IN THE SUPREME COURT OF NEW ZEALAND

SC 33/2008

BETWEEN **ALISDAIR BRUCE AYLWIN**

Appellant

AND **NEW ZEALAND POLICE**

Respondent

Hearing 2 December 2008

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel F P Hogan for the Appellant
J C Pike and A M Powell for the Respondent

CRIMINAL APPEAL

10.00am

Elias CJ Thank you.

Hogan Good morning Your Honours, Hogan is my name. I appear in support of the appeal.

Elias CJ Thank you.

Pike May it please the Court I appear with Mr Powell for the Police in this matter.

Elias CJ Thank you Mr Pike, Mr Powell. Yes Mr Hogan.

Hogan Your Honours in my submission the central issue in this case can be approached in this way. How is proof of an element in a criminal case to be proven? The appellant says the answer is to be found by considering viva voce evidence led or with the appropriate foundation, what other form of evidence, for example certificate, might satisfy the

required proof. The respondent says in the instance of some elements, particularly those to do with matters of procedure, the respondent's submission is that the appellant's approach is old-fashioned, out of step, or paying insufficient regard to modern technology and modern appliances. The respondent asserts that judicial notice or inference or by invocation of the presumption omnia praesumuntur essentially being the same notions as judicial notice, that the employment of any of these approaches can as it were be the flying carpet, if I can use that term, that can transport a fact-finding tribunal over the gap in the evidence in the event that there is no viva voce evidence led in the traditional manner. Every criminal charge can be broken down into elements or ingredients that each need to be proven, and one of the traditional images or ways of approaching the topic is to regard the task of proving a case as links in a chain that are inter-linked. On the one side of the gap is the charge or the contention, the allegation; on the other side there might be conviction. It's a question of how that gap is to be spanned. Hitherto, if a link is missing altogether, then the gap can never be spanned. In other words if there is no foundation evidence covering a discrete element then the gap remains.

Elias CJ Well it depends what you mean by foundation evidence doesn't it?

Hogan Indeed, and I accept that Your Honour, but for inference for example to operate there has to be foundation evidence to move to point C. If points A and B are established then one can look to see whether by employment of the principles associated with inference whether you can move to point C, but in the absence of there being foundation evidence permitting the process of inference drawing to be undertaken, then in my submission that process doesn't as it were commence. However I acknowledge that within that chain of links one can have an imperfect link. The link might be fractured or it might be thin in places. It might

Elias CJ Is it really helpful to start with all these with respect rather trite metaphors? I mean shouldn't we get to the issue which is what you say is the gap here?

Hogan Yes, I'm more than happy Your Honour to move to that point and my submission is that the elements of the charge, and particularly for example the refusing to accompany charge, can be analysed, and I contend that manner compliance remains a required element of proof, and that's

Tipping J The essential question is whether that is any longer so in the light of s.64(4) isn't it?

Hogan Indeed, and I accept Your Honour that s.64(4) precludes any challenge as to reliability, not of the breath screening test, s.64(4) is only triggered in respect of the evidential breath test. It does not apply to the breath screening test unless it is a breath alcohol charge, but on the

first question we have that is confined to the refusing to accompany charge

Tipping J Doesn't 4(a) talk about both? You know you're right Mr Hogan but you just need to help me with that.

Hogan Can I take

Tipping J I thought ss.4(a) bears on both the result of the screening test and the evidential test.

Blanchard J And you have to read it with 5. The two are designed to be read together surely.

Hogan Your Honour in respect of s.64(4) it is no defence to proceedings for an offence against this Act in respect of the proportion of alcohol on a person's breath, that is to do with a breath alcohol charge

Blanchard J And 5, which is the same thing

Tipping J For blood alcohol.

Blanchard J Deals with blood alcohol.

Hogan Yes, but a refusing to accompany charge is neither. A refusing to accompany charge has its life independent and has nothing to do with ultimate testing by either evidential breath tests or blood tests, so those provisions as to non-challenge on error result are confined to the breath alcohol charge or a blood alcohol charge. But I intend Your Honours to commence my discussion by considering

Tipping J Is the Crown's response to that, sorry to interrupt before you develop, but is the Crown's response to that to invoke 64(2)?

Hogan Yes, and I accept 64(2) can apply in any situation when there is that foundation evidence. When you have some evidence then the supervisory role envisaged by s.64(2) comes into play.

Tipping J So your point is that we're not directly covered by 64(4) or (5) in relation to a refusing to accompany, but you do acknowledge that 64(2), for what it's worth, is capable of applying to such a charge?

Hogan Precisely.

Tipping J Thank you.

Hogan If I can move to a consideration of the elements of a s.69 charge. That can arise in respect of four instances. If I could take Your Honours to s.69(1) of the Land Transport Amendment Act.

Elias CJ Sorry, 69?

