INTRODUCTION

Road Traffic Offences are by far the most prosecuted type of criminal offence in the State.¹ In 2010, there were approximately 258,000 road traffic cases detected within the State. There were approximately 110,000 prosecutions. Of that number approximately 28,000 convictions were recorded and there were approximately 79,000 cases where no conviction was recorded. In relation to drunken driving related offences, the number of detected offences appears to be falling. Anecdotal evidence would suggest however that this more likely relates to a lack resourcing and a fall in garda numbers.²

² In 2004, there were 12,168 detected drunken driving related offences. Those numbers peaked in 2007 at 19,822. In 2012, there were 8,254 detected.
As lawyers, it is common to receive instructions in road traffic cases at one time or another. It is important, therefore, to be able to advise defendants in general terms of the approach of the courts, the general penalties and defences. Quite often road traffic cases are the first and only time citizens may find themselves before the courts.

If you receive instructions in a Road Traffic case I would highly recommend you consult the following texts:


THE ROAD TRAFFIC ACT 2010 – OVERVIEW

The Road Traffic Act 2010 (as amended) provides for the most significant reorganisation to Road Traffic Legislation since the 1961 & 1994 Acts.

Summary of relevant issues:

- Provides a consolidation and restatement of the provisions of the Road Traffic Acts relating to intoxicated driving;
- Reduces the alcohol level for drivers;
- Revises penalties, including driver disqualifications. For example, Section 52 of the 1961 Act as amended now provides for a presumptive 2 year disqualification;
- Introduction of new offence under Section 52 of the 1961 Act of Careless Driving Causing Death;
- Mandatory alcohol testing of drivers of mechanically propelled vehicles involved in road traffic collisions under Section 9 of the 2010 Act;
- The requirement under Section 12 (previously Section 13 of the 1994 Act) can be made at a Garda Station or hospital;
- Under Section 14 (previously Section 15 of the 1994 Act) it appears to be a necessary proof for the prosecution that the
member of the Gardai making the requirement consult with the treating doctor.

- Increased the minimum period that must be served before a driver may apply to the courts for the restoration of their licence, following the imposition of a disqualification order;
- Expands powers of the Gardai in forming the opinion that the driver is or is not under the influence of an intoxicant (drug or drugs) and to carry out a Preliminary Impairment Test on such drivers (No regulations drafted to date);
- Provides for amendments to certain fixed charge and penalty point matters;
- Amend certain provisions relating to driving licences;
- Provide for a number of minor amendments to the Road Traffic Acts, IE. Under Section 15 of the 2010 (the new Section 18 of the 1994 Act) a Garda is no longer required to furnish the accused with a statement in writing;
- Section 3 of the Road Traffic Act 1961 amends the definition of a “mechanically propelled vehicle”. A vehicle disabled through “collision” will continue to be regarded as a “mechanically propelled vehicle” for the purposes of the Act.²

Main Issue for Drunken Driving Cases:

Restructuring/Consolidation of Acts:
- For example, Section 49 and Section 50 are now Section 4 and Section 5;
- The main intoxicant offences in the 1961 Act, most of the 1994 Act and the 2006 are now consolidated into one act.

New Limits for Blood/Urine/Breath:
- 50 milligrammes of alcohol per 100 millilitres of blood, or
  Specified person, 20 milligrammes
- 67 milligrammes of alcohol per 100 millilitres of urine, or
  Specified person, 27 milligrammes
- 22 micrograms of alcohol per 100 millilitres of breath, or
  Specified person, 9 micrograms

² Cf. DPP v Breheny Unreported, Supreme Court, March 2, 1993. This more than likely no longer represents the law.
A “specified person” is defined as:

a. The holder of a learner permit,
b. Holds his or her first driving licence, for a period not exceeding 2 years from its date of issue,
c. Is the holder of a driving licence licensing the holder to drive a vehicle in the category D, D1, EB, EC, EC1, ED, 35 ED1 and W while driving, attempting to drive or being in charge of such a vehicle,
d. Is the holder of a licence to drive a small public service vehicle granted under section 34 of the Taxi Regulation Act 2003 or section 82 of the Principal Act while driving, attempting to drive or being in charge of such a vehicle when the vehicle is being hired or plying for hire,
e. Does not hold, at the time or, at any time within the period of 5 years prior to the commission, of the alleged offence a driving licence for the time being having effect and licensing the person to drive a vehicle of the category concerned, or
f. Is deemed under section 7 to be a specified person. (IE. Does not have their driving licence with them at time they are arrested or required to provide a sample)

Fixed Penalty Notices for intoxicant offences:
- In lieu of court appearance, an accused may pay a fixed penalty notice and receive a reduced disqualification where they are within specified categories.

For example, using the concentration of Breath for full licence holders:
- Exceeded 22 milligrammes but did not exceed 35 milligrammes of alcohol per 100 millilitres of breath
  ➔ 3 penalty points
- Exceeded 35 milligrammes but did not exceed 44 milligrammes of alcohol per 100 millilitres of breath
  ➔ 6 month disqualification

For example, using the concentration of Breath for specified persons:
- Exceeded 9 milligrammes but did not exceed 22 milligrammes of alcohol per 100 millilitres of breath
  ➔ 3 month disqualification

Removal of Disqualification:
• The applicant must now serve at least two thirds of the disqualification imposed, or at least 2 years, whichever is greater. Therefore an order of 2 years and 1 day has become redundant.

SECTION 9 RTA 2010 – PRELIMINARY BREATH SPECIMENS

The Oireachtas have made subtle changes to the provisions allowing for the taking of preliminary breath specimens.4 Section 9 of the Road Traffic Act 2010 applies to a person in charge of a mechanically propelled vehicle in a public place who, in the opinion of the garda:5

(a) Has consumed intoxicating liquor;
(b) Is committing or has committed an offence under the Road Traffic Acts 1961 to 2011;
(c) Is or has been, with the vehicle, involved in a collision;
(d) Is or has been, with the vehicle, involved in an event in which death occurs or injury appears or is claimed to have been caused to a person of such nature as to require medical assistance for the person at the scene of the event or that the person be brought to a hospital for medical assistance.

A Garda shall make a requirement of a person for a preliminary specimen of breath—unless he or she is of opinion that the person should be arrested—where in the opinion of the garda, section 9(1)(a) or section 9(1)(d) applies. A Garda may make a requirement of a person for a preliminary specimen of breath, where in the opinion of the garda, section 9(1)(b) or section 9(1)(c) applies.

