and 51 of the Principal Act and sections 12 to 15).

Section 4 however was a departure from this in that none of the above preconditions need be present prior to a requirement to provide a roadside breath test.

The section authorises the establishment of a checkpoint or checkpoints permitting Gardai to require of a person a breath sample or for a person to accompany them to a place at or in the vicinity of the checkpoint to provide a breath sample. The establishment of a checkpoint requires the authorisation of a Garda not below the
rank of Inspector.

In that regard, the authorisation itself has to be regarded as a necessary proof in a case involving a Section 4 checkpoint (See Mary Weir v DPP, infra). Section 4(9) however does permit a copy of the authorisation to be admitted in evidence and appears to suggest that the signature of the person authorising the checkpoint, without proof of their authority, is still proof until the contrary is shown. (Even without the original in Court an application to admit a copy would be permissible under Section 30 of the Criminal Evidence Act 1992 in any event)

Since the introduction of this provision, a number of issues have arisen. These range from the failure of the prosecution to submit the authorisation into evidence to the authorisation itself containing incorrect times, locations or dates.

Mary Weir v DPP

In this case, the accused was stopped at a checkpoint established pursuant to Section 4 of the RTA 2006. A requirement was made of her to provide a roadside breath test. The result of the test was a fail and the Garda went on to form the opinion necessary for an arrest under Section 49(8). She was conveyed back to Trim Garda Station and provided a sample of breath exceeding 35mcgs. At no stage during the prosecution case was the authorisation for the checkpoint admitted into evidence.

At the close of the prosecution case the accused did not go into evidence but sought a direction of no case to answer. The defence argued that a written authorisation to set up the checkpoint was a required proof in a case involving a mandatory roadside breath test. It was submitted that without the authorisation, the arrest was unlawful and evidence obtained as a result of the arrest was inadmissible. Furthermore the accused had been detained unlawfully in the absence of the authorisation. The District Judge rejected the submissions and convicted. The accused appealed by way of case stated.

O'Neill J. in the High Court held the District Judge erred in law. He held that the Section 4 authorisation was an essential prosecution proof where the Garda purports to stop and require a roadside breath test of an accused person under the section. He noted:

"I am satisfied that in the absence of exceptional circumstances, which do not exist in this case, the written authorisation to set up the checkpoint under s.4 of the Act of 2006 was a necessary proof. As discussed above, the arrest and detention of the appellant pursuant to s. 49(8) of the Principal Act and hence the admissibility of the results of the intoxilyser breath test are premised on the existence of a written authorisation establishing a checkpoint. If evidence is obtained in breach of the constitutional right to liberty, the exclusionary rule applies, meaning that the evidence obtained thereafter is excluded, unless as explained by O'Hanlon J. in DPP v. Spratt [1995] 21.L.R.M. 117 at p.123:

"If a breach of the constitutional rights of the accused person took place, as alleged, in what manner was he prejudiced thereby? Was any information obtained which might not have been otherwise obtained?"

1 2008 [IEHC] 268
This begs the question whether the primary evidence establishing the guilt of the appellant, namely the result of the intoxilyser breath test, was obtained as a direct result of a breach of the applicant’s constitutional right to liberty. If there was no written authorisation then, as discussed above, the arrest under s. 49(8) of the Principal Act was, in my opinion, unlawful. That unlawful arrest led directly to the appellant being detained, taken to the Garda station and being compelled under the force of law to submit to the intoxilyser breath test. Hence, it is absolutely clear that the performance of that test and its result were the direct result of the unlawful arrest of the appellant and, in my view, the exclusionary rule must apply to the evidence thereby obtained.”

Crucially, the High Court also rejected the argument by the DPP that there was a duty on the defence to challenge the Garda’s evidence and that in the absence of same the District Judge was entitled to accept that the were was a valid authorisation in place. O’Neill J. held:

“I cannot agree with that submission. If it were correct, in effect, the burden of proving an essential prosecution proof would have been shifted to the appellant, which of course cannot be right. In any criminal prosecution, an accused person is entitled at the close of the prosecution case to seek a direction of no case to answer on the basis that the prosecution has failed to prove the case against him. There is no onus on an accused person to intervene by way of cross examination to fill gaps in the prosecution case”.

SECTION 1 OF THE ROAD TRAFFIC AND TRANSPORT ACT 2006:

This section has amended a number of sections in the 1994 RTA.

