

R v Dr Donoghue

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(WEDNESDAY, MAY 20, 1998)
(RULING BY THE COURT)

1	<u>COURT COMMENCED ON WEDNESDAY,</u>	09:27 AM
2	<u>MAY 20, 1997 AT 9:34 A.M.</u>	09:34 AM
3		
4	THE COURT: Good morning.	09:34 AM
5	MR. ROBERTS: Good morning, My Lord.	09:34 AM
6	MR. HILL: Good morning, My Lord.	09:34 AM
7	THE COURT: The law in section 72 (9) defines breath	09:35 AM
8	test as:	09:35 AM
9	"A test for the purpose of obtaining a	09:35 AM
10	measurement of the proportion of alcohol	09:36 AM
11	in a person's blood carried out by a means	09:36 AM
12	of an alcohol in breath measuring device	09:36 AM
13	in accordance with the instructions of the	09:36 AM
14	manufacturers of such device and a	09:36 AM
15	specimen of breath provided by that	09:36 AM
16	person."	09:36 AM
17	The manufacturer's instructions require, in the case	09:36 AM
18	of the CMI 5000, that the person providing the sample blows	09:36 AM
19	for at least four seconds in such a manner as to allow the	09:36 AM
20	machine to register an adequate sample. In this case the	09:36 AM
21	defendant did not provide such a sample. She provided a	09:36 AM
22	deficient sample, but one which nonetheless was measureable	09:36 AM
23	and measured by the machine. The Crown seeks to have the	09:36 AM
24	results admitted into evidence and the hypothesis to be	09:36 AM
25	supported by expert evidence that, had the proper specimen	09:36 AM

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1 been provided, it would you have registered a result at 09:37 AM
2 least or more than the result which was given. The opinion 09:37 AM
3 of the Crown's expert given at the earlier trial was that 09:37 AM
4 the amount of alcohol in the deficient sample provided 09:37 AM
5 would be less than or equal to the level in the end 09:37 AM
6 expiratory air; the end expiratory air being the air at the 09:37 AM
7 bottom of the lungs, and so is the air that has ethanol 09:37 AM
8 which is at equilibrium with that in blood. 09:37 AM

9 The question that now presents for decision is a 09:37 AM
10 crucial one, particularly in a trial carrying the 09:37 AM
11 consequences here, whether the results of a test on a 09:37 AM
12 deficient sample obtained by the nonfulfillment of the 09:37 AM
13 manufacturer's instructions should be admissible 09:37 AM
14 nonetheless. I accept Mr. Hill's submissions that the 09:37 AM
15 admission of this evidence would be unsafe and in 09:37 AM
16 contravention of the statute. There are at least two 09:38 AM
17 important reasons: 09:38 AM

18 The first is that the results of a test carried out 09:38 AM
19 by a machine are not inherently admissible. The law 09:38 AM
20 prescribes that they are admissible only when the strict 09:38 AM
21 requirement of the law are met. In this respect it becomes 09:38 AM
22 irrelevant that the results of a test on a deficient sample 09:38 AM
23 may or may not be accurate. Were it not for the statutory 09:38 AM
24 provisions, the results of the particular machine would not 09:38 AM
25 be admissible in criminal proceedings at all. It must be 09:38 AM

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1 remembered what the evidential significance of the breath 09:38 AM
2 test is. It is to provide prima facie evidence of the 09:38 AM
3 proportion of alcohol in the blood of the defendant. A 09:38 AM
4 person was who has consumed alcohol in such a quantity 09:38 AM
5 that the proportion thereof in his breath exceeds the 09:38 AM
6 prescribed limit commits an offence. That prescribed limit 09:38 AM
7 is one tenth of one percent weight over volume blood 09:39 AM
8 alcohol concentration on a reading of the prescribed 09:39 AM
9 alcohol in breath measuring device. The CMI 5000 is a 09:39 AM
10 device prescribed for these purposes. The result here was 09:39 AM
11 .25 or, as the Crown would have it, two and-a-half times 09:39 AM
12 the legal limit. 09:39 AM
13 The Crown seek to invite the jury to find that the 09:39 AM
14 defendant was over the prescribed limit and that her 09:39 AM
15 ability to drive was impaired as a consequence. In my 09:39 AM
16 view, the Crown can only be allowed to do that by showing 09:39 AM
17 that the strict requirements of the statute are met. 09:39 AM
18 Section 72 (9) requires that the test be conducted in 09:39 AM
19 accordance with the manufacturer's instructions. The 09:39 AM
20 manufacturer's instructions at pages 22 to 26 are quite 09:39 AM
21 explicit about the procedure to be followed. Page 26 09:39 AM
22 explains that an incorrect operation or procedure or 09:40 AM
23 condition will cause the instrument to produce, among other 09:40 AM
24 results, the result which was obtained here; namely 09:40 AM
25 "deficient sample, value printed was highest obtained". 09:40 AM