A garda may require a person to:6

(a) provide, by exhaling into an apparatus for indicating the presence of alcohol in the breath, a specimen of his or her breath in the manner indicated by the member;
(b) accompany him or her to a place (including a vehicle) at or in the vicinity of the public place concerned and there provide, by exhaling into such an apparatus, a specimen of his or her breath in the manner indicated by the member; or

4 Previously the power was contained in s.12 of the Road Traffic Act 1994
5 Section 9(1) of the Road Traffic Act 2010, as substituted by s.7 of the Road Traffic (No. 2) Act 2011 (No. 28 of 2011). A garda need only form an opinion regarding one of the pre-conditions under section 9(1)(a),(b),(c) or (d).
6 Section 9(2) of the Road Traffic Act 2010
(c) where the member does not have such an apparatus with him or her, remain at that place in his or her presence or in the presence of another member of the Garda Síochána (for a period that does not exceed one hour) until an apparatus becomes available to him or her and then to provide, by exhaling into such an apparatus, a specimen of breath in the manner indicated by the member.

A member of the Garda Síochána shall not make a requirement under section 9(2) if, in the opinion of the member, such a requirement would be prejudicial to the health of the person or if on the advice of a doctor or other medical personnel attending the scene of an event, such requirement would be prejudicial to the health of the person.

**SECTION 10 RTA 2010 – MANDATORY ALCOHOL TESTING**

Although the Garda Síochána have had the power to stop mechanically propelled vehicles under the common law and pursuant to section 109 of the Road Traffic Act 1961, it was questionable—in the absence of legislation—as to whether the power extended to the conduct of mandatory alcohol testing checkpoints where no suspicion was required. Although section 109 is broad in its terms, a garda is still required to form an opinion that one of the following pre-conditions exist prior to a requirement for a preliminary breath specimen to detect the presence of alcohol:

(e) A person has consumed intoxicating liquor;

(f) A person is committing or has committed an offence under the Road Traffic Acts 1961 to 2011;

(g) A person is or has been, with the vehicle, involved in a collision;

(h) A person is or has been, with the vehicle, involved in an event in which death occurs or injury appears or is claimed to have been caused to a person of such nature as to require medical assistance for the person at the scene of the event or that the person be brought to a hospital for medical assistance.

Beginning with section 4 of the Road Traffic Act 2006—and now under section 10 of the Road Traffic Act 2010—the Oireachtas introduced legislation allowing for the establishment of mandatory alcohol testing

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7 Section 9(6) of the Road Traffic Act 2010
8 Section 9(7) of the Road Traffic Act 2010
9 A person is required to stop a vehicle on the request of a garda and “keep it stationary for such period as is reasonably necessary in order to enable such member to discharge his duties”.
10 Section 9(1) of the Road Traffic Act 2010
checkpoints. This provision permitted the establishment of a checkpoint or checkpoints in a public place where authorised in writing by a member of the Garda Síochána not below the rank of inspector. Once authorised, a garda may stop any vehicle\textsuperscript{11} at random and require from the driver a preliminary breath specimen. Under section 10 of the 2010 act, so long as the checkpoint is authorised, none of the preconditions contained within section 9 need exist.

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. Under section 10 of the Road Traffic Act 2010 a mandatory alcohol testing checkpoint or checkpoints may be established where:\textsuperscript{12}

1. A member of the Garda Síochána, not below the rank of inspector, authorises so;
2. An authorisation is in writing;
3. An authorisation specifies the date on which the checkpoint is to be established;
4. An authorisation specifies the hours at any time between which the checkpoint may be conducted;
5. An authorisation specifies the public place in which the checkpoint is to be established.

In that regard, the authorisation is a necessary proof in a case involving a Section 4 or now Section 10 checkpoint (See \textit{Mary Weir v DPP}, infra). The statute does permit a copy of the original 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 mandatory alcohol testing checkpoints, the obligation to specify on the authorisation the date, time and public place

\textsuperscript{11} Compare and contrast the provision under section 10, which applies to persons in charge of a “vehicle” with section 9, which applies to persons in charge of a “mechanically propelled vehicle”. Under section 3 of the Road Traffic Act 1961 a “vehicle” is defined a mechanically propelled vehicle, a trailer or semi-trailer, an animal-drawn vehicle or a pedal cycle. The definition of “vehicle” under section 4 was substituted by section 46(a) of the Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012 (No. 16 of 2012), with effect from March 27, 2013 (S.I. No. 105 of 2013)
\textsuperscript{12} Section 10(2) and 10(3) of the Road Traffic Act 2010
at which the Garda Síochána may establish a checkpoint has caused difficulty. Anecdotal evidence suggests that the most common error relates to the requirement to specify the public place at which the checkpoint may be established. Frequently the authorisation may contain an error in the name or description of the place, ambiguity as to the precise location authorised or the authorisation being void for lack of specificity.  

**Mary Weir v DPP**

In this case, the accused was stopped at a checkpoint established pursuant to Section 4 of the RTA 2006. At no stage during the prosecution case was the authorisation for the checkpoint exhibited in 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*

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13 For example, an authorisation may refer to the public place as “Malahide Road”. In this example, there are in fact numerous separate and distinct public places referred to as “Malahide Road” in Dublin. Cf. Dublin City and District Street Guide (Ordinance Survey Ireland, 10th Ed.) Cf. also Thom’s Dublin Street Directory - 2012 Ed.

14 2008 [IEHC] 268
"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?"

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:

“\textit{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”}."

\textit{Maher v DPP & Judge Kennedy}^{15}

Under Section 10 or Section 4 as it was, the Inspector authorising the checkpoint must “\textit{specify}” the public place or places where the checkpoint can be established.

In relation to whether the location specified was ambiguous, Hogan J.

\footnote{15 2011 [IEHC] 207}
remarked obiter:

“‘It is perfectly clear that in the present case the Gardai acted pursuant to this statutory authorisation. Since s. 4 of the 2006 Act authorizes the Gardai to interfere with the personal liberty of motorists in a significant fashion by stopping them at random and by requiring them to exhale into an alcometer apparatus, it must be presumed that the Oireachtas intended that the statutory safeguards specified in s. 4(3) would be strictly complied with.”

He continued:

“In view of the requirements of s. 4(3), it is plain that the Oireachtas clearly intended that the decision to establish the checkpoint would be taken by a senior Garda officer and that the Gardai operating the checkpoint would be empowered to do so at the public place, time and dates so specified in writing. The very fact that the Oireachtas assigned the decision to establish a checkpoint to a Garda Inspector (as distinct, for example, from an ordinary member of the force) and that this decision requires a special authorisation by law is the strongest indication possible that compliance with these statutory requirements was intended to be of prime importance.”

In *Maher*, the DPP had called evidence by the Inspector who had issued the authorisation to clarify where he had intended to set up the checkpoint. Hogan J. held that this evidence was inadmissible:

“In that regard, I would observe in passing that it was not legitimate for prosecuting authorities to seek to call evidence from [the] Inspector who signed the authorisation - in order to show what subjectively he had in mind when issuing the authorisation. [T]he authorisation is a public document affecting legal rights which must speak for itself and any evidence which seeks to explain, supplement or qualify it is not admissible in law.”

