JUDICIARY OF
ENGLAND AND WALES

Judge Howard Riddle, Senior District Judge (Chief Magistrate)

Westminster Magistrates' Court

CPS

v

Danny Cipriani

The charge

Mr Cipriani is charged that on the 1st June 2015 at the London Borough of Hammersmith & Fulham he drove a motor vehicle, namely a Mercedes index RO64 XGM on a road, namely Imperial Road, London, SW6 after consuming so much alcohol that the proportion of it in his breath, namely 67 microgrammes of alcohol in 100 millilitres of breath, exceeded the prescribed limit, contrary to s5 Road Traffic Act 1988.

Prosecution evidence

At about 5.15am on 1st June 2015 there was a collision on Imperial Road involving a taxi driven by **Mr Kassim**, and a black Mercedes driven by Mr Cipriani. The drivers blamed each other for the accident, and I do not determine fault one way or the other. Mr Kassim says Mr Cipriani smelled of alcohol. He could not speak properly and was stuttering. The taxi passenger phoned the police.

PC Ellsworth was called to the scene. Mr Kassim identified Mr Cipriani as the driver of the Mercedes. The officer asked the defendant if he was the driver, and received the reply "yes". (This was not challenged by the defence, and although the crown had been put to proof that Mr Cipriani was the driver, this aspect of the defence was not actively pursued.) The officer smelled alcohol, "his eyes were glazed" and he appeared intoxicated. Mr Cipriani agreed he had been drinking. He produced the car keys from his pocket and blamed the taxi driver for the accident. His speech was slightly slurred. The

roadside breath test procedure was conducted. On being asked whether he had had a drink in the last 20 minutes, Mr Cipriani said "no". Mr Cipriani failed the roadside test and was arrested at about 5.30am. He was cautioned (for the first time) and made no reply.

PC Pascoe was also at the scene. He described Mr Cipriani as quiet, his speech was slurred and he smelled of alcohol. In cross-examination he said the slurring was slight, not like an obvious drunk.

The defendant was taken to Hammersmith police station. There was a delay booking him in. This was explained to me by Sgt Peacock. The delay was because there was not sufficient time to conduct the booking in procedure before the hand over from the night shift to the day shift. Sgt Peacock described the process in some detail, and I accept that explanation.

Sgt Pullen booked in Mr Cipriani, and opened the custody record at 6.51am. Mr Cipriani was distressed. They talked about rugby. Mr Cipriani said his position with England was in jeopardy. The sergeant gave evidence about the breath test procedure. The machine calibrated regularly. I will return later to the difficulties caused during this passage of evidence. Mr Lucas objected to me having the form MGDDA for note-taking purposes (which was unhelpful) and so the evidence was given orally but by reference to the contemporaneously recorded form. The statutory warning was given. The lower of the two readings was 67. He gave a copy of the print-out showing the reading to the defendant, who did not comment. The machine was working. The two readings were only one apart. As the question had been raised as to whether Mr Cipriani was the driver he was interviewed about this, and that interview does not impact on the decision I now have to make.

In cross-examination the officer insisted he had put all the questions in the MGDDA, including the statutory requirement. He confirmed there was no radio present while the breath testing was conducted. There was another officer present, but she did not put her radio on the machine, as suggested. There was no sound or static. He is satisfied the machine is reliable. He referred to the annex to the form MGDDA.

The print-out was not produced as an exhibit. I will return to this later.

Sgt Peacock gave evidence as to why Mr Cipriani had not been booked in earlier. It was because of the handover period.

Submission of no case

For reasons I gave in writing at the time, I found there was a case to answer.

Defence evidence

Mr Cipriani told me that on 31st May 2015 he played rugby for England. After the game he and three others had dinner together. They arrived at the restaurant, Eight over Eight, at 8:30pm. He had a substantial meal, and drank two espresso martinis and a single vodka and cranberry. He had his first drink of the day, an espresso martini, just before 9 o'clock and his last alcoholic drink just before midnight. He then went to another venue, a club called Libertines, and stayed there for a short period. He drank no alcohol at that club and then went to a friend's home for a little over three hours sleep. He then took a taxi to the Fulham Road where he was meeting others for breakfast. These were the same people he had been with earlier. He arrived there at about 4am and had a full English breakfast. He also had a small (125 ml) champagne flute and two espresso martinis. He probably finished his last drink at 4.40 or 4.45 and then took a taxi to his car. He felt fine. He was going to drive home and from there take a taxi to the airport. On the way home he was involved in an accident. The driver's door was damaged so he had to leave through the passenger door. The driver of the other vehicle was already on his phone and the police arrived fairly soon after he provided a roadside breath test and was shocked when he was asked to go to the police station. "I was miffed." At the scene of the accident his speech was not slurred – he was speaking as he speaks today. He was not drunk and did not feel intoxicated. He was a bit tired having only had just over three hours' sleep.

