

# EVIDENTIARY PRESUMPTION OF DRINKING AND DRIVING CASES AND THE SUSPECTS' RIGHT TO COUNSEL UNDER SOUTH AFRICAN LAW

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## ABSTRACT

*South African legislation makes it an offence for a person to drive a vehicle on a public road while the concentration of alcohol in any specimen of blood or breath is in excess of the prescribed minimum. If it is proved that a sample taken within two hours of the alleged contravention is in excess of the prescribed minimum, it shall be presumed that the concentration of alcohol was above the prescribed minimum at the time of the alleged offence. The purpose of this study was to examine whether the Two-hour Evidentiary Presumption in the Context of Drinking and Driving Cases is Sufficiently a Compelling Factor to Override Suspects' Right to Counsel under the South African Law? This study also investigated whether the suspect is entitled to counsel during the two-hour period and if so, whether the suspects' right to counsel has been violated or whether evidence of the sample should be excluded. Under South African law the suspect is not afforded the opportunity to confer with or to be assisted by counsel when the sample is taken in this crucial timeline. In conclusion, safeguards must be built into the system to help protect the due process rights of a person suspected of drinking and driving under South African law was recommended among others.*

**Keywords:** *Evidentiary Presumption, Drinking, Driving, Cases, suspects right*

## INTRODUCTION

The ascertainment of bodily features frequently forms an essential component of the investigation of crime. In many instances it is a prerequisite for the effective administration of justice<sup>1</sup>. One such instance, is the policing of drinking and driving on a public road whereby the public is protected from the consequences which may result from the actions of a driver who is under the influence of alcohol. In terms of sections 65(2) and 65(5) of the Road Traffic Act<sup>2</sup> no person shall drive a vehicle, or occupy the driver's seat of a motor vehicle of which the engine is running, on a public road, respectively while the concentration of alcohol in any specimen of blood taken from any part of the persons' body is not less than 0.05 gram per 100 millilitres, or while the concentration of alcohol in any specimen of breath exhaled by such person is not less than 0.24 milligrams per 1000 millilitres<sup>3</sup>. In the case of a professional driver referred to in section 32 of the same Act, the permissible concentrations in terms of sections 65(2) and 65(5) are still lower. If, in any prosecution for an alleged contravention of sections 65(2) or 65(5), it is proved that the concentration of alcohol

in any specimen of blood was not less than 0.05 gram per 100 millilitres, or the concentration of alcohol in any specimen of breath was not less than 0.24 milligrams per 1000 millilitres of breath, in a sample taken from the person concerned at any time within two hours after the alleged contravention, it shall be presumed in the absence of evidence to the contrary that such concentration was not less than 0.05 gram per 100 millilitres or 0.24 milligrams per 1000 millilitres respectively at the time of the alleged contravention. In the instance of a professional driver referred to in section 32 of the same Act it is presumed that the concentration was not lower than the permissible lower concentration<sup>4</sup>.

Section 65(9) of the Act provides that no person shall refuse that a specimen of blood, or a specimen of breath, be taken of him. The taking of the samples are facilitated by section 37 of the Criminal Procedure Act<sup>5</sup>. Section 37(1)(a)(i) read with section 37(1)(c) of the Act provides that any police official may take such steps as he may deem necessary in order to ascertain whether the body of a person arrested upon any charge has any mark, characteristic or distinguishing feature or shows any condition or appearance. Provided that no police official shall take any blood sample of the person concerned. In terms of section 37(2)(a) read with section 37(1)(a)(i) of the same Act any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of an arrested person has any mark, characteristic or distinguishing feature or shows any condition or appearance.

Section 37(2)(b) provides that if any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken. It is clear from the above that the sample of blood or breath must be taken within two hours of the alleged offence for the evidentiary burden to apply. If the sample of blood or breath is not taken within two hours, the state will have to prove by way of expert testimony that the concentration was above the legal limit at the time of the offence<sup>6</sup>. This is done by way of the theory of back extrapolation by which later and lower test results are related back to the blood-alcohol level at the time of the offence. The fact that this theory was recently convincingly questioned in *S v Motata*<sup>7</sup> makes it even more crucial that the sample be taken within the first two hours, but if a person upon being stopped by the relevant authorities on suspicion of driving under the influence of alcohol in South Africa, immediately indicates that he first wants to consult with, then can he be assisted by a lawyer when the sample is taken? In South Africa the suspect is not afforded the opportunity to confer with counsel during the two hour timeline and has to submit a sample or face prosecution.

This raises many questions. Is the person who is subjected to the taking of the

sample entitled to the rights in sections 35(1) and 35(2) of the Constitution of the Republic of South Africa, 1996?<sup>8</sup> If so, was the person's right to counsel of choice under section 35(2)(b), or the right to counsel at state expense under section 35(2)(c) of the Constitution not violated? Finally, if the suspects' right in terms of section 35(2)(b) or 35(2)(c) was violated, should evidence of the sample not be excluded under section 35(5) of the Constitution? In doing so, a picture of the rights of a suspect that is conscripted to submit a specimen of blood or breath on suspicion of drinking and driving will emerge incrementally. This study has given regards to the equivalent right to legal representation in selected foreign jurisdictions. Of course the reference to foreign law will not be a safe guide if the principles of comparative law are not followed. In the area of criminal procedure the comparisons are apposite in light of the fact that the law of criminal procedure and evidence in the selected jurisdictions and South Africa are all premised on the English common law of criminal procedure and evidence. The underlying rationale or reasoning for the existence of these principles is therefore similar and accordingly suitable for consideration. In the selected countries with constitutions, the constitutional rights were superimposed on the English common law of criminal procedure and evidence. As a result many English principles were taken up in the constitutions.

As far as Canadian law is concerned, the value of comparison is further enhanced by the similarity in the constitutional structure within which the criminal procedure rights operate. Both the South African Constitution and the Canadian Charter provide for the 'freedom and security' of the person, and lodged together with other criminal procedure rights, the right to be presumed innocent and the right to legal representation. In addition both Constitutions provide for a general limitation clause<sup>9</sup>. The undeniable debt that the South African limitation clause, which is definitive to the method of fundamental rights analyses, owes to Canadian law, calls for an even closer scrutiny of these principles. The use of foreign precedent requires 'careful management' in light of the differences in the criminal justice system and society that might present itself<sup>10</sup>. One must therefore be careful not to import doctrines associated with foreign jurisdictions into an inappropriate South African setting. The question whether evidence of the sample should be excluded under section 35(5) only arises once it has been decided that the suspects' right to counsel under section 35(2) had been infringed.

***Is the person who is subjected to the taking of the sample entitled to the rights in sections 35(1) and 35(2) of the Constitution?***

The rights in sections 35(1) and 35(2) accrue to someone who is 'arrested' and 'detained' respectively. Unfortunately there are no statutory definitions explaining when one is deemed to be arrested or detained. The Supreme Court of Appeal and the Constitutional Court have also not had the opportunity to interpret these terms. However, some answers may be found in the Criminal Procedure Act, foreign law and in a high court decision.

