Defending PCA charges

Introduction

PCA (Proscribed Concentration of Alcohol) charges are rarely defended. There are a number of very good reasons for this fact. For one thing, in most cases there is no reasonable prospect of a successful defence. The system for the detection, documentation and prosecution of PCA offences is so finely tuned that there is often no room left for doubt about the guilt of the accused. Added to this is the cost associated with mounting a defence to a criminal charge. Even where there is a viable defence, some accused will choose to plead guilty to a PCA in order to avoid the substantial cost of a defended hearing.

There is however one other, more troubling, reason why some who charged with a PCA offence plead guilty- because they are not advised of the availability of a potential defence. The combination of the ubiquity of PCA charges and the relative rarity of auspicious circumstances for a defence can lead to complacency when advising clients charged with a PCA. There is a danger that practitioners may too readily gloss over the matters which may give rise to a potential defence and simply assume that the only realistic option available to their client is a plea in mitigation.

This paper is intended to provide practitioners with a practical overview of the most common 'defences'[1] to PCA charges in order to assist in advising and representing clients facing PCA charges. While it is not possible to cover every conceivable defence which may be raised, it is hoped that this paper will go some way to helping criminal law practitioners provide accurate advice to those of their client's who find themselves facing an allegation of a PCA offence.

Honest and reasonable mistake of fact.

In some circumstances, the doctrine of honest and reasonable mistake of fact can be deployed in defence of a PCA charge. While most practitioners are familiar with the defence of honest and reasonable mistake of fact or, as it is sometimes referred to, a *Proudman and Dayman* defence, it is worth restating.

The most commonly quoted formulation of the defence comes from the judgment of Dixon J in *Proudman v Dayman* (1941) 67 CLR 536:

"As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."

[1] In this paper the word "defence" is not used in its strict legal meaning- being a matter which exculpates the accused, proof of which lies on the accused on the balance of probabilities, but rather in a wider sense of a strategy or argument which may be deployed to resist a finding of guilt in relation to a PCA charge.

The defence applies to offences of strict liability. That is, offences where *mens rea* is not an element of the offence, but which are not offences of absolute liability (in which case, the offence conclusively established upon proof of the *actus reus*).

So much is probably not news to most seasoned criminal practitioners. The writer now turns to consider some aspects of the defence which, in the writer's experience, are sometimes less frequently appreciated.

Not really a "defence"

Describing the issue of honest and reasonable mistake as a "defence" can lead to confusion about its true nature. It is often supposed that proof of existence of honest and reasonable mistake lies on the defendant on the balance of probabilities. That is not so. Absence of honest and reasonable mistake is an element of any strict liability offence. The defendant bares only an evidentiary onus to raise the issue (unless the issue arises on the evidence adduced by the prosecution itself). Once raised, the prosecution must negative it beyond a reasonable doubt in order to secure a conviction.

In *He Kaw Teh v R* (1985) 157 CLR Gibbs CJ said

"provided that there is evidence which raises the question the jury cannot convict unless they are satisfied that the accused did not act under the honest and reasonable mistake"

More recently in *CTM v The Queen* [2008] HCA 25 Gleeson CJ, Gummow, Crennan and Kiefel JJ in their joint judgment preferred to describe the doctrine as 'a ground of exculpation'. At paragraph 8 their honours stated:

"As explained in *He Kaw Teh v The Queen*, the evidentiary onus of raising the ground of exculpation is on the accused, but, once that occurs, the ultimate legal onus of displacing the ground lies on the prosecution."

The practical effect of this is very significant. In the absence of an admission to police, it can be very difficult for the prosecution to establish beyond a reasonable doubt that an accused did not make an honest mistake where he or she claims to have made it. It is therefore important when relying on the *Proudman and Dayman* ground of exculpation to assist the court to properly understand where the onus of proof lies.

Honest and reasonable mistake and PCA charges

Honest and reasonable mistake of fact applies to PCA charges. In *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303* Howie J twice affirmed that PCA offences are offences of strict liability (see paragraphs 40 and 101).

Moreover, in *DPP v Bone* (2005) 64 NSWLR 735, Adams J expressly rejected the DPP's submission that PCA offences are absolute liability offences and affirmed the availability of the defence of honest and reasonable mistake.