**SECTION 11 RTA 2010 – PRELIMINARY IMPAIRMENT TESTING**

Under Section 11 of the Road Traffic Act 2010 a garda may require a person undergo an impairment test to assist in the formation of an opinion that a person in charge of a vehicle is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the
vehicle. This section appears to be the first time the Oireachtas have expressly permitted the Garda Síochána to do this. This is surprising given the enthusiasm for such testing in other jurisdictions. It is no doubt aimed at assisting the Garda Síochána to more accurately assess the incapacity of persons driving under the influence of an intoxicant, in particular a drug or drugs. The section is framed in such a fashion so as to permit impairment testing for an intoxicant generally, which is defined as alcohol and drugs and any combination of drugs or of drugs and alcohol.\textsuperscript{16} However if alcohol is the suspected intoxicant, it is difficult to see how section 11 would be preferred over the powers contained within section 9.

Prior to section 11, the admissibility of results from any impairment testing required affirmative proof from the prosecution that a person had voluntarily submitted to such an examination.\textsuperscript{17} In \textit{O'Sullivan v Robinson}\textsuperscript{18} the defendant was suspected of having caused an accident. A garda attended an address where the defendant was suspected to be. At that address he observed the vehicle alleged to have be involved in the accident and spoke with the defendant whom he suspected of having consumed alcohol. The defendant was arrested and brought to Irishtown Garda Station. At the request of a garda in charge of the station, the defendant walked along a floorboard where he was observed to be very unsteady on his feet. A short while later, a garda medical officer examined and questioned the defendant. At the hearing of the charge, the prosecution sought to call the evidence of the doctor regarding the examination of the defendant. The opinion of the High Court was sought, \textit{inter alia}, as to whether the evidence of the doctor was admissible in the absence of affirmative proof that the defendant had voluntarily submitted himself to such an examination. Davitt P. answered the first question in the negative where he stated:

“...it seems to me that when a doctor is called in by the police to examine a person, who is suspected of being drunk, with a view to preferring a charge such as that in the present case, and the doctor converses with him, or conducts an examination involving question and answer, or submits him to certain tests, evidence as to what he said, or of the result of the tests, should not be received by any Court trying the person upon the criminal charge unless the

\textsuperscript{16} Section 3(1) of the Road Traffic Act 2010
\textsuperscript{17} \textit{Cf.} section 107 of the Road Traffic Act 1961 and \textit{People (Attorney General) v Gilbert} [1973] IR 383, which discusses the admissibility of evidence which is compelled as opposed to voluntary. The CCA held that a statement made by the accused in answering the questions posed pursuant to section 107 of the 1961 Act was not a voluntary statement and should not have been admitted in evidence at the trial.
\textsuperscript{18} [1954] IR 161
prosecution affirmatively establishes to the satisfaction of the Court that any statement in the nature of a confession made by the accused was voluntarily made, and any test the result of which tends to incriminate him was voluntarily undergone. In my opinion, the principles as to the admissibility of confessions apply to the question whether evidence of the result of such tests is admissible.”

It is also interesting to note the Canadian position. In Saunders v R. it was held that evidence of co-ordination tests was admissible in evidence, as a basis to require a person to provide a preliminary breath specimen. However, the evidence of co-ordination tests was not allowed on the substantive impairment change as it violated the constitutional right to have access to legal advice where it was adjudged the test and device was being used to gather incriminating evidence.

Under section 11(1), a member of the Garda Síochána may require a person, in charge of a vehicle in a public place, to undergo an impairment test if he or she considers it would assist him or her to form an opinion that a person is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle. A garda may require the person to perform the test in the presence of another garda member to assist him or her or the other member in whose presence the test is to be performed in the formation of that opinion. The manner in which such tests are to be performed is set out in the impairment test regulations.

Section 11(2) permits a member of the Garda Síochána to take into account any advice or opinion given to him or her by another garda member present at the conduct of such a test so as to assist in the formation of an opinion. If a person, without reasonable excuse, fails to comply with a requirement under section 11(1), they commit an offence punishable by fine and/or term of imprisonment.

A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence

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19 Ibid. at pp.168-169. It is interesting to note that although the question posed related to the admissibility of the evidence of the doctor and the requirement to affirmatively prove the tests were voluntary, it appears that the evidence of a garda in the same vein would equally need to satisfy such a test.

20 [1988] 4 M.V.R. 199

21 Under section 11(3) of the Road Traffic Act 2010, the Minister may prescribe the form of tests, indicating the manner and type, for the purposes of section 11(1). No regulations as yet have been prescribed.

22 Section 11(4) of the Road Traffic Act 2010
under this section. As with most of the legislation involving intoxicant offences, section 1(1) of the Probation of Offenders Act 1907 does not apply to an offence under this section.

The relevant Minister has yet to prescribe the regulations. The Medical Bureau of Road Safety (MBRS) conducted training courses in 2011 for 80 “garda trainers” who were successfully examined and graduated with a university certificate in Road Traffic Impairment Testing (RTIT). The “garda trainers” will train other garda members in RTIT, in preparation for its implementation.

SECTION 12 RTA 2010 – POWER TO COMPEL SPECIMENS

The new Section 12(1) expands the provisions under which a person arrested can be required to provide a sample. It is essential that a person be arrested under one of the following provisions before a requirement is lawful:

- Section 4(8) Road Traffic Act 2010;
- Section 5(10) Road Traffic Act 2010;
- Section 6(4) Road Traffic Act 2010;
- Section 9(4) Road Traffic Act 2010;
- Section 10(7) Road Traffic Act 2010;
- Section 11(5) Road Traffic Act 2010;
- Section 52(3) Road Traffic Act 1961;
- Section 53(5) Road Traffic Act 1961;
- Section 106(3A) Road Traffic Act 1961;
- Section 112(6) Road Traffic Act 1961.

A Garda can only make a requirement under Section 13 (or the new Section 12) of a person arrested under one of the above provisions. A Garda cannot make a requirement of an accused where they have been arrested under Section 4 of the Criminal Law Act 1997 on suspicion of an offence contrary to Section 112 RTA 1961. Cf. Ely v O’Shea & DPP.

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

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23 Section 11(5) of the Road Traffic Act 2010
24 Section 11(6) of the Road Traffic Act 2010
25 Medical Bureau of Road Safety (MBRS), Annual Report 2011, p.17.
26 2006/1194 JR
whereby a Garda could make a requirement of an accused to provide a sample pursuant to Section 13.

Section 12 (or Section 13 as it was) contains some important changes from the 1994 Act as to what occurs when a sample of blood or urine cannot be obtained. It was always the case that where a doctor or nurse could not take a sample on medical grounds, if they stated that fact in writing, an alternative requirement could be made. Under the new provision this can now occur where a person is unable or unlikely, within three hours of driving or being in charge of a vehicle, to provide a sample. This appears to have greater relevance for urine samples given the greater scope required for a sample of that nature. It remains to be seen under what circumstances this determination might arise.

