Seven Years Experience of Blood-Alcohol Limits in Britain

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This paper reviews experience in Britain since the Road Safety Act 1967, and attempts, in the light of that experience, to propose criteria for the construction of laws against drinking and driving. To do this it is necessary to refer briefly to earlier history in Britain. Whatever lessons can be drawn from British experience, it would be rash to assume that they can be applied directly in other countries; social reasoning of this sort is notoriously non-exportable.

Such a review of British experience at the present moment is perhaps timely because the Minister for Transport has recently announced the setting up of a committee under the Chairmanship of Mr. F. A. Blennerhassett Q.C. to study the operation of the law on drinking and driving and to make recommendations. In setting up the committee the Minister noted that, although the 1967 Act had been highly successful, and although there was reason to believe it was still making a useful contribution to road safety, there had been some criticism of its operation, and there seemed little doubt that further savings in road casualties could be achieved, particularly at certain times of day, if the number of people who drive after drinking could be substantially reduced. In short, the effect of the Act is wearing off. An analysis of the statistical information at present available and the conclusions to be drawn from it are contained in the paper by Sabey and Codling of the Transport and Road Research Laboratory (TRRL). The present paper attempts a more general approach to the legal and social questions now arising.

THE SOCIAL CONTEXT: ALCOHOL CONSUMPTION

Beer is the traditional alcoholic beverage in Britain, supplemented by spirits and (until recently, only in limited circles) by wine. There are restrictions on the number of retail outlets, on access to them, and on hours of business, and vigorous measures have been taken from time to time to restrict consumption, notably in the nineteenth century when cheap spirits became a severe problem. These restrictions, together with rapid social developments (better housing, the emergence of the salaried middle class, improvements in public education) combined with the economic depression of the inter-war years to cut the consumption of spirits per head in the 1930s and '40s to half

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the level of 1920. Only since 1970 has consumption per head returned to the 1920 level. Offences of drunkenness per 10,000 population show a parallel trend. Moderate increases in the rate of excise duty have (in a period of inflation) only briefly interrupted the trend. A marked feature of the 1960s and '70s is the rapid increase in consumption per head of wine. Consumption of alcohol with meals, both at home and when eating out, has become a more widely accepted part of life, and young people are drinking more. All in all, it has been the excise duties and changes in the size and distribution of national income which have had the greatest effect on patterns and quantity of consumption. Statistics of offences of drunkenness, hospital admissions for alcoholism, and deaths from cirrhosis and alcohol poisoning all show rising trends in relation to population.

It would be idle to pretend that there is any undisputed measure of the extent of alcoholism in Britain, but equally idle to deny that all the evidence indicates an increasing problem, and one of great concern to public health authorities, (as in many other developed countries). This is not the place to discuss this problem, but it clearly has relevance to attempts to control drinking and driving. There is evidence, however, that 'problem drinkers' contribute less to the driving problem in Britain than 'social drinkers' (1).

THE COMMUNITY AND CONTROL OF MOTOR VEHICLES

The history of this fascinating subject has been thoroughly and entertainingly explored in the study by Plowden (6). It is here relevant only to note that until the 1930s motorists were generally a rich, and often unpopular, minority. In so far as they were themselves involved in the law-making process they well exemplified the principle that "criminals are other people". When charged with motoring offences they sought naturally enough to prove that, in their particular cases, no crime had been committed. There were three reasons why they were quite likely to succeed; they did not feel that they were criminals, they could afford the highest standard of legal advocacy, and the offences with which they were charged generally involved an element of judgment. It was notoriously difficult to prove that a driver had not exercised sufficient care, that he was driving too fast for the prevailing traffic conditions, that he had not made sufficient allowance for the possibility of unexpected behaviour by pedestrians, and so on. Convictions tended to be chancy and inconsistent. It was no less difficult to prove that the alcohol a driver had consumed had made him a less safe driver — especially in a society where the suspicion that one might not be able to hold one's drink could carry a stigma more severe than the suspicion of dangerous driving. Only a driver who was 'reeling drunk' might seem to a jury to be self-evidently a public danger behind the wheel of a car.