A. The new Section 13(1) expands on the provisions under which a person arrested can be required to provide a sample. It is essential that a person is arrested under one of the following provisions before a requirement is made of them:

1. Section 49(8) of the Principal Act
2. Section 50(10) of the Principal Act
3. Section 53(6) of the Principal Act
4. Section 106(3A) of the Principal Act
5. Section 112(6) of the Principal Act
6. Section 12(4) of the Road Traffic Act 1994
7. Section 4(7) of the Road Traffic Act 2006

NOTE: When the 2006 RTA came into being in July 2006, if a person failed/refused to give a roadside sample under Section 4(7) RTA 2006, they could be arrested. However the Oireachtas failed to amend Section 13 to include Section 4(7) RTA 2006 as being one of the arrest provisions whereby a Garda could make a requirement of an accused to provide a sample pursuant to Section 13. Hence, the amendment to include Section 4(7).

See also Ely v O’Shea & DPP. A Garda cannot make a requirement of an accused under Section 13 where they have been arrested under Section 4 of

2 2006/1194 JR

B. This section also amends all previous references in the 1994 Act to the duties of the doctor and now also permits a nurse to perform those duties. Gardai can now seek the attendance of doctor or nurse to take a sample pursuant to Section 13(1)(b) and comply with the relevant provisions under Ss. 14, 15, 16, 18, 21, 23, and 24.

This addition of a nurse is important in the context of the prosecution’s duty to justify any detention of an accused. Charelton J. in *O’Neill v McCartan & DPP* refused to grant certiorari of the decision of the Circuit Judge in circumstances where there had been a delay of approximately 44 minutes in the arrival of the doctor. He applied a “real world” test and described the arrival of a doctor in that period as "as being a good service; if not a very good one”. He rejected the argument that the accused was in unlawful custody when the sample was taken.

This decision though is in the context of the old provisions where only a doctor could be required to attend. There remains a duty on the prosecution to prove that the delay that occurred was necessary and justified. Many Gardai are not familiar with the new provisions. It is therefore open to argue that if an accused remains in custody for a substantial period because of a delay involving the arrival of a doctor and no efforts are made to avail of the expanded provisions regarding a nurse, that depending on the facts of the case, the accused may lapse into unlawful custody.

C. The deletion within Section 13(1) of "and a member of the Garda Síochána is of opinion that the person has consumed an intoxicant".

The Garda making a requirement under Section 13, no longer needs to have formed an opinion that an arrested person has consumed an intoxicant. The only pre-condition is that they have been arrested under one of the 7 provisions above.

**POWER OF ARREST AND ALTERNATIVE VERDICTS: SECTION 49 OR 50?**

- **Section 49(6)(b) of the 1961 Act, as substituted by Section 10 of the 1994 Act**

  *A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 50 of this Act.*

- **Section 50(6)(b) of the 1961 Act, as substituted by Section 11 of the 1994 Act**

  *A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 49 of this Act.*
As can be seen from the above there is specific statutory provision whereby a court may, having heard evidence, convict a person under Section 50, although they were charged with Section 49 and vice versa. While there is a possible interchangeability of convictions, there does not appear to be an interchangeability of the powers of arrest under the respective provisions. The following case illustrates how this may arise.

**DPP v Haslam**

In this case the Applicant sought certiorari of the decision of Judge John Buckley of the Circuit Court, convicting the Applicant of Section 49. The Applicant had been arrested and charged with an offence under Section 50. The evidence was that the arresting Garda had been on beat patrol and passed by a certain public road. A few minutes later he doubled back on his beat to discover a car, which had been involved in an accident. The accident was not present on the same road a few moments earlier when the Garda had passed by. The Applicants car was entangled with a signpost. There was a considerable amount of damage to the car so much so that it could not have been driven. There was also evidence that the Applicant had been drinking and the Garda had affected the arrest under Section 50(10) on suspicion of having committed an offence under Section 50. He had formed the opinion that he was under influence of an intoxicant to render him incapable of having proper control of the said MPV. At no stage did the Garda form the opinion that the Applicant was in charge of the vehicle in a public place while incapable of driving with the intention of doing so, but not driving or attempting to drive. The Garda in this case accepted that the accused did not in his view appear to be intending to drive. In the Circuit Court, the Judge substituted the Section 50 charge to one of Section 49 and convicted. The Applicant sought certiorari of the decision of the Judge.