A further issue to consider is that a sample under Section 12 can now be sought in a hospital in addition to a Garda Station. This means that where a person falls ill in a Garda Station, they can be taken to hospital and a requirement made under Section 12. Previously, if taken to hospital, a requirement could only be made under Section 14 (previously Section 15). Frequently that requirement was unlawful because the statutory conditions were unable to be established i.e. that the person was involved in an accident in a public place and was injured or claimed to be injured.

This section also continues the practice of permitting the duties of the doctor to be performed by a nurse. Gardai can seek the attendance of doctor or nurse to take a sample pursuant to Section 12(1)(b) and comply with the relevant provisions under the Act.

This addition of a nurse is important in the context of the prosecution’s duty to justify the detention of an accused. Charleton J. in *O’Neill v McCartan & DPP*27 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 was necessary and justified. Many Gardai are not familiar with the provisions. It is therefore open to

27 2007 IEHC 83
argue, that if an accused remains in custody for a substantial period because of a delay involving the arrival of a doctor and no contemplation or regard is had to the expanded provisions regarding a nurse, depending on the facts of the case, the accused may fall into unlawful custody.

SECTION 22 RTA 2010 – SPECIAL AND SUBSTANTIAL REASON

Where a person fails or refuses to comply with the requirement to provide 2 evidential breath specimens, Section 22(1) provides for a defence as follows:

“In a prosecution of a person for an offence under section 12 for refusing or failing to comply with a requirement to provide 2 specimens of his or her breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his or her refusal or failure and that, as soon as practicable after the refusal or failure concerned, he or she complied (or offered, but was not called upon, to comply) with a requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine.”

The Supreme Court in DPP v. Maressa Cagney recently considered this provision. The accused was prosecuted for failing to provide two specimens of breath. The trial judge found as a fact that the accused had a special and substantial reason for not being able to provide a sample. Following the decision in DPP v Cabot, in order to avail of this defence the accused must have offered (but not necessarily have been called upon) to provide a blood or urine sample. The trial judge believed this was unfair and he therefore stated a case. The Supreme Court held that the accused was entitled to an acquittal where Garda had failed to warn her that a failure to provide a blood or urine sample would preclude her from relying on a defence of having a special and substantial reason for failure to provide a breath sample. The onus was previously on the defendant to make the offer to provide an alternative sample.

Clarke J. stated:

“[I]t seems to me that there is an obligation on a member of An Gárda Síochána, either when giving the original warning required

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28 [2013] IESC 13 (Supreme Court, Clarke J, 11 March 2013)
by the line of authorities starting with McGarrigle or, if not then
given, after a person has failed or refused to give a breath sample,
to alert that person to the fact that, in order to rely on a defence of
special and substantial reason for their failure or refusal, the
person concerned must offer to provide blood or urine. It seems to
me that, in circumstances where such a warning is not given in an
appropriate and reasonably understandable way, the prosecuting
authorities will be precluded from seeking to argue that the person
concerned does not comply with the second leg of the test set out in
s.23.”

SECTION 14 RTA 2010 – SAMPLES IN HOSPITAL

Section 14 (or Section 15 as it was) contains some important changes
from the 1994 Act. Subsection 4 now states that before making a
requirement of a person under subsection (1) the member of the Gardaí
shall consult with a doctor treating the person, and if a doctor treating the
person advises the member that such a requirement would be prejudicial
to the health of the person the member shall not make such requirement.

While the doctor may ultimately sanction the making of the requirement,
the act now mandates evidence that the Garda consulted with the treating
doctor. The absence of such evidence has already caused difficulties in
prosecutions since the enactment of the section either by its absence or
for example a nurse being consulted in lieu of a doctor.

FIXED PENALTY NOTICES FOR DRINK DRIVING OFFENCES

Under the provisions of Section 29 of the 2010 Act, under certain
circumstances a fixed penalty notice must issue prior to the
commencement of proceedings. Non-specified persons (i.e. full driving
licence holders of more than 2 years) in the lowest 2 alcohol brackets and
specified person (i.e. professional drivers or provisional driving licence
holders of more than 2 years) in the lowest alcohol bracket must be
served with a fixed penalty notice. If paid a notice is paid, a person can
avoid an appearance in court and receive a lower penalty.

Where an accused provides a sample and the resulting analysis places that
person in a category where a fixed penalty must issue, evidence is
required of the driver licence status of the accused. For example if a
specified person provided a sample of breath with a reading of 40mcg,
evidence is required from the prosecution to show that a person is a
specified driver and therefore can be treated less favourably than a non-specified person. In that instance, as a non-specified driver with a reading of 40mcg, the accused must be served with a fixed penalty notice and is treated less severely under that regime in that they can elect for no court appearance by paying a fine of €400 and receive a maximum disqualification from driving for 6 months.

In the example above, if it transpired during the evidence that the accused was in fact a non-specified person, although charged as a specified person, the prosecution may seek to have the court impose an alternative verdict under Section 8A. However, the difficulty with the court recording the alternative verdict is that there remains no evidence that a fixed penalty notice issued and was unpaid. With a reading of 40 mcgs, a prosecution can only commence if there is proof that the person is a specified driver or, if a non-specified person, the fixed penalty notice issued and was unpaid. Under Section 35, no prosecution against a person shall commence until such time as a notice a fixed penalty notice is unpaid after the statutory period.

As per Charleton J. in *DPP v John Kelly* [2012] IEHC 540 “…proof is needed in a prosecution for any special category that the defendant fitted into the exceptional definition whereby a conviction for an offence is made subject to a special circumstance or whereby a more severe penalty may result.”

Since the introduction of this section, a number of prosecutions have been dismissed or withdrawn because of the failure to issue the notice where required and/or failing to give any evidence of the driving licence status of the accused.

**THE ARREST**

*DPP v. Ennis*\(^{(29)}\)

In this consultative case stated the accused, *inter alia*, argued that the arrest was unlawful because the Garda had failed to invoke any statutory power when affecting the arrest. It appears that the arresting Garda explained the reason for the arrest in ordinary language, IE. ‘drunk driving’. The arresting Garda later handed the accused over to the Intoxilyser Garda. That Garda inputted into the machine (as required) that the sample was for the purposes of Section 49.

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\(^{(29)}\) [2011] IESC 46
The Supreme Court held that the arrest was lawful. They followed the decision of the Supreme Court in **D.P.P. v. Mooney** [1992] IR 548. In that case Blayney J. followed the well known English case of **Christie v. Leachinsky** [1947] AC 573 as to the requirements for a valid arrest.

