"DRUNK IN CHARGE" AND OPINION EVIDENCE

Blackie v. **Police** [1966] N.Z.L.R. 910 C.A.

In New Zealand the number of motor vehicles in relation to population is high by world standards.[1] It is trite to say that our road toll is, each year, the subject of increasing concern and the ambit of the road safety campaign has been correspondingly enlarged. Self-preservation, an instinct common to all road users has been sharpened by this crusade. But to an undefined extent the fear of criminal conviction has also restrained reckless and dangerous conduct on our highways. For this reason more attention will be focused on the procedures and the attitudes of the courts as they deal with driving offences. Similarly if the average New Zealander has any connection with the courts it is most likely that it will be in relation to such an offence. His view of justice is not unnaturally coloured by his treatment on that occasion; for him justice must be seen to be done. In response to these challenges the courts must not allow their approach to become too rigid. The law of evidence in particular must be adapted to meet new situations, not by rejection of the broad exclusionary rules but by an enlightened approach to their application. The decision of the Court of Appeal (North P., Turner, and McCarthy JJ.) in *Blackie* v. *Police* [1966] N.Z.L.R. 910 shows that this task is a difficult one.

The matter arose in an appeal from a conviction under section 58 of the Transport Act 1962 which provides:

> Every person commits an offence . . . who, while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle drives or attempts to drive a motor vehicle on any road.

A car driven by the defendant hit another car from behind. Evidence of the defendant's condition was given by a number of witnesses. A doctor examined him about an hour after the accident and considered in his report given in evidence that he was not sufficiently under the influence of alcohol to be incapable of having proper control of his car. Two traffic offiers, Shaw and Crowley, who arrived on the scene shortly after the accident held contrary opinions. Both testified that when they first saw the defendant they considered that he was unfit on account of liquor to properly control his car. The defendant was convicted in the Magistrate's Court.

1. At 30 June 1965 there were 1,177,400 vehicles in New Zealand, approximately 2.7 persons per vehicle. Although systems of registration differ round the world the countries with fewest persons per motor vehicle are in order: United States, Canada, Australia and New Zealand—Transport Statistics 1965.

On appeal to the Supreme Court *(Blackie* v. *Police* [1966] N.Z.L.R. 409) the admissibility of the traffic officers' opinions was considered. Hutchison J. adopted the reasoning of the United Kingdom Courts-Martial Appeal Court in *R.* v. *Davies* [1962] 1 W.L.R. 1111[2]. The question in this case was basically the same—whether the defendant was driving a motor vehicle when unfit to drive through drink. Witnesses with no special qualifications gave particulars of the defendant's condition and their opinions concerning his fitness to drive. Lord Parker C.J. delivering the court's judgment said (at 1113) that a witness could give his general impression whether the defendant had taken drink but unless he was expert he could not give an opinion on the defendant's fitness to drive. In *Blackie's* case both the magistrate and Hutchison J. regarded the two officers as experts and therefore competent to give their opinions on fitness to drive. All the argument before the Court of Appeal centred on this finding.

Each year about a thousand charges are laid under sections 58 and 59[3]. Thus it is somewhat surprising that this question had not previously come before our courts. One reason could be that prior to 1953[4] the equivalent offence was simply that of being in charge of any motor vehicle on any road while in a state of intoxication.[5] There was no need in theory to show an impairment of driving ability. In practice however the old section was interpreted restrictively,[6] more in line with the wording of the present section 58.[7] A more substantial reason is that such evidence has probably often been admitted before without objection in Magistrates' Courts. It is easy for a busy court to assume such evidence to be admissible without consideration.

Two major objections to the admissibility of the evidence were considered by the Court of Appeal:

(a) that such an opinion could be given only by a witness with some scientific or medical skill which qualified him to express it and that the traffic officers lacked this skill.

(b) the opinion concerned the very question which the court had to decide.