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1	The manufacturer's operation of the procedure carries the	09:40 AM
2	force of law in terms of section 72 (9), and I find there	09:40 AM
3	can be no residual discretion in the court to admit a	09:40 AM
4	result which is obtained by an incorrect operation or	09:40 AM
5	procedure. The statute is penal in nature and must be	09:40 AM
6	strictly construed.	09:40 AM
7	My second reason is just as fundamental. Were this	09:40 AM
8	evidence to be admitted, it is clear that it could not	09:40 AM
9	stand on its own right. The Crown would need to call	09:40 AM
10	expert evidence to explain to the jury why they should rely	09:40 AM
11	upon it, notwithstanding that the manufacturer's	09:40 AM
12	instructions were not strictly fulfilled, and why it is	09:40 AM
13	that a deficient sample can produce a conclusive result.	09:41 AM
14	The experts differ on this. Essentially, one says that as	09:41 AM
15	the machine measures whatever air is in the chamber, a	09:41 AM
16	proper and adequate sample could not produce a reading of	09:41 AM
17	less alcohol in the blood; that is, could not produce one	09:41 AM
18	more favourable to the accused. The other expert will say	09:41 AM
19	that, in his experience, quite the opposite is true. The	09:41 AM
20	jury will then be left to a choice between the experts'	09:41 AM
21	evidence on the point. At the end of the day the experts'	09:41 AM
22	evidence will be crucial. But that is not the sort of	09:41 AM
23	evidence the statute sanctions, and it would be improper to	09:41 AM
24	allow it in under the guise of coming within the rubric of	09:41 AM
25	section 72 of the law. The whole point of the statute is	09:41 AM

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1 that the results provided by the machine should be itself 09:41 AM
2 prima facie admissible. The statutory standards would be 09:41 AM
3 supplanted by expert opinion, and moreover expert opinion 09:42 AM
4 based upon the jury having to choose between conflicting 09:42 AM
5 experts. That is a premise which is inherently doubtful 09:42 AM
6 and in resolving that doubt, I must do so in favour of the 09:42 AM
7 defendant. 09:42 AM
8 Having so ruled the results of the test inadmissible, 09:42 AM
9 I shall give directions on what questions can be asked 09:42 AM
10 about it and the impact of its exclusion upon the 09:42 AM
11 proceedings. The Crown can no longer seek to prove the 09:42 AM
12 third and sixth counts which depend upon the strict proof 09:42 AM
13 found not to be available. I invite the Crown, in the 09:42 AM
14 presence of the jury, to offer no evidence on those counts. 09:42 AM
15 I will explain to the jury that having regard to the 09:42 AM
16 preliminary arguments, I have decided that the evidence, 09:42 AM
17 which was to be adduced in support of them, will not be 09:42 AM
18 admitted, and so they will be required to return only a 09:42 AM
19 formal verdict on those counts. I propose to invite them 09:43 AM
20 to return a formal verdict of not guilty on those counts at 09:43 AM
21 the close of the Crown's case. The Crown will not be 09:43 AM
22 allowed to adduce evidence of the results of the test. 09:43 AM
23 However, the Crown will be allowed to adduce evidence that 09:43 AM
24 the defendant was required to, and failed to, provide an 09:43 AM
25 adequate sample. It will be a matter for the jury whether 09:43 AM