Blayney J. had held in **Mooney**:

"It is clear […] that a garda in making an arrest does not have to use technical or precise language. Provided the arrested person knows in substance why he is being arrested the arrest is valid. So telling the respondent that he was being arrested for an offence of drunk driving was a sufficient communication of the reason for his arrest since in my opinion it could mean any of the three offences under the Section. He told the respondent in substance why he was being arrested”.

Hardiman J. did however comment:

"[T]he State [are] required to prove not merely that the arrest was a lawful arrest, but also that the person of whom the requirement for a breath specimen was made, was a person arrested under one of the specified Sections set out in s.13(1). Whether this has been established is a matter which the learned trial judge may, if necessary, have to consider, and it is a different question to that raised in paragraph (a) of the case stated.”

He went on:

"But if a statutory scheme positively requires that an arrest be under a specific Section or subsection, or one of a number of specific Sections, then it is manifest that proving the legality of the arrest may or may not involve proof that the arrest took place under one of the specified Sections."

*Cf. also Ely v Judge O’Shea* (supra).

**RIGHTS IN CUSTODY – ACCESS TO A SOLICITOR**

**DPP v Paul McCrea**30

30 [2009] IEHC 39
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 to 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 provide a specimen. 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 that because she had made a requirement and started the machine she believed she could not 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 could not 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 failed to provide the sample. The DPP appealed this decision 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[^31] no longer represented the law on this issue. He applied the exclusionary rule as set out by Finlay C.J. in Kenny[^32]:

> “I am satisfied that Garda Synnott'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. 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

[^31]: [1991] 1 IR 56  
[^32]: [1990] 2 IR 110
applied, unless there were in existence at the material time extraordinary excusing circumstances.”

The DPP appealed the matter to the Supreme Court and the decision of the learned District Judge was upheld the appeal dismissed.

Hardiman J. noted:

“Although the right to consult a solicitor in certain circumstances is deprived from principles contained in the Constitution, as the Case Law of this Court over the years has made clear, in this case the defendant was informed by the gardaí not only of his right to consult a solicitor when he arrived in the Garda Station, but of his right to do so at any time while he was in custody there, on the basis of a statutory regulation. It is not contested by the State that there was a breach of the requirements of the statutory regulation but it was contended that the reason for non-compliance given by the garda member concerned was a reasonable one, even if erroneous, as explained in the Caste Stated. In these circumstances it is not necessary to consider the ambit of the constitutional right of access to a solicitor and in particular whether it applies to a person who has been arrested solely for the purpose of taking a breath test under the Road Traffic Act. This case can be determined having regard to its own particular facts and the failure to observe the regulatory procedure.

In the absence of access to a solicitor, the gardaí themselves were the only source of legal advice available to the Notice Party. They were obliged to advise him about access to a lawyer and this advice was given in unambiguous terms. It was that he was entitled to consult his solicitor at any time during his detention in the garda station and that if he did not avail of the opportunity for access to a solicitor when it was first offered, that fact would not preclude him from exercising it later. This statement of his entitlements was not qualified in any way. The learned District Judge thought it not unreasonable that a person confronted with a demand expressed in statutory, that is in technical legal, terms should then seek a solicitor.”

The case does seem to be determined very much on its own facts. For instance, if the accused does provide a sample notwithstanding the

33 [2010] IESC 60
request for access to legal advice being extant at the time, *Walsh v. O' Buachalla*, more than likely represents the law.

Also note: *DPP v Gormley* [2014] IESC 17

**THE SECTION 13 (OR AS IT WAS 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 or Section 12(1)(a) of the 2010 Act. It is an essential proof in prosecution for exceeding the breath alcohol limit.

*Colm Fitzpatrick v DPP*[^34]  
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 exhibit in 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

[^34]: [2007] IEHC 383
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 and O'Keeffe-v-District Judge Mangan and The DPP [2012] IEHC 195 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 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 and dismissed the case. He followed the decision of Murphy J. in **DPP v Thomas Keogh**. 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, i.e. one containing the Garda’s signature. He agreed with the decision of Murphy J. in **Keogh** that Section 17 was a penal statute 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”.

In this case, 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** i.e. 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”.

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35 MacMenamin J. – 21st April 2009 [2008/1438 SS]
36 Unreported – High Court – Murphy J. – Ex Tempore – 9th Feb 2004
37 Section 17(4) RTA 1994, It is an offence to refuse or fail to sign the certificate.
The DPP further appealed the decision to the Supreme Court. The appeal was dismissed and the High Court order was affirmed on the 25th March 2014.

**DPP v Ioan Benchea**

In this case the accused was convicted in the District Court even though the Section 17 had faded to such an extent that only the final reading and the signatures of the Garda and the accused could be seen. The accused appealed to the High Court and the DPP consented to the conviction being overturned on the basis that there was insufficient evidence to convict the accused. The document did not contain the essential features of a ‘duly completed’ Section 17 certificate and was therefore not in compliance with the relevant statutory requirements for a certificate under the section.

**THE LABELING OF EVIDENTIAL SPECIMENS**

**DPP v Bernard Egan** - Kearns P. - 11th June 2010

See also: **DPP v Tate Croom-Carroll**

The accused was charged with offence Contrary to Section 49(3) of the 1961 Road Traffic Act. The Section 19 (1994 Act) certificate indicating the concentration of alcohol in urine noted that the name of the accused was on the specimen bottle but that “no name” was on the outer container in which the specimen bottle should be placed.

The prosecution called evidence from the doctor, who had completed the form under Section 18. The doctor accepted that he had failed to label and seal the container in which the specimen bottle was placed. He accepted that he had not complied with the requirements under the act although he had signed the Section 18 form stating that he had done so. (Note: In *Croom-Carroll*, the prosecution did not call the doctor to give evidence)

At the close of the prosecution case the Judge dismissed the case, finding as a fact that the provisions of Section 18 had not been complied with. The DPP contended that although *Croom-Carroll* held that the failure to label the container was fatal to the prosecution, evidence could be called to provide an explanation.

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38 Kearns P. – 24th October 2011 [2011/781 SS]
39 [2010] IEHC 233
40 [1999] 4 IR 126
The DPP appealed by way of case stated. Kearns P. held that notwithstanding the prosecution called the doctor to offer an explanation, the doctor accepted that he did not comply with his obligations under the Act. The Judge was therefore entitled to find that Section 18 had not been complied with. Kearns P. endorses O’Higgins CJ in *DPP v Kemmy* [1980] IR 160 at p.164:

"Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof."

**HANDCUFFING IN DRUNKEN DRIVING CASES**

*DPP v Peter Cullen*[^1]

This was a consultative case stated posed by His Honour Judge O’Sullivan from the Circuit Court to the Supreme Court having heard evidence in a District Court Appeal. The accused was prosecuted for an offence contrary to section 49(4) of the Road Traffic Act 1961 for exceeding the legal limit for alcohol in the breath. The legality of the arrest was challenged on the basis of the unjustified use of handcuffs at the point of arrest. The accused sought a direction of acquittal on the basis of that arrest.