Section 35(1) provides certain rights to persons 'arrested for allegedly committing an offence'. The underlying requirement for an arrest in terms of the Criminal Procedure Act is also the alleged commission of an offence<sup>11</sup>. The manner in which the arrest must be effected in terms of the Criminal Procedure Act can accordingly shed light on when one is deemed to be arrested for purposes of section 35(1). In terms of section 39(1), an arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching the person's body or, if the circumstances so require, by forcibly confining the person's body. The arresting officer may only dispense with the physical touching of the person about to be arrested where the suspect clearly subjects himself to the arresting officer<sup>12</sup>. An arrested person will also be a detained person. Consequently, a 'detained' person's rights will also accrue to an 'arrested' person<sup>13</sup>. Can it be said that the necessary degree of physical constraint is present where the suspected offender is ordered to submit a sample at the behest of the official? Section 65(9) of the Road Traffic Act provides that no person may refuse that such a specimen be taken and because of this, the suspect is given no choice but to cooperate. Where the suspect is bundled into a car and transported to the district surgeon to have blood drawn, and especially so where the suspect refuses to have the sample taken and is forced to do so, the physical constraint is much more apparent.

Furthermore, once the blood sample has been taken, and with a breath sample where the concentration of alcohol in the breath is above the legal limit, the person is usually released on bail in terms of section 59, or on warning in terms of section 72 of the Criminal Procedure Act. To be released on bail or on warning in terms of these sections one must have been in custody, and therefore arrested. The argument that a person who is subjected to the taking of a sample is 'arrested' and 'detained' is in accordance with the view of the Supreme Court of Canada. In *R v Therens*<sup>14</sup> the court held that detention also occurs 'when a police officer or other agent of the state assumes control over the movement of a person by demand or direction which may have significant legal consequences and which prevents or impedes access to counsel.' In *R v Thomsen*<sup>15</sup> the court held that 'the necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from the reasonable belief that one does not have a choice as to whether or not to comply'<sup>16</sup>. In *R v Orbanski*<sup>17</sup> the crown conceded that if someone is stopped on the suspicion of driving under the influence of alcohol, he<sup>18</sup> is in custody for purposes of the Charter. In *R v Grant*<sup>19</sup> the court confirmed that even if an accused is not physically held, psychological constraint amounting to detention had been recognized. If a suspect under Canadian law therefore reasonably believes that he must subject himself to the taking of the sample, he will be detained and must be advised of his right to counsel.

The detention under Canadian law also does not have to be for a lengthy time period. In *R v Elshaw*<sup>20</sup> the suspect was held for five minutes in the back of a police car for questioning. The court found that the brief period constituted detention. The

argument that a person who is subjected to the taking of a sample is 'arrested' and 'detained' is also in accordance with the view of the Supreme Court of the United States. In *Orozco v Texas*<sup>21</sup> the court applied custodial principles to someone who has been arrested and is no longer free to go where he pleases. In *Oregon v Mathiason*<sup>22</sup> the court found that the suspect was not in custody because his freedom to depart was not restricted in any way.

It follows that when a person is subjected to the taking of a blood or breath sample, the individual loses his freedom of movement and potentially at least his access to services, including legal assistance available in the wider community. In that sense there is physical constraint (or psychological perception of such constraint). Even if it is not accepted that the person subjected to the taking of the sample is not 'arrested' and 'detained', the right to the constitutional warnings not only accrues to an arrestee or detainee in the technical sense<sup>23</sup>. It also extends to a person who may not be an arrestee or detainee but the official reasonably suspects him<sup>24</sup>. In England and Wales the caution similarly extends to suspects prior to arrest<sup>25</sup>. Because he is at risk of being charged he must be afforded the pre-trial rights of an arrested and detained person so that he does not commit some careless or unwise act, or utters some potentially incriminating words<sup>26</sup> and so that, at least where the suspect asserts his right to legal assistance, there is some assurance that the official acts in a constitutionally acceptable and lawful manner. A person who is subjected to the taking of a sample is entitled to the rights in sections 35(1) and (2) of the Constitution.

***Was the person's right to counsel of choice under section 35(2)(b), or the right to counsel at state expense under section 35(2)(c) of the Constitution violated?***

In terms of section 35(2), everyone who is detained has the right to: (b) choose, and to consult with a legal practitioner, and to be informed of this right promptly, (c) have a legal practitioner assigned to him by the state and at state expense if substantial injustice would otherwise result, and to be informed of this right promptly. Notwithstanding, only providing for the 'right to consult with' in section 35(2)(b), the drafters of the Constitution meant to confer the right to be assisted by a legal practitioner upon everyone that is detained.

It is immediately clear that there is nothing in the wording of sections 35(2)(b) and 35(2)(c) that authorizes a dilution of the right to counsel by allowing for a holding off period. To the contrary, the wording clearly indicates that a detainee must be informed of his rights to counsel promptly. Section 73(1) of the Criminal Procedure Act furthermore provides that an accused is entitled to assistance by his legal advisor as from the time of arrest. The accused must at the time of his arrest be informed of his right to be represented at his own expense by a legal adviser of his own choice, and if he cannot afford legal representation that he may apply for legal aid. The accused must also be informed of the institutions that he may approach for legal assistance. However, it is trite that the rights in the Bill of Rights are not absolute. Section 36 of the Constitution provides that rights in the Bill of Rights may be limited

by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including the nature of the right; the importance of the purpose of the limitation<sup>29</sup>; the nature and extent of the limitation<sup>30</sup>; the relation between the limitation and its purpose<sup>31</sup> and less restrictive means to achieve the purpose<sup>32</sup>. The exact scope of the right may consequently not be immediately clear by simply reading it. The right is subject to constitutional analysis and must be interpreted and applied by the courts. Again there is no Supreme Court of Appeal or Constitutional Court decision directly on point that can provide guidance. Fortunately, some noteworthy foreign jurisdictions that are good examples of open and democratic societies based on human dignity, equality and freedom have had the opportunity to engage with the issue. Under Canadian law, a right to counsel exists in terms of section 10(b) of the Canadian Charter. Section 10(b) provides that 'everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right'<sup>33</sup>.

Section 10(b) imposes three duties on state authorities who arrest or detain persons. The duties are to inform the detainee of the right to retain and instruct counsel without delay, to provide a reasonable opportunity to exercise the right, and to refrain from eliciting evidence from the detainee until the reasonable opportunity has been exercised<sup>34</sup>. In *R v Bartle*<sup>35</sup> and *R v Prosper*<sup>36</sup> the suspects were arrested for driving under the influence of alcohol. In *Bartle*, the Supreme Court of Canada found that the second and third duties were 'implementational' duties which are only triggered if a detainee expresses the desire to exercise his right to counsel<sup>37</sup>. The majority in *R v Prosper* explained that once a detainee has indicated a desire to exercise his right to counsel, the state is required to provide him with a reasonable opportunity to do so<sup>38</sup>. In addition, authorities must refrain from eliciting incriminating evidence from the detainee until he has had reasonable opportunity to reach counsel<sup>39</sup>.

There are a few exceptions to this rule. The police only have a duty to hold off where the detainee is sufficiently diligent in pursuing his right to counsel after being informed of this right<sup>40</sup>. The exceptions also include where a suspect is too drunk to exercise his right, and where a suspect was 'rude and obnoxious towards police'<sup>41</sup>. What constitutes a reasonable opportunity will depend on the surrounding circumstances. The circumstances that effect the determination of what is a reasonable opportunity include the availability of counsel of choice, the existence or non-existence of free legal aid and the existence of duty counsel. Each of these circumstances may effect what constitutes reasonable diligence of a detainee in pursuing the right to counsel which will in turn effect the time period during which the authorities' 'implementational' duties will require them to hold off from trying to elicit incriminating evidence from the detainee. The fact that the detention is late at night and counsel of choice is not available, or the fact that duty counsel is not available in the particular jurisdiction will for example serve to extend the period in which a detainee will have been found to have been duly diligent in exercising his right to counsel<sup>42</sup>.