Since the Second World War car ownership has become widespread, but the tendency to regard motoring offences as in some sense less criminal than other offences which have comparable (or even less serious) effects on the safety or welfare of the community seems to have persisted. It is difficult to provide objective evidence of this, but there is a widespread belief that juries are more inclined to feel, in the case of motoring offenders, "there but for the Grace of God go I" than in the case of other offenders. Traffic offences are not all alike in this respect; breaking the speed limit, and driving with excess alcohol seem particularly liable to be regarded as "technical offences".
DRINKING AND DRIVING

The first law against drinking and driving was that in the Licensing Act 1872 which made it an offence to be “drunk while in charge on any highway or other public place of any carriage, horse, cattle or steam engine”. How was it, one may reasonably ask, that if Parliament recognised the problem 100 years ago we had to wait until 1967 before passing a law which dealt with the matter relatively effectively? The difficulty lay in the absence of evidence which could go to the root of the social mischief. The mischief was the danger caused by driving a motor vehicle while affected by alcohol. The difficulty was to prove danger when moderate amounts of alcohol had been consumed. The trouble with the drunken driver was that if he was so drunk as to be obviously dangerous he was very likely too drunk to drive. If he had consumed a more moderate amount of alcohol the manner and the extent of the danger he embodied was much less obvious. As a result, court decisions were uncertain and inconsistent. It was fifty years ago that this point was recognised, and the British Medical Association published a report on tests for drunkenness in 1927 (2). But it was not until the 1950s and early '60s when research, in Britain and other countries (4), proved the statistical connection between blood alcohol levels and liability to involvement in an accident, that the necessary firm evidence was available. It was Borkenstein's Grand Rapids study in particular which provided the experimental warrant for the British Act of 1967, though evidence from other sources also strengthened the case.

THE DIFFICULTIES IN THE WAY OF THE 1967 ACT

The circumstances which cause a particular driver to be involved in an accident at a particular time and place are notoriously complex and difficult to determine and evaluate. Apart from external factors such as weather and road geometry; skills, attitudes, and other personality factors in the driver may play a large or decisive part. Even now, despite the amount of research that has been devoted to the problem, the detailed mechanism by which alcohol impairs driving cannot be precisely and quantitatively described. One driver may be a greater danger sober than another with a Blood Alcohol Concentration (BAC) of 100 mg/100 ml. Nearly a century of experience in the courts showed that it was generally impossible to prove that a particular driver was culpably dangerous by reason of the alcohol he had consumed. A law was necessary that would make it unnecessary to prove the social mischief in each particular case. Such a law is patently rough justice — it had to apply to everyone alike, despite the fact that alcohol does not affect everyone alike. It had to be a legislative “blunt instrument”, justified by broad statistical evidence, and making no fine allowances for individual differences of personality or physiology. This was not in itself a very great obstacle — many laws are of this sort, court decisions under the earlier laws had not been very just or consistent, and speed limits offered an obvious analogy in the traffic field. However, there was an important difference; speed seemed self-evidently dangerous; it felt and looked dangerous. Speed limits were applied long before the statistical evidence for the effect of speed on accident rates and severity had been established. But many drivers sincerely believed that small amounts of alcohol actually improved their driving. To justify a general prohibition on driving after drinking it was necessary to convince them that this sincere belief was an illusion. It was necessary to show that the illusion was one of the effects of the alcohol itself, and perhaps its most sinister effect. This effect of alcohol had of course been noted in antiquity, and references to
it can be found in ancient literature\textsuperscript{2}. There was also experimental evidence of it in the case of drivers.