Hogan 1. This is the roadside situation that's encountered. A person can be required to accompany if they are (a) undergone a breath screening test under s.68 and it's a fail, or if the person is younger than 20, there is an indication of some alcohol in the person's breath, or the person refuses to undergo a breath screening test, that's (c), or (d) is where there is no breath screening available. So then if the person refuses in any of those four given situations they can be arrested and charged with that discrete stand-alone as it were charge. They then become subject to the later evidential breath testing procedures. Now a person cannot be charged with refusing to carry out an evidential breath test, but if potentially they carry out an evidential breath test and the reading is under 400, because alcohol is never static in the system. It's in a process of either arising or reducing, so potentially in the gap between the breath screening test and the evidential breath test the level may have dropped below the level prohibited, namely 400, and the person is prosecuted for no breath alcohol offence but faces a charge of refusing to accompany. Similarly if a person either failed or refused to undergo an evidential breath test but submitted to a blood test, potentially again for the same rationale, the breath blood alcohol level is never static, potentially the reading could be below 80, so the person again does not face a breath or blood alcohol charge. So if one looks at the breath screening test itself, this is a procedure, this is a device that is not accompanied by a certificate of compliance, and with respect to the Court of Appeal it has misconceived the position when it has ruled as it has, or when it has stated as it has in para.39 of its judgment, that, I beg your pardon, it's not para.39, if I can just have a moment. Paragraph 70

Tipping J Just as part of the sequence Mr Hogan, where is the offence of failing to accompany actually constituted? Is it in a general provision later on in the power? It says everyone who's lawfully required to accompany must do so

Wilson J 59.

Tipping J 59 is it?

Hogan Yes.

Tipping J Thank you.

Hogan If I could take Your Honours just to para.70 of the Court of Appeal judgment. The prosecution must still prove that the relevant brief tests, plural, were carried out with an approved device accompanied by a certificate of compliance. Well with respect there is no certificate of compliance provision

Tipping J Has that got anything to do with the ultimate issue?

Hogan Well it has, the Crown in defending the breath screening test is saying these are fail-safe devices and you can take them for what we claim them to be because they are so well recognised and so approved that you can safely conclude that nothing can go wrong.

Tipping J Is it relevant to reasonable compliance?

Hogan Indeed, it might be

Tipping J That's all I want to know at this stage.

Hogan It might be but it's not like the new evidential breath testing procedure or the devices that are accompanied.

Tipping J I just wanted to know where it fitted in.

Elias CJ Where is the certificate of compliance requirement, which section is that?

Hogan That's s.75(a) Ma'am of the 2001 amendment.

Elias CJ Sorry, where do I find that

Tipping J Tab 3.

Elias CJ Oh yes, 75(a). Yes, thank you.

Hogan And just generally on roadside breath-screening tests. Of course they can occur at any time. In the old days there used to have to be, or the manufacturer recommended, a 20 minute gap between last consumption of alcohol and testing. That's no longer the case but in this modern day a person could be apprehended at a check point within moments after leaving a social function and be called upon to blow and then into the booze bus, again within moments of it. Now the testing devices are not specific to liquor alcohol. They will detect pickled onions.

Blanchard J This is the breath screening

Hogan Both breath screening tests and evidential breath tests.

Blanchard J Well the breath screening test is only that, it's only a screening test.

Hogan But it is the only test in respect of the refusing to accompany charge Sir. I'm discussing just for the moment the only procedure that governs the refusing to accompany charge is the breath screening test, because the later testing has taken the prosecution nowhere in terms of no charge arising, so I'm concentrating my discussion for the moment

on what the circumstances surrounding the undertaking of a breath screening test, or alternatively

Elias CJ But it doesn't have to be a breath screening test entailing the production of admissible evidence does it?

Hogan Well before the refusing to accompany charge

Elias CJ Yes.

Hogan Well with respect it has to be one that's carried out in compliance with the notice.

Elias CJ Why?

Hogan Well that's the step before taking the next step of requiring to accompany, I can do no better than refer Your Honour to the judgment of *Picot*, when Your Honour commented on this point.

Elias CJ No, don't take me there. I'm talking about the product, yes you have to go through the step of having a breath screening test, but if you have mis-managed that test and so the result itself would not be valid, does that taint in your submission the request to accompany?

Hogan If you have mis-managed, whether it's the individual or the Police Officer. Potentially mis-management could occur from either party if the person was being obstructive, and I'll discuss this in a moment, if the person was being obstructive in supplying a sufficiently strong blow, because some of these devices, and I'll take Your Honours to them in a moment, some of these devices have a volume capacity. You fill up a bag. Others have a pressure capacity where you have to achieve a certain pressure in your blow to activate the machine. So potentially a person could be obstructive in not giving a sufficiently hard blow, or potentially the Officer could be obstructive in not changing the mouth pieces.

Tipping J Could we just look at 69(1)(a) for the moment which I think is what you are referring to? It's worded in quite an interesting way. It says 'and it appears to the Officer that the test indicates'

Hogan Yes.

Tipping J Now is there any significance in that way of putting it because all it has to do is appear to the Officer that the test is indicating whether for good or ill.

Hogan Well I accept it's a two-stage process that there is an undergoing a breath screening test under s.68, so that invokes in my submission that the

Tipping J Well you have to accompany if it appears to the Officer that the test which you've just undergone indicates. Isn't that the crunch?