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1 she failed because she believed that the results would have 09:43 AM
2 shown her over the limit, or for the reasons that she 09:43 AM
3 eventually gave. 09:43 AM

4 As to the evidence of other witnesses who observed 09:43 AM
5 the condition of the defendant both before and after the 09:43 AM
6 accident, my decision is that that evidence is admissible 09:43 AM
7 as going to the issue whether at the time of the collision 09:43 AM
8 the driving of the defendant was adversely affected or 09:43 AM
9 impaired by the consumption of alcohol. This evidence 09:43 AM
10 will, of course, include the admission of the defendant 09:44 AM
11 herself as to the amount of alcohol she had consumed. It 09:44 AM
12 will also be a matter for the jury whether they accept her 09:44 AM
13 explanation that she had eaten and had consumed those 09:44 AM
14 drinks over the period of time she claims. 09:44 AM

15 In closing, I wish to emphasise the importance of the 09:44 AM
16 mandatory statutory provisions. A defendant is not 09:44 AM
17 required by law when faced with possible charges of this 09:44 AM
18 kind in the indictment to incriminate herself. If she 09:44 AM
19 fails to provide a specimen, she commits a lesser offence. 09:44 AM
20 If she fails, it is open to the police to require her to 09:44 AM
21 try again or to take bodily samples of blood or urine. 09:44 AM
22 None of those recourses was used here. Instead, the Crown 09:44 AM
23 seeks to rely on a result based on her deficient sample, 09:44 AM
24 and to seek to do so by -- it seems to me -- flying in the 09:44 AM
25 face of the manufacturer's instructions which carry the 09:45 AM

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1 force of law and which state that the results were obtained 09:45 AM
2 by means of an incorrect operation or procedure. 09:45 AM

3 This is not a case of the Crown seeking to adduce 09:45 AM
4 evidence which was illegally obtained, but the integrity of 09:45 AM
5 which, as in R v Powell, (1980-83 CILR 277) nonetheless 09:45 AM
6 remained intact. 09:45 AM

7 Here, because of the failure to comply with the 09:45 AM
8 manufacturer's instructions, the very integrity of the 09:45 AM
9 evidence itself is in dispute, and the rubric of the 09:45 AM
10 statute cannot be employed to salvage it, and the 09:45 AM
11 substitution of the statutory requirements by conflicting 09:45 AM
12 expert evidence is not only wrong for being outside the 09:45 AM
13 statute but, in my view, also inherently unsafe. 09:45 AM

14 I am also satisfied, from examination of the 09:45 AM
15 transcript and discussions with Justice Graham, that these 09:45 AM
16 are issues which were not specifically raised or considered 09:45 AM
17 by this court in the earlier proceedings. 09:45 AM

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3 MR. ROBERTS: Thank you, My Lord for a very clear and 09:45 AM
4 thoughtful judgment. I think the waves of that judgment 09:45 AM
5 will go far beyond this case and I wonder if he could have 09:46 AM
6 a copy of the judgment to distribute to the Traffic 09:46 AM
7 Department because clearly that's going to affect all cases 09:46 AM
8 of this nature. 09:46 AM

9 THE COURT: Having said that, are you aware of any 09:46 AM
10 case where they sought to rely upon successfully upon a 09:46 AM
11 deficient sample? 09:46 AM

12 MR. ROBERTS: I am not, My Lord, because my 09:46 AM
13 department does not necessarily prosecute them. 09:46 AM

14 THE COURT: If it reassures you in any way, Mr. 09:46 AM
15 Roberts, nor have I. 09:46 AM

16 MR. ROBERTS: My Lord I do know that the policy did 09:46 AM
17 change as a result of Mr. Schofield's evidence and 09:46 AM
18 obviously that is now going to have to be stopped 09:46 AM
19 immediately. 09:46 AM

20 THE COURT: I would think so. I think the policy 09:46 AM
21 must be that if the person fails to meet the requirement of 09:46 AM
22 the operators instructions then the person is charged with 09:46 AM
23 failing or refusing. 09:46 AM

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