



The Review of Drink and Drug Driving Law

Chaired by Sir Peter North, CBE, QC

Response by the Criminal Bar Association of England and Wales

The Criminal Bar Association, which represents over 3,800 barristers with expertise in criminal law, welcomes the opportunity to respond to this consultation. CBA members both prosecute and defend in criminal cases.

Drugs

Question 1. Do you consider the current offence under s.4(1) of the Road Traffic Act 1988 of driving while unfit due to drugs to be effective and adequate?

We have not seen the evidence database on the involvement of drugs in road fatalities/accidents etc. Neither have we examined figures relating to the prevalence of drugs amongst drivers generally. Nonetheless, we feel able to make the following observations:

- a) There appears to be a relatively high prevalence of drug use amongst certain drivers – the worst category being young males.
- b) Drug use amongst drivers is increasing rather than decreasing.
- c) The drugs most frequently affecting drivers are cannabis, cocaine, ecstasy and amphetamines.
- d) There are relatively few prosecutions under s.4.

- e) The s.4 offence is less effective than the equivalent s.5 offence. This may be because it offers less certainty to police and prosecutors. The test to be applied for the offence is whether a person has the ability to drive properly. This will frequently be demonstrated by evidence as to the nature of the driving (speed, manoeuvres, collisions etc), the condition of the driver when spoken to and the results of any preliminary roadside tests. All of these aspects are liable to challenge. Furthermore, the question of whether a driver is able to drive properly may be answered affirmatively notwithstanding that a person has taken drugs (and/or alcohol). Without defined limits a defendant may seek to argue that the quantity of drugs consumed was at such a low level as not to have caused impairment.
- f) The offence is adequate to deal with most situations e.g.: it is sufficiently broad to deal with driving affected by both illegal drugs and medicinal drugs; but it is concerned with the effect (bad driving) rather than the cause (getting into a car having taken drugs). If the real mischief is the taking of drugs that may cause impairment, then setting specific limits would in our view be more effective.
- g) The current offence is ineffective in relation to sentence because the level of intoxication cannot be accurately gauged. Currently, the Sentencing Guideline description of 'moderate impairment' is so broad as to be of little use.

Question 2. Do you think that the current law is adequately enforced by the police? Do you think the police should have greater powers to stop drivers to test if they are impaired?

As stated in the answer to Q 1 above, there appears to us to be a sharp disparity between the apparent prevalence of drug use amongst

drivers and the number of prosecutions under the s.4 offence. Although the offence may not be the most effective we do believe that it is probably not adequately enforced.

One possible explanation for this is that driving whilst under the influence of drugs is frequently coincidental to impairment through alcohol and in many circumstances it is easier simply to proceed to charge with a s.5 charge.

Another possible explanation is that where drugs alone are concerned it is easier to charge drivers with other drugs offences such as possession etc. These are more straightforward and offer a greater likelihood of conviction. *R v Sofekun* [2008 EWCA 2035] is a good example of a situation when 'drug-driving' should have been charged and was not. The defendant was under the influence of cannabis, smelt of it and was pulled over in his car. He was charged with possession of cannabis, driving without insurance and driving without a licence.

According to the figures from the annual Christmas drink and drug driving campaign (December 1 2009-January 1 2010) announced by the national Association of Chief Police Officers (ACPO):

- Police conducted 223,423 breathalyser tests for alcohol – three percent were positive, failed or refused
- In comparison, just 489 Field Impairment Tests were carried out for drug driving – with 18 percent arrested

Both drink and drug driving testing increased on the previous year:

- The total number of drink driving tests was up by almost 22 percent
- This compares to less than a two percent increase in drug driving

tests

There is a substantial gap between the numbers of tests done for drug driving compared to drink driving, and yet proportionally more people on our roads were found to be positive for drugs.

Question 3. Do you consider that a new offence that prohibits driving with a specific drug or level of drug in the body would make the regulation of drug driving more effective?

Broadly yes, although there are obvious difficulties in attempting to establish limits for a very wide range of different drugs. Any such offence would create a parallel with s.5; this is an offence that is readily understood by the public and the police.