Hogan Well it's an additional. It permits the Officer to conclude, and we have to go back to the notices as

Elias CJ But what's the harm? If the Officer, having administered this test, it appears to him that the alcohol in the breath exceeds the permitted amount and he asks the person to accompany him, I'm just trying to work out why it's necessary for the screening test, which is only a screening test, to have been properly conducted.

Hogan With respect Your Honour, saying it's only a screening test reads down when on a charge of refusing to accompany, it is the only test

Tipping J But it's a different sort of test in that it's not the absolute result that matters, it's the result as it appears to the Officer, given in good faith

Hogan Well no, and a test undergone under s.68, and it appears.

Wilson J Mr Hogan are you asking us to read into the first line of 69(1)(a) the words lawfully conducted under s.68?

Hogan No, not lawfully conducted, just conducted in accordance with the section which invokes s.2, a test being carried out in accordance with the prescribed notice.

Blanchard J Why have they used 'and it appears to the Officer'? Why hasn't it just said 'and the test indicates'?

Tipping J I think there's a very good reason. It's to choke off this sort of performance.

Hogan Well I'm not sure Sir that relieves the Officer from having to carry out the test in accordance with the manner prescribed. The end result of appearance could be achieved in an unlawful manner. For example, and I'll happily take Your Honours to the requirements if we could look at how the variation between the requirements of the various breath screening tests. If I could take Your Honours to tab 4 which sets out the Transport Breath Test Notice (No.2) 1989 which governs the way in which these tests are to be carried out.

Tipping J This is all in support of the proposition that the Officer, when giving evidence for the prosecutor, has to say something about the manner in which it was done. In other words either the steps taken or generically?

Hogan Yes.

Tipping J This is what this is all about isn't it?

Hogan Yes.

Tipping J And if they don't say that, even if it does appear in good faith to the Officer that it read above the 400, that's not good enough?

Hogan No, the foundation must still be there.

Elias CJ What's the foundation? Say it again.

Hogan That the test was carried out in a manner prescribed by s.2. That s.2 still remains alive and s.64 remains alive, that the manner compliance is to be led and is available for the Court to supervise

Elias CJ Why is the manner of compliance material to the charge of failing to accompany?

Hogan Well it's one of the ingredients in the process of completing the breath screening test. To permit an Officer to say I carried out a breath screening test finito, has never been regarded as sufficient.

Elias CJ But it's not in dispute that the appellant underwent a breath screening test, nor that it appeared to the Officer that the level of alcohol in his breath was more than the exceeded amount, isn't that sufficient to provide the foundation for the request to accompany?

Hogan With respect, no Ma'am, it is acknowledged that a procedure was undertaken on the roadside, but whether or not that amounts to a breath screening test, that's not a concession that the defence has ever made nor in my submission can it ever be called upon, the defence ever be called upon to make, but I'm not disputing that a procedure was carried out on the roadside, but with respect it is not for the defence to make that concession either by judicial inquiry at the commencement of the case

Tipping J Doesn't under s.68 mean simply that in one of the circumstances prescribed in 68(1), (a), (b) or (c)? In other words if there was no power to require then you might have some legs, but I don't think it's anything to do with the manner of application of an empowered test.

Hogan Well that's by referring to the 'and the appearance to the

Tipping J No, no, under s.68 is when required by you I suspect to do quite a lot of work.

Hogan Well I'm content to rest my argument on the basis that throughout these procedures a breath screening test is still required to be undertaken and the Officer has to give the qualifying evidence as to the type of device employed that it meets with an approved device

Tipping J Yes.

Hogan But it begs the question why would that be the case if it's sufficient for an Officer just to say 'and a breath screening test was carried out on the side of the road', and similarly that the test that he carried out was done so in accordance with the statutory notice, then the opportunities or the possibilities spoken of in the second part of s.69(1) can come into play.

Tipping J There may be a distinction between failing to accompany and an actual breath alcohol result in that it could be argued that failing to accompany isn't absolute but it does require the point to be put in issue, whereas breath alcohol is absolute. You can't claim an error full stop. Now do you making anything out of that?

Hogan No with respect Sir, my argument is that error result is a separate element. That's a substantive element that has its own life and it has its own regime.

Tipping J Yes, yes, I understand, but I may be jumping ahead a bit Mr Hogan and forgive me if I am, but I was just interested as to whether you saw a possible distinction between these two situations – failing to accompany and excess breath alcohol?

Hogan No, I'm going to be submitting Sir that there should not be any distinction at the end of the day. They are discreet charges but there should not be one test or one outcome

Tipping J For one and one for the other

Hogan One for the other

Tipping J Yes, well that's alright, just as long as that's clear. I'm not saying necessarily I agree with that at the moment but we're just inching our way forward.

Hogan Sir.

Wilson Mr Hogan if a breath test was carried out, surely it must have been carried out under s.68.

Hogan No that begs the question with respect. While s.2 remains in place and s.64(2) is in place, they dovetail together; they compliment each other. One is the prescription and one is the supervision of how the prescription has been performed, then that is a, and I hesitate to use the word 'code', but that is a charter at least as to how the Courts are to approach the matter. Not to eliminate it altogether and simply permit an Officer to say 'I carried out a roadside breath screening test'

Elias CJ Well he says much more than this the Officer though doesn't he? I've just been looking at the evidence on it. He names the device. He says

he assembled it. He said there was a sufficient puffer there or whatever, so he's describing the test.