In the High Court it was held that the Garda in this case had to not only form the opinion the accused was in charge of an MPV in a public place with an intent to drive (but not driving or attempting to drive same) whilst under the influence of an intoxicant but that there was a reasonable factual basis for the formation of such an opinion. On the facts of this case, it was held that there was no such reasonable factual basis in the circumstances that would have permitted the Garda to execute a lawful arrest under section 50.

In the circumstances in was held the arrest was a mistake that was neither reasonable nor excusable. The Haslam case is a refinement of an earlier decision in **DPP v Moloney** (Unreported, Finnegan J. delivered 20th December 2001 – WJSC 2001 volume 8, p2055). The issue that arose in that case was whether a person arrested under section 49 can be charged with an offence under section 50 and vice versa. Finnegan J. did state a person arrested under section 49 could be charged with an offence under section 50 and vice versa. However, in submissions during the course of Haslam it was accepted that if the evidence makes the decision to use one power of arrest so unreasonable or irrational it effectively amounts to an error of jurisdiction. The Road Traffic act does not imply such interchangeability of powers of arrest in such clear factual circumstances.

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4 High Court - 788 / 2001 J.R. O’Caoimh J. 27th day of January 2003, Counsels Note of Ex Tempore Judgment
RIGHTS IN CUSTODY - ACCESS TO A SOLICITOR:

*DPP v Paul McCrea*\(^5\)

(Under appeal by the DPP to the Supreme Court)

In this case the accused was arrested under Section 49(8) of the Act and conveyed to Blanchardstown Garda Station. He was observed for a period of 30 minutes and then brought the intoxilyser machine. Garda Gillian Synott therein made a requirement of the accused pursuant to Section 13(1)(a) of the 1994 Act. At this stage the accused stated that he wished to speak to a solicitor and refused to blow into the machine. Garda Synott informed him that he could speak to a solicitor once he had complied with the requirement having informed him that it was an offence to fail or refuse to provide a sample. Garda Synott stated in her evidence that because she had made a requirement and started the machine she believed she couldn't restart the process and make another requirement of the accused.

In the District Court, Judge Watkin held in favour of the accused finding that the Garda had mistakenly believed that she couldn’t restart the process and because of this the accused was denied reasonable access to a solicitor under the custody regulations. She held that he was in unlawful custody at the time he provided the sample. The State appealed by way of case stated.

In the High Court, Edwards J. held that the accused was in unlawful custody at the time he was deemed to have refused to give a sample by virtue of the fact he was denied access to a solicitor. Edwards J. agreed with the submissions for the accused that *Walsh v. O’Buachalla*\(^6\) no longer represented the law on this issue. He applied the exclusionary rule as set out by Finlay C.J. in *Kenny*.

"I am satisfied that Garda Synott's decision, although it was a bona fide one, and not in any way a mala fide attempt to ensure that the accused was without legal advice, was nonetheless a deliberate and conscious decision in the sense spoken of by Finlay C.J. in *People (D.P.P.) v Kenny*\(^7\). Accordingly, she unwittingly committed a deliberate and conscious violation of the accused's constitutional right to have access to a solicitor. This breach had the effect of rendering the accused's detention unlawful from the moment Garda Synott made the decision to refuse the accused's request. For so long as the accused remained in unlawful detention the strict exclusionary rule as identified in Kenny's case must be applied, unless there were in existence at the material time extraordinary excusing circumstances."

**NOTE:**

*DPP v Cash*\(^8\) – Decision of Charleton J. regarding the exclusionary rule in Irish Law. This case is under appeal to the Supreme Court and may have a significant impact on the rule. I am informed the matter has been adjourned so as to allow the convening of a seven Judge Supreme Court.

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\(^5\) [2009] IEHC 39  
\(^6\) [1991] 1 IR 56  
\(^7\) [1990] 2 IR 110  
\(^8\) [2007] IEHC 108
THE SECTION 17 CERTIFICATE:

In summary, this is the printout from an apparatus that determines the concentration of alcohol in the breath of an accused, following a requirement made by a Garda pursuant to Section 13(1)(a) of the 1994 Act, as amended. It is an essential proof in prosecutions under Section 49(4) and Section 50(4) of the Road Traffic Act.