The effect of this is that if the accused raises the issue that he/she honestly and reasonably believed that he/she was not over the legal limit at the time of driving than, unless the prosecution can

negative that issue beyond a reasonable doubt, the accused is entitled to be acquitted. It is important to appreciate that an honest belief by the accused that they were not in the BAC range charged, but rather a lower range, but still above the legal limit applicable to them, does not avail the accused of a defence. This is because the doctrine requires a belief in a state of affairs which would render the impugned conduct **innocent**- not merely less serious.

In practice, the most obvious application of this defence to PCA matters is in relation to the so called "morning after" offence. That is, where the accused is detected with typically a very low blood alcohol concentration after having consumed alcohol the previous night.

In such a case, it is almost always the situation that the accused thought that he/she was not over the legal limit and was very much surprised when told by police that he/she was in fact over. For a lay person (without the benefit of the accrued wisdom about how alcohol is metabolised by the human body which most magistrates and criminal practitioners acquire during their career) such a mistake is (in the writers view at least) quite a reasonable one to make. Indeed, there seems to be an implicit recognition of this fact within the profession and amongst members of the magistracy. This is evidenced by the common practice of dismissing charges in these circumstances under the provisions of section 10 of the *Crimes (Sentencing Procedure)* Act 1999. What is missing however is widespread recognition of the applicability of the honest and reasonable mistake issue.

Another good candidate for this defence is the accused who in his/her drinking has been scrupulous to count their drinks and ensure that they stayed within the familiar guideline which was until recently promulgated by the RTA of "two standard drinks in the first hour and one every hour thereafter", and then before driving waited some time to allow a further margin for abundant caution. Again, in that situation one would have thought that the accused was operating under and honest and reasonable belief that he/she was under the limit.

It is worth noting that the RTA no longer promulgates the guideline referred to above. Instead, the current road user's handbook makes the following statements:

"The easiest way to accurately measure a person's BAC [blood alcohol concentration] is with an Australian Standards approved (AS3547) breath testing device."

And:

"Even when you know how many drinks you have consumed you will not be able to calculate your BAC without taking a breath test…"

This advice is in the writers view next to useless in a society in which the consumption of alcohol is very much a part of the culture and where personal breath testing devices are not widespread. Worse still, if followed, it is liable to mislead. Pharmacologists tell us that a person's BAC can continue to increase for up to one and a half hours after the last drink is consumed. Consequently, even undergoing a self-administered breath test at the commencement of driving is no guarantee that one will not find oneself over the limit during the course of the journey. Accordingly, the implication conveyed by the advice quoted above - that if a breath test returns a negative reading than its OK to drive- is wrong.

All of this serves to underscore the complex task that it is to accurately judge ones BAC at any given point in time. Seen in this light, the defence of honest and reasonable mistake assumes particular relevance.

Below is a suggested checklist of some of the matters with respect to which instructions should be obtained when considering a defence of honest and reasonable mistake for a PCA matter:

1. What drinks where they, in particular, were they standard size?

2. Is there any possibility that some drinks might have been spiked without the accused's knowledge?

3. What method was the accused using in an effort to ensure that he/she was under the limit at the time of driving?

4. Was the accused ever previously subjected to an RBT after having relied on this method and if so:
    a. What was the result of the RBT
    b. What conclusions did the accused draw about the reliability of that method from that experience?

5. Did the accused rely on the 'rule of thumb' referred to above?

6. If so,
    a. how did the accused become aware of that rule
    b. when did the accused obtain his/her driver's license (i.e. Was it at a time when the RTA was still promulgating the rule of thumb).
    c. did the accused allow a margin for error before commencing the journey.
7. How did the accused feel before commencing the journey?