Hogan I'm not sure Your Honour, are we moving from the general to the

Elias CJ Well I'm getting confused with general. I really would find it of help if you indicated where the gap is in the evidence that was given that you're saying is so critical.

Hogan That he failed to say that the breath screening test was carried out in compliance with the Transport Breath Test Notice (No.2) 1989.

Blanchard J Was he ever asked about that?

Hogan Not by the prosecution.

Blanchard J And not by the defence?

Hogan No Sir.

Blanchard J Well surely then there must be taken to have been reasonable compliance. You can't just lie in wait these days.

Hogan Well with respect Sir in my submission we're not talking about a technicality where scale comes into place

Blanchard J The whole thrust of these provisions if you read them together is to stop this kind of nonsense of lying in wait.

Hogan Well with respect Your Honour, I'm casting my submission as it being an element of the charge, and if the proposition becomes that a burden falls on the defence to repair a missing element in the prosecution case

Elias CJ But I just don't see that it's a material element. That's really what I'm asking you about. He gave evidence, not of the manner, but then that wasn't causative of the complaint you're now making.

Hogan Well I'm not sure with respect Your Honour

Elias CJ Well there's no reliance on the product of the test.

Hogan But with respect Your Honour, in the evidential breath test arena you cannot challenge the reliability, but in the breath screening test arena it's perfectly conceivable that you could challenge the arena and I'll demonstrate an example. Potentially it may have been a breath freshener that I had just taken, or the pickled onions I had just eaten that are being tested, I should be able to give evidence to that effect and call scientific evidence to say that that potentially, and I bring along a truck load of people to say this man had not consumed any alcohol in

our presence for the preceding hours but I saw him eating pickled onions

Tipping J I thought you were going to say a truck load of pickled onions

Hogan Well whatever. But the point is it's not specific to liquor and the point being that potentially I could call that evidence to demonstrate factually that this testing is erroneous in terms of the claim that I was liquor affected.

McGrath J Doesn't all this get clarified isn't it the scheme of the Act that the evidential breath test is the mechanism for determining these issues.

Hogan I'm confining with respect Your Honour to the first question

McGrath J I know you are.

Hogan And I'm more than happy to address the issues in respect of an evidential breath test, but in respect of a discrete breath screening test, it must remain capable for a defence to mount an argument that either the procedures employed by the Officer, and I'll take Your Honours in a moment to – I've referred to breath fresheners and pickled onions – but the other one is mouth pieces not being changed between blows

Elias CJ But we're not concerned with the results here.

Hogan Well I'm endeavouring to tie it to a real situation. If Your Honour's opposing the questions that this is all theoretical and unreal

McGrath J Your mouthpiece point is a different one, but when you start talking about behaviour of the person who's been asked to do the screening test, why has that got anything to do with it? In the end the Act does contemplate it will all be straightened out and the truth revealed by the evidential breath test. Now your mouthpiece point is perhaps a different character.

Hogan But that mouthpiece applies in respect of possibly the Officer's manner in respect of carrying out the breath screening test in terms of multiple blows are contemplated or are possible under the breath screening test regime, but there is no provision for the changing of mouthpieces in the breath screening regime, so if the point that plainly the rationale for changes of mouthpieces is to avoid the possibility of contamination between successive blows. That has to be the rationale underpinning the change of mouthpieces.

McGrath J Yes.

Hogan Now in a breath screening situation, if you don't change the mouthpieces then plainly the possibility arises of a manner compliance issue on the part of the Officer

Tipping J At the very least here surely you have to put it in issue. You can't just simply pop up at the end and say there hasn't been proof of this. I might be with you to that extent for this particular failing to accompany, not necessarily for the next one, but surely you have to put it in issue.

Hogan With respect Your Honour, if my fundamental is sound that manner compliance evidence is an element

Tipping J It's a pre-condition you could argue to the lawfulness of the request to accompany.

Hogan Well I'm content with respect Your Honour to rely upon you analysis of it in *Livingston* that it's an element or an ingredient.

Tipping J But that was in support of a reverse onus wasn't it or loosely so-called?

Hogan No with respect Sir, it was where Your Honour set out – that's not *Livingston v ESR*, this is *Harvey Livingston*, in which Your Honour set out at the beginning of the judgment what the elements were, what the ingredients were – same thing – of proof that was required, and that included manner compliance evidence.

Tipping J But didn't we in that *Livingston* indicate that you couldn't just ambush the Crown

Hogan No.

Tipping J Well, I need to be reminded then.

Hogan No, with respect it's not an ambush if it's not there in the first place. I accept if we get to the link; if there is some evidence, albeit imperfect, then the defence cannot rely upon not questioning

Blanchard J He says that I carried out a breath screening test. It is surely implicit in that that he carried it out in accordance with the notice and if you want to show that it wasn't carried out in accordance with a notice, you have to examine on it.

Hogan Well with respect Sir, that contains two propositions with respect I disagree with for these reasons. (1), that mere statement would be sufficient to include that a type of device

Blanchard J Why?

