Neutral Citation Number: [2019] EWHC 3317 (Admin)

Case No: CO/1798/2019 & CO/3716/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2019

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
THE HONOURABLE MRS JUSTICE MAY

- -

Between:

DPP	**Appellant (1)**
DPP	**Appellant (2)**
- and -	
Walsall Magistrates' Court	**Respondent (1)**
Lincoln Magistrates' Court	**Respondent (2)**
Ramachandra Bhusal	**Interested Party (1)**
Neill Thaiss	**Interested Party (2)**

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Simon Heptonstall (instructed by **DPP**) for the **Appeallant 1 & 2**
Non- Attendance on behalf of Respondent 1 & 2
Jeremy Benson QC (instructed by **Geoffrey Miller Solicitors**) for the **Interested Party 2**

Hearing date: 23 October 2019

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Approved Judgment

The Rt Hon the Lord Burnett of Maldon CJ and the Hon Mrs Justice May:

Introduction

1. These proceedings concern two applications for judicial review, arising out of prosecutions for driving with a breath alcohol level in excess of the statutory limit, contrary to section 5(1) of the Road Traffic Act 1988 ("the RTA"). In both cases, following the service of a defence statement, the District Judge allowed a defence application for disclosure pursuant to section 8 of the Criminal Procedure and Investigations Act 1996 ("the CPIA"), ordering the Crown to make disclosure of the further material sought. The DPP seeks to review the decision of the District Judge in each case and asks us to quash the orders for disclosure.

2. Since both cases raise very similar issues they were joined and came before us on a "rolled-up" hearing to determine permission and, in the event of permission being granted, the judicial review itself. At the end of the hearing we announced our decision giving permission, allowing the applications for judicial review and quashing the orders for disclosure, with reasons to follow. These are our reasons.

Factual background

3. Drivers who are stopped on suspicion of driving with excess alcohol are generally tested first using a breathalyser at the roadside. If the roadside test gives a positive result, the driver is taken to a police station where an "evidential" procedure follows, using a breath-testing device approved by the Secretary of State for the purpose of prosecutions under section 5 of the RTA.

4. The device used in the two prosecutions the subject of these proceedings was the Lion Intoxilyser 6000UK ("the Intoxilyser"). The Intoxilyser is one of three breath-testing devices approved under the Breath Devices Analysis Approval Order 2005. It uses infra-red spectroscopy, which can identify the presence and amount of ethanol in breath. Ethanol (the principal active constituent of alcoholic drinks) is identified by the way the infra-red light is absorbed; the amount of ethanol in a sample can be measured by the extent of the absorption. The person being tested is asked to supply two samples of breath by blowing into the chamber of the machine, where infra-red spectroscopy identifies the proportion of ethanol (alcohol) in each of the samples, provided as microgrammes of alcohol in 100 millilitres of breath (µg/100ml). An offence is committed under section 5(1) of the RTA when the level of alcohol in the lower of the two samples exceeds the prescribed limit of 35µg/100ml.

5. The first case before us concerned the prosecution in the Walsall Magistrates' Court of Mr Ramchandra Bhusal.

6. On 21 October 2018 at around 9.15pm PC David Wild and PC Bethany Smith were on uniformed mobile patrol when they encountered a queue of stationary traffic on Newhampton Road East, Wolverhampton. Upon investigation they found that the cause of the queue was a black Kia Picanto, stopped in the middle of the road. The lights were on and the engine was running. Mr Bhusal was in the driver's seat, there was no one else in the car with him. The car's progress was prevented by a woman standing in front of the vehicle.

7. PC Wild instructed Mr Bhusal to move the Picanto from the road as it was obstructing the flow of traffic. Mr Bhusal reversed the car from the road into an alley and onto a driveway of a house which he said was his home. He told PC Wild that he had been trying to park behind other cars but the woman had not let him. PC Wild noticed no smell of alcohol on Mr Bhusal's breath nor any indication that he was intoxicated. However, PC Smith reported the woman as saying that Mr Bhusal had been drinking. When asked if that was correct Mr Bhusal said that he had drunk "about two pints a couple of hours ago". He was tested using a roadside device which gave a reading of 47µg/100ml. Mr Bhusal was arrested and taken to Wolverhampton police station where the investigative evidential breath procedure commenced at 9.56pm using an Intoxilyser. At 10.04pm Mr Bhusal provided a specimen of breath for analysis by the Intoxilyser, giving a reading of 57µg/100ml. At 10.05pm he provided a second specimen of breath, producing a reading of 55µg/100ml. The Intoxilyser printout showed no error message and no indication of any incorrect operation. Upon request Mr Bhusal signed the printout. At 11.29am the next morning Mr Bhusal was charged with an offence of driving or being in charge of a motor vehicle after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 5(1) of the RTA.

8. The Crown evidence consisted of statements from PC Wild, PC Smith, the drink drive procedure documents, CCTV of Mr Bhusal in the custody suite and undertaking the Intoxilyser procedure, together with a certificate showing that the Intoxilyser's calibration had been certified for the relevant period.

9. At the first hearing in the Magistrates' Court the parties completed a Preparation for Effective Trial ["PET"] form; at that stage the matters identified on Mr Bhusal's behalf were (i) that Mr Bhusal was only driving as directed to by a police officer as he had not intended to drive and the engine was only running to keep him warm and (ii) the breath test procedure was in dispute and would be challenged, by reference to the authority of *Cracknell v Willis* [1988] AC 450, since he had consumed only two cans of lager some hours previously and did not believe he would be over the limit. The court was told that Dr Mundy would be asked to produce a "Widmark" report ("Widmark" being the name given to a particular method of calculation used to estimate alcohol levels in the breath) based on Mr Bhusal's reported alcohol consumption and to comment on whether he would have been over the drink-drive limit at the relevant time.