There may be compelling and urgent circumstances where the police, despite the detainee not being able to contact his lawyer due to unavailability, will not be required to hold off. However, the two-hour evidentiary presumption in the context of impaired driving cases does not, by itself, constitute such a compelling or urgent circumstance<sup>43</sup>. Urgency is not created by mere investigatory and evidentiary expediency where detainees have indicated their desire to procure counsel and have been duly diligent in exercising their right to counsel. The loss of this presumption is one of the prices that have to be paid by governments who do not have a system of free, preliminary legal advice to detainees on a twenty four hour basis<sup>44</sup>. The Supreme Court did not decide whether the detainees' reasonable opportunity extended to the point where it may no longer be possible to obtain readings that can be accurately extrapolated backwards to provide information about the detainees' blood level at the time of the offence. The question whether the imminent loss of the chance to obtain any meaningful data might constitute an 'urgent circumstance' sufficient to curtail the holding off period did therefore not arise<sup>45</sup>.

The Supreme Court also cautioned lower courts to ensure that Charter protected rights are not too easily waived. An additional 'informational' requirement will be triggered if a detainee, who has previously asserted the right to counsel, indicates that he has changed his mind and no longer wants counsel. At this point, the authorities must explain to the detainee that he has a reasonable opportunity to contact a lawyer and that the police are obligated to hold off participating in any incriminatory process until he has had that opportunity. There must be a clear indication that he has changed his mind and the burden of proving an unequivocal waiver will be on the crown. The waiver must be free and voluntary and must not be the product of either direct or indirect compulsion<sup>46</sup>.

In *R v Sheppard*<sup>47</sup> the Newfoundland and Labrador Court of Appeal, also in a breathalyzer case, held that once the suspect had decided to consult with duty counsel, and has done so, his right in terms of section 10(b) was satisfied. The duty to hold off cannot be revived by a later decision to speak to a lawyer of choice<sup>48</sup>. In *R v McCrimmon*<sup>49</sup> the Supreme Court of Canada confirmed that where a detainee exercises his right to speak to a specific lawyer he must be given a reasonable opportunity to contact his chosen counsel. If the chosen lawyer is not immediately available the detainee has the right to refuse to contact another counsel and wait a reasonable time for his counsel to become available. Provided the suspect exercises reasonable diligence in the exercise of this right the police have a duty to hold off attempting to elicit evidence until the suspect has had the opportunity to consult with counsel. If the chosen lawyer does not become available within a reasonable period of time, the detainee must exercise his right by contacting another lawyer; otherwise the duty of the police to hold off will be suspended<sup>50</sup>. The court confirmed that what constituted a reasonable time depended on the circumstances as a whole, including the urgency of the investigation<sup>51</sup>.

Under American law, the Sixth Amendment of the United States Constitution guarantees 'the right to assistance by counsel for ones' defence'<sup>52</sup>. The Fourteenth Amendment guarantees the accused 'the right to a fair opportunity to defend against the State's accusations'<sup>53</sup>. For present purposes, it is important to determine exactly when in the criminal justice process this right arises. In *Powell v Alabama*<sup>54</sup>, the Supreme Court of the United States held that there was a vital right to legal representation at the pre-trial stage from arraignment leading up to the beginning of the trial. In *Brewer v Williams*<sup>55</sup> the same court reiterated that the right to assistance by counsel was indispensable to the fair administration of the American system of adversary criminal justice. In confirming the need for legal representation at the pre-trial stage, the court held that the right to counsel 'means at least that a person is entitled to help of a lawyer at or after the time that judicial proceedings have been initiated against him whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'<sup>56</sup>. The court added that 'an individual against whom adversary proceedings have commenced has the right to legal representation'. The court also held that an individual has the right to counsel 'when the government interrogates him'<sup>57</sup>, and when he has, as is the case under discussion, been arrested on a warrant, arraigned and had been committed to jail<sup>58</sup>. The Supreme Court has also found that due process 'is flexible and calls for such procedural protections as the particular situation demands'<sup>59</sup>.

From these authorities, it is uncertain whether an individual has a constitutional right to be assisted by counsel in the United States of America when he or she is conscripted to supply a sample of breath or blood when under suspicion of drinking and driving? However, what is certain is that the right to counsel does not depend upon a request by the defendant<sup>60</sup>, and once the right to counsel arises 'a defendant should be afforded a fair opportunity to secure counsel of his own choice'<sup>61</sup>. Unsurprisingly, there is a difference in the way that the states address this issue. Some hold that due process is not violated by delaying the suspects' right to be assisted by counsel until after the sample has been secured. Idaho Code 18-8002 provides that any person who drives a motor vehicle is deemed to have given his consent to be tested for alcohol, drugs or other intoxicating substances where the official has reasonable ground to believe that the person is violating the provisions of the section<sup>62</sup>. The person will not have the right to consult with an attorney before submitting the sample<sup>63</sup>.

However, the states' scheme does also provide protection for the suspects' interest in that the code provides the suspect with the right to independently test for sobriety. The case law in Idaho makes it clear that the state may not prevent or unreasonably delay the suspects' ability to obtain evidence of sobriety after submission of the sample<sup>64</sup>. The due process right to obtain evidence, therefore, arises after submitting the sample. Other states hold that due process requires that an arrestee have access to counsel before the sample is secured. In Alaska, the Court of Appeals has in a series of cases held that the arrestee must be given a reasonable opportunity



to hold a private conversation with his attorney before the administration of the breath test<sup>65</sup>. In England and Wales, the situation is somewhat different. When the police suspect that an individual has committed an offence, they must inform him of his right to remain silent, also that it 'may harm your defense if you do not mention when questioned something which you later rely on in court' [sic] and 'anything you do say may be given in evidence'<sup>66</sup>. The police need only inform the suspect of his right to free legal advice when they get to the police station (where the samples are collected)<sup>67</sup>. Article 6.3(c) of the European Convention on Human Rights<sup>68</sup> provides that everyone charged with an offence has, amongst others, the following minimum right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.' In *Kennedy v CPS*<sup>69</sup>, the High Court of Justice, Queen's Bench Divisional Court held that although the right to a fair trial in article 6 of the convention could be said to apply from the outset of the police investigation, article 6 does 'not spell out a right to legal advice at any particular stage'. Because of this the court found it necessary to refer to domestic legislation. The court indicated that the domestic legislation satisfied the requirements of article 6.

In terms of section 58 of the Police and Criminal Evidence Act<sup>70</sup> 'a person arrested and held in custody in a police station ... shall be entitled, if he so requests, to consult a solicitor privately at any time.'<sup>71</sup> 'If a person makes such a request he must be permitted to consult a solicitor as soon as practicable...'<sup>72</sup> In terms of the Code of Practice issued under the Act 'all people in police detention must be informed that they may at any time consult and communicate privately, whether in person, in writing or by telephone with a solicitor, and that independent legal advice is available free of charge from the duty solicitor'<sup>73</sup>. 'When legal advice is requested the custody officer must act without delay to secure the provision of such advice to the person concerned'<sup>74</sup>.

A failure to comply with provision in the Act or the code does not automatically result in the exclusion of the evidence. Section 78 of the Act enables the court to refuse to allow the evidence if it appears, having regard to all the circumstances, that admission of the evidence would have such an adverse effect on the fairness of proceedings that it should not be admitted<sup>75</sup>. In *Kennedy v CPS*<sup>76</sup>, the court held it was a question of fact and degree in any given situation whether the detainee had been permitted to consult a solicitor 'as soon as is practicable'<sup>77</sup> and the custody officer 'acted without delay' to secure the provision of legal advice<sup>78</sup>. The court added that where the offence is driving while under the influence of alcohol, the public interest requires that the taking of the breath sample cannot be delayed to any significant extent in order for the suspect to take legal advice. However, if there happens to be a solicitor in the charge office and the suspect requests to consult for a couple of minutes, he should be allowed to do so. Similarly if the suspect asks to talk to his own solicitor or the duty officer for a few minutes by phone, he should be allowed to do so. But, where the solicitor does no more than to indicate his general desire to

obtain legal advice, there is no need to delay the taking of the samples and alert the solicitor at the first convenient opportunity<sup>79</sup>.