On arrival at the police station he was taken to the gated area. He waited in the caged area. The arresting officer spoke to somebody inside. He didn't hear what was said, save that he heard the name "Danny" (his first name) and it appeared the officer was trying to set up for him to go into the police station. He was in the caged area for quite a long time. It was impossible to say how long as he didn't have a watch and the officer had his mobile phone. He was called in and remembers Sgt Pullen as "a friendly guy". He had watched the rugby game the day before and they talked about it. He was accommodating and friendly. Mr Cipriani was in a cell for a short while and then taken to the breathalyser. He provided two samples of breath. He remembers formal language being

used and was told failure to blow into the machine might make him liable for prosecution. He was "pretty shocked" to learn that he was over the limit. He didn't say anything, but thinks the officers would have been able to tell from the look on his face that he was startled. He was then put in a cell for an hour or two, saw a doctor, and was released.

In cross-examination he said he was with Chris and Marlon and Chris's brother, but they were not at court to give evidence. They saw how much he had to drink. He doesn't know the exact alcoholic content of an espresso martini, as it is a cocktail. It comes in a cocktail glass. He didn't ask how much alcohol was in the drink. He reaffirmed that the last drink he had at the restaurant was just before 12. He also confirmed he had nothing to drink at Libertines. He slept at a friend's house, but the friend was not a court to give evidence. He was not remotely over the limit. He denied swerving, driving fast or causing the accident. He didn't call the police because the other driver was already on the phone to the police. His last drink before the accident was within the hour. Sgt Pullen was trying to make the process smooth for him, but Mr Cipriani didn't mention to him the effect it would have on his career. He was asked whether there was a radio in the breathalyser room and he said that he heard static from a police officer behind him. He gave a no comment interview on the advice of his solicitor.

Dr Mundy specialises in the field of alcohol detection and has a background working in the Metropolitan Police Forensic Science Laboratory in London from 1967 until, after a merger, 1999. Since then he has acted as an independent forensic alcohol consultant for Hayward Associates. His other clients have included Intoximeters UK and he has given evidence in over 1000 cases as a forensic expert on alcohol. He prepared a joint report with a Mrs Dale, and gave live evidence. He was present when Mr Cipriani gave evidence, but not during the prosecution evidence. He is familiar with the Intoximeter EC/IR, the machine involved in this case. This machine was approved in 1998 and approval was reissued in 2005. It is also in use in Scotland, and continues to be used there after the legal limit in Scotland was reduced from 80 to 50 in blood. He received instructions from Mr Cipriani's lawyers. His conclusion, which he justified for the court, was that either Mr Cipriani had drunk more than he had said, or the machine was unreliable. On the information supplied, the range of breath alcohol would be from 0 to 28mg %, and the likely breath alcohol level would be about 7mg%. It could not be higher than 28 and couldn't get anywhere close to 67, the reading provided by the police. He

repeated that either the defendant's evidence is incorrect, or someone has added something in his drink, or the machine is wrong.

Dr Mundy explained for me the significance of the A29 table at the end of the MGDDA. This table is to be used only where there are two printouts, never where (as here) there was a single printout. The table is not concerned with calibration. Whether the machine is reliable depends on calibration. If the machine is not properly calibrated, then it will not provide a reading. He assisted me by explaining the steps the machine takes to provide a printout (a sample of which appears, for example, in Wilkinson's *Road Traffic Offences* at appendix 1). After the first purge blank and simulator there is a check which should be 35 (in a range between 32 and 38) and then another purge. If that is successfully completed, then the first sample is taken. There is then a further purge blank cycle, followed by a second sample from the motorist and another purge. There is then another check. If everything is in order, there is a certification at the end of which the operator should sign. If everything is not in order the machine does not produce a certificate and an error message will appear. That should be obvious to the operator, but Dr Mundy has seen some strange operators in his time.

The machine does not calibrate itself, it checks the calibration. Calibration is a different process. This process was described for me. Calibration is long-lived. There may be years between calibrations. If you have breath tests that are "within spec" then you could say they have calibrated regularly. The evidence of Sgt Pullen, as put to Dr Mundy by Mr Lucas, does not tell us what the second calibration test was, or whether there "were any messages there". We do not know if something has gone wrong between the last sample and the end of the test. On this evidence, he said, we do not know if these are valid and reliable measures.