10. A trial date was fixed for 10 April 2019. On 27 March Mr Bhusal's representatives served a report from Dr Mundy dated 24 March 2019. Dr Mundy calculated that, on the basis of Mr Bhusal's height, weight, age and reported consumption of two 500ml cans of Carling lager between 4pm and 6pm, the breath alcohol level at 10.05pm would have been around 0µg/100ml but could have been as high as 5µg/100ml. On 29 March Mr Bhusal's representatives served a document entitled "Defence Statement and Rolled-Up Section 8 C.P.I.A. 1996 Application for Disclosure". We shall refer to this document as Mr Bhusal's defence statement. Mr Bhusal's defence statement repeated and augmented the issues previously raised in the PET form, including in particular taking issue with the reliability of the breath alcohol reading. Reference was made to Dr Mundy's report; it was asserted that the roadside reading was incompatible with the subsequent Intoxilyser readings, implying that either or both had provided unreliable results. The defence statement continued:

"…it is submitted that the Lion Intoxilyzer 6000 evidential breath testing instrument may give incorrect readings notwithstanding the fact that the printout does not reveal any errors on the face of the document for the following reasons:

a). No evidential breath testing instrument is infallible and it is not to be regarded by the court as being "virtually infallible". Cracknell v Willis 1988 HL, R (DPP) v Manchester and Salford Magistrates' Court 2017.

b). If the Lion Intoxilyzer is working correctly it is supposed to be able to detect a certain number of pre-programmed errors. The reliability of the breath testing instrument is challenged in this case by relevant evidence. If the instrument is not working properly it may not be able to detect these errors and the court will not be able to draw any inferences from the apparent absence of an error message on the face of the printout.

c). The Instrument is programmed to detect only pre-defined errors in certain limited scenarios. If the instrument encounters a problem which it is not programmed to recognise, the printout may not give any indication that a problem has occurred.

d) If the true concentration of the gas in the gas cylinder is actually below 32µg% (for example because the cylinder has expired, or for other reasons) the court will not be able to rely on the simulator check results on the printout because they have been incorrectly measured by the evidential breath testing instrument. In these circumstances the defendant's recorded breath alcohol levels will be too high. On the face of the printout there will be no indication that the instrument is giving falsely high readings.

e) The simulator check results are based on an analysis of dry gas. The defendant's breath is a wet gas. Evidential breath test machines measure wet gas and dry gas differently. If the instrument is not making an appropriate allowance for this factor, the defendant's breath alcohol levels may be incorrectly recorded on the instrument even though the simulator check results appear to be correct.

f) The response of the Lion Intoxilyzer 6000 is not linear. Therefore, even if the simulator check results on the printout are reliable, it does not follow that the instrument is correctly calibrated at higher levels. This can only be determined from the engineer's calibration and service documentation which is left with the police.

g) Dust within the Lion Intoxilyser may affect the evidential breath test results. This will not necessarily be revealed by the reported simulator check values on the printout because the

> simulator gas is a dry gas which is administered under pressure. The defendant's breath samples are wet gas samples which are likely to have been delivered at a different rate of flow.
>
> h).The Lion Intoxilyser may not detect mouth alcohol at low levels. The defendant's breath test results may be elevated by mouth alcohol and the printout will give no indication of this.
>
> i) All analytical instruments have a coefficient of variation – even if they are working correctly. There will be a degree of analytical uncertainty (imprecision)."

11. We have set out these assertions in full, for reasons which will become apparent later in this judgment.

12. The defence statement then contained with an application for disclosure under section 8 CPIA asserting that as the prosecution was relying on the calibration certificate for the Intoxilyser, it should disclose "all of the relevant service history". The prosecution's decision to disclose the machine's calibration certificate was said to distinguish the instant case from the circumstances in *R (Director of Public Prosecutions) v Manchester and Salford Magistrates' Court* [2017] EWHC 1708 (Admin), [2019] 1 WLR 2617. The material sought to be disclosed included:

    (i) A download of memory showing all subject tests from 6 months before 21 January 2019 up until the present date. The download was said to be disclosable as

    > "it may reveal problems with the device as indicated [above]…In particular, the memory download for 12 months will enable the expert instructed by the defence to calculate the standard deviation for this particular instrument. Once the standard deviation is known an appropriate deduction can be made from the reading of 55 micrograms – which may indicate that the defendant was below the limit."

    (ii) The calibration certificate for the calibration gas used in the defendant's tests on the basis that

    > "If the alcohol level in the gas cylinder is below 32µg% [sic] the breath alcohol measurements on the printout are too high. If the certificate has expired this can lead to issues of reliability of approval of the instrument. The Calibration Certificate for the simulator gas may undermine the prosecution case or assist the defence case because it may reveal problems with the device as indicated [above]."

13. The prosecution responded to the requests in Mr Bhusal's defence statement by letter dated 3 April 2019 accompanied by a skeleton argument, opposing the application. Also enclosed, for the purposes of the application only, was a report by Dr Paul Williams, an expert in the operation of the Intoxilyser, prepared for use in other proceedings that had addressed a virtually identical disclosure request. The Crown contended that the material sought was not relevant as it did not meet the basis for disclosure in the *Manchester Justices* case. However, the prosecution did make disclosure of one item, namely the gas calibration certificate for the cannister of control

gas attached to the Intoxilyser as it had expired in November 2018, some two months prior to Mr Bhusal's arrest and testing. There was no concession that expiry of the gas calibration certificate affected the reliability of the machine and the prosecution gave notice of its intention to ask the court for a short adjournment to investigate that question.