8. Was there any facility for checking ones BAC at the venue where the accused was consuming alcohol?

9. Did the accused in fact undergo a breath test before commencing driving?

The *Jiminez* defence

In *Jiminez v R* [1992] HCA 14, the High Court held that a person cannot be said to be driving while unconscious at the wheel. In a joint judgment the majority said at paragraph 9 :

"If the applicant did fall asleep, even momentarily, it is clear that while he was asleep his actions were not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public. The offence of culpable driving is, in this respect, no different to any other offence and requires the driving, which is part of the offence, to be a conscious and voluntary act"

While the charge under consideration in *Jiminez* was culpable driving, used imaginatively, the principles araising from this decision it can be utilised (in appropriate cases) in relation to any charge which has driving as an essential element, including a PCA. As an example, the writer acted for a person charged with high range PCA. The client was found by passers-by slumped over the wheel of his car. He was asleep, the engine was running, his car was in gear and resting up against a parked

car with which it had obviously collided. After being woken up, he was subjected to a breath analysis and returned a reading in the high range. Perhaps not surprisingly, he was charged with high range PCA.

He entered a plea of not guilty. The basis of the plea was that in accordance with the *Jiminez* principle, he could not have been said to be driving whilst unconscious. Therefore, since driving is an essential element of a PCA offence, he could not have committed the offence while asleep. While it was clear that the client had driven to the site of the accident at some earlier time, there was no way to ascertain when that was. This meant that the prosecution could not prove what his blood alcohol concentration would have been at that time, nor could they prove that the 2-hour rule was in fact complied with (see below). Following some last-minute discussions with the prosecutor, the charge was withdrawn and a charge of negligent driving proffered (to which a plea of guilty was entered and, dealt with by way of fine only).

Home safe rule

The statutory bases for the so-called "home safe" rule appears in cl. 2(1)(e) of Schedule 3 to the *Road Transport Act 2013*, which relevantly provides that:

"A police officer cannot require a person to submit to a test, analysis or assessment, or to provide a sample, under this Schedule:

…

(e) at that person's home."

It was established in *R v Vanter* (1992) 29 NSWLR 311 that once the issue of whether or not this provision has been breached is raised by the evidence, the prosecution bares the onus of proving, beyond a reasonable doubt, that the breath test was not carried out in breach of that section.

In *Vanter*, which concerned the construction of the statutory predecessor to cl.2, the Court said at p 315-316 :

"If, however, evidence were given in a particular case which raised an issue whether the requirement was made at the person's usual place of abode within the meaning of subs (5)(d), then the onus would, in our view, rest upon the prosecution to establish beyond a reasonable doubt that the requirement [to undergo a breath test] was not made at the defendant's usual place of abode…"

The question of exactly in what circumstances the rule does and does not apply has been the subject of some judicial consideration. However, before proceeding to consider the case law on this point, a preliminary question raises for considerations.

In December of 2006, the statutory predecessor of the provision presently under consideration (i.e. section 17(d) of the Road Transport (Safety and Traffic Management) Act) was amended by the *Road Transport Legislation Amendment (Drug Testing)* Act 2006 by deleting the words "place of abode" and replacing them with "home" (that is, sub section (d) previously read 'at that persons place of abode'). Each of the decided cases consider the meaning of the old concept of "place of abode". It is therefore necessary to consider whether, and to what extent the old cases can be applied to the provision as it currently stands.

The new wording has not yet received judicial consideration. However, the writer submits that the change from "place of abode" to "home" is cosmetic, not substantive, and does not alter the meaning of the section. There is support for this view in *Haberhauer v Simek* (1991) 9 Petty Sessions Review 4235. In that case, Sully J held that the phrase "usual place of abode" was equivalent to "home". Hence, the change of wording can be regarded, in the writer's view, as being merely an

exercise in converting the wording of the provision into plain English without altering its meaning. It follows therefore that the cases which had previously considered the construction of “place of abode” are directly applicable to the provision in its current incarnation.