Dr Mundy was also asked about other evidence that he had not heard. There is no correlation between the smell of alcohol and the breath test reading. The roadside test is secondary evidence. It is a screening test. It can give unreliable results, for example (it has been suggested) if damaged by being dropped. The roadside test indicates pass or fail but doesn't show a value.

In cross-examination Dr Mundy agreed it is unlikely that both the roadside test and the evidential breath test machine would be wrong, except in the case of mouth alcohol. He

could not speculate on why there should be such a vast difference between the reading from the evidential machine, and the likely reading on the information provided by Mr Cipriani. He described the recipe he had come across for espresso martini. If the machine had failed and gone back to the manufacturers it would have been calibrated. Servicing should take place at six month intervals, and not more than 13 months. The EC/IR is a second generation machine and is generally-speaking reliable.

Mr Christian Wade gave evidence by way of a section 9 statement. The defence said this had been served on the prosecution, but Ms Weiss had not seen it until the evidence was about to be adduced. It was not in the court file. In the event I agreed that it would be admitted on the basis that the facts were not necessarily agreed and I would attach such weight to it as I thought appropriate. Mr Wade accompanied Mr Cipriani to Eight over Eight. "Danny had two espresso martinis. We went to a club and joined friends who had a table, drinking vodka. As we did not have a table of our own we did not order a bottle of anything and so both just had one cranberry vodka each from the table." He was also present at breakfast when "Danny had two espresso martinis and a small glass of champagne". They both walked back to where they had left their cars the night before. "I know Danny well and he did not seem drunk to me at all, if he had I would have called him a cab."

It was agreed that the defendant is entitled to the good character direction. This relates both to propensity and credibility, and I bear it in mind. There was no other defence evidence and no exhibits.

Defence submissions

In the preparation for effective trial form the following issues were raised: reliability of DNA and reliability of breath alcohol readings; MGDDA procedure not correctly followed and procedure unduly delayed; whether there was a bona fide investigation into a section 5 offence; admissibility of "verbals"; sufficiency of evidence of driving. The defence made admissions that their client was charged, and that there was a no comment interview. There was also a defence statement saying that the defence takes issue with breath alcohol procedures and the reliability of breath alcohol readings. "Furthermore, the defence asserts that the defendant was unlawfully detained in the police station and that the evidential breath test results were not obtained in consequence of a bona fide investigation into a section 5(1)(a) offence. The defendant makes no admission that he

was the driver of the vehicle. The defendant will not advance a positive case at his trial that he was not the driver of the vehicle." Later it is said that the defendant disputes any suggestion that he was visibly intoxicated and the accuracy of the "verbals" attributed to him. The allegation of unlawful detention is repeated. "It is disputed that the evidential breath test produced an accurate reading and the defence will rely on the expert evidence contained in the expert reports served to date." There are then written submissions on disclosure and a series of questions asking for information about some 15 matters. A skeleton argument was served dated 10th April 2016, covering non-disclosure, abuse of process, exclusion of evidence in accordance with section 78 PACE 1984 and a reference to case law, in particular *Cracknell v Willis*. "In the instant case the evidence of the amount of alcohol consumed constitutes an inferential challenge to the reliability of the reading. It is contended that this alone is sufficient to raise the issue evidentially and challenge the common law presumption [the presumption that the breath-alcohol instrument was working reliably]. In addition, the expert evidence provides direct evidence of possible malfunction which arguably goes further than is required by law to rebut the evidential presumption of reliability." The argument concludes that "to the extent that any Divisional Court or Administrative Court authority appears to conflict with the proposition of law in the House of Lords case of *Cracknell v Willis* it must be disregarded." There was then a further skeleton argument dated 5th June 2016 running to 12 pages with another 123 pages of statute and case law. This supplementary skeleton argument "does not purport to address all of the issues in the case and is limited to the question of proof of proper calibration which arose at the close of the prosecution case." It purported to summarize some of the evidence that had already been heard; summarized (it said) the written reasons I gave for finding a case to answer; it refers to the law of evidence that the machine was calibrated regularly; the section 15 RTOA assumption and the common law presumption of reliability.

In his closing comments, Mr Lucas expressly did not abandon his earlier arguments. However, he emphasized the question of calibration. He said the general reliability of the breath machine is not a matter for this court. However, the prosecution failed to meet the burden and standard of proof, which requires the court to be satisfied so that it is sure on the evidence provided that the machine was reliable on this occasion. Without evidence of the second calibration clearing report the reading cannot be relied on. Earlier decisions of the Divisional Court have required proof of calibration or at the very least proof that "all" the readings have been considered. Dr Mundy gave unchallenged

evidence and therefore it is not open to the court to convict. (He relied on *Gregory v DPP*, but I comment here that this case is not directly on point – Dr Mundy did not give direct evidence as to why the machine was unreliable, but strayed into commenting on evidence he had not heard to give an opinion on a matter properly for the court.) Here the reliability of the machine has been challenged by evidence of the amount of alcohol consumed by the defendant. There is no burden on the defence to provide direct evidence of malfunction. In the opinion of the professor, there is insufficient evidence of calibration for the court to be sure the machine is reliable, and therefore the defendant must be acquitted.