In New Zealand, section 23 of the New Zealand Bill of Rights Act<sup>80</sup> provides as follows: 'Rights of Persons arrested or detained (1) Everyone who is arrested or who is detained under any enactment ... (b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right.'

In *Ministry of Transport v Noort*<sup>81</sup>, the Court of Appeal in Wellington considered the interaction of section 23 in the Bill of Rights and the relevant sections in the Transport Act<sup>82</sup>. The court held that there was no good reason to believe that the administration of the Transport Act will be substantially impaired, or the road toll substantially reduced, if a driver who is brought in after a positive screening breath-test, is given a limited opportunity to make telephone contact with a lawyer and take advice. The opportunity is to be limited but reasonable. If a driver cannot immediately contact his lawyer he should normally be allowed to try one or two others. If despite the reasonable opportunity no lawyer can be contacted, the tests need not be delayed further. Ultimately, it will be a question of common sense whether a reasonable opportunity has been given<sup>83</sup>.

This brings me to the question whether the two hours timeline in sections 65(3) and 65(6) of the Road Traffic Act is a sufficiently urgent factor to override the detainee's right to counsel in section 35(2) of the Constitution under South African law? In the foreign jurisdictions discussed above, a suspect who is detained for purposes of securing a breath or blood sample is afforded the right to counsel in some form or the other (bar some American States). Under Canadian law, the arrestee must immediately upon his arrest be fully informed of his 'rights to counsel'. Once a detainee has indicated a desire to exercise his right to counsel, the state is required to provide him with a reasonable opportunity to do so. What constitutes a reasonable time depends on the circumstances as a whole. It is unclear whether the detainees' reasonable opportunity extended to the point where it may no longer be possible to obtain readings that can be accurately extrapolated backwards to provide information about the detainees' blood level at the time of the offence.

It is unclear from the decisions by the United States Supreme Court whether a suspect is entitled to the services of an attorney before the taking of the sample. Because of this, there is a difference in the way that the states address this issue. Some hold that due process is not violated by delaying the suspects' right to be assisted by counsel until after the sample has been secured. Other states hold that due process requires that an arrestee has access to counsel before the sample is secured.

In England and Wales the police must inform the suspect of his right to free legal advice when they get to the police station where the sample will be taken. When legal advice is requested the custody officer must act without delay to secure the provision of such advice to the person concerned. Where the offence is driving while under the influence of alcohol, the public interest requires that the taking of the breath sample cannot be delayed to any significant extent in order for the suspect to

take legal advice. However, if a solicitor is easily available the suspect should be allowed to consult for a couple of minutes. In New Zealand, a driver who has been brought in after a positive screening breath-test, must be given a limited but reasonable opportunity to make telephone contact with a lawyer and take advice before the blood sample is taken. It is furthermore fair to say that in all of these jurisdictions, driving while under the influence of alcohol is a major problem leading to deaths, injuries and huge financial and social costs. In Canada impaired driving was the leading criminal cause of death between 1999 and 2006<sup>84</sup>. Based on what is reasonable and justifiable in these jurisdictions, the rights of the suspect to counsel in terms of sections 35(2)(b) is violated if he is refused access to counsel in the two-hour, timeline. The violation can also not be saved by the limitation clause in section 36 of the Constitution.

Section 36(1)(a) requires that the nature of the right that has been infringed be taken into account. This is not only a separate enquiry but also an indication of how stringently the other factors must be viewed. If the right to be limited, as here, is crucial to the constitutional project, it must be understood to mean that the other limitation requirements must be tightened accordingly<sup>85</sup>. It will therefore be more difficult to justify the infringement of a right that is of particular importance to the constitution's ambition to create an open and democratic society based on human dignity, equality and freedom.

Section 36(1)(c) provides that the nature and extent of the limitation must be taken into account. This factor ensures that where a serious infringement of a right occurs, the infringement will carry a great deal of weight in the exercise of balancing rights against justifications for its infringement. From the point of view of the individual affected by the violation, his right to counsel is taken away completely in this instance. It is well established that section 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other. It is a process of weighing the individuals' right, which the state wishes to limit, against the objective that the state seeks to achieve by such limitation. This evaluation must necessarily take place against the backdrop of the values of the South African society as articulated in the Constitution. If the object of the government is to control impaired driving less restrictive means can be applied<sup>86</sup>. It has been held that the state has to prove minimal intrusion<sup>87</sup>. Less intrusion can be effected by allowing a suspect a limited but reasonable opportunity to counsel before the taking of the sample. The state must furthermore not prevent or unreasonably delay the suspect's ability to obtain evidence of sobriety after the sample has been taken<sup>88</sup>.

The following procedure would comply with the states' constitutional obligation to allow access to counsel under South African law: The right to counsel in terms of sections 35(2)(b) and 35(2)(c) must be explained to all suspects immediately upon arrest, regardless of the time and the place of detention. If the detainee indicates a desire to exercise his right to counsel of choice, the state must provide him with a

reasonable opportunity to do so. The suspect must exercise due diligence in pursuing his right to counsel otherwise the duty to hold off falls away. What constitutes a reasonable time will depend on the circumstances as a whole, including the two hour deadline. The suspect must be allowed a limited but reasonable time to consult with his attorney. If the attorney is readily available to assist the suspect when the sample is taken, he must be given a reasonable opportunity to do so.

If the detainee wishes to have a legal practitioner assigned to him by the state at state expense in terms of section 35(2)(c), the issue is more problematic. If it is after hours, and the suspect is not able to exercise his right to legal aid assistance because legal aid is only available during office hours, his right in terms of section 35(2)(c) will be breached if the taking of the sample is not held off until legal aid counsel has become available during office hours. However, this unfortunate outcome can easily be prevented by having legal aid counsel on standby when drivers are targeted for testing. Where free duty counsel is not available for a suspect that wishes to rely on section 35(2)(c), the loss of the presumption will have to be shouldered by the prosecution. In both instances the state must not prevent or unreasonably delay the suspect's ability to obtain evidence of sobriety after the sample has been taken. Where the informational or the implementational requirements are not met, the admissibility of the sample evidence will have to be decided under section 35(5) of the Constitution.

### ***Should evidence of the sample not be excluded under section 35(5) of the Constitution?***

In terms of section 35(5) of the Constitution 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.' It has been pointed out that the words 'or otherwise' in section 35(5) entail that an unfair trial is always also detrimental to the administration of justice<sup>89</sup>. If the admission of the sample would not render the trial unfair, it might still have to be excluded because the admission thereof in the specific circumstances might be detrimental to the administration of justice<sup>90</sup>. For this reason, a suitable point of departure is to first determine whether admission of the sample evidence where the suspect was refused legal assistance, 'would render the trial unfair'.

In terms of section 35(3)(j) of the Constitution an accused at trial has the right 'not to be compelled to give self-incriminating evidence'. This right has been held to be 'inextricably linked to the right to a fair trial'<sup>91</sup>. One of the pre-trial rights that protect against the right against self-incrimination is the right to counsel. However, it has long been held under South African law that the privilege against self-incrimination is confined to communicative or testimonial evidence and does not extend to real evidence emanating from an accused<sup>92</sup>. This approach is in accordance with the common-law rule formulated by Wigmore<sup>93</sup> and also the view that was taken by the majority of the United States Supreme Court in *Schmerber v California*<sup>94</sup>.