Based on this assumption, the question of what constitutes a persons ‘home’ for the purpose of this section is ultimately a matter of fact to be determined on the facts of each individual case:

In *DPP v Skewes* NSWSC 1008 (12 November 2002) Sperling J, referring with approval to the remarks of Sully J in *Haberhauer* regarding the question of what constitutes a “place of abode”, said at paragraph 15:

“Each case, his Honour said, must be decided having regard to ‘the character and the circumstances of the item under consideration’”

However, the following general propositions and indicia of what constitutes a person’s ‘home’ can be gleaned from the cases:

- The common law concept of ‘delineation of the curtilage’ (that is, the enclosed space within which a building is situated) is not a reliable indicator of a person’s home (see *Skewes* at [5] and *DPP v Linnett* (2006) NSWSC 1086 at [37]). Thus, if a person resides in a lodge within enclosed hospital grounds, the entire grounds of the hospital are not that person’s home. Similarly, a resident of a caravan park cannot sustain an argument that the entire grounds of that park are his home for the purpose of clause 2(1)(e).

- In the case of an ordinary residential property, anything inside the boundary of that property is the occupants home (see *Skewes* at [20])

- There is generally no distinction between a single occupancy property and a multi-occupancy property (see *Skewes* at [21], but see also *Linnett* at [35] which suggests - referring to a caravan park- that this does not apply where the occupants do not “in any sense reside in the same physical space or area’’)

- Physical contiguity or physical connection between the building in which the person resides and the place where the breath test took place is an indicium that that place was that person’s home within the meaning of the section (see *R v Clampett* (1984) 11 A Crim. R 103). For instance, a car park which is part of the same structure as the dwelling is more likely to be considered part of a person’s home than one which is not.

- A further indicium is whether the place was used for the comfortable enjoyment of the dwelling. Ground which is used for the comfortable enjoyment of a dwelling may be considered as integral to the dwelling and therefore form part of the home regardless of whether it is marked off or enclosed. (see *Haberhauer* at [15])

Once it is established that a breath test was conducted contrary to cl.2(1)(e) the next question is what effect that has on the proceedings for a PCA charge. In this regard, there are two competing points of view.

On one view, a breath test contrary to cl. 2(1)(e) merely renders the test itself, the subsequent arrest and breath analysis illegal. The consequence of that illegality is that the evidence of the breath analysis is illegally obtained within the meaning of s138 of the *Evidence Act* 1995, giving the Court discretion to exclude it from evidence.

The competing view is that the consequence of a breath test contrary to cl.2(1)(e) in not just **illegality** but in fact **invalidity** of the clause 35 certificate which is used to evidence the result of the breath analysis.

This view emanates from the two penultimate paragraphs of the decision in *Skewes* in which Sperling J said:

"25 In *Vatner*, as I have recorded, the Court decided where the onus of proof lay on the issue as to whether a person is at the person's place of abode. The Court then went on to hold (at 316) that, because the prosecution had failed on that issue, the offence of refusing to undergo a breath test was not made out. Similarly, because the arrest was then invalid and the requirement to submit to a breath analysis was then also invalid, the offence of failing to submit to a breath analysis was not made out. The Court accordingly remitted the proceedings to the District Court with a direction that the appellant was entitled to a verdict of not guilty on each charge.

26 By parity of reasoning, so far as the present case is concerned, the prosecution having failed on the issue as to whether the breath test was required at the defendant's place of abode, the conditions necessary for the issue of a certificate under the legislation were not established. The certificate was therefore not a valid certificate and was, accordingly, inadmissible. In these circumstances, no question of discretion arose as to whether the certificate should be admitted into evidence. It had to be rejected."

This view is contrary to the view expressed by Sully J in *Haberhauer* where his honour said "the notion that a breach of s4E(5)(d) [of the *Traffic Act* 1909- which is the predecessor of s17(d)] renders absolutely inadmissible evidence of the result of a breath test analysis conducted after the breach, cannot be sustained, in my opinion, in light of the decision of the High Court in *Merchant v The Queen* [(1971) 126 CLR 414]."

In *Linnett,* Buddin J declined to express a concluded view on the issue (see par. 42-43).

The writer suggests that the view expressed in *Haberhauer* is the better view. The view in *Skewes* is very difficult to reconcile with the high court decision in *Merchant*.