The first argument states that merely being a traffic officer does not enable a witness to give this opinion. McCarthy J., delivering the

2. See note Hudson, "Opinion Evidence of Intoxication" (1961) 77 L.Q.R. 166.
3. In 1965 there were 1,007 charges of which 851 resulted in convictions—Statistics of Justice 1965. Each year there are also a few convictions under s.55(2) (Causing death or injury while driving under the influence of drinks of drugs.) Note that s.59 provides that it is an offence to be in charge of a motor vehicle on any road while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle (but not so as to be liable under s.55(2) or s.58 of the Act) and where on being required to deliver up all the ignition or other keys of the vehicle he fails to do so.
4. s.7 Transport Amendment Act 1953.
5. s.40 Transport Act 1949.
6. e.g. *R.* v. *Hawkins* (1926) 2 N.Z.L.J. 470, *Smith* v. *Harris* [1946] G.L.R. 32.
7. See *Lysaght* v. *Police* [1965] N.Z.L.R. 405, 409-10 F.C. for the ingredients of the offence under s.58.

majority judgment pointed out (at 910) that it was well established that scientific study was not the only criterion available to decide a witness's qualification. Knowledge and skill could also be gained from experience. On this footing there was evidence that Crowley had sufficient experience of intoxicated motorists to qualify as an expert on their fitness to drive. His evidence would not be excluded because he expressed his opinion before qualifying himself, though preferably qualification should be given at the outset. Shaw, who arrested the defendant never qualified himself. His opinion could not be regarded as expert and was inadmissible.

The Court of Appeal also followed the reasoning in *R.* v. *Davies*. The court confined the question to a narrow ambit by deciding that only expert opinions could be given. McCarthy J. said (at 914):

> We accept that on many occasions the determination of the question whether an accused's capacity to drive has reached or descended beyond a certain level is a nice question calling for skill, care and precision. It would not be proper to accept non-expert opinion on such a question . . . .

Turner J. also, in a dissenting judgment, appears to have assumed that only expert opinions could be given. But the proposition is by no means free from doubt. An example of a different approach is that of the Supreme Court of the Republic of Ireland in *Attorney-General* v. *Kenny* (1960) 94 I.L.T.R. 185,[8] an important decision which was not referred to either in *R.* v. *Davies* or in the Court of Appeal. In this case a police officer gave his opinion that the defendant was so intoxicated as to be unable to exercise proper control over his vehicle. He was not an expert. On this foundation the High Court (Davitt P.) and the Supreme Court (Lavery and O'Daly JJ., Kingsmill Moore J. dissenting) nonetheless held his evidence admissible. The Court regarded the opinion as one which, like those concerning identity and speed, could be given by a non-expert from familiarity with the facts upon which it was based. None of the judges acknowledged any distinction between giving an opinion on whether a person was intoxicated and giving an opinion on the degree of that intoxication. In the words of Lavery J. (at 189):

> In my opinion the drunkenness or sobriety of an individual either in the ordinary sense or in the statutory sense for the purpose of this prosecution is one upon which any ordinary person . . . is qualified to express an opinion to be weighed by considerations I have set out.

Kingsmill Moore J. dissenting would not accept an opinion on either intoxication or the degree of intoxication required for the offence,

8. The writer was unable to obtain a copy of this report. It does not appear to be available in Wellington. The writer's appreciation of the case was gained from a note: Hudson, "Opinion Evidence of Intoxication" (1961) 77 L.Q.R. 166 and also from extracts of the judgments quoted in *Sherrard* v. *Jacob* [1965] N.I. 151.

unless it was given by an expert (at 191). It would be dangerous if the court accepted a layman's opinion because it would erode its duty of independent judgment. But if the opinion was admitted but not accepted it would be otiose. At least in regard to the opinion on intoxication this attitude was contrary to established practice and with few exceptions[9] contrary to authority. It may also be suggested that it shows little confidence in the ability of a court to weigh evidence.

Nevertheless regarding the opinion on the degree of intoxication Kingsmill Moore J.'s judgment was approved by the Court of Appeal of Northern Ireland (Curran and McVeigh L.JJ. MacDermott L.C.J. dissenting) in *Sherrard* v. *Jacob* [1965] N.I. 151. This decision contains the best discussion of the question. If only for this reason it is regrettable that it was not referred to in *Blackie's* case. As far as Northern Ireland is concerned the conflict between *Davies* and *Kenny* was resolved in favour of the former. Here the opinions were given by a constable of the Royal Ulster Constabulary, a sergeant-in-charge of the station and a station orderly—all laymen. Curran L.J. (at 170) considered that the opinion on intoxication was admissible because it was an impression produced by a fusion of what the witness had observed through various senses. But an opinion as to its effect on driving skill