In the short, the defence has at one stage or another argued almost every conceivable defence that there might be to a charge under section 5 of the Road Traffic Act 1988.
Mr Lucas has not formally abandoned any of the arguments raised in the various documents, although he has conceded (as I understand it) that his client was the driver of the vehicle at the time. Whether he has conceded it or not, the evidence to that effect is overwhelming.

The defence has never made clear why it is argued that the MGDDA procedure was not correctly followed. There was a half-hearted (if I can be forgiven for saying so) attempt to suggest to Sgt Pullen that he had not given the statutory warning. However, he was clear that he had, and Mr Cipriani said so explicitly in evidence.

A significant amount of court time was taken examining the reasons for the delay between Mr Cipriani arriving at the police station and being booked in. Here it was suggested, strongly, that the officers were not acting properly and deliberately delayed the procedure. This was not specifically argued by Mr Lucas in his final submissions and some of the key points he put to the officers were not confirmed by his client when giving evidence. I am satisfied that the officers were proceeding properly and accept the explanations they gave. While Sgt Pullen may have been sympathetic, he did not ask for an autograph, did not arrange for the defendant to wait outside in the yard in an attempt to undermine the statutory procedure, and did not in any way act improperly.

The defence argued against the admissibility of "verbals". What this amounted to was a dispute as to whether Mr Cipriani had told the officers his last drink was an hour ago, or alternatively had said that his last drink was "within the hour". In fact, Mr Cipriani's

evidence was that his last drink was about 45 to 50 minutes before his arrest. It is true that the comment was not recorded contemporaneously and no notes were offered to the defendant in interview or indeed at any time. The distinction between the accounts may very well seem trivial, and perhaps not worth the time spent arguing about it, but in the event I excluded the evidence and have proceeded on the basis that the defendant told the police that his last drink was within the hour.

In the first skeleton argument the defence stated that: "it is disputed that the evidential breath test has produced an accurate reading and the defence will rely on the expert evidence contained in the expert reports served to date." In the event the only expert evidence relied on by the defence contained in those reports related to what the reading would have been, had Mr Cipriani accurately reported the amount of alcohol he had drunk at the times he gave. Here I say immediately that I accept the evidence of Dr Mundy on this point. Either Mr Cipriani is wrong about the amount of alcohol he consumed, or the reading is wrong.

The central issue

The defendant relies in *Cracknell v Willis* [1988] 1 RTR, a House of Lords decision that is still good law. It is convenient to point out here that this case was decided in the early days of the Lion Intoximeter. Since then we have moved to a second generation of breath-testing machines, whose reliability has now been considered on many occasions over many years. This experience adds weight to the comments about reliability made by Lord Griffiths in *Cracknell v Willis*. More recently, the second generation of evidential breath machines has gained a reputation for reliability such that the blood option has been removed by parliament. Dr Mundy said they are generally reliable. Despite years of experience he gave me no example of a machine that had been demonstrated to be unreliable, and he did not suggest ways in which this machine on this occasion could have malfunctioned. On the contrary, had it malfunctioned it would not have produced the first reading, or if it malfunctioned between readings it would have shown error and not have certificated. The possibility he alluded to was operator error, and I will return to that.

I also mention here that since the decisions in the cases on which Mr Lucas relies, the Criminal Procedure Rules have effected a sea change on the way cases should be conducted. I will also come back to that.

There is an assumption that the proportion of alcohol in the specimen of breath at the time of the offence was not less than in the specimen. That is a rebuttable assumption, as decided by the House of Lords in *Cracknell v Willis*. There is a separate presumption that the machine is reliable. That is a long-standing presumption and is referred to by Lord Griffiths at p20:

> "I am myself hopeful that the good sense of the magistrates and that the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that few defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol**. The magistrates will remember that the presumption in law is that the machine is reliable [my emphasis].**"

In the same judgment Lord Goff, who did not share the optimism that the point would not be taken by, as he put it "an industry devoted to assisting motorists to defeat charges under …the Act", nevertheless expressed confidence that magistrates would give proper scrutiny to such defences, be fully aware of the strength of the evidence provided by a print-out taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure. He drew attention to the safeguards (at p21), which he describes as a formidable list of protections for the motorist.

Is the presumption rebutted?