Once a "blunt instrument" or "general limitation" approach was seen to be justified, it still remained possible, in theory, to proceed in a number of ways. For example, licensees of drinking establishments might have been made responsible for confiscating the ignition keys of any client who arrived by car and consumed more than a specified "Driver's tot". This would have laid an impracticable and intolerable responsibility on licensees; and what about the driver who drank at home — or kept a bottle in the car? The only workable law would be one that made the driver himself responsible; but responsible for what? Purists would say "responsible for refraining from driving for at least 12 hours after drinking any alcohol at all." But the prescriptions of purists are rarely acceptable as social legislation and therefore a limit has to be set. This imposed the problem of finding a legal definition for the limit to be imposed. There was really no alternative to a limit defined in terms of BAC. The correlation of BAC with accident risk had been proved; it was known that BACs, for a given amount of alcohol consumed, varied widely, not only from person to person, but also in relation to the nature of the drink consumed and many of the surrounding circumstances; and BACs could be measured with reasonable economy and accuracy. So a limit defined in terms of the type and quantity of drink consumed would not be practicable, but it would be practicable to make the driver responsible for keeping below a specified BAC.

However, if the crime is to be to drive with a BAC above a specified level, how far is the driver's responsibility to go? Is conviction to depend on proof that he drove knowingly and wilfully with excess blood alcohol? Few people thought that this would work. Every defendant would plead that his intentions were pure, and that the BAC shown by analysis was an insoluble mystery in view of the negligible quantity of drink actually taken. Therefore, the offence had to be "absolute" — the offender's state of mind must be irrelevant. He might be a callow novice in the world of alcohol, a hardened business drinker taking a calculated risk, or an alcoholic unable to control his drinking. All this would be irrelevant to the proof of guilt, and, with the sole exception of a person genuinely deceived as to the nature of what he was drinking, it was to be no protection against the automatic penalty of disqualification for at least a year (but not necessarily irrelevant to the consideration of other penalties the court might impose — nor to disqualification for more than a year if the court decided it was justified).

How was the evidence of BAC to be obtained? A driver could be required to give a specimen of breath at the roadside, but breath analysis was not politically acceptable as sufficiently accurate and reliable for conviction in court, so a specimen of blood or urine would be required. This meant that the police must be given power to require the suspect to provide the evidence against himself.

The public debate of these questions did not, of course, take the form set out in the preceding paragraphs. The argument set out here is a condensation of a diffuse public discussion stretching over a decade and more. The debate had been both expert and general, and the British Medical Association had played no small part in bringing out the facts and dispelling misconceptions. By 1966 legislation was judged to be politically possible.

The Bill laid before Parliament in 1966 provided for breath analysis to be used as a screening test that is, no one should be required to provide a specimen of blood or

\textsuperscript{2}See for example, Proverbs 20:1
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urine unless a breath test had first proved positive. Nevertheless, it gave to the police a formidable power and the thoughts of the legislature turned to safeguards. The relations of the police with the public in Britain were (and are) generally good, and there is no evidence that any specific abuses were widely feared, but the random breath-testing power proposed in the first Bill caused considerable controversy. It was argued that law-abiding drivers, who might well be teetotallers, could be stopped by the police and submitted to the indignity of being required to blow into a bag. This first Bill was lost by the Dissolution of Parliament, and the second draft of the Bill introduced after the election, no longer provided for random testing. In introducing the new Bill the Minister (Mrs. Barbara Castle) said “I myself do not accept that there is anything unfair about an entirely random test . . . .”, but she added that evidence had come to her from Members of Parliament and through her department that there was widespread public feeling that an issue of individual liberty was involved. She made clear that although she had never shared that view, she was anxious to make an important start in changing public attitudes and recognised that this could not be done by means of legal procedures which were widely regarded as unfair to those affected by them. She recognised the need for a measure “. . . which will command widespread public cooperation. This is essential if we are to change public attitudes. . . . we have attempted to retain some element of the random test system while concentrating the effectiveness of the deterrent.” The new Bill provided power to test drivers after an accident, after they had committed a moving traffic offence, or when the police had reason to believe that they had alcohol in their bodies. The Minister made clear that what she meant by her reference to retaining some element of the random system, was that accidents themselves are to some extent random, although drivers involved in them are more likely to have been drinking than other drivers. She pointed out that the powers in the new Bill made a more efficient use of police resources by concentrating on drivers who were more likely to have been drinking than would those in a completely random sample. Finally, she said that there was no intention that the police would “lie in wait” for motorists near drinking establishments.