> calls for a conscious process of reasoning in which the relevant facts for and against have to be marshalled and weighed

in order that it may be formed. McVeigh L.J. (at 176) examined the reasons for admitting non-expert opinions—that in such cases nobody could assemble all the details without giving an opinion and in many situations it arose through necessity. He also examined the rule against admitting opinions on the ultimate issue. Although he was attracted by Davitt P.'s opinion in *Kenny's* case—that to admit the first opinion you could not refuse the second—the rules to which he referred did not permit him to do this. Lord MacDermott took a similar approach. He stressed another reason for admitting non-expert opinion (at 157): where the matters were ones of

> . . . common experience within the ken of ordinary men it enables evidence to be conveniently summarised or distilled in opinion form which in practice could not reasonably be called for in all its multitudinous detail.

On both principle and authority this would apply to evidence that the defendant was under the influence of drink. The same reasoning applied to the opinion on ability to drive (at 162):

> The driving of motor vehicles is now so much a matter of everyday experience for ordinary people that I find it difficult to see how inferential or

9. But see the views of Smith J. in *R.* v. *McKimmie* [1957] V.R. 93 and *R.* v. *Kelly* [1958] V.R. 412.

> opinion evidence as to being (a) under the influence of drink and (b) thereby unfit to drive a car can be placed in different categories for the purpose of determining admissibility.

The decisions to which the Court of Appeal did refer show a similar division of views. In the "leading authority" (per McCarthy J. at 915) of *R.* v. *German* [1947] O.R. 395. A ruling of the Ontario Court of Appeal, Robertson C.J.O. dealt with such evidence. He proceeded (at 409) on the basis that the opinions of laymen were admissible.[10] The Victorian case of *R.* v. *Spooner* gave some support to the majority's view. But the amount of expertise which the court regarded as necessary in that case was minimal and the effect was nearer to that of admitting layman's evidence. In *Warming* v. *O'Sullivan* [1962] S.A. S.R. 287, a decision of the South Australian Supreme Court, opinion evidence as to intoxication given by a layman was held to be admissible but the second limb of the problem was not mentioned.[11] Finally, it may be added that in England the Courts-Martial Appeal Court considered their earlier decision in *R.* v. *Neil* [1962] Crim. L.R. 698. In a rather confusing judgment the court appeared to accept *R.* v. *Davies* while at the same time casting doubt upon its scope.

So although there were no authorities binding on the Court of Appeal, their discussion did not convey the cleavage of opinion which does exist. In this field, where the application of the opinion rule is very much dependent on the type of fact situation, other decisions based on almost identical statutes are of great value.

An attractive alternative view of the problem could on that account have been that the question of competency to give this particular opinion should go to the weight rather than the admissibilty of the evidence. Undoubtedly the opinion of a doctor or an experienced traffic officer would carry more force but why should the opinions of other drivers or passengers carry no weight? After all drunkenness and driving are both matters well within the domain of popular understanding. Both, and more unfortunately the former are an integral part of modern life.

The decision could conceivably lead to injustices. If the defendant has an accident an experienced traffic officer who came to the scene may give evidence for the prosecution that in his opinion the accused was unfit to drive. If passengers travelling in the defendant's car who had seen him driving thought that he was fit to drive they will almost certainly be prevented from stating their opinions in court. Consider

10. For a similar approach see *R.* v. *Marks* (1952) 15 C.R. 47, 52 a decision of an inferior court *Giddings* v. *The King* (1947) 4 C.R. 305, a decision of the Prince Edward Island Supreme Court, seems to accept (at 312) that provided that the witness has observed and relates the facts, conclusions as to the fact or degree of intoxication can be stated. *R.* v. *Pollock* (1947) 4 C.R. 496, a decision of an inferior court which was cited in argument was concerned only with an opinion as to the fact of intoxication.
11. See also the earlier decision of the Supreme Court in *Burrows* v. *Hankin* [1930] S.A.S.R. 54, 55 the exact effect of which is in doubt.