Mr Cipriani gave evidence as to how much alcohol he had drunk that night, and I accept the evidence that those quantities would not have produced a reading of 67, or anything like it.

There is ample evidence from independent witnesses that Mr Cipriani showed signs of being affected by alcohol. We have the account of the other driver. Even leaving aside the evidence of Mr Kassim, there is the evidence of the police officers. There is no reason to believe they had anything against Mr Cipriani – indeed it is part of the defence case that the sergeant tried, inappropriately, to help him.

At the scene of the accident PC Ellsworth smelled alcohol, "his eyes were glazed" and he appeared intoxicated. PC Pascoe was also at the scene. He described Mr Cipriani as quiet, his speech was slurred and he smelled of alcohol. In cross-examination he said the slurring was slight, not like an obvious drunk. Sgt Pullen described the defendant as

distressed and worried about the effect on his career. This is not necessarily a result of alcohol, but forms part of the picture and at the very least suggests that Mr Cipriani was not confident of passing the test. He failed the roadside test, and made no comment when that happened. Again this is not strong evidence in its own right, but is a factor to take into account when considering whether it is the machine or Mr Cipriani that is unreliable. Similarly, he made no comment when he failed the breath test at the police station, and there is no suggestion of any verbal protest at the time that he could not have failed because he had insufficient to drink.

Mr Cipriani denies that at any stage his speech was slurred, disputes the conversation with the sergeant, and says that although he was shocked by the roadside failure and by the EBM result, he said nothing (but the officers would have noticed the shock on his face). The fact is that there was ample opportunity to protest, as the fictional motorist in *Cracknell v Willis* protested and he did not.

Mr Wade in his section 9 statement says that he did not consider Mr Cipriani to be impaired, otherwise he would have made sure he took a taxi. Firstly, it appears that both men had been drinking champagne and cocktails in a comparatively short period of time over breakfast, and a person who has been drinking is not necessarily a good judge of whether somebody else has been drinking to the extent of being over the drink drive limit. Secondly there is the fact that Mr Cipriani gives evidence that he did indeed take a taxi back to his car, while Mr Wade says they both walked. There is also a material discrepancy as to what happened at the nightclub shortly after midnight. Mr Wade refers to friends with a bottle of vodka on the table, and explicitly says that he and Mr Cipriani drank vodka. Mr Cipriani, on the other hand, insists he did not have a drink at the nightclub.

The evidence as to how much Mr Cipriani and to drink on the night of 31st May/1st June 2015 is highly unsatisfactory. We have no evidence from Eight to Eight as to how they make their cocktails. There is not even a cocktail list or any record from the restaurant (such as a bill) showing what was drunk. If Mr Wade is right, and there were bottles of vodka in the nightclub, it must be very hard to be sure what measures were used. Of course it is possible Mr Wade was wrong, and I did not have the advantage of hearing him give evidence in person. However, it is, and I put it no higher than this, surprising for Mr Cipriani to say they were at a nightclub with friends for 15 to 20 minutes and had

no alcoholic drink, when his friend said otherwise. I have not had the advantage of statements from the others, still less seeing them in person. Similarly, I have not seen the bill for breakfast, or any list showing what alcohol was drunk over what period of time. None of these things would have been conclusive. However, the evidence on Mr Cipriani's behalf falls far short of the evidence of the two fictional bishops in *Cracknell v Willis*. It is impossible to rely on it as clear evidence of the exact amount of alcohol consumed, or when it was consumed.

I am reluctant to conclude that Mr Cipriani is lying. He may have had more than he realised. The measures may have been more generous than he believed. His memory may be clouded by alcohol. He may, and this is not uncommon, genuinely have come to believe what it is in his interests to believe. However, cumulatively the evidence is overwhelming that he had more to drink than he has told me.

Decision

There is an assumption that the proportion of alcohol in the specimen of breath at the time of the offence was not less than in the specimen. That is a rebuttable assumption, as decided by the House of Lords in *Cracknell v Willis*. There is a separate presumption that the machine is reliable. That is a long-standing presumption and is referred to by Lord Griffiths at p20. The advice of Lord Griffiths and of Lord Goff is quoted above.

Nothing has happened in the intervening years to diminish the strength of that advice. The decisions following *Cracknell v Willis* remain good law, but must be considered in the light of scientific realities, of the changing approach to summary trials as now clearly set out by the Criminal Procedure Rules, and above all else by common sense.