Colm Fitzpatrick v DPP

In this case, the accused was charged with Section 50(4) RTA (excess alcohol in the breath whilst in charge of a vehicle in a public place with the intent to drive). The prosecution closed their case but had failed to hand into evidence the Section 17 certificate indicating the level of alcohol in the breath of the accused.

It was submitted on behalf of the accused, at direction stage, that the Section 17 cert was an essential proof. The District Judge rejected this argument and convicted. The accused appealed by way of case stated to the High Court.

O'Neill J. held that the judge erred in law and allowed the appeal. He held that the Section 17 certificate was an essential proof in a prosecution under either Section 49(4) or 50(4) of the RTA.

However, he went on to comment that the facts recited on a Section 17 certificate could be proved by way of oral evidence other lawful means. (This has been the approach of the English Courts)

Furthermore if the certificate is unavailable, the prosecution can seek to admit a copy and rely upon it subject to there being evidence before the court that the original is "lost or destroyed or for some other reason, it is physically or illegally impossible to produce the original"

It envisages that an application to admit the certificate is made pursuant to Section 30 of the Criminal Evidence Act 1992:

"(1) where information contained in a document is admissible in evidence in criminal proceedings, the information will be given in evidence, whether or not the document is still in existence, by producing a copy of the document or of the material part of it, authenticated in such a manner as the court may approve...."

Importantly in this case no application was made by the prosecution to re-open their case to seek to admit the Section 17 certificate. (See Bates v Brady [2003] 4 IR 111 regarding recalling a witness and re-opening the prosecution case)

DPP v Lloyd Freeman

In this case the accused was acquitted in the District Court where the District Judge held that the Section 17 certificate, which the prosecution sought to admit into evidence, was not a "duly completed" certificate for the purposes of Section 21 1994 RTA. The District Judge found as a fact that the accused had signed the certificate prior to the Garda doing so. He held that the Section 17 certificate was inadmissible.

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9 [2007] IEHC 383
10 MacMenamin J. – 21st April 2009 [2008/1438 SS]
and dismissed the case. He followed the decision of Murphy J. in *DPP v Thomas Keogh*¹¹.

The State appealed by way of case stated to the High Court.

MacMenamin J. held that the District Judge did not err in law. He stated that the statutory provisions (Ss. 17 and 21 RTA 1994 and the Section 17 Regulations contained within SI 326 of 1999) envisaged a procedure whereby the accused was presented with a duly completed certificate, ie. one containing the Garda’s signature. He agreed with the decision of Murphy J. in *Keogh* that Section 17 was a penal statute¹² and therefore the procedure envisaged should be strictly construed in favour of the accused. He disagreed with DPP’s contention that the court can read the provisions in a “purposive” manner and stated that the High Court should not engage in the creation of “judicial legislation” or “penal liability by extension”.

There is also interesting discussion in this case of the doctrine of *stare decisis*. The DPP had argued that the decision of Murphy J. was *per incuriam*, ie. contained a manifest error without regard to the proper statutory provisions. MacMenamin J. held however that a court of equal jurisdiction was bound to follow an earlier decision of the High Court, unless the previous decision contained a “manifest error”.

**SECTION 18 OF THE ROAD TRAFFIC ACT 1994:**

This section is relevant to prosecutions where a requirement has been made of an accused under Section 13(1)(b) to provide a sample of blood or at the option of the accused, a sample of urine.

**Section 18(1):**

“Where under this Part a designated doctor has taken a specimen of blood from a person or has been provided by the person with a specimen of his urine, the doctor shall divide the specimen into 2 parts, place each part in a container which he shall forthwith seal and complete the form prescribed for the purposes of this section.”

It is common case that errors or omissions appear on the doctor’s form. In most cases, the Superior Courts have overlooked sloppiness or inadvertence on behalf of the doctors as simply a slip that was not capable of rebutting the presumption in sub-section 4.¹³

However if the Doctor fails to seal the container, it has been held to have rebutted the presumption of regularity and therefore entitled the accused to a dismissal.