14. At the hearing on 10 April 2019, the District Judge gave a short ruling granting an adjournment to enable the parties to investigate the relevance of the expiry of the gas calibration certificate. The trial was re-fixed for 2 September 2019. As to the memory download, the judge observed that, in normal circumstances, it would "without a doubt" not be disclosable, however due to the unusual position of the gas certification being out of date, he would allow the application. He directed that the download be served by 15 May 2019.

15. Judicial review proceedings were issued on 3 May 2019, together with an application for interim relief. Supperstone J subsequently ordered a stay of the order for disclosure pending determination of the application for permission to apply for judicial review. On 5 August 2019 Sir Wyn Williams, sitting as a High Court Judge, ordered that the application be adjourned to be listed in court as a "rolled up" hearing.

16. The second case before us concerned the prosecution of Mr Neill Thaiss, also under section 5(1) of the RTA. At about 1.42am on 5 August 2018 PC Jared Thorp and PC 609 Daniel Thomas were on duty in full uniform in an unmarked police vehicle on Newark Road, Lincoln. Their attention was drawn to a white VW Scirocco travelling in excess of the speed limit. The police stopped the car, the driver identified himself as Mr Thaiss. He was seen to be unsteady on his feet and was repeating himself. The police also noticed that he smelt of alcohol and asked him to undertake a roadside breath test, which he did. The result was positive with a reading of 44µg/100ml. Mr Thaiss was arrested at 1.45am and taken to Lincoln police station.

17. At the station, the evidential breath procedure was started at 2.19am using an Intoxilyser. The first specimen of breath, taken at 2.26am, gave a reading of 46µg/100ml; the second one, at 2.27am, produced a reading of 45µg/100ml. The Intoxilyser printout showed no error message and no indication of any incorrect operation. Mr Thaiss signed the printout after which he was charged with an offence under s.5(1) RTA.

18. At the first hearing before the Lincoln Magistrates' Court on 5 September 2018 Mr Thaiss pleaded not guilty. Various issues were identified for trial including: (1) the reliability of the breath sample, Mr Thaiss disputing that he had consumed sufficient alcohol to put him over the limit and (2) the functionality of the testing device "on the basis of the above" i.e. on the basis of Mr Thaiss' reported alcohol consumption; at that hearing his representative declined to inform the court what that consumption was asserted to be.

19. A trial date was set for 25 January 2019. The prosecution complied with its initial duty of disclosure on 19 October 2018. On 23 November 2018 Mr Thaiss' representatives served a "Defence Statement and section 8 CPIA 1996 Application for Disclosure" ("Mr Thaiss' defence statement"), together with an expert report from Dr Mundy.

20. Mr Thaiss' defence statement repeated and expanded upon the defence issues identified at the pre-trial hearing. Reference was made to Dr Mundy's Widmark calculation based on Mr Thaiss' reported consumption showing, it was said, a likely level of breath alcohol at the time of testing of 0µg/100ml. The defence statement went on to challenge the reliability of the Intoxilyser, relying on the same reasons as those contained in Mr Bhusal's defence statement set out at [10] above. The entire section was faithfully reproduced, down to the same (odd) punctuation and misspellings.

21. Mr Thaiss' defence statement sought disclosure of:

    (i) The metrological log for the Intoxilyser, on the basis that it would indicate whether the instrument was suffering from any faults at the time of Mr Thaiss' test, suggesting that "underlying faults… may not" be apparent from the printout. It was said that the logs would indicate whether the instrument had been serviced at appropriate intervals, whether any faults had been identified and remedied, and that any recurrent faults which occurred before and after an engineer's visit could indicate that "the underlying cause has not been addressed".

    (ii) Downloaded memory of the device for the period six months before and six months after Mr Thaiss' test, on the basis that it might reveal problems with the device;

    (iii) Calibration certificates for the device for the service before and after Mr Thaiss' test, noting that

    > "the Lion [Intoxilyser] may not have had a valid calibration certificate at the time of [Mr Thaiss'] test. If this is so, the Lion [Intoxilyser] should not have been used and this will have implications for the reliability and type approval for the device on the day of [Mr Thaiss'] test. Furthermore, the calibration certificates will assist the expert to determine whether the instrument was correctly calibrated for the alcohol level which is relevant to the defendant's test. If the certificates have expired this will have implications for the reliability and approval of the instruction. The Calibration Certificates…may reveal problems with the device"

    (iv) The calibration certificate for the calibration gas canister used during the test. It was suggested that if the alcohol level in the gas cylinder was below 32µg/100ml then the breath alcohol measurements on the printout would have been too high, claiming "[i]f the certificate has expired this can lead to issues of approval of the instrument".

22. Pre-release breath test results were also requested but it is not disputed that none were undertaken, with the result that there was nothing to disclose.

23. Dr Mundy's report accompanying Mr Thaiss' defence statement made a series of points purporting to address the reliability of the Intoxilyser and to justify the requests for disclosure (at section 39 of the report, references in square brackets are to paragraphs in that section) including:

    (i) Variation in the concentration of the gas in the gas calibration cylinder may result in readings being too high [39.4].

(ii) If there was dust in the analytical chamber and if that dust entered the infra-red beam used to assess the level of alcohol in the sample there might be no effect on the calibration checks whereas the breath specimens might be affected. It was acknowledged that depending on the circumstances the effect was likely to be small [39.6].

(iii) All analytical instruments have a "coefficient of variation (degree of precision)", which could be determined, it was said, from results retained in the memory of the device. The report asserted that "This parameter gives a measure of the reliability of the instrument. If the coefficient of variation for a specific instrument is outside the expected range the instrument will be unreliable, even though the simulator check results are acceptable" [39.8] (note that the "expected range" was not identified).

