December 21, 2011

Blow over? Think twice before blaming it on the flu.

By Arlene Kwasniak

Decision Considered:
R v Kasim, 2011 ABCA 236.

The Respondent claimed to have drunk no more than 3 or 4 beers between 7 and 8:30 p.m. on September 18, 2008. He was behind the wheel soon after. At about 9 p.m. he complied with a lawful demand for an Intoxilyzer breath sample and the two samples he provided measured 100 mg percent, or 20 mg percent over the legal maximum of 80 mg of alcohol in 100 millilitres of blood. At trial the Respondent testified that his body temperature was elevated as he was suffering from the flu or a fever that day. This testimony was corroborated, and the trial judge accepted it. The Respondent's expert witness, Dr. Malicky, testified that given the Respondent's elimination rate, and an elevated body temperature, "his blood alcohol level at the time should have been approximately 36 mg percent if he had three containers of beer, and 60 mg percent if he had four containers of beer" (*R. v. Kasim*, [2010] A.J. No. 969, para 64). The Respondent argued that the test results were therefore askew and that raised a reasonable doubt as to whether he the violated the *Criminal Code* (RSC, 1985, c C-46). Both the Provincial Court judge and Queen's Bench summary conviction appeal judge found for the Respondent. By consent order the Crown appealed to the Court of Appeal on a single issue: "The summary conviction appeal judge erred in law in her interpretation of s. 258(1) (c) of the Criminal Code" (CA decision at para 7). These Criminal Code provisions set out presumptions that subject to certain time and other limitations Intoxilyzer readings of blood alcohol are accurate. The provisions also limit permissible challenges to the presumed accuracy.

As set out in paragraph 9 of the Court of Appeal decision, the relevant *Criminal Code* provisions are:

258.(1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2), ...

> (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
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> > (i) [Not in force]
> > (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
> > (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
> > (iv) an analysis of each sample was made by means of an approved instrument

operated by a qualified technician, evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things –

[A] that the approved instrument was malfunctioning or was operated improperly,

[B] that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and

[C] that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

[sub-paragraphs lettered for ease of reference]

...

(d.01) for greater certainty, evidence tending to show that an approved instrument was malfunctioning or was operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of

(i) the amount of alcohol that the accused consumed,

(ii) the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or

(iii) a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed;

As pointed out by the Court of Appeal, in order to successfully challenge the accuracy of the Intoxilyzer measurements, the defendant must provide evidence required by paragraphs 258(1)(C)(iv)(A),(B),and (C) (set out above) sufficient to raise a reasonable doubt that the instrument was operated improperly or malfunctioning in some manner. The key question was whether evidence was raised to support paragraph was 258(1)(iv)(C), that "the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed."

The trial judge relied on Dr. Malicky's evidence and analysis of the Respondent's average elimination rate. As stated by the Court this was that "each centigrade degree of elevated body temperature would result in an 8.9% overstatement of the Respondent's blood alcohol level. The Intoxilyzer blood alcohol readings were 100 mg percent. They would have to be approximately 25% overstated in order to conceal a true blood alcohol level below the legal limit of 80 mg percent (1.25 X 80 = 100). The Respondent's body temperature would therefore have to be approximately 2.8 centigrade degrees (25 ÷ 8.9 = 2.8) above normal in order to meet the test in subparagraph 258(1)(c)[C]" (CA decision para 13).

No evidence was lead regarding the defendant's actual elevated temperature at the time of the offence. However Dr. Malicky's evidence was that anything between 36.1^{o} and 37.5^{o} may be considered normal, and anything over 37.5^{o} is may be considered to be fever. A low grade fever is 38^{o} to 39^{o}, a moderate fever is 39^{o} to 40^{o}, and a high grade fever is between 40^{o} and 41.5^{o}.

Any body temperature over 40 ^{o} is dangerous, and could result in convulsions. Above 41.5 ^{o} constitutes hyperthermia (CA para 13, referring to AR para 60). Accordingly, based on Dr. Malicky's assessment and calculation, the defendant need only have had a moderate fever at the time he gave breath samples for the true alcohol content in his blood to be 60 mg percent.

The Court of Appeal, however, assessed the situation from a different angle, all based on the Respondent's evidence.

In the Court's words "From another perspective, if the Respondent's blood alcohol level was really 60 mg percent (as suggested by Dr. Malicky's testing) his body temperature would have had to have been 44.5°C in order to explain the 100 mg percent readings generated by the Intoxilyzer (100 mg. - 60 mg. = 40; 40/60 = 66.6% ÷ 8.9% = 7.5o C + 37o C= 44.5) (CA decision, para 18).

Berger J.A., concurring in the result of the majority set out above, expressed the calculation in a somewhat different manner. He started with Dr. Malicky's testimony that the Respondent's blood alcohol content would have to be 60 mg percent if he consumed no more than four beers. Based on the assumption that the Respondent drank only four bottles of beer (as the trial judge accepted) the "following calculation applies:

> 1°C = 8.9% increased body temperature
> 1°C = 0.089
> 100 / 60 = 1.667
> 1.667 – 1 = 0.667 = 66.7%
> Δ temperature = 66.7% / 8.9% = 7.49°C
> 37°C + 7.49°C = 44.49°C" (para 31)"

Berger J.A. concluded that the Respondent would have had to have run a temperature of 44.49 ^{o} centigrade "to skew the results from 60mg percent to 100mg percent by increased body temperature alone" based on the "tested elimination rate of 18mg percent and based on his consumption of four beers." And a "temperature of 44.49 degrees centigrade would have rendered" the Respondent "comatose or worse. There was no evidence of such malaise" (paras 31, 32, and 34).

In the end the Crown's appeal was allowed, the acquittal set aside and a conviction entered on the *Criminal Code* clause 253(1)(b) charge. The matter was remitted back to trial judge for sentencing.

And this leads me, on behalf of the ABlawg, to wish you a wonderful and spirited (but not too spirited) holiday season.