In *Merchant*, the Court considered the issue of the admissibility of a breath analysis certificate under s.4E(12), which is the forerunner of the cl.35. It was submitted to the Court that the certificate was not valid because the breath test which was administered to the driver was performed in breach of the provisions then applying to such tests. The Court rejected that argument and held that:

"Where a constable employs the authorities given by the section there is a progression through the various stages from a reasonable belief in the mind of the constable, s. 4E (2), the administration of the breath test, s. 4E (2), the arrest, s. 4E (3), and the subsequent breath analysis test, s. 4E (4), to a point where the material for a certificate under s. 4E (12) becomes available. But that does not mean, in my opinion, that all the stages in that progression, called by the applicant's counsel steps in a chain, are an indispensable prelude to the admissibility of a certificate given in conformity with s. 4E (12). In my opinion, there is no warrant for introducing by implication any conditions prerequisite to the admissibility of a certificate under that sub-section. If the certificate complies

with the provisions of the section it is, in my opinion, admissible on its mere production in a prosecution under s. 4E (1) whether or not those proceedings emanated from an arrest under s. 4E (3)."

Given that the legislative scheme described by the High Court is mirrored by the current legislation, it is difficult to see how *Skewes* can be reconciled with the dictum of the High Court.

None the less, it is at least arguable that until and unless *Skewes* is overruled, lower Courts are bound by it.

Road

Section 110 of the *Road Transport Act* 2013 (the Act) makes it an offence to drive with a prescribed concentration of alcohol in one's blood (or breath) per-se. That is, it does not limit the offence to driving taking place on a road or road related area. However, in an apparent anomaly which the writer is at a loss to explain, the power of a police officer to require a person to undergo a random breath test is inextricably linked with activity taking place on a road (which is defined in the ACT as including a road related area).

Clause 3 of schedule 3 to the Act provides that:

> 1) A police officer may require a person to submit to a breath test in accordance with the officer's directions if the officer has reasonable cause to believe that:
>
> > (a) the person is or was driving a motor vehicle **on a road**, or
> >
> > (b) the person is or was occupying the driving seat of a motor vehicle **on a road** and attempting to put the motor vehicle in motion, or
> >
> > **(c)** the person (being the holder of an applicable driver licence), is or was occupying the seat in a motor vehicle next to a learner driver while the holder of the driver is or was driving the vehicle **on a road.**
> >
> > (emphasis added).

Clause 4 than gives the police a power of arrest following a failed breath test carried out in accordance with clause 3 and clause 5 provides a power to require a person arrested under clause 4 to undergo an evidential breath analysis.

The effect of this legislative scheme is that if, at the time of issuing the demand to a person to undergo a breath test, the police officer did not have reasonable grounds to suspect that the activity described in sub-sections (a), (b) or (c) above took place on a road, there was in fact no power to demand the submission to the breath test.

It follows that the subsequent arrest and subsequent breath analysis are illegal and therefore the result of the evidential breath analysis is illegally or improperly obtained within the meaning of section 138 of the *Evidence Act* 1995. It is therefore liable to be excluded from evidence.

The upshot of all of this is that in advising clients in respect of PCA charges, some attention should be devoted to whether the driver was in fact on a road or road related area at or about the time of the breath test.

It needs to be borne in mind however that the issue of 'road' is of relevance in relation to admissibility of evidence of a PCA, not in relation to the commission of the substantive offence. Two points of caution flow from this:

1. What is of importance is not whether or not, as a matter of fact, the activity which enlivens the power to subject a person to a breath test took place on a road or road related area but rather whether the police officer conducting it had reasonable ground to suspect that it did. Accordingly, it may of little comfort to an accused that the police officer conducted a breath test in the middle of a paddock if that same police office also happened to see the accused drive onto that paddock from a road.

2. Even if a court is satisfied that the police officer conducted the breath test contrary to clause 3, that does not automatically render the subsequent breath analysis excluded from evidence. It merely engages section 138 of the *Evidence Act* 1995, which requires the court to undertake a balancing exercise in deciding whether to exercise its discretion to exclude the evidence. Although, if the view about the admissibility of a section 33 certificate following a breach of s17(d) espoused by Sperling J in *Skewes* is to be accepted, then it is arguable that it is equally applicable to a clause 35 certificate issued after a breach of clause 3.

The 2 hour rule

The so called '2 hour rule' holds that the breath analysis must be carried out within 2 hours of the last act of driving. In actual fact, there are two limbs to this rule.