It is difficult to disentangle all the threads in the argument about random testing. On the one hand, it may be argued that completely random testing is the fairest method of all. If the police pick vehicles from the traffic stream by some random method, they have no way of knowing which drivers the net will catch and the assurance of randomness eliminates the possibility of malice, the victimisation of social groups, or the showing of favour. On the other hand, the very fact that the random system means that anybody who drives is liable to be tested appears to have constituted the mainspring of political objection. As things have worked out, it is arguable that the absence of a power of random testing has not weakened enforcement of the law. The fact that 60 per cent of the breath tests administered by the police in Britain are positive and the fact that 30 per cent of breath tests are administered after accidents, suggests that that law has “concentrated the effectiveness of the deterrent”. The question of “lying in wait” may come nearer to the true problem of enforcement than the question of random testing. It has been argued that the Act does, in fact, give the police power to “lie in wait”. It has been pointed out that a policeman who sees a person leave a bar and drive away in his car has “reasonable cause to suspect him of having alcohol in his body”. In practice, however, the police do not do this and the question has not been tested directly in the courts. In any case, whatever the correct interpretation of the present law, “lying in wait” would probably be regarded as politically indistinguishable from random testing, and therefore politically unacceptable, unless Parliament had first reconsidered the matter.
There is no doubt that the 1967 law was highly deterrent in the initial stage. Because the courts were required to disqualify offenders for a year at least meant that the penalty was certain and unpleasant. The main provisions of the Act and its initial effect on accidents have been thoroughly reported elsewhere (1). What remains obscure is the mechanism by which the accident savings were achieved. The new law had been supported by heavy publicity and the severity and certainty of the penalty were widely known. What the individual driver did not know, however, was the chance that he would be required by the police to submit to a breath test or the likelihood that his drinking pattern would place him over the BAC limit. The wide variations of blood alcohol level induced in different individuals by similar quantities of drink, or in the same individual according to the attendant circumstances were well known to the government, who consequently declined to give any guidance, except that those who intended to drive should not drink at all. Coroner’s statistics of the BACs of drivers killed in accidents in the year following the legislation show that there was a dramatic fall in the proportion over the limit in all age groups. The effect has since largely worn off, especially among the younger age groups (3), but it is not possible to infer the reasons with any precision. Have drivers discovered that the chance of being required to take a breath test is less than they feared? Have they revised their estimates of the amount they can drink without exceeding the limit — possibly to an unrealistic degree? Have they just forgotten about the law? It is interesting that the apparent decline in the deterrent effect of the legislation has accompanied a continual increase in the number of breath tests administered. Very little government publicity against drinking and driving has been promoted during the last five years, and it is possible to speculate that the perception of drivers of the risk of being breathtested has been falling at the same time that the actual risk of being tested has been rising. In the absence of a roadside screening programme (which poses certain administrative difficulties) there is no reliable means of estimating what proportion of the drivers on Britain’s roads at any time are over the limit, and it is therefore not possible to estimate the proportion of offenders actually detected. It may be that this is sufficiently low for an increasing numbers of drivers to find the risk acceptable, despite the fact that the number of tests is rising.

The high initial impact of the 1967 Act did not prevent those who were charged under it from exploring every legal technicality in the hope of avoiding disqualification. The main weight of the attack focussed on the question of whether the accused was “driving or attempting to drive”, when the police asked him to take a breath test, and whether the BAC established by analysis, corresponded to the actual BAC at time of driving.