Arguably, on this view, the primary aim of the privilege against self-incrimination is to respect the will of the suspect to remain silent.

Some South African courts have sought to define the scope of the privilege in other terms. In *S v Mkhize*<sup>95</sup> and *S v R*<sup>96</sup> the Witwatersrand High Court following the Supreme Court of Canada in *R v Collins*<sup>97</sup> and *R v Facoy*<sup>98</sup> held that the privilege does not extend to material that existed before and irrespective of the constitutional breach. The two courts were presumably not aware that the scope of the privilege had already been significantly altered in *R v Stillman*<sup>99</sup>.

In *Saunders v United Kingdom*<sup>100</sup> the Grand Chamber of the European Court of Human rights held that the privilege does not extend to material that existed irrespective of the constitutional breach and that can be obtained through compulsion. This test does not appear to make much sense with regard to documents that existed before the constitutional breach and appear to be in conflict with decisions respectively before and after the *Saunders* decision which specifically dealt with pre-existing documents<sup>101</sup>. It seems fair to indicate that the majority in the United States Supreme Court in *Schmerber v California*<sup>102</sup> was only 5 to 4. The minority held that the taking of blood constituted a breach of the right against self-incrimination. Black J in his dissenting reasons held as follows<sup>103</sup>:

*'How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of 'testimony' taken from the petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression...'*

The Supreme Court of Canada has since the decision of *R v Stillman*<sup>104</sup> included physical evidence within the ambit of the privilege against self-incrimination. The majority in *Stillman* held that if a person is compelled to participate in the creation of or discovery of self-incriminating evidence, including the provision of bodily samples, the admission of that evidence tends to render the trial unfair<sup>105</sup>. If the accused was not compelled to participate in the creation or discovery of the evidence, that is if the evidence existed independently of the Charter breach in a form useable to the state, the evidence will be non-conscriptive<sup>106</sup>.

The majority held that there is a misconception that real evidence, for example bodily samples existing as an independent entity, is always admissible. While the bodily samples may exist quite independently of the Charter breach, the key to their classification is that they do not necessarily exist in a useable form. In the absence of the compelled provision of the sample, the independent existence of the sample is of no use to the prosecution<sup>107</sup>. Where the arrested person is compelled to provide the

sample in breach of his Charter right, his privilege against self-incrimination will be violated<sup>108</sup>. Referring to the minority judgment in *Schmerber v California*<sup>109</sup>, the court held that the unauthorised use of a persons' body, or bodily substances, was just as much compelled 'testimony' that could render the trial unfair, as is a compelled statement<sup>110</sup>. However, the court added that a particular procedure may be so unintrusive and so routinely performed that it is accepted without question by the society. The Criminal Code provisions with regard to breath samples are such an example which is minimally intrusive and which is essential to control the damage caused by drinking and driving<sup>111</sup>. The right to bodily integrity and sanctity is embodied in section 7 of the Charter. The section confirms the right to life, liberty and the security of the person. Section 7 requires that interference with or intrusion upon the human body could only be undertaken in accordance with the principals of fundamental justice. Police action without consent and authority which intrude upon an individuals' body in more than a minimal fashion violated section 7 of the Charter and would as a general rule tend to affect the fairness of the trial<sup>112</sup>.

The court found that intrusive searches of the body could also be said to violate section 8 of the Charter. In terms of section 8 of the Charter, 'Everyone has the right to be secured against unreasonable search or seizure'. The detainee's expectation of privacy, although lower when detained, is not so low as to permit the seizure of bodily samples without consent. For a search to be reasonable it must be authorized by law, the law itself must be reasonable, and the manner in which the search was carried out must be reasonable<sup>113</sup>. If the search was unreasonable, to admit such evidence would bring the administration of justice in disrepute. However, the court was concerned that this approach failed to 'recognize the fundamental importance of the innate dignity of the individual' which was largely based on the integrity and sanctity of the body<sup>114</sup>.

In *R v B (SA)*<sup>115</sup>, the unanimous Canadian Supreme Court affirmed the earlier decision in *Stillman* that the principle against self-incrimination limited the extent to which an accused could be used as a source of information about his own criminal conduct. The court held that the taking of a bodily sample engaged the principle against self-incrimination<sup>116</sup>. However, the court found that the principles of fundamental justice that are alleged to be implicated by the taking of a bodily sample are more appropriately considered under section 8 Charter analysis<sup>117</sup>.

An analysis of some South African high court decisions reveal that the reason for not extending the privilege against self-incrimination beyond communicative evidence was that the presence of legal representatives would not have made any difference where non-communicative evidence was obtained. In these cases, it was held that the suspects were lawfully obliged to participate in the giving of the evidence and legal representation was therefore not needed to advise on the desirability of such a step. In *S v Mphala*<sup>118</sup> and *S v Thapedi*<sup>119</sup>, the high courts admitted evidence with regard to identification parades where the legal counsels of the suspects were not present at the parade. In admitting the evidence, both courts found that the presence

of the legal representatives wouldn't have made any difference in the outcome of the parade. On the same analysis it could be argued that where a bodily sample is taken, the presence of counsel would not have made a difference to the outcome of the tests, and the result of the tests should therefore be allowed as evidence. However, both the courts noted that there was no suggestion that the parades were improperly conducted and the courts would almost certainly have excluded the evidence of the identification parades had they been improperly conducted. While the availability of a legal representative may not be needed to advise whether to participate in the taking of the sample, legal representative still has an important role to play in seeing to it that the correct procedures are followed. Incorrect procedures may directly impact on the reliability of the evidence, and consequently the fairness of the trial<sup>120</sup>.

Considering the decisions by the Canadian Supreme Court, it remains to be seen what the approach of the South African courts will be with regard to the taking of bodily samples and the privilege against self-incrimination. In the past, South African courts have been eager to follow Canadian jurisprudence. Fortunately, it is not necessary for purposes of section 35(5) to decide whether the unconstitutional taking of a bodily sample affects the fairness of the trial. The evidence must still be excluded if the admission thereof would be detrimental to the administration of justice<sup>121</sup>.

In *R v Prosper*<sup>122</sup>, the Canadian police complied fully with their duty to inform the suspect of his rights and behaved admirably throughout. The suspect had asked to see a Legal Aid lawyer before taking the breathalyzer test but because of factors beyond the control of the police the suspect failed to reach a Legal Aid lawyer before the expiry of the two hours. The suspect did not try and reach a private lawyer as he could not afford one. The suspect consequently agreed to take the breathalyzer test. The court found that the police had under the circumstances failed to hold off administering the test until the suspect had contacted a Legal Aid lawyer<sup>123</sup>. The police therefore failed to provide the suspect with a reasonable opportunity to contact counsel as he was entitled to under section 10(b). The court held that the breath sample was conscripted evidence which might not have been obtained had the suspects' rights not been infringed. Admission of the evidence would undermine the suspects' privilege against self-incrimination and render the trial unfair. The Court indicated that undeniable good faith of the police, nor the relative seriousness of the offence, could compensate for the adjunctive unfairness which admission of the evidence would bring<sup>124</sup>. Admission of the evidence would also bring the administration of justice into disrepute<sup>125</sup> and should be excluded under section 24(2) of the Charter.