Such an offence would presumably require some form of roadside test (saliva?) followed by a further sample (blood?) to be taken at the police station. Provided the testing of the suspect could be achieved with a similar facility to the alcohol testing procedure then it seems this type of offence would offer a more effective solution and be less open to challenge at trial - although a variety of different 'medical' challenges along the lines of those in *R v Ealing Magistrates ex p Woodman* [1994] RTR 189 would be bound to occur. However, once the offence had 'bedded down' the bulk of the cases would in all likelihood be relatively straightforward.

Question 4. Should any new or amended offence be based on:

- *(a) an absolute ban on driving with drugs in the system?*
- *(b) driving with a certain, specified level of a drug within the driver's system, as is the case with alcohol? If yes, what drugs do you think should be included or specified and why?*

An amended offence should set out the limits with respect to specified drugs. Whether the ban is absolute will presumably depend upon medical evidence as to the different intoxicating effects of different drugs. It should take into account the length of time different drugs stay in the body, their effects at low levels and the possibility of passive consumption leading to a low positive.

Question 5. If a new offence is created for some drugs, do you think that the existing offence of driving while unfit due to drugs needs to be retained for others?

Yes. Any offence would only be capable of application to specified drugs. Other intoxicants would still be caught by s.4.

Question 6. Do you consider that any new offence should apply to:

- *(a) all controlled drugs (eg heroin, cannabis, cocaine)?*
- *(b) prescribed or over the counter drugs which are used inappropriately or may otherwise have impairing effects?*

There seems no reason in principle why a new offence should only apply to controlled drugs. However, if there are to be limits set for certain specified drugs then controlled drugs should be within the list of specified drugs. The extent to which other drugs are included will, we imagine, depend upon resources and medical evidence. Given the vast number of prescribed drugs available it would not be possible to include them all in any list of specified drugs.

Question 7. Do you think that the law should also specifically address impairment caused by combining drugs with alcohol?

This is complex but if this could be achieved it might be advantageous. It seems to us uncontroversial that greater degrees of intoxication are likely to attract more severe penalties and that this will be so whether the intoxication is caused by an excess of one substance or by a combination of more than one.

Question 8. What is your view on compulsory drug testing of all drivers involved in fatal (or serious) road accidents?

Broad approval subject to ensuring that the procedures adopted were HRA compliant.

Question 9. Do you think that there are any legal or procedural barriers to securing a conviction for drug-driving? What alternatives or improvements can you suggest?

The taking of samples both at roadside and at the police station is still problematic. As far as we understand, no preliminary drug test has been approved to test the saliva/sweat of an alleged drug user. Without a simple and practical device to use, the police must adopt a far more complicated procedure than that used for drink. This is liable to create difficulties and must be a practical disincentive. If there is to be a new offence it will need the approval of a roadside device (of whatever kind). We understand that approval for this sort of device has been in the pipeline for years but that no test has yet been settled on.

Question 10. What is your knowledge and view of the effectiveness of available drug testing equipment?

Very limited but see the answer to Q 9 above.

Question 11. Do you consider that the procedures for drug testing at the police station (including the role of the Forensic Medical Examiner) need to be improved?

A new offence would presumably require the taking of blood (or urine?) samples at the police station. This would have to be obtained by and with the agreement of a doctor (section 7 (3) and (4) Road Traffic Act 1988). This is resource-intensive and time-consuming but as far as we are aware there will be no need for the procedures themselves to be improved.

We envisage that these would remain the same unless the samples to be required are markedly different in some way. We do not suppose this will be the case.

Question 12. Do you think that the drug drive laws in other countries provide examples of practice that could be adopted in the UK?

We are aware that drug drive laws have been implemented in Canada and some states of Australia. We are not able to comment on their laws and practice however.

DRINK

Question 1. Do you think that the current prescribed blood alcohol limit of 80mg/100ml should be reduced to 50mg/100ml or less?

This would depend on the evidential database; if this shows clearly that in States where there is a lower limit fatal or serious incidents are reduced, then there would be a strong argument for doing so.

