

Drink Driving Defences

s110 & Schedule 3 Road Transport Act (NSW) 2013

Many lawyers seem to take the view that it is impossible to contest a drink driving charge. They advise their clients to plead guilty without even analysing the case and seem unaware of the available defences. This article seeks to assist practitioners appearing in the Local Court of NSW by explaining the available defences to drink driving.

Compulsory Questions

For every Prescribed Concentration of Alcohol matter, the lawyer should ask the following questions:

1. Was the client 'driving' a 'vehicle' on a 'road' or 'road related area'?
2. Does the novice range defence apply?
3. Were the police permitted to conduct the breath test?
4. Does the Certificate evidence comply with the law?
5. Is there an Honest & Reasonable Mistake of Fact defence?

Definitions

The terms 'drive', 'vehicle', 'road' and 'road related area' are all defined in s4 Road Transport Act (NSW) 2013:

Drive - to control of the steering, movement or propulsion of a vehicle.

Vehicle - anything on wheels or tracks that is not a train.

Road - an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles.

Road Related Area:

- an area that divides a road,
- a footpath or nature strip adjacent to a road,
- an area that is open to the public and is designated for use by cyclists or animals, or
- an area that is not a road and that is open to or used by the public for driving, riding or parking vehicles, or
- a shoulder of a road, or
- any other area that is open to or used by the public and that has been declared under section 18 to be an area to which specified provisions of this Act or the statutory rules apply.

Novice Range Defence

s110(9) provides a defence for Novice range PCA if the defendant can satisfy the court that the Prescribed Concentration of Alcohol was:

- not caused by the consumption of an alcoholic beverage,
- not caused by the consumption or use of any other substance (for example, food or

- medicine) for the purpose of consuming alcohol, or
- caused by the consumption of an alcoholic beverage for the purposes of a religious observance – ie holy communion.

When Testing Not Permitted

Clause 2 of Schedule 3 RTA provides that police cannot require a breath test if:

- (a) the person was admitted to hospital and the treating doctor objects,
- (b) an authorised sample taker objects,
- (c) it appears to the officer that it would be dangerous to the person,
- (d) more than two hours after the person was driving or attempting to drive, or
- (e) at the person's home.

Breath Analysis Certificate

Clause 35 of Schedule 3 requires the certificate to be signed by a police officer who is authorised by the Commissioner of Police to operate the breath analysing instrument. In which case it becomes prima facie evidence that the instrument was working properly and of the particulars specified in clause 36(2). It is then up to the defendant to adduce evidence that his BAC was below the relevant limit ¹ or to raise doubt that the instrument was in proper condition.²

Honest & Reasonable Mistake of Fact

Drink driving is a crime of strict liability. This means the police do not need to prove that the driver subjectively knew that he or she was over the limit. This matter will be presumed by the court. However, the presumption is rebuttable. The driver may be able to call evidence to show that they didn't know they were drunk and so raise a reasonable doubt.

The problem is that simply losing count of how many drinks you have had is not a 'reasonable' mistake. There needs to be something more. One case where this defence did succeed was DPP v Bone³. Mr Bone was charged with High-Range PCA and claimed that, unbeknown to him, a friend had spiked his beer with vodka. Justice Adams accepted this evidence and held that the burden was on the police to show that Mr Bone had not been mistaken.

A colleague of mine had a similar case in which his client's drink had been spiked with ecstasy by a so-called friend. The friend came to court and gave that evidence. As a result, the court found that the defendant did not intend to take the drug and was not guilty of driving under the influence.

Chris Nowlan
Barrister-at-Law
Ph: (02) 9024 9533
chris@chrisnowlan.com

¹ Clause 31(3) Road Transport Act (NSW) 2013

² Clause 35(4) Road Transport Act (NSW) 2013

³ DPP v Bone [2005] NSWSC 1239