

## New Law on Evidence to the Contrary Defences

The recent case of *R. v. Gibson* handed down by the Supreme Court of Canada on April 17, 2008 has clarified impaired driving law in two important areas.

Firstly, the Court has ruled that “straddle” cases will not provide a valid evidence to the contrary defence when an individual is charged with operating a motor vehicle over the legal limit. An evidence to the contrary defence predominantly involves calling an alcohol elimination expert to testify as to the individual offender’s rate of eliminating alcohol from the body; an opinion which more often than not takes into account an accused’s body weight, height and gender, as well as the amount of alcohol consumed and the period of time over which the alcohol was consumed. Prior to trial, the offender is usually tested by the expert to determine an individual rate of elimination.

Evidence to the contrary is a defence that attempts to raise a reasonable doubt as to the presumption that an accused was impaired by alcohol at the time of driving based on breathalyzer readings that were taken at the time of the offence. At trial, the expert will testify that based on clinical testing of the individual’s alcohol elimination rate and the amount of alcohol consumed on the date of the offence, the accused would have been under the legal limit at the time of driving. “Straddle” cases however, involve the expert providing evidence that the accused’s blood alcohol concentration was in a range that included the legal limit, and possible even above. For example in *Gibson*, the accused G had provided breathalyzer readings of 120mg and 100mg at the time of arrest, the legal limit being 80 mg. The expert in that matter testified that if the evidence of consumption testified to by the offender was accurate, the accused G would have had a blood alcohol concentration of between 40 to 105 mg.

The Supreme Court of Canada determined that evidence of “straddling” the legal limit did not show that the accused’s blood alcohol concentration was clearly under the legal limit, as was required to properly rebut the breathalyzer readings. Instead, the Court determined that “straddle” evidence merely confirmed that an accused falls within a category of drivers targeted by Parliament as posing sufficient enough risk to the public to warrant criminal prosecution.

A second important finding made by the Court determined that experts could be called to provide an evidence to the contrary defence without the need or expense of an accused first undergoing testing to determine an individual alcohol elimination rate.

[T]his Court should not interpret this legislative scheme, which is intended to combat the social evils resulting from drinking and driving, as requiring accused persons, some of whom may well be battling with alcohol addiction, to submit to drinking tests in order to make out a defence. Surely, Parliament cannot have so intended.

While straddle cases no longer provide a defence in impaired cases, doing away with the need for alcohol elimination rate testing may mean that raising a valid evidence to the contrary defence may require considerably less time and expense in the future.

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