Question 2. Do you think that the current penalty regime for drink driving offences is sufficient?

Without data it is difficult to comment; we do not know whether offending is stable, increasing or reducing. It is also difficult to assess whether increasing penalties would have an effect on offending.

Question 3. Do you think that the current penalty regime is effective in tackling repeat offenders? How do you think repeat offenders should be dealt with?

The existing sentencing regime for drink driving offences involves longer periods of disqualification for repeat offenders. Additionally, having a previous conviction or convictions for the same type of offence will be treated as an aggravating feature of any case. We would welcome sight of research into whether sentencing disposals for repeat offenders address alcohol or other substance misuse or dependency. It seems to us that, in keeping with general sentencing principles, there will often be a need to balance public protection and individual treatment of identified issues. In such cases sentences are likely to require an individualised approach.

Question 4. What other measures (other than stricter limits) do you consider could be effective in addressing drink driving?

We do not consider ourselves in a position to make firm suggestions. As identified above in our answer to Question 3, where in particular cases issues are identified that are capable of individualised treatment, we can see scope for reducing the rates of individual repeat offending.

Question 5. Do you think that the current law is adequately enforced by the police? Do you think the police should have greater powers to stop drivers to test if they are impaired or over the limit (e.g. random testing)?

We do not consider we have sufficient information to comment on the adequacy of enforcement.

Random testing brings with it the scope for both abuse and perceived abuse and carries with it a significant risk of losing the confidence of certain parts of the public. Unless there is evidence of very large numbers of people drink driving and not being caught, we cannot see how random testing would begin to become a proportionate response.

Question 6. What is your view of the Government's drink and drug drive message and the relationship between that message and the law?

A clear consistent message for some years: Don't drink and drive or you will lose your licence. The message is reinforced by the law.

Question 7. If the blood alcohol limit were to be reduced, do you think that the penalty attached to a lower limit should be changed?

In terms of fines and length of disqualification, penalties are already dependent upon the level of intoxication.

If it were proposed to remove disqualification itself or to reduce it below 12 months for some lower readings, then this would seem to defeat the purpose of a new lower limit which is presumably there for sound medical reasons.

Question 8. Do you think there that different prescribed limit (or limits) should be imposed on different classes of drivers and riders (eg novice drivers, drivers of Public Service Vehicles (eg buses and coaches), HGVs and those driving for hire or reward)?

No.

Question 9. Do you think that there is a case for immediate suspension of a person's driving licence where that person fails a breath test?

There is a case for it but it is not strong. If a driver wishes to defend a case then he should be entitled to continue to drive until that has been aired before a court.

For those who do not have a defence and plead guilty their appearance at a Magistrates Court will come only a short period after the breath tests in any event and their disqualification will then take place with immediate effect.

Question 10. Do you think that the right (under s.8(2) of the Road Traffic Act 1988) to have a breath specimen replaced with a specimen of blood or urine where the lower of the two breath specimens is less than 50mcg/100ml is justified in light of modern testing equipment?

We are not in a position to answer this question.

Question 11. Do you consider there to be any legal or procedural barriers to enforcing the current law and / or securing a conviction for driving over the limit? What alternatives or improvements can you suggest?

The offence of 'Failing to Provide' is committed regularly because drivers know that the equipment is usually accurate and will establish guilt. 'Failing to Provide' is resource-intensive to prosecute, not least because, to establish a medical excuse, the defence almost always must call expert evidence from a medical professional. This results also in regular and often lengthy adjournments at court, which is costly. The Crown often has to call an opposing expert also.

A narrower distinction between sentences for driving with excess alcohol and for failing to provide a specimen may act as a deterrent to those who seek to avoid criminal liability through sabotaging the testing procedures.

Broadly, however, the law is relatively settled and widely understood by the public. Convictions are commonplace.

Question 12. What do you consider the impacts of any lowering of the blood-alcohol limit may be on casualties, other health outcomes, businesses and on the economy more widely?

We do not know what the impacts would be. We would be very interested in considering data from countries where such changes have been introduced.

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