At the trial, a Sergeant Moyles gave evidence that having been on “covert mobile patrol” he had cause to stop the vehicle of the accused. Having spoken to the accused he subsequently made a requirement for a preliminary breath specimen, which the accused complied with. Thereafter, the Sergeant formed the opinion that the accused had consumed an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle in a public place and proceeded to arrest the accused pursuant to section 49(8) of the Road Traffic Act 1961. He informed the accused in ordinary language

[^1]: [2014] IESC 7
that he was arresting him for drunk driving and proceeded to caution him in the normal fashion. Following this the Sergeant immediately placed handcuffs on the accused.

Under cross-examination, Sergeant Moyles stated that accused had cooperated with the Gardaí at all times prior to and subsequent to his arrest. Sergeant Moyles further accepted that the accused had not used or threatened force in order to avoid arrest, nor had Sergeant Moyles formed the opinion that there was anything in the conduct of the accused which might lead him to suspect that the accused might resist arrest unless restrained. In response to questioning as to why handcuffs had been used, Sergeant Moyles stated that it was his policy to place any person arrested for an offence under section 49 of the Road Traffic Act in handcuffs irrespective of the circumstances as it was his experience that such persons might become abusive and resist arrest either immediately prior to or following communicating the reason for arrest to them. [my emphasis]

Arising from the evidence, the trial Judge posed the following questions for consideration by the Supreme Court:

“1. On the evidence adduced was I entitled to hold that the placing of handcuffs on the accused following arrest was unjustified on the grounds Sergeant Moyles did not believe the particular accused was likely to resist arrest or was likely to attempt to escape from lawful custody unless so restrained?

2. If the answer to the above is in the affirmative was I correct in law in concluding that the placing of the handcuffs on the accused by Sergeant Moyles was a conscious and deliberate breach of the accused's constitutional rights which rendered the accused's arrest and detention unlawful and which obligated me to apply the exclusionary rule in respect of any evidence obtained thereafter?”

In delivering the majority judgment of the Court (Hardiman J. concurring), Fennelly J. answered the first question in the affirmative and answered the answer the second question by holding that where the arrest was unlawful; it was sufficient to determine the case on that basis without reference to the breach of constitutional rights or the exclusionary rule. Fennelly J. held that the application of handcuffs was unlawful where “the Sergeant expressly accepted that Mr Cullen had been fully cooperative both before and during the arrest process and that there was
nothing, in the facts of this case, to suggest that he might resist arrest.”

In holding that the arrest was unlawful, Fennelly J. also noted as follows:

“I would entirely accept that any individual member of An Garda Síochána is fully entitled to and may well be obliged to apply handcuffs to an arrested person, where he or she genuinely believes that it is necessary to do so in the particular case. The decision must be left to the individual Garda dependant on his or her own appreciation of the requirements of the individual case. The nature of the offence, the prevailing circumstances, the personality and character of the individual to be arrested must be taken into account. The law is realistic. It is appreciated that decisions on the necessity for an arrest, the appropriate amount of force and the need for the use of handcuffs are often made under pressure of circumstances of urgency, of danger of flight, and of violence and the threat of violence. Ordinarily, courts are slow to review decisions of Garda officers made in the wide range of situations which they confront in the course of their duty.

It may be, therefore, that the use of handcuffs is justified, in the particular circumstances, in order to prevent the arrested person from fleeing or otherwise causing disturbance. In the present case, the decision as to whether to apply handcuffs was pre-ordained. It did not depend on any evaluation of the circumstances. It left no room for the case of the entirely peaceful and cooperative suspect.”

He went on to say:

“In my view, it is unlawful to place handcuffs on suspects who are being arrested without giving any consideration to the context and in particular to the behaviour and demeanour of the individual being arrested. It is unlawful because, as a matter of principle, the police must use only such force as is reasonable in the circumstances...”

Clarke J. in delivering a dissenting judgment was in broad agreement with Fennelly J. regarding the use of handcuffs on the facts of this case. However, Clarke J. believed that while the placing of handcuffs on the

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42 [2014] IESC 7, Fennelly J. at para. 16 of the judgment
43 [2014] IESC 7, Fennelly J. at paras. 25-26 of the judgment
44 [2014] IESC 7, Fennelly J. at para. 38 of the judgment
accused was unlawful, the arrest was not in and of itself unlawful and therefore it did not necessarily flow that the evidence should be excluded.

Clarke J. indicated that in his view the issue arising for consideration was as follows: “Does the use of unreasonable force in carrying out an arrest render the arrest unlawful for all purposes?”. In determining this issue, Clarke J. noted that “...a lawful arrest is a prerequisite to the introduction at a trial of the sort of evidence of alcohol concentration typically relied on.”

In respect to the use of handcuffs by members of the Garda Síochána, Clarke J. noted:

“...a person who has a lawful power to arrest must be afforded a reasonable margin of consideration in deciding whether, on the facts of an individual case, handcuffing is necessary. However, that margin of consideration does not permit an arresting person to adopt a policy of handcuffing in all cases irrespective of the circumstances of the individual case. There can be no doubt but that the sergeant in question in this case was not entitled to adopt the policy which he did.”

Leaving aside any margin of consideration that may be vested in an individual officer, it appears however that a trial judge is entitled to consider the decision to use handcuffs on an objective basis. Clarke J. went on to say:

“It is equally clear from the facts set out in the case stated that the trial judge was more than entitled to come to the view that there was no reasonable basis for the sergeant (even allowing for a significant margin of consideration) to have concluded that handcuffing was necessary on the facts of this case.... The trial judge was entitled to conclude that the placing of handcuffs on Mr. Cullen was unjustified.”

Clarke J. in agreeing with the view of the trial Judge in respect of the first question posed in the case stated, also noted:

“I would hold that the trial judge was entitled to form the view that the placing of handcuffs on Mr. Cullen was unjustified on the

45 [2014] IESC 7, Clarke J. at para. 2.1 of the judgment
46 [2014] IESC 7, Clarke J. at para. 2.4 of the judgment
47 [2014] IESC 7, Clarke J. at para. 2.4 of the judgment
grounds that the relevant sergeant did not believe (and had no basis for believing) that Mr. Cullen was likely to resist arrest or escape unless so constrained.”

It must be noted that Clarke J. also concurred with Fennelly J. in citing with approval the decision of Hardiman J. in People (DPP) v. Davis [2001] 1 IR 146. The relevance being that in the context of the Cullen case, the offence with which he was charged is necessarily committed in a public place and the arrest will normally take place in public. The following passage was cited with approval:

“the public depiction of any person, but particularly an unconvicted prisoner, wearing the double restraints which are now commonly used in the prison service is a depiction of him in a position of humiliation and indignity.”