<u>The first limb</u>

The first limb arises out of the provisions of clause 31(3) of schedule 3 to the Act. This is a facilitative provision. Its effect is that, as long as the breath analysis was conducted (or blood sample taken) within 2 hours of the last act of driving (or other activity referred to in clause 3) than the reading it produces is rebuttably presumed to be the reading at the time of driving (or other activity referred to in clause 3).

This provision is intended to overcome the difficulty which would otherwise exist in proving the blood alcohol concentration (BAC) of the accused. Given that BAC is not constant, but fluctuates with time, a breath analysis result taken even 30 mins. after the last act of driving does not, in truth, accurately represent the BAC at the time of driving. By utilising clause 31 the prosecution is relieved of the burden of extrapolating the BAC at the actual time of driving from a reading taken some time later.

It is not impossible, with the assistance of expert pharmacological evidence, to extrapolate the BAC at the time of driving. However, to do this requires information which may not be available to the prosecution or, if it is available, may not be sufficiently reliable to ascertain the BAC beyond a reasonable doubt. This information includes the time of first and last drink, the amount of alcohol consumed and the alcoholic content of the drinks.

In order to avail itself of clause 31 (3), the prosecution must prove (beyond a reasonable doubt of course) that the breath analysis or blood sample was in fact taken within 2 hours of the last act driving. If this proof is not available, the prosecution must prove the BAC at the actual time of driving or else the prosecution fails.

The second limb

The second limb of the 2 hour rule arises out of the provisions of clause 2(c) schedule 3 to the Act.

This provision reads as follows:

"A police officer cannot require a person to submit to a test, analysis or assessment, or to provide a sample, under this Schedule:

…

(c) at any time after the expiration of the relevant period (if any) for the test, analysis assessment or sample concerned."

In turn, the "relevant period" is defined in clause 2(2). In relation to a breath test or analysis, that period is 2 hours from the time of the event in in clause 3(1) which enlivens the power to conduce a breath test (however, in relation to a blood sample, the relevant period is 4 hours).

Under this limb, a breach of the two hour rule is even more problematic for the prosecution. This is because the consequences of a breach of the 2 hour rule under this limb are identical to a breach of clause 2(3) discussed above. That is either illegality of the breath analysis leading to an application to exclude under s138 of the Evidence *Act* 1995 or, on the basis of the *Skewes* decision, complete invalidity of the resulting evidently certificate.

Clearly, it is generally preferable to utilise both limbs of the two hour rule. However, before deciding to utilise the second limb, a number of strategic considerations should be resolved.

First, when asserting the inadmissibility of evidence, the onus of proving the facts which make the evidence inadmissible is on the person seeking to exclude that evidence (to the civil standard - see s.142 *Evidence Act* 1995). Sometimes the Accused is not in a position to discharge that onus in relation to the 2 hour rule but is simply relying on the fact that the prosecution cannot come up to proof either.

Second, reliance on the second limb of the two hour rule must generally be flagged earlier in the proceedings than reliance on the first limb. If objection is taken to the admission of evidence of the reading on the basis of a breach of clause 2, it must be taken at the time that the prosecution tenders that evidence. This gives rise to a possibility that once the prosecution is alive to the fact that there is a problem in their case, an application for adjournment could be made to allow the police to carry out further investigations with a view to ascertaining the time of driving. On the other hand, reliance on the firs limb need not become obvious until after the prosecution closes its case, in which case it would be much more difficult for it to seek to adduce further evidence. Accordingly, if there is a possibility that further investigation could produce evidence of the time of the last act of driving which may not be favourable, it may be prudent to forgo reliance on the second limb.

In the writer's experience, the 2 hour rule can be very useful in defending matters. This is particularly so in cases where the Accused is apprehended as a result of a collision. In these

circumstances, the police are not at the scene at the time of the collision and therefore it can be difficult to prove what time it occurred. Further, even where there is good evidence of the time of the collision, by the time the police are called, arrive at the scene, deal with any injuries and convey the accused to a police station for a breath analysis, more than 2 hours has often elapsed. The point here is that whenever one obtains instructions that the offence involves a collision, alarm bells should start ringing as to whether there is a potential defence based on a breach of the two hour rule.