the case of an expert driver who has taken drink. His driving ability may be impaired but not to the extent that he is incapable of proper control of his car. A qualified traffic officer may conclude on the basis of the defendant's appearance that he was unfit to drive and this conclusion could be given in evidence. His opinion would be based on the driving ability of an average driver affected to the same extent as the defendant. But the driver of a car following the defendant whose opinion is formed by witnessing the actual driving would probably not be legally qualified to give an opinion. Conversely the case of a poor driver whose driving drops below the standard of proper control after taking only a small amount of alcohol may give rise to a similar difficulty.[12] If the opinions of both traffic officers and laymen were admitted they could be considered in the light of the circumstances in which they were made and, of course, the respective qualifications of the witnesses. Replying to this contention it could be suggested that laymen could still give a detailed description of the facts constituting the defendant's demeanour and his driving.[13] This is true but so often these facts fail to convey the general impression. For example a witness may agree that an accused person was inebriated but still be certain that his driving was not lowered below the standard of proper control. He could give his opinion that the defendant was intoxicated yet in many cases it would be difficult to convey by facts alone the added impression that the defendant was still fit to drive. The court would know less of what was relevant to the truth than the witness.

The circumstances of Blackie's case show the difficulty from another angle. The offence with which the defendant was charged is a status offence; as long as the factual ingredients of the offence—the defendant under the influence of drink to the required degree while driving or attempting to drive a car on any road—are proved a conviction will result. There is no need to show that the defendant knew he was incapable of having proper control of his vehicle.[14] Now Shaw arrested the defendant presumably because he had reasonable cause to believe that the defendant had been driving when he was not fit to do so. This belief was an inference from observed facts and no question of the defendant's intention was involved. But because he did not qualify himself he could not tell the court that he held this belief. Similarly any officer who has the power to arrest may still not be sufficiently experienced to give his opinion in court; the Court of Appeal emphasized that every traffic officer would not necessarily be an expert. It is difficult to understand why a traffic officer who is competent to act on his reasonable belief as to certain facts is yet not qualified to state that inference in a court of law. Are they to be likened to "mere robots, with no right or ability to use ordinary common sense judgment in all manner of critical situations involving the con-

12. The objective nature of the test of driving ability is stressed in *Lysaght* v. *Police* ibid., at 409-10.
13. An argument advanced by Kingsmill Moore J. in *Attorney-General* v. *Kenny* ibid., at 191.
14. *Pearson* v. *Police* [1966] N.Z.L.R. 1095 although it may be necessary to prove that the driving was done knowingly.

sumption of alcohol".[15] Added to this the effect of inadmissibility is illusory and hollow because in every case the court knows from the fact of arrest for this offence what opinion the officer held.[16]

The second objection dealt with by the court was that the question asked of the officers was the very question which the court had to decide. The majority emphasized that it is not unusual nowadays for experts to give opinions on an ultimate issue. They followed (at 914) Phipson's formulation;[17] that a witness could give such an opinion when the issue was substantially a question of science or skill merely, and the witness has himself observed the facts. Because Crowley was an expert who had observed the defendant's condition[18] his opinion was not excluded by reason of its being directed to the ultimate issue. On the other hand Shaw was not a qualified expert and his opinion was inadmissible for that reason.

Turner J. devoted much of his judgment to this objection. If he were to decide the question according to Phipson's test he would have come to a different conclusion from the majority; this ultimate question involved other elements besides the purely scientific so the opinion of an expert witness could not be given. Likewise an application of a test proposed by Cross—that if the ultimate issue was whether a person had complied with a particular standard an opinion would be inadmissible—would have given the same result. Not only has Turner J. given a more realistic interpretation of the officers' opinions but he has also taken a pragmatic and wise approach in rejecting these tests especially having regard to the widely varying possible fact situations. If his decision had rested on these grounds a curious result which he mentions by reference (at 918) to *R.* v. *Davies* would have ensued. Both the doctor and the traffic officers[19] would have been qualified in terms of knowledge and skill to give their opinions yet the doctor's opinion alone, in line with established practice would have been admissible. This would result even though both were testifying on an identical issue and giving opinions in compliance with the same particular standard or on the same question of science or skill. Such a conclusion would not be justifiable.