In *DPP v Croom-Carroll*,¹⁴ the Supreme Court held that the Doctor is required to write the name of the person from which the sample was taken on the container, making sure therefore that it is sealed. The certificate in that case from the Medical Bureau recited that the name and address of the accused was on the specimen bottle but that there was “NO NAME ON CONTAINER”. The court in this case had to determine whether the specimen bottle or the (then) cardboard container in which

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¹¹ Unreported – High Court – Murphy J. – Ex Tempore – 9th Feb 2004
¹² Section 17(4) RTA 1994, It is an offence to refuse or fail to sign the certificate.
¹³ See De Blácam Drunken Driving and the Law – 3rd Ed, Paras 7.17 to 7.19
¹⁴ [1999] 4 IR
the bottle was placed was the “container” for the purposes of the act. It determined that the outer cardboard container in which the specimen bottle is placed was the “container” and since it had not been sealed it held there had not been compliance with the section.

The Supreme Court held that this was enough to defeat the statutory presumption and that it called for an explanation from the prosecution (no such explanation had been given in evidence in that case).

Note also: the Doctors form is required as essential proof in prosecutions where this procedure is adopted. See DPP (Treacy) v Young

Section 18(2):

"Where a specimen of blood or urine of a person has been divided into 2 parts pursuant to subsection (1), a member of the Garda Síochána shall offer to the person one of the sealed containers together with a statement in writing indicating that he may retain either of the containers."

Simply, when a sample is taken, the Garda must offer the accused one of the samples that has been divided into two parts along with a statement in writing. The statement in writing is more commonly referred to as the pink or yellow slip, for either blood or urine respectively.

In McCarron v Groarke & the DPP, the conviction of the accused was overturned where there was a failure to offer "a statement in writing indicating that he may retain either of the containers" having successfully provided a sample of his urine and in fact had retained one of the containers. The Circuit Judge found as a fact that the accused had not been offered a statement in writing however because he had retained a specimen he suffered no prejudice because of a mere technical failure on behalf of the Garda.

Kelly J. disagreed with the learned Circuit Judge: -

"It seems to me that the mandatory procedure prescribed by Section 18(2) was not followed and that this has been so found by the learned Circuit Court Judge. He has come to the conclusion that this was a tiny flaw in the proofs of the prosecution and that it comes within the purview of the DPP v. Somers, I do not think that the failure can be so viewed. It is not a flaw of no significance or one which could not work an injustice. It is not in accordance with the purpose and objects of the legislation to fail to provide the statement in writing to the accused. In fact it is in discord with the purpose and object of the legislation."

The McCarron case was followed by O’Caoimh J. in DPP (Bermingham) v Reville. In almost identical circumstances to McCarron, O’Caoimh J. answered the following question posed by the District Judge in the affirmative:

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15 Unreported, Supreme Court, 13th July 1983 [1982/208]
16 Counsel’s note of ex tempore judgment – High Court - Kelly J. 4th April 2000
17 Section 18(2), Road Traffic Act 1994
18 Page 7 of Counsel's Note
19 Ibid at No. 4
20 Unreported – High Court – O’Caoimh J. – 21st December 2000
"Whether having found as a matter of fact that the statement in writing referred to in Section 18(2) of the Road Traffic Act 1994 (commonly known as the Pink Slip) had not been offered to the accused [was I] correct in law in holding that there could be no conviction for the offence charged and accordingly in dismissing the summons against the accused."

Section 18(3):

"As soon as practicable after subsection (2) has been complied with, a member of the Garda Síochána shall cause to be forwarded to the Bureau the completed form referred to in subsection (1), together with the relevant sealed container or, where the person has declined to retain one of the sealed containers, both relevant sealed containers."

"As soon as practicable" the Garda must forward the specimen together with the doctor's form to the Medical Bureau. In DPP v Cawley21 the High Court upheld the dismissal of the District Judge where the Garda had taken the sample on a Saturday and had not posted it until the following Thursday because he was working nights.

Section 18(4):

"In a prosecution for an offence under this Part or under Section 49 or 50 of the Principal Act, it shall be presumed until the contrary is shown that subsections (1) to (3) have been complied with."

As seen above, the presumption is capable of rebuttal on the facts of any given case.

SECTION 19 OF THE ROAD TRAFFIC ACT 1994:

This section deals with the obligations of the Medical Bureau of Road Safety to perform the analysis "as soon as practicable" where a sample has been forwarded under Section 18.

Section 19(1):

"As soon as practicable after it has received a specimen forwarded to it under section 18, the Bureau shall analyse the specimen and determine the concentration of alcohol or (as may be appropriate) the presence of a drug or drugs in the specimen."