(iv) It was a requirement of type approval that the instrument regularly be serviced and records kept [39.10].

24. There were other observations in Dr Mundy's report levelling criticisms at the accuracy of the Intoxilyser (at [39.2], [39.3], [39.5], [39.7] and [39.9]), but it was not suggested that the further disclosure sought would or might reveal the existence or extent of any such inaccuracy.

25. The prosecution responded to the disclosure request on 28 December 2018 stating that there was no further prosecution material that it was required to disclose, but if the defence considered that there was further material which might assist, the prosecution would reconsider its decision in light of further information. Shortly afterwards the prosecution served a report of Dr Williams dated 24 December 2018 challenging Dr Mundy's conclusions as to likely alcohol level and including detailed comments on each of the assertions of unreliability raised in Mr Thaiss' defence statement and in the report of Dr Mundy.

26. By letter dated 9 January 2019, Mr Thaiss' representatives wrote asserting that there had been no response to the section 8 application for disclosure. On 11 January 2019 the prosecution responded stating that the police had not obtained the metrological log, memory download or calibration certificates, no pre-release breath test had been conducted and that there was nothing further to disclose.

27. The trial date of 25 January 2019 was subsequently vacated owing to the non-availability of Dr Williams as a result of bereavement and the trial was re-fixed for 15 April 2019. That date was also vacated, this time at the request of Mr Thaiss because of non-availability of the defence expert Dr Mundy. The trial was re-fixed for 12 August 2019.

28. On 12 August 2019 Mr Thaiss was represented by counsel who submitted that the prosecution had not complied with its disclosure duty as it had failed to address the s.8 application contained in Mr Thaiss' defence statement. The prosecution responded that it had done so by letters dated 28 December 2018 and 11 January 2019. The District Judge initially agreed with the prosecution and directed that the trial commence. At that point counsel for Mr Thaiss pressed for a hearing on the section 8 application for disclosure, on the basis that the prosecution had not responded to it and that the

Criminal Procedure Rules did not require an oral application. At that point the District Judge appears to have changed his mind and heard the application, allowing it and ordering disclosure of the items sought, namely the metrological logs, the memory download, the calibration certificates for the machine and its calibration gas, and any pre-release breath tests. The reasons given by the District Judge for making those orders were that Mr Thaiss' reading was so near the limit and the prosecution had not properly responded to the s.8 application. Disclosure was directed to be made within 6 weeks. The trial was adjourned and re-fixed for 19 December 2019.

29. The claim for judicial review of the District Judge's order was issued as an urgent application on 22 September 2019. On 23 September 2019 Butcher J granted a stay of the order for disclosure pending determination of the application to apply for judicial review; he directed that the application for judicial review be adjourned to be heard at a "rolled-up" hearing, to be listed together with the claim in Mr Bhusal's case.

Issues arising

30. The issue central to both cases before the court was whether it had been open to the District Judge to decide that the material was such as might be considered capable of undermining the case for the prosecution or of assisting the case for the defence. Slightly different considerations arise in approaching this question in the two cases but the central objection was the same, namely that there had been no basis upon which the District Judge could properly have arrived at the decision to order disclosure.

31. In Mr Thaiss' case, the prosecution advanced a further ground of challenge, namely that the delay on the part of the defence in seeking to have its section 8 application heard of itself rendered it unreasonable for the District Judge to have entertained the application.

Statutory requirements for disclosure

32. Under section 7A of the CPIA a prosecutor has a continuing duty to disclose any prosecution material which

> "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused."

33. Section 8 of the CPIA goes on to provide that:

> "(1) This section applies where the accused has given a defence statement…and the prosecutor has complied with section 7A(5) or has purported to comply with it or has failed to comply with it."
>
> (2) If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him.

> (3) For the purposes of this section prosecution material is material –
>
> (a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused.
>
> (b) …
>
> (c) which falls within subsection (4).
>
> (4) Material falls within this subsection if in pursuance of a code operative under Part II the prosecutor must, if he asks for the material, be given a copy of it or be allowed to inspect it in connection with the case for the prosecution against the accused."

The parties' arguments

(i) Relevance of documents sought

34. Mr McLaughlin appeared to note for Mr Bhusal, the Interested Party in the first case, but we were notified in advance that he would be making no representations at the hearing. Jeremy Benson QC appeared for Mr Thaiss, the Interested Party in the second case.

35. Mr Heptonstall, for the DPP, accepted that the material sought by the defence in both cases was "prosecution material" falling within section 8(4) of the CPIA. However, he maintained that in neither case was it relevant material, in that it could not reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defence. He directed us to the guidance given by the (then) PQBD, Sir Brian Leveson, in *R (DPP) v. Manchester and Salford Magistrates' Court* [2017] EWHC 1708 (Admin) at [55]-[59], dealing with the nature and content of evidence required to support an application for disclosure in cases involving Intoxilyser breath-testing devices.

36. In relation to the case of Mr Bhusal, Mr Heptonstall pointed out that Dr Mundy's report served with the defence statement contained nothing even purporting to support the assertions made in the defence statement (set out at [10] above) challenging the reliability of the Intoxilyser. Unsupported assertions, Mr Heptonstall argued, are incapable of grounding a section 8 application for disclosure; there must be a "proper evidential basis", as the court in the *Manchester Justices* case emphasised at [55].