SECTION 5 RTA 2010 – AWARE OF REASON FOR ARREST?

DPP v Prezemyslaw Czyzak 51

The accused was prosecuted under section 5 of the RTA 2010. On approaching the motor vehicle, the garda observed a male who appeared to be asleep in the driver’s seat. The engine of the car was running, the car keys were in the ignition and the lights of the car were on. The garda knocked on the car window but failed to initially rouse the driver. The garda spoke with the accused and ultimately formed an opinion that the accused was under the influence of an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle in a public place. The garda stated he had formed the opinion that the accused was in charge of the car and had "intent" to drive. The garda then arrested the accused under section 5 and cautioned him in plain English that he was being arrested for being "drunk in charge" of a vehicle.

The District Judge found that the circumstances of the arrest were not such as to make it obvious to the accused why he was being arrested. Having so found, the Judge held the arrest was unlawful and dismissed the charges. The District Judge held that the arrest was not a valid arrest because the garda had not sufficiently communicated the reason for the arrest to the accused. The DPP appealed by way of case stated to High

48 [2014] IESC 7, Clarke J. at para. 5.2 of the judgment
49 [2014] IESC 7, Clarke J. at para. 2.5 of the judgment
50 [2001] 1 IR 146 at page 150
51 [2014] IEHC 102
Court. The following questions were posed by the District Judge:

“(a) In circumstances where the accused did not understand the reason for his arrest, was it within my discretion to hold that the arrest was invalid for the reason set out above?
(b) If the answer to bracket (a) above is ‘yes’, did I then have discretion to dismiss both charges against the accused in the particular circumstances of this case?”

Kearns P. held that the answer to the first question must be that if an accused does not know the reason for his arrest, it is within the discretion of the judge to hold that the arrest was invalid. However, he held that there was no evidence before the court that the accused did not understand the reason for his arrest. He stated that it therefore follows that the answer to the second question must be in the negative.

The decision is somewhat surprising given the findings of fact made by the Judge that the reason for the arrest was not communicated sufficiently to the accused and that the answer to the first question was in the affirmative. Unlike some of the "well aware" type cases such as DPP v. Francis Connell [1998] 3 IR 62, the District Judge had in fact made an express finding of fact to the contrary.

**PENALTY POINTS & THE COURT POOR BOX**

**Kennedy v District Judge Gibbons**\(^{52}\)

Since the introduction of section 55 of the Road Traffic Act 2010, the provisions of section 1(1) of the Probation of Offenders Act 1907 cannot apply to an offence where upon conviction, penalty points are mandatory. In this case the applicant pleaded guilty to an offence contrary to Section 47 of the Road Traffic Act 1961 for speeding. The District Judge, having previously struck out a case on the basis of a donation to the court poor box, was invited to consider the same course of action. The District Judge declined to make such an order and convicted the applicant. The applicant, inter alia, sought certiorari by way of judicial review of the decision of the respondent convicting him of the offence. In addition to the conviction, the applicant also complained about the behaviour of the Judge in refusing to adjourn the case to consider the law on the topic.

Hogan J. held that it was not necessary to consider the behaviour of the

\(^{52}\) [2014] IEHC 67
judge and held that the fundamental question arising for consideration was whether the poor box was a sentencing option open to the Judge. Hogan J. distilled the issue as follows: "Where the imposition of penalty points in respect of a traffic offence is made mandatory by statute and where the accused does not dispute the offence, does a District Court judge have any jurisdiction to strike out the proceedings in return for the accused making a donation to the court poor-box?"

Hogan J. held that despite its obscure and uncertain origins, the poor box jurisdiction is of such long standing and so widespread, that it must be considered to be part of the common law which was adopted by Article 50.1 following the coming into force of the Constitution on 29th December, 1937. However, Hogan J. held that in the case of those traffic offences where the imposition of penalty points has been made mandatory by the Oireachtas via the enactment of the Road Traffic Act 2002, and where the Probation of Offenders Act 1907 has been removed as a sentencing option (section 55 of the Road Traffic Act 2010), the District Court’s common law poor box jurisdiction must be taken to have been superseded by these statutory provisions. The Court held that the District Court enjoys no jurisdiction to impose an informal sanction short of actual conviction such as accepting a donation to the poor box, as this would amount to an indirect circumvention of these statutory provisions.

Hogan J. held that the present case was indistinguishable from the principles set forth by Ó Caoimh J. in DPP v. Judge David Maughan [2003] IEHC 117. In that case the District Judge accepted a donation to the poor box in lieu of convicting the accused of the offence of drunk driving. The facts were admittedly exceptional, in that the accused had suddenly been roused from his bed by a message informing him that his father was seriously ill in hospital. The accused was in the course of driving to the hospital when he was arrested for drunk driving. It was later determined that his blood alcohol level exceeded the statutory maximum and the accused indicated that he would plead guilty to the offence.

Ó Caoimh J. nevertheless held that the District Judge had acted ultra vires by taking this admittedly humane and perfectly understandable course:

“…as he was obliged at the time to determine the case before him and to proceed in accordance with law to enter a conviction and to impose a penalty as required by law. He was not entitled to strike out the charge, notwithstanding the circumstances outlined to him by the notice party’s solicitor at the time. While these indicate that
the notice party might not have driven but for the fact that he was requested to visit his father in hospital, it is clear that such circumstances do not and cannot afford a defence to the offence as charged against the notice party.....”

The critical feature of that case is that section 49(7) of the Road Traffic Act 1961 expressly provided that the s. 1(1) of the Probation of Offenders Act 1907, did not apply to such an offence. Ó Caoimh J. concluded that the terms of s. 49(7) of the 1961 Act necessarily excluded informal sanctions short of formal conviction, such as the acceptance of a donation to charity and the striking out of the charges.

Hogan J. also distinguished the decision of Kearns P. in DPP v Ryan [2011] IEHC 280, [2011] 3 I.R. 641 where he held that the District Judge in that case was entitled to accept a donation to the poor box following a plea of guilty in respect of the offence of sexual assault in lieu of a formal conviction for that offence. Although noting that the offence of sexual assault is inherently graver and more serious than the offence of speeding, the essential difference between the cases was that the Oireachtas had elected for policy reasons to provide for mandatory sanctions and penalties upon conviction in the case of certain categories of road traffic offences. No such mandatory penalties have been prescribed in the case of sexual assault.

In Kennedy, the Court however appears to have disregarded the provisions of Section 7 of the Sex Offenders Act, 2001 where it states "....a person is subject to the [notification] requirements of this Part if he or she is convicted of a sexual offence after the commencement of this part". It must be said that although the sentence the court imposes determines the length of time a person is subject to the notification requirements, it is difficult to see how the decision in Ryan does not apply to the Kennedy scenario and that the poor box is no longer a sentencing option.