Hogan Because there's two elements to the manner compliance. One is an approved device being employed and (2)

Blanchard J It seems to me it stands to reason, that's what he's referring to. It's just a shorthand.

Hogan Well no, the Court of Appeal at least in this case, on the instant case said the Officer has still got to tell us precisely what type of device he employed. He's got to go through the approval, satisfy the approval aspect

Blanchard J And was that not done here?

Hogan No that was done, that was done in this case, but in the example Your Honour posed it wouldn't be necessary. Now I have to say that the Court of Appeal have given contradictory answers to that point and on the one hand in one part of the judgment they have said yes there has to be device approval evidence, but on the other hand they've reflected exactly the point Your Honour has made that if the claim is made as to the carrying out of a breath screening test, it invokes both approval, the approval point, and the manner compliance point.

Blanchard J Well maybe they're right the second time.

Hogan Well I'm happy to go back and address that first proposition

Tipping J What possible practical difference could it make whether these magic words are spoken or not, because you're either prepared to challenge the procedures or you're not, and if you so built your case that you're going to attack the procedures – wrong device, improper methodology or whatever – you'll be ready to do it.

Hogan Indeed, if I have the breath freshener or the pickled onion situation I'll call my evidence.

Tipping J Or any other situation.

Hogan But if I don't have it in the first place, if I don't have the prosecution covering that element of proof that's been forever up until today by all the Courts have all said we've got to have this manner compliance evidence.

Tipping J Well I want to be persuaded that that is actually in practical terms necessary, because either that's going to be your defence, in which case you can raise it, or it's not going to be your defence, well what possible harm is there?

Hogan Well I go back to the statutes.

Tipping J It's just semantics.

Hogan No, no, with respect Sir, it does mean something. If it be that hitherto evidence as to compliance is no longer necessary, if we are going to

Tipping J In what detail is the issue? You've got to give at least some foundation for the fact that you were referring to the statutory processes, but rather like my brother Blanchard I would have thought that's demonstrably implicit, unless it's put in issue.

Hogan Well no, the minimum pathway, the minimum level that is normally met is the Officer saying

Tipping J Never mind what's normally met Mr Hogan, we're here to resolve the law, never mind what's been in the past. Why is it so vital that there be precision of language when everyone knows what you're talking about?

Hogan Well with respect that concluding proposition, that concluding is not made out and I say it's not made out with respect for these reasons. Parliament has successfully amended this legislation but has retained the s.2 definition and the s.64(2) reasonable compliance provision.

Tipping J Well reasonable compliance applies when you've actually done something a bit wrong or you've missed something out and the Court comes in but

Hogan Indeed, but it kicks in once there is something to examine.

Tipping J If you want to examine it you can examine it.

Hogan But with respect that essentially casts the burden on the defence to fish around and to establish an element that's missing.

Blanchard J It stops the defence game-playing.

Hogan Well with respect Sir in my submission that is a denunciation of the defence which is uncalled for.

Blanchard J Well I'm not withdrawing it Mr Hogan. It is game-playing to stand back and wait to see whether the Officer technically gets it all right, say nothing, and then stand up at the end and say it's not proved in this area where there is a reference to having administered a breath screening test.

Hogan Well if the law as enunciated by the Court of Appeal in *Livingston* and by Your Honours, and I've referred to some of the cases where if it's to be read down that s.2 no longer has any meaning

Blanchard J Oh it has meaning because if you challenge it then you may demonstrate that there is something that the Crown has failed to prove, namely that there is a problem with the way the test was administered, or the type of device that was used, so the definition still has work to do.

Hogan But the prior point appears to be that if it is an element of the charge and there is no evidence on the element, then the burden is on the defence if it wishes to pursue the matter to ask questions to establish the element first and then attack it.

Tipping J Well there's no magic in it being an element. The question is what is sufficient proof of that, and the question is how detailed the proof has to be.

Hogan I accept that, but with respect that's a different point to your brother Justice Blanchard. His point is that if the element is not covered off in prosecution evidence it's too bad

Blanchard J No, what I'm saying is it is covered off by reference to an evidential breath test having been administered - sorry, a breath screening test having been administered. That that form of shorthand is acceptable.

Tipping J That's why I put the point to you in the way I did because I'm inclined to agree with that.

Hogan Well in my submission the prosecution is not relieved by mere reference to a breath screening test being carried out of establishing either its approval; the type of device that was employed; or the manner. Now I can say it only so many times, so that hitherto has been an element recognised by the Court of Appeal as being a necessary ingredient of proof.

Tipping J So the point is prosecution must prove complying device and complying manner?

Hogan Indeed.

Tipping J In terms they must prove it, not just by any generic reference?

Hogan Not by the mere assertion that a roadside breath screening test was carried out. That does not include

Elias CJ He didn't say that, he said he assembled the device; he named the device; and he placed the assembled device in front of the driver. He blew a sufficient sample and the result was fail general.

Hogan Well with respect the term in the notice is carried out. There is nothing in the test about assembly. Assembly to a humble person like me suggests

Elias CJ Where are the steps again? Where do we find them? I read them last night.