Displacing the presumption of accuracy of the breath analysis.

Last, but by no means least among the strategies available for defending a PCA charge is displacing the presumption in cl. 31(3). As was noted above, in order to overcome the difficulty associated with the dynamic nature of blood (or breath) alcohol concentration, the prosecution relies on the presumption in cl. 31(3). At the risk of repetition, the effect of this provision is that, as long as the breath analysis was carried out (or blood sample taken) within two hours of driving, it is presumed to represent the accused's BAC at the time of driving. What is of importance for present purposes is that this presumption can be re-butted by the defence proving (on the balance of probabilities) that the actual BAC at the time of driving was below the threshold relevant to the charge in question.

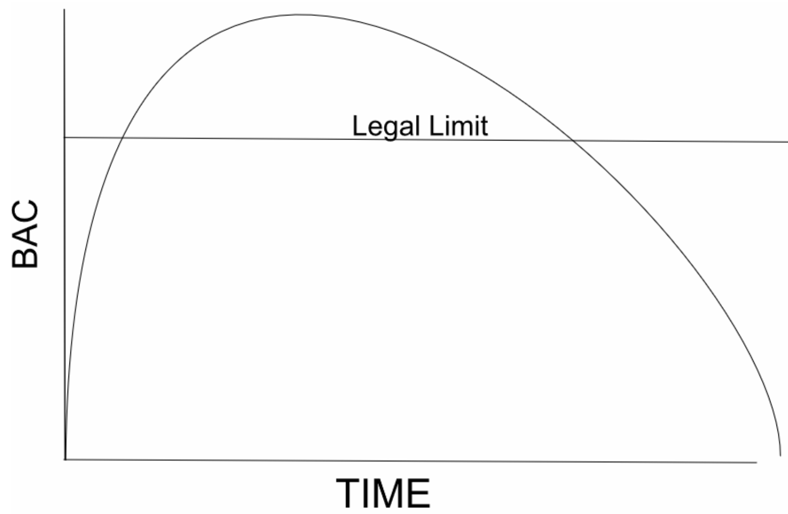
An expert pharmacologist is able carry out calculations in order to effectively extrapolate the BAC at the time of the breath analysis back to the time of driving and express an opinion as to what the accused's likely BAC was at that time. If that opinion is that the BAC at the time of driving was lower than the reading obtained from the breath analysis conducted by police, it can constitute either a complete defence (if the likely BAC was below the applicable legal limit) or a partial defence (in a case where the likely reading is above the legal limit but in a lower range than that charged).

While only an expert can express an admissible opinion concerning a person's BAC, it is important for criminal practitioners to have a working knowledge of the fundamentals of the way in which the body absorbs and metabolises alcohol so as to be able to recognise circumstances in which an expert opinion ought to be sought. For this purpose, what follows is a clayton's explanation way in which the body deals with alcohol.

When alcohol is ingested, it first makes its way into the stomach. From there it is absorbed through the wall of the stomach straight into the bloodstream causing the BAC of the subject to increase. This is referred to as the "absorption phase". The duration of the absorption phase is variable and depends partly on whether the subject drinks on a full or empty stomach and what type of food the subject has in the stomach. As a rule of thumb, the absorption rate can last between 30 to 90 minutes.

Once alcohol enters the blood stream, the liver starts to metabolise it out. This is a slower process than absorption. Initially, both absorption and metabolisation are occurring simultaneously, however because absorption takes place faster than metabolisation, the result is an initial increase in BAC during the absorption phase. Once all the alcohol in the stomach has been absorbed, the liver continues to slowly metabolise the alcohol out of the blood, resulting in a gradual decrease in the subject's BAC. This is referred to as the 'elimination phase'.

This process is best illustrated diagrammatically:



In view of the above (admittedly perfunctory) analysis, the tell-tale signs that a pharmacological opinion may be of assistance to the accused are:

1. The last drink was less than 90 minutes before the accused was pulled over by police.
2. The BAC is just over the legal limit or just over the threshold applicable to the range charged.
3. A significant period has elapsed between the accused being pulled over and the breath analysis or blood sample.