37. Mr Heptonstall submitted that the District Judge had been wrong to rely on the recently expired gas calibration certificate as a basis for making any wider order for disclosure. The certificate had been disclosed by the prosecution out of an abundance of caution; they had sought an adjournment for the purposes of obtaining expert evidence as to the effect of an out-of-date certificate on the functioning of the machine in question. But the fact that the prosecution had disclosed the out-of-date certificate did not relieve the

defence of the obligation to produce proper evidence in support of its section 8 application. In the absence of any such evidence the District Judge should have refused the application without more.

38. Moving to Mr Thaiss, Mr Heptonstall accepted that Dr Mundy's report served with the defence statement in his case had included a section purporting to give evidence in support of the section 8 application (at paragraph 39 of the report). However, he submitted that such evidence fell very far short of what was required to support a disclosure application, as set out in the *Manchester Justices* case.

39. Mr Benson referred us to a short section of Dr Mundy's report (at paragraph 36) discussing a "coefficient of variation" of 3.75% which, when applied to the lower of Mr Thaiss breath-alcohol readings, gave a possible reading of 39µg/100ml. Dr Munday continued (at paragraph 37):

> "Therefore, Mr Thaiss' breath alcohol result could be below the point of prosecution when taking into account the predicted results from the roadside breath alcohol test."

40. Mr Benson pointed to this part of Dr Mundy's report as evidencing the relevance of the Intoxilyser's past test data: he suggested that historical data could be used to determine a coefficient of variation for the machine which would allow him to argue that the results of Mr Thaiss' test put him at a level of breath alcohol below 40µg/100ml. Mr Benson relied in this respect on the guidance for prosecutors precluding the prosecution of persons whose readings fall between 35-40µg, arguing that if Mr Thaiss' results, allowing for variance, put him under 40µg then there was the potential for submitting that his prosecution was an abuse.

41. Mr Heptonstall accepted that all machines will show some small variation around a mean for results generated by a known (control) sample. But, he argued, determining a coefficient of variance by means of an analysis of results against a known control is very different from comparing actual test readings taken from a variety of subjects over a period of time. He suggested that the machine's historical readings could give no useful information about its inherent variance; in any event, he said, Dr Mundy's report had given no indication of how it might do so.

42. Mr Heptonstall further submitted that even setting aside these considerations, the lowest figure which Dr Mundy proposed in his report – 39µg/100ml – was still above the statutory limit of 35µg/100ml. Thus, even if the machine's historical test data could in some way have demonstrated the degree of variance asserted by Dr Mundy, the lowest resulting figure, according to his calculation, was still above the level required for the purposes of an offence under section 5 RTA. Accordingly, even on Dr Mundy's evidence taken at its highest, it could not be said that the material sought might have undermined the prosecution case or supported the defence and the District Judge should have dismissed the application.

(ii) Delay

43. On the question of timing of the application in Mr Thaiss' case, Mr Heptonstall referred us to the overriding objective of dealing with cases justly, and to the provisions of the

Criminal Practice Directions designed to achieve that result. He pointed out that it was not for a party to secure some perceived advantage by obstructing or delaying the preparation of the case. Having received the prosecution's response refusing to make further disclosure, given in its letters of 28 December 2018 and 11 January 2019, Mr Thaiss' representatives should have taken steps actively to pursue the section 8 application prior to trial. It was inevitable, Mr Heptonstall pointed out, that if an order for disclosure was to be made then the trial would need to be adjourned, as indeed it had been. In those circumstances it was contrary to the letter and spirit of the Criminal Procedure Rules to fail to bring a genuine concern to the attention of the prosecution and the court so that it could be resolved without jeopardising the trial date. The failure was particularly egregious in Mr Thaiss' case, where two trial dates had already had to be adjourned to allow for the experts to attend. In these circumstances, Mr Heptonstall argued, the District Judge should have refused to entertain the application without more.

44. Mr Benson suggested that however strong the prosecution case on delay may have been before the District Judge, that was not a sufficient reason now to set aside the order for disclosure, if his application under section 8 CPIA was otherwise meritorious.

Discussion

(i) Relevance

45. In *Cracknell v Willis* (supra) Lord Griffiths expressed the hope that challenges to breath analysis results on the basis of what he termed "spurious evidence" of alcohol consumption would be few. His optimism was not shared by Lord Goff who noted that "… there is an industry devoted to assisting motorists in defeating charges brought under [the forerunner of section 5 RTA]". Lord Goff has proved to be the more accurate seer: the cases before us represent a further product of that industry.

46. The challenges concern interlocutory orders made in the court below. Challenges to such orders are sparingly entertained in this court. However, in cases like the two before us the court's intervention is justified: the issues raised are of wide application, they are not dependent on the final result and there is no other way by which the orders for disclosure may be effectively challenged (see *Manchester Justices* at [15] and [19]).

47. The breath-testing machine at the heart of these applications is the Intoxilyser. As noted above, it is of a type approved by the Secretary of State for use in assessing breath alcohol levels for the purposes of prosecutions under the RTA. Details of its mode of operation are given in the reports of Dr Williams relied on by the prosecution in the cases before us; they are a repetition of what Dr Williams said in his report considered *de bene esse* by the court in the *Manchester Justices* case, the relevant parts of which are reproduced in the judgment of Sir Brian Leveson at [37]. In short, the Intoxilyser has in-built calibration checks which are run before, between and after each of the two breath samples taken from the subject for analysis; accordingly, breath-tests of individual subjects are complete in themselves. The printout is the full and sufficient record of the test and of the machine's reliability when performing the test. In the *Manchester Justices* case, the PQBD summarised the salient feature of Intoxilyser testing as follows (at [40]:

> "In effect this is a device which fails safe in the sense that, if faulty, it will not work at all rather than produce readings which would be unreliable."