Turner J. still reached a different result from the majority. In his view the traffic officers were too closely associated with the prosecution to give an opinion on the ultimate issue. He said (at 920):

> Such a witness must always be regarded as biased,

15. *R.* v. *Marks* ibid., at 52.
16. In Dixon, *The Road Traffic Laws of New Zealand* (4th ed. 1964) it is suggested (at 61) that ss. 62 and 63, which deal with powers of arrest, imply that police and traffic officers are expert witnesses on the point of fitness to drive and therefore should be capable legally of giving such an opinion. In *Sherrard* v. *Jacob* ibid., at 162 MacDermott L.C.J. subscribed to the same view based on analagous statutory provision.
17. *Phipson on Evidence,* (10th ed. 1963) 1298.
18. It is arguable that to have 'observed the facts' he should have seen or had knowledge of the driving which led to the charge.
19. It may be noted that Turner J. was prepared to accept both officers as experts (at 918) even though one of them, Shaw, did not qualify himself.

> since he has an interest, though it be only an emotional one, in the result.

To decide this was to go further than was expressly reported in any of the decided cases and hence in conflict with all the decisions where the opinions, whether expert or not of traffic officers and policemen who arrested defendants were held admissible.[20] Counsel for the appellant did not appear even to have argued the point. Reliance was placed by Turner J. (at 920) in a passage from *Greenleaf on Evidence* (14th ed, 1892) Vol. I pp. 585-6.[21] This passage refers to "weighing the testimony" as if there is no question of admissibility involved and it is difficult to judge from the context what the learned author intended. If the passage does refer to admissibility its application would lead to the exclusion of all biased opinions whether or not made by an expert and regardless of whether or not they were directed to the ultimate issue. In any case the judicial approach to the opinion rule, in this century at least, has not followed such strict rules if indeed they were ever followed. Instead all relevant evidence is admitted and such charges as bias are referable only to the weight. Apart altogther from other exclusionary rules a judge still has a discretion to exclude any evidence whose probative value is slight compared with its prejudicial effect. The view of the majority (at 916) is to be preferred:

> Not only would it in our view be wrong, but it would also grievously impede the proper administration of justice by rendering it virtually impossible in many cases to prosecute those whose conduct is, in the interests of public safety required to be considered by the courts.

Reference to section 3 of the Evidence Act 1908 is also germane. This provides:

> No person shall be excluded from giving evidence in any proceeding on the ground that he has or may have an interest in the matter in question, or in the result of the proceeding . . . .

Therefore it can be seen that whether the approach of the majority or that of Turner J. is preferred there are practical complications. It has been submitted that on principle and authority a strong case may be made for the addition of the type of opinion in this case to the list of exceptions where the opinion of the man in the street may be given. The Court of Appeal in laying down that only expert opinions can be

20. In *Sherrard* v. *Jacob* ibid., Curran L.J. (at 170) and McVeigh L.J. (at 179) regarded the fact that the opinion was on the ultimate issue as a significant element in the decision. Two points may be made: (i) there was no mention of bias and (ii) their lines of argument suggest that this objection may not have been pertinent if the policemen had been experts. cf. MacDermott L.C.J. at 164. The majority's view was similar ot that of Kingsmill Moore J. in *Attorney-General* v. *Kenny* ibid., at 191.

21. Although the judgment indicates that the italics are to be reproduced from the text there are a number of italicised words in the text which are not italicised in the excerpt set out in Turner J.'s judgment.

given has at the same time implicitly stated that to qualify as an expert a considerable amount of experience is required. Notwithstanding this a wider classification of experts would be desirable in future so as to include, for example, a skilled driver.[22] Perhaps it may be argued that the Court of Appeal has still left the way open for such a classification. The admission of these opinions would not open the floodgates for there are still comparatively few people who actually witness the facts. The dangers of a court being swayed by opinions can be overrated; these cases are dealt with by magistrates[23] who supposedly are not quite so prone as juries to the dangers which the opinion rule was designed to prevent.

The question before the court in *Blackie's* case although important was narrow in its scope. It may well be that in future the advent of compulsory blood or breath tests for drivers may render such opinions of little value. The case is, however, testimony if more be needed that the application of the opinion rule follows no prescribed pattern but is dependent on the context of the particular class of case.

J.M.N.

22. The approach taken in *R.* v. *Spooner* ibid.
23. Transport Act 1962 s.194 but see s.55(2) and (3).