Significantly, the highest court in Canada decided to exclude the evidence even though the test of 'bringing the administration of justice into disrepute' contained in section 24(2) of the Charter, has a higher threshold than the requirement of 'detrimental to the administration of justice contained in section 35(5) of the South African Constitution<sup>126</sup>. The Canadian courts have also stressed that a breath sample is much less invasive than a blood sample<sup>127</sup>. For this reason the courts prefer that breath samples be taken and the taking of blood samples is seen as exceptional<sup>128</sup>.

However, the recent decision in *R v Grant*<sup>129</sup> brought a change in the way that the exclusionary rule in section 24(2) is to be applied. In terms of section 24(2) of the Charter '... the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute'. Previously, the factors that had to be considered were categorised according to the way that the factors affected the repute of the administration of justice. The factors affecting a fair trial, factors relevant to the seriousness of the Charter breach and the factors relevant to the effect that exclusion would have on the repute of the administration of justice had to be considered<sup>130</sup>. The discretion to exclude evidence now rests on a balancing of the following three factors: the seriousness of the Charter breach, the magnitude of the impact on the rights of the accused and society's interest in adjudicating the case on the merits<sup>131</sup>.

In reshaping the new three-part test the court in *Grant* used breath sample cases as an example of a category of cases that would benefit from the new test. The majority held that the general rule of inadmissibility of all non-discoverable conscriptive evidence was not consistent with the requirement that 'all the circumstances'<sup>132</sup> had to be considered<sup>133</sup>. The court noted that the admissibility of bodily substances should not depend solely on whether the evidence was conscripted and that<sup>134</sup> the admissibility of bodily substances should not be equated with cases involving statements made by accused<sup>135</sup>. The court emphasized that all factors must be taken into account.

The discoverability remained a factor in assessing the impact of the breach on the accused's Charter rights. The court held that the enquiry requires that the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity must be taken into account. The greater the intrusion upon these interests, the more important it is that a court exclude the evidence in order to substantiate the Charter rights of an accused<sup>136</sup>. The court held that breath sample evidence were in the past automatically excluded where the breach was minor and admission of the evidence would not realistically bring the administration of justice into disrepute<sup>137</sup>. In such an instance, the third factor that a criminal allegation should be judged on the merits, should win the day. The wilful or flagrant disregard of the Charter by the persons who are charged with upholding the law may still require that the court disassociate itself from such conduct<sup>138</sup>.

After the decision, some Canadian legal scholars understandably predicted that samples in alcohol driving cases, especially breathalyzer evidence, might be admitted more often<sup>139</sup>. However, data that have been compiled after *Grant* indicates that real and physical evidence is still excluded almost as often as conscripted testimonial evidence. Breathalyzer evidence is still being excluded in the large majority of cases and the exclusion rate is only 2% lower than the global exclusion rate. Madden surmises that this may be because of the courts embracing the part of the *Grant* decision that requires the courts to take all circumstances into account<sup>140</sup>. Under South African law, the Supreme Court of Appeal in *Tandwa*<sup>141</sup> cited the following passage in *S v Mphala*<sup>142</sup> with approval:



*'So far as the administration of justice is concerned, there must be balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated'.*

This passage recognises the need to protect constitutional rights and due process when considering whether to exclude evidence on the basis that the admission thereof would be detrimental to the administration of justice. However, public acceptance and support for the system is also an important consideration in deciding whether to exclude the evidence. The task is to attain a balance in these considerations.

It has been held that the courts are because of the high level of crime entitled to lean towards crime control in this exercise<sup>143</sup>. However, this view has come about due to the high level of especially serious and violent crime that pervades South African society. The occurrence and consequences of drinking and driving in South Africa are arguably comparable to the other jurisdictions discussed above. In *Tandwa*<sup>144</sup> and *S v Mthembu*<sup>145</sup>, the Supreme Court of Appeal confirmed that the nature and extent of the constitutional infringement is a factor to be taken into account when deciding whether to admit evidence<sup>146</sup>. Under South African law, the suspect's right to counsel is taken away completely. In *Mark*<sup>147</sup>, the court held that where the infringement is serious, exclusion is a strong possibility even where the offence committed is trivial. Where the unconstitutional conduct is part of a settled or deliberate policy the evidence should furthermore as a rule be excluded<sup>148</sup>. It is a matter of disciplining the police.

South African law enforcement officials may not be trusted with the task of performing fair and proper procedures because there are no safeguards built into the system. If the evidence is not reliable, it should be excluded. The admission of unreliable evidence does not serve the public interest in getting to the truth. The breath or blood test forms just about the entirety of the case when an individual is charged with the contravention of sections 65(2) or 65(5) of the Road Traffic Act. The admission of evidence with questionable reliability is more likely to be detrimental to the administration of justice. Therefore, evidence of the sample should be excluded in terms of section 35(5) where the suspect is refused the right to counsel.

## CONCLUSION

The criminal law has always had to strike a balance between the protection of society on the one hand, and the protection of the rights of individual members of society on the other hand. The conflict between the protection of society and the rights of the individual must as far as possible be resolved in a manner most compatible with the dignity, freedom and security of the individual. Certainly, it is not out of place to argue that the price that some persons may escape the net is not a too high price to

pay for the right to live in freedom and security. However, due process does not require procedures that are maximally beneficial to the accused. The system must provide fundamental fairness and be acceptable to society.

The taking of a bodily sample clearly interferes with bodily integrity. However, the degree of intrusion to the bodily integrity where a breath sample is secured is relatively quick, not terribly intrusive and is reasonable in the circumstances. It may be that the invasiveness of taking a blood sample has been overstated especially by the Canadian courts. The taking of a blood sample is undeniably more invasive, adds to the time in detention and in doing so provides less opportunity to the suspect to obtain independent proof of sobriety. With regard to the 'informational' aspect of privacy, the Criminal Procedure Act clearly articulates that the breath and blood tests are solely for forensic purposes. The tests do not reveal any medical, physical or mental characteristics. Therefore, as far as bodily integrity is concerned the taking of a sample of breath strikes an appropriate balance between the public's interest in effective law enforcement and the right of the individual to dignity and physical integrity, and the right of the individual to control the release of personal information about himself.

It is a matter of concern to a suspect under South African law that there are no safeguards when an individual is tested for driving under the influence of alcohol. The present statutory scheme is clearly inadequate to protect a suspect's due process rights. Section 65 of the Road Traffic Act provides that a person can be prosecuted on one sample alone, the suspect is not entitled to have a second sample taken and the suspect is not afforded the opportunity as a right to independently obtain and preserve evidence of his sobriety. By the time that the suspect is released from detention on bail or on warning, his window of opportunity to obtain independent evidence of his sobriety will have lapsed. The outcome of the case is therefore premised on the outcome of the one state-administered test.

Unfortunately, it is fair to say that South African law enforcement authorities may not be trusted with the task of performing fair and accurate procedures. Because of this the results of the test may be unreliable. The statutory scheme should provide a suspect with the opportunity to have a second test taken within the two hour time frame. Many democracies provide for two samples to be taken<sup>149</sup>. In New Zealand a positive breath sample is followed up by a blood sample and in England and Wales two breath samples are taken. Ideally, the state should administer a breath test and the suspect must be given the option to also undergo a blood test. In this way it is ensured that the test is not performed by the same person and apparatus, and the suspect is given the choice to undergo the more invasive procedure. If nothing else, videotaping the events might even produce more reliable test results.