48. Like the two cases before us, the *Manchester Justices* case concerned applications for disclosure of logs and historical test data. The court in that case considered what was required before magistrates could reasonably conclude that the disclosure sought might undermine the case for the prosecution or assist the defence. Having found that the order for disclosure was wrongly made, the PQBD gave the following guidance, at [55] to [59]:

> "55. First, those seeking and those making disclosure orders in excess alcohol cases must bear in mind the risks to which Lord Goff spoke, as set out above in *Cracknell v Willis*…. This means that there must be a proper evidential basis for concluding that the material sought is reasonably capable of undermining the prosecution or of assisting the defence, or that it represents a reasonable line of enquiry to pursue. We appreciate that DJ Hadfield did consider the extensive disclosure request because, plainly rightly, he declined to order disclosure of much of what was sought. We accept that he heard argument and asked some questions of Miss Dale. But we are satisfied that there is no evidential basis upon which the disclosure should have been ordered.
>
> 56. Second, it is not enough for one or more experts to say that the material is necessary to verify that the device was reliable in the language used in the reports of Dr Mundy and Miss Dale in support of the application for disclosure. Nor does the written application for section 8 disclosure provide any evidential basis for it. It is not enough to say that the defence case is that the amount drunk would not [put the defendant over the limit or anywhere near it, and therefore the machine must be unreliable. What the evidence needed to do, in order to provide a basis for such a disclosure order was to address two critical features.
>
> 57. The first requirement is the basis for contending how the device might produce a printout which, on its face, demonstrated that it was operating in proper fashion, but which could generate a very significantly false positive reading, where, on the defence case, the true reading would have been well below the prosecution limit. The second requirement is to identify how the material which was sought could assist to demonstrate how that might have happened. Those are the two issues which arise and which the expert evidence in support of disclosure should address. Unless that evidence is provided, the disclosure is irrelevant.
>
> 58. But Dr Mundy and Miss Dale simply ignored the printout, and the way in which the device is designed and operates. They provide no explanation as to how the device could have malfunctioned in the way they say it must have done and still

> have produced a positive reading so far from the true reading which they say it would have produced. No explanation of any sort is offered for the four blank readings and the two simulator readings all designed to demonstrate that the machine is operating correctly. Their generalised assertions that the machine could be unreliable and that its reliability needed to be verified was accompanied by no evidence that the disclosure sought could cast any light on its reliability in that way.
>
> 59. Third, this is not to say that the machine must be taken to be infallible. *Cracknell v Willis [1988] AC 450* permits evidence to be given that the defendant had not been drinking anything like enough to produce a positive reading, even if he cannot demonstrate how the machine might have malfunctioned. But these disclosure applications go further and are addressed to identifying how that might have happened. However, unless the disclosure application addresses the two questions which we have identified, this extensive disclosure would have to be given in every case in which a defendant alleged that his alcohol consumption had been too low to sustain a positive reading, and in effect proof of reliability would always be required and the presumption of accuracy would be displaced."
>
> (our emphasis)

49. In Mr Bhusal's case there was no evidence at all served in support of the application for disclosure. Dr Mundy's report accompanying the defence statement in his case did not contain the section included in his earlier report served on behalf of Mr Thaiss. The assertions concerning the operation of the Intoxilyser made in Mr Bhusal's defence statement, set out at [10] above, were accordingly no more than that, and could not provide any basis for disclosure (*Beattie v Crown Prosecution Service* [2018] EWHC 787 (Admin), at [23]).

50. In *R (DPP) v Caernarfon Crown Court* [2019] EWHC 767 (Admin), the prosecution successfully challenged an order for disclosure made on a section 8 application by a defendant on appeal to the Crown Court following a speeding conviction. In that case the prosecution had disclosed video and other data relating to observations of the defendant's car and measurement of its speed using a type-approved device ("speed gun"). Before the hearing in the Crown Court, the defence made a section 8 application for disclosure of all readings obtained from the speed gun that day, covering numerous vehicles observed over many hours. Prior to trial in the lower court the defence had obtained an expert report but that expert was not called at trial. His evidence was abandoned. When the case came to the Crown Court there was no expert evidence in support of the application for disclosure. The judge was instead told that there was an expert in the offing who had indicated that he needed to see the full data from the day's operation of the speed gun in order to arrive at a view as to the accuracy of the reading in the instant case. The judge made the order on that basis. In quashing the judge's order Edis J, with whom Coulson LJ agreed, observed as follows, at [31]:

> "In the absence of a report served in support of the application for disclosure which established the matters identified in paragraph 56 of the *Manchester Justices* case it was not properly open to the judge to grant the order sought. Mr Davies relied upon the opinion of an expert, apparently Mr Wilkinson, to show that he needs all of the footage in order to express an opinion on any of it. That opinion was essential to the disclosure application. In breach of CPR 19.3(b) no report setting it out in proper terms so that it could be evaluated by the court was ever served. In these circumstances the disclosure application was entirely misconceived and the only proper course open to the judge was to reject it"

51. In the absence of any supporting evidence in Mr Bhusal's case, the District Judge's first instinct, namely to refuse the application, was right. The District Judge was persuaded that the expiry of the gas calibration certificate overcame that difficulty. We respectfully disagree. He was right to adjourn the trial to enable the attendance of experts to speak to the relevance, if any, of that fact to the accuracy of the Intoxilyser readings; but that circumstance alone could not justify ordering the wider disclosure in the absence of any evidence establishing its relevance. (Mr Heptonstall informed us that the prosecution has now obtained further evidence demonstrating no impact at all of the expired gas calibration certificate on the proper operation of the machine.)