Hogan You'll find them under tab 4. If I could usefully just spend a few moments discussing the four different types of device. You will see under tab 4 the Transport Breath Test Notice (No.2) 1989, and you will see that in para.3 five types of device are deemed approved.

Elias CJ Well he said he's used an Alcotech AR1005.

Hogan And that's (d), but there are essentially four in use. We can cross out No.B. The Alkaliser has to my knowledge never been

Elias CJ Well we can cross out all of them because we're only concerned with the Alcotech AR 1005.

Hogan Well maybe Your Honour, but that suggests somebody else is going to come here on the Drager Alcotest 80 because they are different animals and they have different features and different requirements, and that's part of my point. If a mere assertion of a breath screening test is carried out, it doesn't matter which of the four is employed, if that's deemed to include an approved device, but on the face of it each have different procedures and functions and possibilities.

Elias CJ Are you saying that if one looks for example at para.6(a), or clause 6(a), the Officer must solemnly intone in evidence 'I attached a mouthpiece; I pressed a button and observed a display showing screening ready

Hogan Never.

Elias CJ What does he have to do?

Hogan He has to say – there are two pathways home. He can say I carried out the test in accordance with the Transport Breath Test Notice (No.2) 1989 and that's it, unless challenged. Some Officers in fact in their evidence in chief take the long way home. They simply spell out what they did.

Elias CJ Sorry, so are you saying, I'm just trying to get this absolutely straight, you say as long as he had said I administered the test in the manner prescribed under the Transport Breath Test Notice?

Hogan No.2 1989, that is sufficient unless challenged, and I do not expect there will be any dispute with it. That has been the proposition that has been accepted throughout in this area, but

Blanchard J But a reference to a breath screening test is a reference to a test that's been carried out like that.

Hogan Well that begs the question with respect Sir

Elias CJ Unless you want to challenge it.

Blanchard J Yes.

Hogan Well as to type it doesn't tell us

Blanchard J You can ask about the type. It is a breath screening test using an approved device in accordance with the prescribed procedure. That's the definition, so why can't the Officer take advantage of the definition?

Hogan That is the intended end result.

Blanchard J You want to use the definition against the Officer. I'm turning it around the other way on you and saying the Officer can speak in terms of the statute using the defined terms. You read those in whenever he uses the word breath screening test.

Hogan Well that represents in my respectful submission a benefit that hitherto is not being conferred upon the Officer in thousands of cases to date.

Blanchard J Well it may be that the law will have to change in that respect, but it seems to me common-sense that the Officer uses the term breath screening test, he'd be taking to using it in terms of the definition, and if you want to show that he didn't in fact adhere to the definition, you have to examine on it.

Hogan Well can I take it this point. The Officer in this case as I recall uses the words 'I assembled'. He didn't say 'I carried out'.

Elias CJ Well the witness that you called – I'm just now reading this evidence which perhaps I should have read last night – but the witness you called, Miss Vinac confirms that she saw him fail two breath tests at the roadside.

Hogan Well with respect to her, she wouldn't know unless

Elias CJ Whether it was correctly carried out.

Hogan There were two tests

Elias CJ I'm just responding to your suggestion that he didn't say that he administered the test or whatever.

Hogan There's no issue that something happened on the side of the road

Wilson J Well surely that something was the breath screening test.

Hogan Well if we look at the Officer's evidence as to mere assembly, assembly to my understanding means putting something together.

Wilson J I come back to the point if it wasn't the breath screening test, what was it?

Hogan Well it's still the statute by repeatedly including the definition section and the s.64(2) speak of the necessity for compliance evidence to be led. If the proposition becomes we don't need the mere invocation of the words a roadside test imports everything, then there's no need for a s.64(2).

Tipping J Not in this context.

Hogan I cannot see it in any context

Tipping J Well you might have a proved failure to follow the thing properly or an improved omission

Blanchard J You start asking the questions and it turns out that the device that was used is not one that's had approval, then there would be a question of whether s.64(2) could save the day. I doubt it could, but it would have some work to do.

Hogan Well if I might save the day that an approved device is required, why is it that the burden is not on the prosecution in the first place to satisfy the requirement that an approved device is employed in the first place.

Tipping J I can understand the jurisprudential force of that but from the practical point of view I want to understand whether there's any practical problem for defending these cases that we should bear in mind that might support your argument. So far it's all been jurisprudential.

Hogan Well if, and I found my case essentially on a jurisprudential point Sir.

Elias CJ He's a Police Officer this man.

Hogan He was.

Elias CJ And he'd carried out these sort of tests himself. He said something like that at the beginning didn't he and there was discussion about that?

Tipping J I don't think you're able as far as I can see to point to any pragmatic issue. It's whether we should take a very strict jurisprudential approach to this.

Hogan No, no, I found it on jurisprudential issues Your Honour. I found my argument at the core or fundamental level.

Tipping J Alright that's fine.

Hogan But then I move also, and I illustrate my case by potentially the practical - the breath freshener, the pickled onions, the non-replacement mouthpieces.

Tipping J Well if you'd been eating pickled onions I daresay you'd muster the courage to say so.

Hogan But you will still return a positive result.

Tipping J Indeed.