Because it is not possible for a blood or urine sample, or indeed a breath sample, to be taken from a driver while he is actually driving, the law must provide a procedure, starting from the point at which he is driving and the police first have reason to form a suspicion, and leading by a connected chain to the point at which a sample is taken. The law protects motorists from the oppressive use of breath testing by the police by requiring that it may only be applied to somebody who is “driving or attempting to drive”, or is the driver of a vehicle involved in an accident. It is at this point that it has been possible for ingenious defence advocates to prise open a gap. A driver who had been involved in an accident was badly shaken and had been given one or two drinks by a kindly bystander. The BAC revealed by a subsequent analysis was such that the prosecution were able to show that it must have been over the limit even before the further alcohol was taken. Nevertheless the driver was acquitted on the ground that the BAC revealed by analysis was not the BAC while driving. A driver
followed by two plain clothes officers, because of his wild and erratic driving, was eventually stopped and held pending the arrival of a uniformed officer with breath testing equipment. He was held not to be still driving at the time when he was breath tested and therefore acquitted. In the early years of the Act some drivers escaped by managing to get home and park their cars before being caught by the police, and subsequently convincing the court that they were no longer "driving" when the breath test was administered. The most recent appeal decisions have largely stopped up these gaps by holding that, provided there is a continuous process from the time when the accused was driving and the police formed a reasonable suspicion, to the time when the breath test was administered, then the accused is still "driving" at the relevant time. Lord Hacking proposed amendments in the House of Lords in a debate on the Road Traffic Bill on the 17th December 1973 (5) which he said were intended to set out separately the offence itself and the proof of the offence. His amendments would have provided that the BAC found on analysis would be deemed to be the level when the accused was last driving, unless he could prove otherwise. The Government felt that such an amendment would go too far, and the questions will now fall to be considered by the Blennherhassett Committee.

In terms of the number of guilty motorists who escape conviction by means of them, the technical loopholes are certainly not important. The numbers of breath tests, of positive breath tests, of prosecutions, and of convictions in recent years are shown in Table I.

### TABLE 1 Number of Breath Tests and Prosecutions in Englanda (1968-1972)

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of breath tests administered</th>
<th>No. of breath tests positive</th>
<th>Positive %</th>
<th>No. of &quot;false positives&quot; (not confirmed by analysis)</th>
<th>No. remaining</th>
<th>No. of prosecutions</th>
<th>No. of convictions</th>
<th>Prosecutions successful %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>48,100</td>
<td>26,400</td>
<td>55</td>
<td>3,800</td>
<td>22,600</td>
<td>18,900</td>
<td>17,400</td>
<td>92</td>
</tr>
<tr>
<td>1969</td>
<td>55,100</td>
<td>31,800</td>
<td>58</td>
<td>5,500</td>
<td>26,300</td>
<td>25,500</td>
<td>22,800</td>
<td>89</td>
</tr>
<tr>
<td>1970</td>
<td>69,500</td>
<td>39,400</td>
<td>56</td>
<td>7,400</td>
<td>32,000</td>
<td>28,000</td>
<td>25,200</td>
<td>90</td>
</tr>
<tr>
<td>1971</td>
<td>91,200</td>
<td>56,300</td>
<td>60</td>
<td>11,800</td>
<td>44,500</td>
<td>41,400</td>
<td>37,600</td>
<td>90</td>
</tr>
<tr>
<td>1972</td>
<td>112,700</td>
<td>69,700</td>
<td>62</td>
<td>15,200</td>
<td>52,500</td>
<td>50,300</td>
<td>46,000</td>
<td>92</td>
</tr>
</tbody>
</table>

Allow for about 3 months' cases carried into '73, less 3 months' cases carried in 1968

-17,000  -10,800  -2,900  -7,900

TOTAL FOR 5 years

| 359,500 | 212,800 | 40,800 | 170,000 | 164,100 | 149,000 | 91 |


It will be noted that the totals for the five-year period of 1968-72 (allowing for the fact that the courts carry forward a few months’ business each year) show that about 96 per cent of the positive breath tests confirmed by analysis lead to prosecutions, over 90 per cent of which lead to conviction. Also that the number of breath tests is
rising steeply and continuously. Nevertheless, there is another argument for looking carefully at possible loopholes in the law. It is not just, nor is it politically acceptable, that those who can afford the services of adroit advocates should be able to escape the consequences of their offences by the exploitation of technical loopholes. It may well be for this reason, rather than the numbers involved, that loophole cases attract a great deal of public attention.