52. Dr Mundy's report in Mr Thaiss' case purported to give some evidence in support of the application for disclosure; but it was in our view inadequate, falling far short of demonstrating the necessary relevance, as discussed in the passages from the *Manchester Justices* case set out above. Paragraphs 39.1 to 39.9 of Dr Mundy's report contain a series of generalised and, for the most part, unexplained assertions. Some are no more than a statement of the obvious as, for instance, paragraph 39.2:

> "If the instrument is working correctly it is capable of detecting certain pre-programmed problem (sic). However, the instrument cannot detect problems that it is not programmed to detect. Therefore, if a problem occurs that the instrument is not programmed to detect – no error message will be generated on the printout…"

In others Dr Mundy speculates as to ways in which the Intoxilyser might produce an unreliable result, see for instance paragraph 39.6:

> "If there is dust in the analytical chamber, and this enters the infra-red beam then it will scatter the light ultimately producing a higher recorded alcohol concentration…"

53. We comment further on evidence such as this below; for present purposes we observe that courts faced with evidence purporting to call into question the reliability of a type-approved device should scrutinise such evidence very carefully for its actual meaning and its relevance to the particular test results under examination. We found little of the former and none of the latter in this section of Dr Mundy's report served on behalf of the defence in Mr Thaiss' case.

54. It was unsurprising, perhaps, in light of the above, that Mr Benson's submissions should have focussed instead on paragraphs 34 to 37 of Dr Mundy's report setting out his conclusions regarding breath-alcohol level, raising the possibility of Mr Thaiss' actual level being as low as 39µg/100ml owing to some (unexplained) level of variance in the test results.

55. As to this, we accept Mr Heptonstall's criticisms of Dr Mundy's figures. We could find no proper explanation of Dr Mundy's numbers; it is impossible to understand how he arrived at a figure for variance of 3.75%, nor how this applied to reduce the lower reading of 45µg produced by the Intoxilyser in Mr Thaiss' case to one of 39µg, as suggested at paragraph 36 of Dr Mundy's report. But even if we had been satisfied of Dr Mundy's figures and workings, we agree with Mr Heptonstall that this evidence does not establish relevance for the purposes of a section 8 application. An offence under section 5 RTA is committed when a person has ingested sufficient alcohol to give a breath-alcohol reading on an approved machine of greater than 35µg/100ml. The fact that the prosecution limit is set at a higher level is irrelevant. As explained by Dr Williams in his report at p.6:

> "Th[e prosecution] allowance from 35 to 39 is more than sufficient to allow for any errors in the breath analysis process, and so for any inaccuracy in the reported alcohol readings."

56. Mr Thaiss' lower reading was 45µg/100ml, well above the statutory limit and also the prosecution limit; but even if the data sought could have demonstrated that this figure was subject to a degree of variance of as much as +/-6µg (which seems to us unlikely), the resulting level of 39µg would still have been above the statutory limit; thus it cannot be said that any material which might have demonstrated a variance at this level (if the material sought could have done so, as to which there was no evidence) would have undermined the prosecution case against Mr Thaiss, nor assisted his defence. The suggestion that an abuse argument might have been available is fanciful.

(ii) Delay

57. In our view the delay on the part of Mr Thaiss' representatives in pursuing the section 8 application was a further reason for the District Judge to have refused the application for disclosure in his case. In his submissions Mr Benson did not seek to explain or justify the delay. It seems that the District Judge was given no explanation either, counsel then appearing for Mr Thaiss merely asserting (wrongly) that the prosecution had failed to respond to the section 8 application.

58. The Magistrates' Court Rules 1981 (as amended) ("MCR") provide as follows:

> "**3A Case management**
>
> (1) The court must actively manage the case. That includes—
>
> (a) the early identification of the real issues;
>
> …

(d) monitoring the progress of the case and compliance with directions;

…

(f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion and avoiding unnecessary hearings;

…

(3) Each party must—

(a) actively assist the court in managing the case without, or if necessary with, a direction; and

(b) apply for a direction if needed to assist with the management of the case.

…

(15) In fulfilling his duty under paragraph (3) actively to assist the court in managing the case, each party must—

…

(d) promptly inform the court and the other parties of anything that may—

(i) affect the date or duration of any hearing, or

(ii) significantly affect the progress of the case in any other way."

The same provisions appear in the Criminal Procedure Rules at rules 3.2, 3.3 and 3.10.

59. The prosecution responses of 28 December 2018 and 11 January 2019 had unambiguously dealt with the section 8 application, declining to make further disclosure. Two trial dates had been set and adjourned, without any indication from the defence that it was intending to press the application. We agree with Mr Heptonstall that it was contrary to the spirit and intent of the overriding objective and of the MCR set out above, for Mr Thaiss' representatives to have renewed the application on the day of trial, knowing (as they must have done) that, if granted, the trial date would need to be adjourned. In our view, in the circumstances of this case as it was before the District Judge in August, quite apart from the evidential deficiency we have identified vitiating the disclosure decision, the lateness of the application would have entitled the District Judge to refuse to entertain it. However, it is sufficient to rest our decision on the substance of the issues.

Conclusions

60. On the material before the two District Judges the orders for disclosure made in each case were unsustainable. Accordingly, we granted leave, allowed the DPP's applications and quashed both orders.

The content of the applications and evidence in support

61. Having dealt with the substantive challenges, we do not wish to leave this case without commenting on the content of the disclosure applications and the supporting expert evidence relied on in the magistrates' courts in these cases.

62. In the same way as the court observed in the *Caernarfon* case at [29] in relation to speed gun evidence, the disclosure issues raised before us are of broad application in very many other prosecutions being heard every day in magistrates' courts throughout the country. Unmeritorious applications for disclosure of unused material relating to type-approved devices whose data form the basis of standard prosecutions cause delay and expense.