SECTION 9 RTA 2002

- European Convention on Driving Disqualifications
- Section 9 came into effect on January 28, 2010 by art.2 of the Road Traffic Act 2002 (Section 9) (Commencement) Order 2010 (S.I. No. 11 of 2010).
- A disqualification imposed in one EU state can be imposed in another (respondent) state. For example if a driving disqualification was imposed in Northern Ireland, an application
can be sent to the corresponding licensing authority in Ireland for an application to be made for the imposition of the disqualification.

PROVING REGULATORY OFFENCES UNDER ROAD TRAFFIC ACTS

*Simon Kelly v Judge Dempsey & the DPP*\(^{53}\)

The applicant/accused was charged with and convicted of an offence contrary to *Misuse of Drugs Regulations 1988 and 1993 made under Section 5 of the Misuse of Drugs Acts 1977 contrary to Ss. 15 and 27 (as amended by Section 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977*. The prosecutor failed to admit into evidence the Misuse of Drugs Regulations.

At the close of the prosecution case an application for a direction of no case to answer was made to the presiding Judge. The Judge refused and application to re-open the prosecution case but indicated that he was taking judicial notice of the existence of the regulations.

MacMenamin J. held that the regulations are required to be admitted into evidence where those regulations create the offence. A Judge does have discretion as to whether to re-open the case if the prosecution wishes to admit the regulations. A Judge cannot (in lieu of reopening the prosecution case) take judicial notice of the regulations where those regulations create the offence.

For obvious reasons this case has practical application to cases under the Road Traffic Acts where the alleged offence is contained within regulations. For example see: S.I. No. 182/1997, *ROAD TRAFFIC (TRAFFIC AND PARKING) Regulations, 1997*, Article 8 (Failing to yield right of way) or S.I. No. 432/1999 — Vehicle Registration and Taxation (Amendment) Regulations, 1999 (format of licence plates).

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\(^{53}\) [2009/1049 JR] MacMenamin J. 14th July 2010
REMOVAL OF A DISQUALIFICATION FROM DRIVING

RELEVANT STATUTORY PROVISIONS:

1. Section 67 of the Road Traffic Act 2010 (which substituted a new Section 29 of the 1961 Act)
   • Applicable to orders of disqualification made on or after 1\textsuperscript{st} June 2011.

2. Section 7 of the Road Traffic Act 2006 (which substituted a new Section 29 of the 1961 Act)
   • Applicable to orders of disqualification made on or after the 5\textsuperscript{th} March 2007 and before the 1\textsuperscript{st} June 2011.

3. Section 29 of the Road Traffic Act 1961 (as amended by Section 27 of the 1994 Road Traffic Act)
   • Applicable to all orders of disqualification made before the 5\textsuperscript{th} March 2007.

To remove or lift a disqualification from driving (more commonly referred to as a restoration of a driving licence) prior to its 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, and

• The order disqualifying the applicant for more than two years was the first such order within a period of ten years, and

• In order to apply the applicant has served over half the period of that disqualification,\textsuperscript{54} 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.\textsuperscript{55}

• The court may grant the application where the applicant has served:

\textsuperscript{54} Section 7(2)
\textsuperscript{55} Section 7(5)
• **Orders made under the 2010 Act:** Two-thirds of the period or a minimum 2 years which ever is the greater. IE. If disqualified for a period of 2 years and 1 day, the applicant must serve a minimum 2 years.

• **Orders made under the 2006 Act:** Two-thirds of the period. IE. If disqualified for a period of 3 years, the applicant must serve 2 years.

• **Under the 1961 Act:** Where the order of disqualification is greater than 4 years, the court may grant the application after the expiry of 2 years. IE. If disqualified for a period of 10 years in 2006 the Applicant may have been entitled to the return of their licence since 2008.

**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. Drunk 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. Careless Driver was convicted of no insurance and disqualified in the District Court for a period of 5 years. The matter was appealed to the Circuit Court and the disqualification order was varied to one of 4 years. He must then make an application for a removal of the disqualification in the Circuit Court.

**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 an application for a removal of the disqualification in the
Different procedures operate around the country in respect of the precise location where applications will be heard. In the Dublin Metropolitan District, applications are now heard in Court 46 of the Bridewell. In most regional courts, the application will be made in the court where the order was made although it can be made in any court in that District or Circuit (where applicable).

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).\footnote{Section 29(6) of the 1961 Act (as substituted)}

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.”\footnote{Section 29(3) of the 1961 Act (as substituted)}

In reality, 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 nature. 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:

- The applicant did not drive during the disqualification period.
- 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

\footnote{Section 29(6) of the 1961 Act (as substituted)}
\footnote{Section 29(3) of the 1961 Act (as substituted)}
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 and the authority is aware of the endorsement.

- The applicant acknowledges the seriousness of offences under the road traffic acts and is prepared to give undertakings to observe the road traffic law should the licence be restored.

- Some Judges (although there is no statutory requirement) also require that the applicant has notified their insurance company of the conviction and endorsement.

Other issues the court will consider:

- Whether there is an objection on behalf of An Garda Síochána to the licence being restored and whether they wish to give evidence as to their objection;

- The conduct of the Applicant in general terms 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 but may not have been prosecuted for a road traffic offence.

A CONDITIONAL ORDER RESTORING THE LICENCE?
The court, upon hearing the application, cannot attach conditions or restrictions. This often arises where, for example, an applicant will present evidence of an offer of employment. Judges frequently pose the
question: Can a licence be restored with a condition being that it is work purposes only? The court cannot do this as per **R v Cottrell**. A person is either fit to hold a licence or not.

WHERE THE APPLICATION HAS BEEN REFUSED, THE APPLICATION CAN RENEWED OR APPEALED:
Where an application for a restoration has been refused, the applicant can renew the Application after the expiry 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 (or Section 67 of the 2010 Act as the case maybe)?

This precise issue was dealt with in **O'Sullivan & Creighton v Superintendent in Charge of Togher Garda Station, Cork & DPP**.

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58 [1956] 1 WLR 280
59 [2008] IEHC 78, Dunne J.
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 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.

**Barry O’Sullivan:**

A Section 49(4) RTA was committed on the 6th October 2002. He was convicted in the District Court on the 1st December 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:**

A 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 Dunne J., the applicants argued that having been disqualified under the old regime they had a right under that regime 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, they had accrued a right to apply under the old provisions as they were disqualified prior to the commencement of Section 7.

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.7 of the 2006 Act].”

Appendix:

Sample Checklist for the application

- 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?;
- Has the Superintendant been notified of application 14 days in advance? (Proof of same);
- Is there a Garda objection to the application?;
- Insurance Company Notification?;
- Why does the applicant need licence back?;
- Why should the court give the licence back to the applicant?;
  - Acknowledgement of seriousness?;
  - Undertaking not to commit any further offences?;
- Relevant personal Circumstances.