In this case the position is simple. Following correct procedure on an approved machine at a police station the machine provided a lower reading of 67. The officer conducting the procedure gave evidence that the machine was working and he was satisfied that it was reliable. That evidence encompasses calibration, which in the absence of challenge does not need to be referred to directly. As it happens, Sgt Pullen gave evidence that the machine calibrated regularly, and I take that into account. That evidence was not challenged in cross examination. The opportunity to recall the sergeant to clarify the position was specifically declined and indeed opposed by Mr Lucas. If the machine had not been working properly before the procedure started, it would not have produced a

first reading. If there was a malfunction afterwards it would have shown this on the printout and the certification would not have been produced. The professor did not have the advantage that I had of seeing the operator. I have no doubt as to Sgt Pullen's competence and integrity. Indeed, these were not challenged as far as this part of the procedure was concerned. He was not hostile to Mr Cipriani and if anything was sympathetic. We know from the evidence that he provided a copy of the printout to the defendant. It is inconceivable that had there been an error he would not have noticed. Again I come back to the fact that the defence had a copy of the printout and had the opportunity to cross-examine about any perceived error. Indeed, Ms Weiss thought she had exhibited the printout. She was wrong about this, but it was undoubtedly available in court and the opportunity for it to be exhibited after the close of the prosecution case was specifically and strongly resisted by the defence.

Against that the only rebuttal evidence is that of the defendant himself. For the reasons given above I am sure that his evidence comes nowhere near rebutting the common law presumption or indeed the statutory assumption.

In these circumstances I am sure the machine was operating reliably, and I am sure that the lower reading in breath was 67.

Other arguments raised on behalf of Mr Cipriani by Mr Lucas

The only real issue in this case was whether the evidential breath testing machine was working correctly. As Mr Lucas chose not to cross-examine Sgt Pullen on this point, the time taken by prosecution evidence on the central matter for the court to decide was minimal. Despite that, the prosecution case alone lasted almost two days. A trial that could have been conducted in less than a day took over three full days (spread over five). This is not consistent with proper case management, and I recognize the argument that the court should not have allowed it.

1. ***Disclosure.*** The first hour or so of the hearing was taken by Mr Lucas arguing about disclosure. The argument was rarified and ultimately pointless. The crown had long since purported to comply with its disclosure obligations. Had Mr Lucas been in a position to argue for further disclosure (and eventually he conceded that he wasn't) then the matter should have been brought back to court by way of a s8 application before the day of trial.

2. ***Evidence of calibration.*** Mr Lucas continued to argue that there was no evidence of calibration from Sgt Pullen, despite being told by me, orally and in writing, that there was. He appears to accept that he did not cross-examine about calibration. What happened was that Sgt Pullen said the machine calibrated regularly. Ms Weiss then appeared about to put a document to the witness when she was interrupted by Mr Lucas, and there was an exchange between them. It was not addressed to me. Mr Lucas did not observe the usual professional courtesy of standing and making his objection (if such it was) to me. The evidence stands and was not challenged. After it had been made abundantly clear to the defence that the court had heard and admitted evidence about calibration, the defence opposed an application to recall the sergeant, and therefore deliberately failed to take the opportunity to clarify what had been meant by the evidence he gave, or to challenge it. Instead he attempted to question the evidence in two impermissible ways, related to the reason why Sgt Pullen was satisfied that the machine was operating properly (for which, incidentally, see *Haggis* [2003] EWHC 2481). Firstly he appeared to give evidence about it himself. Secondly he asked his expert witness about evidence the witness had not heard, and from notes that were not part of any official record (see below). This was an extraordinary approach, and I commented to that effect to Mr Lucas at the time. It may be that what was meant by "calibrated regularly" was not clear, but the opportunity to clarify it was deliberately lost. In fact, it was not, in my view, essential to the prosecution case, as I will set out later.

   Mr Lucas relies heavily on a series of cases, including *Owen v Chesters; Morgan v Lee; Denneny v Harding; Mayon v DPP and Hasler v DPP* for his assertion that it is essential for the prosecution to establish that the device was properly calibrated. All these cases go back to the early days of the first generation machines and involve situations where either the test record was not served on the motorist, or no print out was produced, or the machine registered "abort" or the bench wrongly admitted the print out in evidence. This did not happen in this case. In *Greenaway v DPP* the officer stated that at the time of the test all the readings showed the machine was working properly. This was sufficient. In *Haggis* and *Sneyd*, both cases from this century, the position where the machine was working properly was analysed, and these are the cases that are relevant to the facts that I am dealing with.