The 1967 Act gave very little power to Ministers to alter the details of the measure by regulation. They could alter the BAC limit, specify a different breath testing device for use by the police and authorise the analysts who carry out analysis. Beyond this, changes could only be made by returning to Parliament for a new Act. There were no doubt good reasons for proceeding in this way at the time; the Act was very controversial and imparted a new principle into the law. Parliament would not readily have given the Government power to alter the detail of the law without returning for re-enactment. It is possible that some of the loopholes opened up in the courts (and most of them eventually closed again by the Higher Courts) might have been closed more quickly and with less effort if there had been wider regulation — making powers. This is by no means certain, however, since governments are naturally reluctant to use a power to make regulations for the purpose of amending case law where it seems likely that the courts themselves may put the matter right eventually.

It is a feature of the procedure specified in the 1967 Act that it places a considerable burden of work on the police at the time the offence is discovered. A policeman who administers a breath test which proves positive must go through a procedure which may well take more than two hours. The removal of a patrol car from the road for so long a period is a considerable drain on resources. The evidence afforded by the “Alcotest” would certainly not be sufficiently accurate or reliable to be used for purposes of prosecution, but the search for a means of simplifying and, if possible shortening, the procedure the police have to follow is of some urgency.

Whether a two-stage procedure can be avoided seems questionable. In any case, further police time must be taken up in court proceedings.

Is it possible to draw from British experience with the 1967 Act a set of principles which should inform the drafting of a law against drinking and driving, so as to increase the likelihood that it will be effective? The following criteria are proposed for consideration:

1. The law should define an offence or offences which are clearly accepted in the public mind as representing substantial danger to road users.
2. The offence or offences which the law defines must be capable of proof by specific objective information. Proof must not depend crucially on the opinion of witnesses, police officers or experts.
3. The law must be enforceable, at a sufficiently high rate of detection to be respected, without undue demands on police resources and technical means.
4. The law must provide penalties which are effective to deter offenders, and to protect other road users.
5. The law must be fair and reasonable and it must be socially undiscriminating: it must bear, and be seen to bear, equally on rich and poor, and on all groups within the community.
6. The law should, so far as possible, be adaptable, that is to say, it should be capable of small modifications (to deal with defects which emerge in practice) without the necessity for re-enactment.
These principles are not independent of one another, nor are they independent of time. The enforceability of a law will be strongly dependent on its acceptance by the motoring public as being necessary to deal with a social mischief, and appropriate for that purpose. Enforceability also depends on the law being seen to be administered in an effective and even-handed way. Resentment and disrespect for the law is liable to follow if a high proportion of offenders escape by luck — and a fortiori if by wealth or influence people are seen to escape. It is worth noting here that, although there has been some exploitation of legal technicalities, the law in Britain has generally operated in an even-handed manner and influential members of all professions have not escaped conviction. Disqualification from driving has proved a most effective penalty. Mandatory minimum penalties are not popular with the courts, but it seems unlikely that this law would have had so great an effect if mandatory disqualification had not been provided. This provision makes it the more important, however, that the law continues to command general public respect. This inevitably raises the question whether the heavy publicity promoted seven years ago when the law was introduced can still be regarded as having discharged the government’s duty of public information. It should not be forgotten that convictions provide a continual stream of publicity for the law, and continuing controversy about it ensures that it gets considerable coverage by the media. Whether this is an adequate substitute for official information, renewing awareness of the social evils that flow from drinking and driving, is a question for consideration.

These and other questions will be considered by Mr. Blennerhassett’s committee. There is little room for doubt that their work is now urgently needed.

REFERENCES