See Hobbs v Hurley22 and DPP v Corrigan23.

UPCOMING SUPERIOR COURT DECISIONS OF RELEVANCE TO DRUNKEN DRIVING:

DPP v Melissa Cagney
Consultative Case Stated to the Supreme Court by Judge Terence O'Sullivan, with reference to DPP v Cabot [2004] IEHC 79. The Circuit Judge, having found as a fact, that the accused had established a defence under Section 23, is seeking clarification as to whether as a matter of law, she must go on to

21 Unreported, High Court, McMahon J. – Nov 5th 1979
22 Unreported, High Court – Costello J. – 10th June 1980
23 Unreported – High Court – McCracken J. – 22nd June 1999
offer a sample of blood/urine before she can avail of a defence under the section.

**Thompkins v DPP & O’Neill**  
**Aronu v DPP & O’Neill**  
Judicial Review of the decision of the District Court Judge refusing to order disclosure as against the DPP seeking specific details of the analysis of the sample prior to the issue of the Section 19 certificate by the Medical Bureau of Road Safety in a drug driving case.

**DPP v Patrick Fitzgerald**  
Case stated heard before Mr. Justice Hedigan, which partly deals with the operation of the Intoxilyser machine outside the recommended temperature and humidity parameters. (Decision awaited)

**DPP v Andy Devereux**  
DPP appeal by way of case stated heard before Mr. Justice O’Keefe, dealing with delay and whether the reasoning forwarded by the Garda to insist on bringing the accused for a breath test led to a necessary and objectively justified delay in his detention. (Decision awaited)

**DPP v Bernard Egan**  
DPP appeal by way of case stated, revisiting the caselaw where there has been a rebuttal of the presumption under Section 18 of the RTA 1994, with reference to McCarron v Groarke, Bermingham v Reville and DPP v Tate Croom-Carroll.

**UPDATED PERIODS OF DISQUALIFICATION UNDER THE 2006 ACT:**

**Section 49 (2,3,4) Drunk Driving and Section 50 (2,3,4) Drunk in Charge:**

<table>
<thead>
<tr>
<th>Breath Alcohol Concentration</th>
<th>1st Conviction</th>
<th>2nd Conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>35 - 44 Mcg</td>
<td>1 year</td>
<td>2 years</td>
</tr>
<tr>
<td>45 - 66 Mcg</td>
<td>2 years</td>
<td>4 years</td>
</tr>
<tr>
<td>67 Mcg or over</td>
<td>3 years</td>
<td>6 years</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Blood Alcohol Concentration</th>
<th>1st Conviction</th>
<th>2nd Conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>81 mg - 100 mg</td>
<td>1 year</td>
<td>2 years</td>
</tr>
<tr>
<td>101 mg - 150 mg</td>
<td>2 years</td>
<td>4 years</td>
</tr>
<tr>
<td>Urine Alcohol Concentration</td>
<td>1 year</td>
<td>2 years</td>
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<tr>
<td>-----------------------------</td>
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<td>--------</td>
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<tr>
<td>107 - 135 mg</td>
<td></td>
<td></td>
</tr>
<tr>
<td>136 - 200 mg</td>
<td></td>
<td></td>
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<tr>
<td>201 mg or over</td>
<td></td>
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</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other Offences in relation to Disqualification</th>
<th>4 years</th>
<th>6 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 13, 14, 15 of the 1994 Act</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Section 49(1), 50(1), 53 (on indictment)</td>
<td></td>
<td></td>
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<tr>
<td>and 106 of the 1961 Act</td>
<td></td>
<td></td>
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<tr>
<td>Section 138(3) Railway Safety Act 2005 (on indictment)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
PART C:

REMOVAL OF A DISQUALIFICATION FROM DRIVING – A PRACTICAL GUIDE

RELEVANT STATUTORY PROVISIONS:

- Section 7 of the Road Traffic Act 2006

To remove a disqualification from driving (more commonly referred to as a restoration of a driving licence) prior to it’s the natural expiry, an application must be made to court.