Hogan And potentially you might say well I'm not having any blood tests or breath tests, I know what I've been consuming tonight.

Elias CJ Well does that mean that it's an element of proof before you can lawfully be required to accompany a Police Officer that you accept that the positive test is because of your consumption of alcohol. I just don't understand why since we're not dealing with the consequence

Hogan That's the jurisprudential issue. I'm happy to address that point on the jurisprudential issue. Your brother Judge posed

Elias CJ Mr Hogan you're not meant to refer to him as my brother Judge.

Hogan I beg your pardon.

Elias CJ No that's alright.

Hogan Can I enquire as to – His Honour Justice Tipping posed the question as to whether there might be any practical

Tipping J What I want to know is the defence practically disadvantaged in putting forward a case that might be meritorious?

Hogan If there is a conclusion that is the equivalent of a non-challenge to manner compliance evidence

Tipping J We're not talking about that here. I think that may come up with the next one, that's why I asked you that question earlier you will remember. We're not putting to you that you can't challenge it, we're putting it to you that there must be some obligation on you to put it in issue.

Hogan Well I'm going back to the prior jurisprudential point that if there is a gap in the evidence on an element then there is no burden on, and I go back to *Woolmington* whatever the setting, there is not a gap on the defence to repair.

Tipping J I understand that but you've effectively answered my question, thank you.

McGrath J Mr Hogan can I just ask you that when we look at s.69(1) and the words "it appears to the Officer that the test indicates that the proportion of alcohol exceed 400 micrograms" which enables the Officer to proceed, would you accept that the Officer is not the slightest bit concerned with what caused that level of apparent on breath to be established, and it's irrelevant as to whether or not it's from alcohol or pickled onions.

Hogan Yes

McGrath J I don't see how you can ever escape the breath testing procedure by proving that some outside cause other than alcohol was responsible.

Hogan I accept Your Honour that it doesn't distinguish, neither testing procedure distinguishes the source of the alcohol, whether it not be methyl-alcohol or ethyl-alcohol or what

McGrath J Procedure's not concerned with it is it?

Hogan No, but I'm not sure Sir that that relieves the Officer from having to still give evidence as to compliance

Blanchard J So are you saying that if the Officer did give evidence as to compliance it wouldn't rule out the pickled onions?

Hogan No, no.

Blanchard J So it's pretty pointless isn't it?

Hogan No, no, I wouldn't rule it out but addressing the practical or pragmatic situations that might arise as opposed to the jurisprudential foundation as to it being an element of the charge

Blanchard J Well I'm not at all persuaded on this so-called jurisprudential argument. I'm more interested in Justice Tipping's enquiry about whether there is any practical disadvantage.

Tipping J To a legitimate or worthy defence if you like. By worthy, I'm not making a moral judgement, I'm just saying a defence that would be a valid defence.

Hogan Well that comes in to play if the matter is squarely before the Court in the form of an element

Tipping J You're back to jurisprudence if we want and I've coined that phrase. What would inhibit the running of a viable defence on the approach that's been put to you? I don't think there is anything otherwise you would have come up with it long ago.

Hogan Well I'm not sure if I grasp the question.

Tipping J What I'm saying Mr Hogan is simply this, let us assume the law were along the lines being put to you. That the Officer doesn't have to mouth anything more than I administered a breath screening test or whatever.

Blanchard J And that's taken to be a test under the Act.

Tipping J And that's taken to be a qualifying and properly conducted test, unless the point is put in issue. Now what practical disadvantage is there for the defence – practical disadvantage?

Hogan On my feet I cannot conceive.

Tipping J No. You're going to have the ammo there or you're not.

Hogan Well it begs the question as to what is sufficient qualifying evidence, and I don't want to

Tipping J I know, well you're

Blanchard J That's back to the same point.

Tipping J Alright

Hogan But saying I administered is not sufficient; saying I assembled doesn't mean

Blanchard J He said a lot more than I assembled in this case.

Hogan Well I'm arguing the issue

Blanchard J As it happened

Hogan In general, but the term employed is carrying out which embraces all the procedures. For the Officer to say I assembled begs the question is what bits did he get together.

Blanchard J He said a lot more than that.

Elias CJ This is so unreal Mr Hogan I have to say, I mean here's the appellant who's a Police Officer who says he's very familiar with the requirements under the Land Transport Act and has processed a number of these things, who acknowledges that he failed the breath test in his evidence. You failed the passive test and then failed the breath screening test, correct.....yes. There isn't any prescribed method of giving evidence. The Judge simply has to be satisfied that even putting your argument at its highest that the procedure was correctly followed.

Surely there's plenty of evidence from which he could have come to that conclusion.

Hogan Well I'm not sure whether we wish to debate that the actual evidence in this case or the general point. I'm happy to look at it at either level but

Elias CJ Well the point of principle surely is was there, and you put it on this basis, was there an evidential foundation from which the Judge could conclude that the Constable was entitled to require the appellant to accompany him.

Hogan Yes.

Elias CJ And one of those bases is that he's failed a screening test or whatever.