3. ***Record of the hearing.*** A magistrates' court is not a court of record. Ultimately the parties must accept the decision of the court as to what evidence was and was not given. It helps if the proceedings are not unnecessarily protracted, as they were here. If an expert is to be asked about evidence given by prosecution witnesses, the normal and better approach is for that expert to attend and hear the evidence directly. To proceed, as here, by putting an incomplete and potentially inaccurate statement to the expert witness is of little or no value to the court. It is usually unhelpful for an advocate to attempt to introduce into the evidence his notes, or other people's notes, where he knows the court has a different understanding of the evidence (unless invited to do so by the court). For the record, Mr Lucas's own note of the proceedings, as summarized in his further skeleton argument, is inaccurate and cannot be relied on in any further proceedings. Where, unusually, written reasons are given for a finding of a case to

answer, the court is not assisted by argument immediately afterwards expressly intended to change the judge's mind – there are other remedies. Moreover, if there is later argument around the reasons given it is best to set out those reasons rather than paraphrase in a way that could be considered misleading. An advocate's first duty is to the court, and if a challenge as to what was said is unavoidable, then scrupulous accuracy is required.

4. ***Calling the experts.*** At the case management hearing, the court made it clear that if the defence relied on expert evidence then the witnesses must be called. No application was made for witness summonses. Despite the hearing date being fixed well in advance, the experts were not present when Sgt Pullen gave evidence and were not, as far as I was aware, present at court at all. Instead, Mr Lucas made and repeated an application for the statements to be read. The matter is simple and covered by the Criminal Procedure Rules, and the Criminal Practice Direction part 19A.2. The practice of serving expert evidence on the Crown, and arguing that this by-passes the Rules and PD, is unacceptable. (Indeed I add that the serving s9 statements of a witness likely to be contentious, and relying on no reply to avoid calling the witness is regrettable.) It should not have been argued at trial, and certainly not more than once. In a case of this nature, if the issue is the reliability of the evidential breath machine, then the defence must make arrangements for their witnesses to be present during the relevant part of the prosecution case, and should proceed on the basis that any court will want to hear from the witnesses, unless otherwise agreed by the court in advance.

5. ***No case to answer.*** On Day 2 of the trial, that is the day after Sgt Pullen gave evidence, Mr Lucas made a submission of no case to answer. He did so, apparently without prior warning to the prosecutor and without producing his authorities in advance to her. Often in a summary trial this is inevitable. In this case it was not. This is not the place to set out the difficulties caused for the rest of the trial by what was clearly an ambush. It was made worse by the fact that the authorities produced were old, and did not include two from this century – *Haggis* and *Sneyd* - that on any account are relevant and in my view are against the defence. For example, *Haggis* makes it clear that *Mayon* is distinguishable because the machine registered "abort" and therefore there was evidence that there might have been a problem with the machine. Similarly in *Denneny v Harding* the defendant had not been served with the printout and the officer called to give evidence did not appear to have been trained upon the use of the device. As the court pointed out "there is a danger in construing dicta in a particular case as though it were a requirement in a statutory instrument." Similarly, failure to draw to the attention of the bench the passage from *Cracknell v Willis* highlighted above is disappointing in an advocate as familiar with the authorities as is Mr Lucas. I must ask that when in future cases this point arises then Mr Lucas not neglect his professional duties to cite these authorities.

6. ***What needs to be proved?*** I have set out my findings of fact and reasons above. However, given the reliance of Mr Lucas on passages from judgments, that do not directly apply and given the way that this case was conducted over a number of days, I believe the following points need to be made.

a. There is a presumption that the EBM is working accurately. That was so at the time of *Cracknell v Willis* and is indeed a common law principle. The cases Mr Lucas quotes from took place in the early days of the breath testing machines. Since then a second generation of machines has been introduced. They have been in operation every day for many years. They have gained an enviable reputation for accuracy. They self-calibrate (or more accurately they check calibration) so that the operator can see if a fault has developed, and the motorist is given a copy of the print out so it can be checked by his own experts, as happened here.

b. The common law presumption and the statutory assumption are both rebuttable. They can be rebutted by evidence of consumption by the defendant.

c. The defence can also directly challenge the reliability of the reading produced by the machine. In this case the print-out was provided to the defendant and was available to the experts and at the time of trial. The officer could have been cross-examined about the reliability of the machine, calibration or indeed any other matter of concern. I am suggesting that it is appropriate for the experts to be present in court during this cross-examination. The experts can later be called to say why the machine was unreliable, normally after the defendant has given evidence of consumption or other relevant issues. Without a challenge to the prosecution witness, the presumption that the machine works will on this point take the case beyond "no case", and indeed may lead to the question of admissibility of the defence expert, as not relevant to an issue raised.

d. In this case there was express evidence that the evidential breath machine was working and reliable, and there was evidence of calibration. My decision takes those into account. However, absent an express challenge to the machine, direct evidence of reliability and calibration is unnecessary. The presumption and assumption will suffice. The defendant's protection is that he can challenge reliability, operator competence, and calibration by clear and direct cross examination (and advance notice in the case management form) so that these matters can be properly and fully considered by the trial court.