STATUTORY PRE-CONDITIONS:

- The applicant was disqualified from driving for a period of more than two years,\(^{24}\) and
- The order disqualifying the applicant for more than two years was the first such order within a period of ten years,\(^ {25}\) and
- The applicant has served over half the period of that disqualification,\(^ {26}\) and
- The applicant has given 14 days notice in writing of the application to the Superintendent of the Garda Síochána for the district in which the person ordinarily resides.\(^ {27}\)

VENUE:

The application must be made in the court in which the disqualification was imposed. If a case was appealed to a higher court and that court varied the order of disqualification then the application must be made to the appeal court. If a case was appealed to a higher court and it affirmed the order of the lower court then the application must be made in the lower court.

Example 1:

Mr. Bad Driver was convicted of drunken driving and disqualified in the District Court for a period of 3 years. The matter was appealed to the Circuit Court and the disqualification order was affirmed. He must then make an application for a removal of the disqualification in the District Court.

Example 2:

Mr. Bad Driver was convicted of drunken driving and disqualified in the District Court for a period of 2 years. The matter was appealed to the Circuit Court and the disqualification order was varied to one of 2 years and 1 day. He must then make an application for a removal of the disqualification in the Circuit Court.

\(^{24}\) Section 7(1)
\(^{25}\) Section 7(1)
\(^{26}\) Section 7(2)
\(^{27}\) Section 7(5)
Example 3:

Mr. Dangerous Driver was convicted of dangerous driving causing death and disqualified in the Circuit Court for a period of 10 years. The matter was appealed to the Court of Criminal Appeal and the disqualification order was varied to one of 8 years. He must then make and application for a removal of the disqualification in the Court of Criminal Appeal.

[See also the O’Sullivan & Creighton case28]

Different procedures operate around the country in respect of the precise location where applications will be heard. In the Dublin Metropolitan District, applications are moved in Court 54. In most regional courts, the application can made in any court in the appropriate district court area or on the appropriate Circuit in which the original order was made.

No information is available as yet regarding the permanent venue in Dublin once the new Criminal Courts open in Parkgate St.]

COSTS:

The court hearing the application has discretion to order the applicant to pay the whole or any part of the costs of the application (should any arise).29

CONSIDERATIONS/FACTORS FOR THE COURT:

"In considering an application made under this section a court, without prejudice to its power to have regard to all of the matters that appear to the court to be relevant, may, in particular, have regard to the character of the applicant, his or her conduct after the conviction and the nature of the offence."30

Before a court will consider the application for the removal of disqualification, there must be evidence before the court which would justify the granting of the application. (Leaving aside the statutory pre-conditions in relation to time served etc.)

The great adage of knowing your Judge is relevant to applications of this sort. There are many different variables that may operate in terms of the court deciding to dismiss or grant the application.

The main issues to satisfy the court of are as follows:

- Whether there is an objection on behalf of An Garda Siochainca to the licence being restored.
- The Applicant did not drive during the disqualification period.

28 infra at no. 9
29 Section 7(6)
30 Section 7(3)
• The Applicant did not commit any offences under the Road Traffic Acts during the disqualification period.

• The applicant has paid any fine imposed in respect of the offence for which he was disqualified. Equally this applies to circumstances where orders of community service or suspended sentences were imposed. It would be expected that the Applicant to have either completed the hours imposed or adhered to the conditions of the suspended sentence.

• The Applicant, in seeking the restoration, actually has good reason in applying to have it restored. I.E. He requires it for employment or an offer of employment, health reasons, family circumstances.

• The licence was handed in for endorsement with the relevant licencing authority.

• The applicant acknowledges the seriousness of offences under the road traffic acts and that he be prepared to give undertakings to observe the road traffic law should the licence be restored. (Some Judges also require that the Applicant has notified their insurance company of the conviction and endorsement)

Other issues the court will consider:

• The conduct of the applicant in general terms of the Applicant since being disqualified.

• Previous convictions of the Applicant

• Whether or not the Applicant had been convicted of an offence since being disqualified, other than a road traffic offence, which involved the use of a vehicle. I.E. An armed robbery where he was the getaway driver.

A CONDITIONAL ORDER RESTORING THE LICENCE?

The court, upon hearing the application, cannot attach conditions or restrictions.

This arises on a regular basis for example where an applicant will present evidence of an offer of employment. Judges frequently ask the question can they restore a licence with the condition being that it is work purposes only. The court cannot do this as per R v Cottrell.31

MINIMUM PERIOD TO BE SERVED PRIOR TO THE LICENCE BEING RESTORED?