Finally, the South African Constitution specifically provides for state-funded counsel to prevent that substantial injustice is perpetrated against those that do not have the means to hire an attorney. There is scope to argue that there is a constitutional obligation on the government to ensure that counsel is available to provide free and

immediate advice where an urgent timeline prevents an accused from having the benefit of legal aid? Based on this argument, the state would have to shoulder the loss of the presumption if it fails to make use of duty counsel. In the interest of fairness and for administrative convenience, a system of duty counsel providing free preliminary assistance is surely desirable for these individuals. Though, it might just go too far to hold, yet duty counsel is a constitutionally entrenched obligation. Limited resources will certainly weigh against such an interpretation.

## NOTES

- 1 See for example *S v Orrie & Another* 2004 (1) SACR 162 (C) at para 15 and *ML Van der Mescht 'The Influence of the Interim Constitution upon the Taking of a Blood Sample of a Person Arrested for Drunken Driving'*(1996)9 SACJ 286 at 287.
- 2 93 of 1996.
- 3 The Western Cape Department of Transport and Public Works has been tasked by the Cape High Court and the National Transport Department to modify the Dräger breath alcohol test to meet the required standards. The final modifications were expected by February 2012. New legislation will be drafted if the high court accepts the procedures. See 'General: Precedent-setting Dräger modifications by February', *Legalbrief TODAY* of 28 November 2011, available at <<http://www.legalbrief.co.za>>. Accessed on 28 November 2011.
- 4 See section 65(3) with regards to blood and section 65(6) with regards to breath.
- 5 51 of 1977 (hereafter referred to as the Criminal Procedure Act).
- 6 See *R v Burnison* (1979) 70 CCC (2d) 38 (Ont CA) and *R v Deruelle* [1992] 2 SCR 663 with regard to a breathalyzer sample that was taken after the two hours.
- 7 Unreported case number 63/996/07 (GSJ), court transcript at 993-1022, 1314-1315, 1350 and 1079-1087.
- 8 Hereafter referred to as 'the South African Constitution', 'the Constitution' or 'Constitution'.
- 9 Section 1 of the Charter (Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982.C 11. Hereafter referred to as 'the Canadian Charter', 'the Charter' or 'Charter') and section 36 of the Constitution.
- 10 See *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) at para 26.
- 11 For a lawful arrest in terms of the Criminal Procedure Act the general object of the arrest must be to bring the arrested person before court to be charged, tried and then either convicted or acquitted. See *Ex Parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (2) SACR 105 (CC); *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security & Others* 2009 (6) SA 513 (WCC).
- 12 *S v Thamaha* 1979 (3) SA 487 (O) at 490; *E du Toit et al Commentary on the Criminal Procedure Act* (loose-leaf, Juta, Claremont, updated to 25 March 2011) at 5-2A.
- 13 *I Currie and J de Waal The Bill of Rights Handbook* (5th ed, Juta, Claremont, 2005) at 741 and *F Snyckers and J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons'* in *S Woolman* (ed) *Constitutional law of South Africa* (loose-leaf, Juta, Claremont, updated to May 2011) at 51-38.
- 14 [1985] 1 SCR 613 at 642-645.
- 15 [1988] 1 SCR 640.
- 16 See also *R v Rahn* [1985] 1 SCR 659 and *R v Trask* [1985] 1 SCR 655.
- 17 [2005] SCR 3, 21 2005 SCC 37 (Can).
- 18 I used the masculine pronoun where neutral language is inappropriate. This is not due to a lack of sensitivity but because of the Interpretation Act 33 of 1957. Section 6 of the Act provides that

- in every law unless the contrary intention appears, words imputing the masculine gender includes females.
- 19 2009 SCC 32.
- 20 [1991] 3 SCR 24 (Can).
- 21 394 US 324, 89 S Ct 1095.
- 22 429 US 492, 97 S Ct 711.
- 23 PJ Schwikkard and SE van der Merwe *Principles of Evidence* (3rd ed, Juta, Claremont 2009) at 233.
- 24 S v Sebejan 1997 (1) SACR626 (W).
- 25 DJ Feldman, 'England and Wales' in RS Frase, France, in *Criminal Procedure: a Worldwide Study* (C Bradley ed, 2nd ed, Carolina Academic Press, Durham, NC, 2007) at 149 and 166/7.
- 26 Sebejan supra (n 24) 633g-h. However, see my discussion with regard to bodily samples and the fair trial requirement below.
- 27 Section 73(2A).
- 28 Section 36(1)(a).
- 29 Section 36(1)(b).
- 30 Section 36(1)(c).
- 31 Section 36(1)(d).
- 32 Section 36(1)(e).
- 33 The framers of the Charter decided not to incorporate a right to those without sufficient means and 'if substantial injustice would otherwise result'. The South African Constitution accordingly provides additional protection in this regard.
- 34 See for example R v Brydges [1990] 1 SCR 190 at 203-204; R v Evans [1991] 1 SCR 869 at 890, R v Prosper [1994] 3 SCR 236 at para 35 and R v Bartle 1994 92 CCC (3d) 289. See also S v Solomons 2004 (1) SACR 137 (C) for the first two duties under South African law.
- 35 Ibid.
- 36 Supra (n 34).
- 37 At para 19.
- 38 At para 35.
- 39 At para 35. See my discussion below where I indicate that Canadian law includes physical evidence within the ambit of the privilege against self-incrimination. See also the earlier decision in R v Leclair [1989] 1 SCR 3 (SCC) at 12 where the majority of the Supreme Court held that once a detainee asserts his right to counsel, the police cannot in any way compel him to make a decision, or to participate in a process, which could ultimately have an adverse effect on the detainee, until he has had the opportunity to exercise that right. This requirement applies to breath as well as blood tests. See also R v Therens [1985] 1 SCR 613).
- 40 At para 38.
- 41 K Roach, 'Canada' in RS Frase, France, in *Criminal Procedure; a Worldwide Study* (G Bradley ed, 2d ed, Carolina Academic Press, Durham, NC, 2007) at 57 and 76.
- 42 At para 36.
- 43 See R v Manninen [1987] 1 SCR 1233 and R v Strachan [1988] 2 SCR 980 for examples of 'urgency'.
- 44 At para 46.
- 45 At para 48.
- 46 Page 274-275.
- 47 2005 CarswellNfld 196, 2005 NLCA 45, 20 MVR (5th) 220, 32 CR (6th) 183, 203 CCC (3d) 533, 253 Nfld & PEIR 307, 759 APR 307.
- 48 See also R v Smith [1989] 2 SCR 368, 71 CR (3d) 129 (SCC).
- 49 2010 SCC 36 at para 17.
- 50 See also R v Leclair supra (n 39) and R v Black [1989] 2 SCR 138 (SCC)).