e. There is no principle of law that the Crown must adduce evidence of calibration. This may or may not be necessary when the machine has aborted (as in *Mayon*). In *Haggis* Sullivan J said

> "In simple terms, there was evidence in that case that there was or might have been a problem with the machine. There was no such evidence in the present case. There was nothing to gainsay PC Fagin's evidence that it was "working properly"
>
> Mr Ley accepts that had that been the sum total of her evidence it might have been reasonable to infer that a machine that was "working properly" was correctly calibrating itself. He submits that PC Fagin's answer in cross-examination that she did not know the calibration limits of the

machine means that she could not have know whether it had correctly calibrated itself and therefore could not have known whether it was working properly.

As I have indicated, when considering the answer to question 2, beyond eliciting the fact that PC Fagin did not know the correct calibration limits of the machine, there was no attempt to challenge her evidence that the machine was working properly, that it had produced a print out and that the readings at least appeared to PC Fagin (accepting that she did not know the calibration limits) to be appropriate and that the lowest reading was 43 microgrammes in 10 millilitres of breath.

The appellant had been provided with a copy of the print out. If there was anything in the print out (which was not produced to the judge) to indicate that the machine was not working properly that could, and no doubt would, have been put to PC Fagin in cross examination. In these circumstances, and each case will turn very much upon its own particular facts, the judge was entitled to conclude:

"That there was no evidence at all which would have raised any doubt about the question as to whether the machine was operating correctly".

Since it is "well known" that the machine tests itself, I do not accept that the prosecution have to prove that this is characteristic of the machine on each and every occasion. It may be taken that the device does test itself unless there is something to indicate that it might not have done so in the particular circumstances of the case. Pausing there, there was evidence in this case that this machine did test itself, that is to say that it was self calibrating. Although the operator's knowledge was imperfect, her evidence was, nevertheless, that the machine in her view was working properly and nothing was put to her suggest that her evidence in this respect was or might have been wrong".

As Sullivan J said in *Haggis* (at paragraph 9) "there is a danger in construing dicta in particular case as though it was a requirement in a statutory instrument".

f. The Criminal Procedure Rules have effected a sea change to the way cases are to be conducted. The parties are required to abide by the Rules. This case, where almost everything was challenged or put to proof (even the identity of the driver), has an antique air about it.

g. In future, drink driving cases cannot be conducted in the way that this one was. All parties, including the court, have an obligation to ensure that only relevant and contested issues require evidence. Here, this court acknowledges its own failings. It should have ensured that the precise nature of the challenge to the MGDDA procedure was spelt out at the case management stage. Similarly, the "reliability of breath alcohol readings" was insufficient to identify the matter in dispute. If it was radio, then that should have been

made clear. Similarly, if the question was calibration then that should have been made clear. If the issue was that the operator failed to detect an error on the face of the print out, then that should have been made clear.

h. Where the Crown is put to proof, for example as to the identity of the driver, then it might have been more appropriate for that evidence to be given in statement form, rather than requiring a witness to attend when his evidence on this point was not in dispute. Indeed, while it remains the case that a defendant can put the Crown to proof generally, the practice of single issue "putting to proof" may well be inconsistent with the Criminal Procedure Rules.

i. I told Mr Lucas during the course of the trial that I struggled to understand his approach to the evidence. I am concerned that colleagues, especially those not trained in the law, should not be faced with the type of arguments that have been put before me. Drink drive cases should be far simpler than this. If the issue is that the defendant's consumption of alcohol shows that the machine is unreliable, then that is a straightforward matter of fact and does not need to be accompanied by a large number of law reports of early cases. If the issue is that the statutory warning has not been given, then this should be spelled out in the case management form and dealt with in cross examination. If the issue is that the machine was not properly calibrated, then again this should be spelled out in advance and dealt with directly by cross examination and possibly expert evidence. If the issue is operator error, so that the operator should have noticed that the machine had not properly completed its cycle and produced a certificate then I venture to suggest this can be dealt with very early on by producing the relevant printout to the Crown Prosecution Service and demonstrating the error. In those circumstances I doubt that a trial would be necessary.

j. It is essential that the bench has and retains confidence in the advocates who appear before it. In those circumstances I trust Mr Lucas to bring the above comments (from at least page 13 onwards) to the attention of a bench trying cases such as these. He can of course point out why he disagrees, and it is clear that these comments are not a binding authority. However, it is in the interests of all that summary trials concentrate on the real contested issues, and do not descend into a game of smoke and mirrors.

I find the case proved.

24th June 2016