63. At the time of serving defence statements, and up to and including the first day of trial, Mr Thaiss was represented by Geoffrey Miller Solicitors. Mr Bhusal was represented by National Motoring Lawyers. Both instructed the same counsel. Their defence statements were in each case accompanied by a report of Dr Mundy. Geoffrey Miller Solicitors and Dr Mundy were also instructed on behalf of the defendant involved in the prosecution considered in the *Manchester Justices* case.

64. The defence statements served on behalf of Mr Bhusal and Mr Thaiss each contained an identical section of assertions purporting to challenge the reliability of the Intoxilyser in general terms, set out at [10] above. As long ago as 1985, this court observed that general complaints about the operation of a type-approved machine, like the Intoxilyser, should be addressed to the Secretary of State, not used to ground an application for disclosure: *R v. Skegness Magistrates' Court, ex parte Cardy* [1985] RTR 49. *Cardy* concerned an order for a witness summons to produce documents relating to an approved breath-testing device. In quashing the order Goff LJ said this, at 61F-H:

> "…[I]t is one thing to challenge the reliability of the particular device upon which the defendant's breath was tested at the relevant time, which may be entirely proper in the circumstances of a particular case, and another thing to attempt to challenge the reliability of [Intoxilyser] devices generally. If there are those who have reason to believe that [Intoxilyser] devices are generally unreliable, they are in truth saying that they should never have received the approval of the Secretary of State, or that the Secretary of State should withdraw his approval from them. They should therefore address their representations to the Secretary of State. But, so far as cases such as these are concerned, the fact is that the [Intoxilyser] device is…an approved device for the purposes of the Act and, so long as that state of affairs continues, it is, in our judgment, wholly immaterial to mount a challenge to the general reliability of these

> approved devices in individual prosecutions brought under the Act…"

65. In the light of this clear statement we are troubled that defence statements, or an application for disclosure, relying on generalised, speculative complaints about a type-approved device were produced in the two cases before us.

66. Part 19 of the Criminal Procedure Rules contains provisions dealing with the requirements of expert reports used in criminal proceedings, including:

> "**Content of expert's report**
>
> **19.4** Where rule 19.3(3) [party relying on report other than as admitted fact] applies, an expert's report must –
>
> …
>
> (b) given details of any literature or other information which the expert has relied on in making the report;
>
> (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;
>
> …
>
> (f) where there is a range of opinion on the matters dealt with in the report –
>
> (i) summarise the range of opinion, and
>
> (ii) gives reasons for the expert's own opinion;
>
> …
>
> (h) include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;"

67. The Criminal Practice Directions at section 19A.4 encourage courts actively to enquire into factors by which the reliability of expert evidence may be tested. Those factors are set out at section 19A.5 and include the following:

> "(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
>
> (b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

> (c) if the expert's opinion relies on the results of the use of any method…whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
>
> (d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise…and the views of those others on that material;
>
> …
>
> (f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
>
> (g) if there is a range of opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained…"

68. The Practice Directions go on, at section 19A.6, to identify potential flaws in expert evidence, including

> "(a) being based on a hypothesis which has not been subjected to sufficient scrutiny…;
>
> (b) being based on an unjustifiable assumption;
>
> …
>
> (e) relying on an inference or conclusion which has not been properly reached."

69. We have stated our concerns with particular aspects of the expert evidence given by Dr Mundy in his report prepared for Mr Thaiss. In addition, we note that in neither of his reports prepared for the cases before us does Dr Mundy mention the Intoxilyser test printout, or discuss or deal with the results of the ordinary calibration checks performed by the machine before, between and after the two evidential breath samples provided by Mr Bhusal and Mr Thaiss. Given that the printout is the key evidence in relation to the breath-alcohol test results which Dr Mundy considers and the reliability of which he apparently seeks to question, it is an omission that his reports do not examine and discuss the entries on the printout, in particular the results of the device's self-calibration checks. This failure is particularly striking given that the need for an expert report to examine and address the machine's printout was expressly highlighted in the *Manchester Justices* case at [57] and [58] (where Dr Mundy is mentioned by name).

70. The omission of key data from his report engages a number of the factors identified in the Rules and Practice Directions, set out above.

71. Our concerns about Dr Mundy's evidence were amplified by the following extract from the report of Dr Williams, the expert instructed by the prosecution in Mr Thaiss' case.

Responding to paragraph 39 of Dr Mundy's report (the section containing assertions regarding the Intoxilyser's reliability), Dr Williams comments that:

> "Dr Mundy has made exactly these same points about the Intoxilyser in several other like cases, but does not comment here on the same answers I have given previously…"

72. Dr Mundy's failure to deal in his reports with contrary views previously expressed by Dr Williams in other cases is a further factor undermining the reliability of his evidence.

73. The combination of these factors calls into question the reliability, and consequently the admissibility, of reports such as the ones produced by Dr Mundy in the two cases before us, which contain general or speculative assertions of unreliability, incorporate unexplained workings and which do not (i) discuss the calibration entries recorded on the Intoxilyser printout, (ii) identify and deal with known responses already made by another expert on the matters raised and (iii) address each of the matters identified in the *Manchester Justices* case. It is the responsibility of defence representatives to ensure that experts like Dr Mundy understand the requirements of the Criminal Practice Rules and Directions, and that the expert reports which they serve on behalf of their clients are reliable and admissible; further that if such reports are to be relied upon for the purposes of seeking further disclosure in relation to a type-approved machine, they address all the matters identified at [55] to [57] in the *Manchester Justices* case.