- 51 At para 18.
- 52 Kimmelman v Morrison 477 US 365 at 374.
- 53 See also Chambers v Mississippi 410 US 284 at 294 and California v Trombetta 467 US 479 at 485.
- 54 287 US 45 (1932) at 57.
- 55 430 US 387 (1977) at paras 1 and 2.
- 56 Id at para 3. My emphasis.
- 57 See also Massiah v United States 377 US 201.
- 58 At para 2.
- 59 Morrissey v Brewer 408 US 471 at 481.
- 60 Brewer supra(n 55) para 10.
- 61 Powell v Alabamasupra(n 54). See also for example Wheat v US 486 US 153, 108 S Ct 1692 US Cal, 1988 and US v Gonzalez-Lopez 548 US 140, 126 S CT 2557 US 2006.
- 62 Subsection 1.
- 63 Subsection 2. See also State v Carr 128 Idaho 181, 911 P 2d 774 (Ct App 1995).
- 64 State of Idaho v Green 149 Idaho 706 (2010), 239 P 3d 811 at para 8; State v Hedges 143 Idaho 884, 887 154 P 3d 1074, 1077 (Ct App 2007).
- 65 Farrel v Anchorage 682 P 2d 1128 (Alaska App 1984); Reekie v Anchorage 803 P 2d 412 (Alaska App 1990); Kiehl v State 901 P2d 445 (Alaska App 1995); Mangiapane v Municipality of Anchorage 974 P 2d 427 (Alaska App 1999).
- 66 DJ Feldman, 'England and Wales' in RS Frasesupra(n 23) at 149 and 166/7.
- 67 M Zander, The Police and Criminal Evidence Act 1984 (2d ed, Sweet & Maxwell, London, 1990) at 106.
- 68 1950.
- 69 2002 WL 31476402.
- 70 1984.
- 71 Section 58(1).
- 72 Section 58(4)).
- 73 Code C item 6.1. The provision allows for special circumstances when delay in access to a solicitor is permitted. The circumstances are not relevant to the present discussion.
- 74 Code C item 6.5. Unless the special circumstances apply.
- 75 Kennedy v CPS supra (n 69) at para 14.
- 76 Id at para 31.
- 77 See section 58(4).
- 78 See item C: 6.5.
- 79 See also John Myles v DPP [2004] EWHC 594 Admin, [2004] 2 ALL ER 902 and Ian Causey v Director of Public Prosecutions 2004 WL 3154157.
- 80 1990.
- 81 [1992] 3 NZLR 260.
- 82 1962 (sections 58B, 58C and 58D).
- 83 At page 274.
- 84 G W Mercer Estimating the Presence of Alcohol and Drug Impairment in Traffic Crashes and Their Costs to Canadians: 1999 to 2006 [Vancouver: University of British Columbia 2009 at 8 and 11]. See also 'Road Safety Information, Education and Tips' available at <www.arrivealive.co.za> for the devastating effect of impaired driving on South African society. Accessed on 25 November 2011,
- 85 S Seedorf and S Sibanda 'Separation of Powers' in S Woolman (ed) Constitutional law of South Africa (loos-leaf, Juta, Claremont, updated to May 2011) at 12-50.
- 86 See section 36(1)(e).
- 87 Brink v Kitshoff NO 1996 (6) BCLR 752 (CC) at 770J-771; Mohlomi v Minister of Defence

- 1996 (12) BCLR 1559 (CC). See also *Tetreault-Gadoury v Canada* (Employment and Immigration Commission) (1991) 4 CRR (2d) 12 at 26 (SCC); *Rodriguez v British Columbia* (Attorney-General) (1994) 17 CRR (2d) 193 at 222 and 247 (SCC) and *R v Laba* (1994) 120 DLR 175 at 179c (SCC) under Canadian law.
- 88 By for example independent testing.
- 89 *S v Naidoo* 1998 1 SACR 479 (N) at 527.
- 90 *S v Tandwa* 2008 SACR 613 (SCA) at para 116.
- 91 See for example *Ferreira v Levin* NO; *Vryenhoek v Powel* 1996 1 SA 984 (CC) at para 159 under South African law, and *R v P* (MB) [1994] 1 SCR 555 and *R v Jones* [1994] 2 SCR 229 under Canadian law.
- 92 See for example *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75 at 82-83; *S v Binta* 1993 2 SACR 553 (C) at 562d-e (hair and blood); *Levack v Regional Magistrate, Wynberg* 1999 2 SACR 151 (C) at 155i (voice) and *Minister of Safety and Security v Gaqa* 2002 1 SACR 654 (C) at 658f (bullet).
- 93 JH Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (McNaughton revised ed, 1961, Little Brown: Boston, 1940) at paras 2263-2265
- 94 384 US 757 (1966).
- 95 1999 2 SACR 632 (W) at 637g-h.
- 96 2000 1 SACR 33 (W) at 40g-41d.
- 97 1987 28 CRR 122 (SCC).
- 98 1988 38 CRR 290 (SCC).
- 99 1997 42 CRR (2d) 189 (SCC). Discussed below.
- 100 (1997) 23 EHRR 313 at paras 68-69.
- 101 *Funke v France* (1993) 16 EHRR 297 (bank statements) and *JB v Switzerland* [2001] Crim LR 748 (documents in the course of an investigation into tax evasion)).
- 102 *Supra*(n 94).
- 103 At page 778.
- 104 *Supra*(n 99).
- 105 At paras 73 and 74.
- 106 At para 75 and further.
- 107 At para 76.
- 108 At para 77.
- 109 *Supra*(n 94).
- 110 At para 86.
- 111 At para 90.
- 112 At para 92.
- 113 At para 25. See also *R v Golden* [2001] 3 SCR 679 and *R v B* (SA) [2003] 2 SCR 678.
- 114 At para 93. It is difficult to understand how the search could be found to be unreasonable if the dignity, integrity and sanctity of the body was not taken into account.
- 115 *Supra*(n 113).
- 116 At paras 33 and further.
- 117 At para 35.
- 118 1998 1 SACR 654 (W).
- 119 2002 1 SACR 598 (T).
- 120 See *United States v Wade* 388 US 218 (1967); *United States v Gilbert* 388 US 263 (1967) and *R v Ross* 1987 37 CRR 369 (SCC) where the Supreme Courts of the USA and Canada held that an arrestee was entitled to legal representation at the identity parade.
- 121 Under the second leg in section 35(5).
- 122 *Supra*(n 34).
- 123 At para 55.

- 124 At para 63.
- 125 At para 64.
- 126 See also *S v Mphala* 1998 1 SACR 654 (W) at 659i-j.
- 127 See for example *Stillmansupra*(n 101) at para 90; *R v Pavel* (1989), 53 CCC (3d) 296 at 3 and 10, 74 CR (3d) 195 (Ont CA) and *R v Hanet*, 182 AR 30 [1996] AJ No 210 at para 20 (Prov Ct) (QL).
- 128 E Chamberlain and R Solomon 'Enforcing Impaired Driving Laws against Hospitalized Drivers: The Intersection of Healthcare, Patient Confidentiality, and Law Enforcement' (2010) 29 Windsor Rev Legal & Soc Issues 45.
- 129 SCC 32 2009.
- 130 *R v Collins* 1987 28 CRR 122 (SCC).
- 131 At para 71.
- 132 See section 24(2).
- 133 At para 65.
- 134 At para 104.
- 135 Para 105.
- 136 Para 109.
- 137 Para 106.
- 138 Para 75 and 108.
- 139 T Qiugley 'Was it Worth the Wait? The Supreme Court's New Approaches to Detention and Exclusion of Evidence' (2009) 66 CR (6th) 88 at 94; D Stuart 'Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms' (2010) 16 SW J Int'l L 313 at 326; J Dawe and H McArthur 'Charter Detention and the Exclusion of Evidence after Grant, Harrison and Suberu' (2010) 56 Crim LQ 376 at 420.
- 140 M Madden 'Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of *R v Grant*' 15 Can Crim L Rev 229. See the Conclusion.
- 141 2008 1 SACR 613 (SCA) at para 118.
- 142 1998 1 SACR 654 (W) at 657g-h.
- 143 *S v Ngcobo* 1998 10 BCLR 1248 (N) at 1254E-J. See also PJ Schwikkard & SE Van der Merwesupra (n 23) at 248.
- 144 *Supra*(n 141).
- 145 2008 2 SACR 407 (SCA).
- 146 See also *S v Mark* 2001 1 SACR 572 (C) at 578c-d.
- 147 *Ibid*.
- 148 *S v Seseane* 2000 2 SACR 225 (O).
- 149 In terms of section 7 of the Road Traffic Act 1988 as amended.