The applicant must serve two thirds of the disqualification imposed. I.E. if he was disqualified for a period of 3 years (36 months), he would be entitled to make the application after 18 months has expired but can only have his licence restored at the expiry 24 months, at the earliest.

31 [1956] 1 WLR 280
WHERE THE APPLICATION HAS BEEN REFUSED, THE APPLICATION CAN RENEWED OR APPEALED:

Where an application for a restoration has been refused, a fresh application shall not be made within 3 months of the refusal. IE. If he District Court refuses the application, the applicant can renew the Application after 3 months

If the application is refused and the applicant is aggrieved by the refusal or the date from which it will be restored, an appeal can be made to:

- In the case of an application refused in the District Court to the Circuit Court
- In the case of an application refused in the Circuit or Central Criminal Court to the Court of Criminal Appeal

THE OLD PROVISIONS FOR RESTORATIONS OF DRIVING LICENCES - SECTION 29 OF THE ROAD TRAFFIC ACT 1961: (as amended and summarised as follows)

- If a person was disqualified for a period not less than 2 years, they can, after the expiration of 9 months from the beginning of the period of disqualification, apply to the court and the court may remove the disqualification as and from a specified date not earlier than 1 year after the beginning of the period of disqualification.
- If a person was disqualified for a period not less than 4 years, they can, after the expiration of 21 months from the beginning of the period of disqualification, apply to the court and the court may remove the disqualification as and from a specified date not earlier than 2 years after the beginning of the period of disqualification.

WHAT HAPPENS IN CIRCUMSTANCES WHERE YOU ARE DISQUALIFIED PRIOR TO THE COMMENCEMENT OF SECTION 7 OF THE ROAD TRAFFIC ACT 2006?

O'Sullivan & Creighton v Superintendent in Charge of Togher Garda Station, Cork & DPP 32

This was a consultative case stated from the District Court, stated by Judge David O’Riordan. Both of the applicants were seeking to have their driving licence restored. Both were convicted of drunk driving and disqualified for a period 2 years. The date of the applications in the District Court was the 10th December 2007, however since the date of their convictions, Section 7 of the Road Traffic Act 2006 had been enacted.

The Applicants:

Barry O’Sullivan:

The offence of Section 49(4) RTA was committed on the 6th October 2002. He was convicted in the District Court on the 1st December

32 [2008] IEHC 78, Dunne J.
2005. He appealed to the Circuit Court and on the 15th June 2006, the District Court order was affirmed. He was disqualified for a period of 2 years to take effect as and from that date.

Andrew Creighton:

The offence of Section 49(4) RTA was committed on the 25th March 2006. He was convicted in the District Court on the 5th May 2006. He appealed to the Circuit Court and on the 13th December 2006, the District Court order was affirmed. He was disqualified for a period of 2 years to take effect as and from that date.

In respect of both Applicants, it appears that both were meritorious of having their licence restored; however they had not been disqualified for a period of more than two years. The District Judge stated a case to the High Court asking whether or not the old or new regime applied.

Before Miss Justice Dunne, the applicants argued that having been disqualified under the old regime they had a right under that regime to apply for the removal of the disqualification notwithstanding the enactment of Section 7. She held that while they did not have a “legitimate expectation” to make the application under the old regime but because they were disqualified prior to the commencement of Section 7 they had an accrued right in applying under the old provisions.

She further held with the applicants in the context of 27(1) of the Interpretation Act 2005:

"In the circumstances I am satisfied that the applicants herein are entitled to make application to the District Court for the restoration of their licences notwithstanding the repeal of the old s. 29(1) and I am not satisfied that their right to do so has been taken away by the introduction of the new s. 29(1)."

Appendix:

Sample Checklist for the application

- Know the specific offence for which the disqualification was imposed.
- Date of conviction / commencement of disqualification.
- Period / length of disqualification.
- Did the Applicant plead guilty / not guilty?
- Court which imposed / varied the disqualification.
- Fine / Sentence / Community Service Imposed?
- Was this paid / served / completed?
- Did the relevant local authority endorse the applicant’s licence?
- Were the Gardai notified of application 14 days in advance? (Proof of same)
- Is there a Garda objection to the application?
- Insurance Company Notification?
- Why does client need licence back?
- Why should the court give the licence back to the client?
  - Acknowledgement of seriousness?
  - Undertaking not to commit any further offences?
- Personal Circumstances.