Hogan The Officer has failed to give evidence that he carried out that test

Elias CJ But where does it say that he has to give evidence of that? The Judge may have to be satisfied that that happened but I'm pointing to a number of bits of evidence which seemed to me to suggest that he was able to be satisfied.

Hogan Well hitherto and with respect Your Honour's own judgment on the point has said that there has to be evidence of compliance with

Elias CJ Well why is this not evidence of compliance?

Hogan Well it doesn't meet that he carry out the test in accordance with what notice. He assembled it – so what – against what criteria did he assemble it? What did he assemble? What pieces did he bring together? It doesn't tell us at all what pieces he had. It suggests there were more than one.

Elias CJ But you're not saying that he has to say all those things. You're simply saying that he has to incant I administered the test in accordance with the regulations or the rules.

Hogan If that's what he did, yes. If it is merely an incantation that has no reflection on what the Officer actually did then I would challenge him, but if the person does say that and I do not challenge then I'm left high and dry if I am content with that statement, but if the Officer doesn't lay the foundation in the first place then in my submission there is no burden on the defence to illicit the necessary foundation evidence.

Tipping J Just finally for my point of view Mr Hogan, what would be your response if the Officer were to exactly use the words of 69(1)(a) and say the defendant underwent a breath screening test under s.68 and it appeared to me that the test etc.. That wouldn't be enough would it?

Hogan No, by reference to s.68 it imports

Tipping J But all I wanted you to say if that was your position that wouldn't be enough. I understand you correctly.

Hogan Yes.

Tipping J Thank you.

Elias CJ So does that complete the accompanying

Hogan Yes. I pose that the answer to question 1 is yes, and I note that the Crown agrees with me in its submission that it by virtue of para.23 of its submissions in discussion says this proposition clearly has the corollary that the answer to both questions in the leave judgment must be yes.

Tipping J But here we've got to be careful. We've been so far discussing ground 1, that's the failing to accompany ground

Hogan Yes.

Tipping J Are you moving on now to ground No.2 – that's the excess breath alcohol ground?

Hogan Yes I will but before departing from No.1 I'm simply trying to garner the benefit that I have that the Crown agrees with the proposition that the answer to question

McGrath J But if the word 'strict' was inserted before compliance the Crown did not agree.

Hogan Well it goes to an endeavour to shift the goalposts and not for one moment is there any ever requirement to establish strict compliance? Nobody's contending that. The statute only requires reasonable compliance. To put up a higher level requirement and then to shoot it down is an exercise devoid of utility because nobody is suggesting – I'm certainly not contending that there has to be strict compliance – so that the Crown are accepting by their answer that

Elias CJ There are two points aren't there? One is strict compliance, the other is sufficient evidence, and I rather thought that this submission was being directed at the sufficiency of the evidence and that you're saying the Officer has to actually say I complied with the method prescribed in the regulations?

Hogan Yes, I'm saying that there has to be that qualifying evidence to satisfy the element. Now as I read the Crown's submission, they acknowledge it remains an element and the answer to it must be yes

Elias CJ Well you were referring to their paragraph 23, but that's about whether there's sufficient reliable evidence isn't it? Am I looking at the wrong place?

Hogan No

Tipping J Well why don't we wait and see what the Crown says Mr Hogan and then you can respond to it.

Hogan I'm happy to gather any support I can get

Tipping J Well it might be rather fragile support.

Hogan It may prove that Sir but

Elias CJ So that completes your argument on the accompanying conviction?

Hogan Yes.

Elias CJ Alright. So now your second argument.

Hogan I have made the initial point Your Honours that I contend that there should be a consistency of approach between the breath screening test approach and the evidential breath test but again, if one goes back to what are the elements and I have endeavoured to outline them at paragraph 9.1 of my submission that there are five substantive elements and one procedural element that have to be covered.

Tipping J Doesn't subsection 4(a) of section 64 in effect say that if there is a reading it must be taken at face value, whatever happened before?

Hogan With respect, no. That's as to the reliability. That's error in result.

Tipping J Are you saying that Parliament when enacting this meant that you couldn't challenge for internal reliability but could challenge a result appearing on the screen for manner compliance?

Hogan Yes.

Tipping J They made that studied distinction in their minds did they?

Hogan They have retained that, and again I can do no better then refer to the judgment of the Court of Appeal in *Livingston* that the definition section for prescription, section 2 is retained; section 64(2) is retained and if I can go to the point in *Livingston* and the fact, I'm referring to page 265 of *Livingston v Institute of Environmental Science* under tab 26, and the fact that the defence was not excluded –

Tipping J Sorry, which page?

Hogan Page 265, under tab 26. Paragraph 45 of page 265 and the passage

Tipping J But error can come about for two reasons. One, reliability of machine.

Two, reliability of operator. I can't see how Parliament here was trying to distinction between two categories of error and say that one doesn't matter, you've got to go by the result but the other does. That would be a very peculiar approach to the subject.

Hogan It is not contended that the device reads erroneously. But the device may read unfairly.

Tipping J Well if it's not erroneous that's just tough.

Hogan No, no. My point being that it will read accurately for the material introduced into it. If the material, however, is a combination of contamination of earlier blows then it's unfair

Tipping J That's why you've got an absolute right now to a blood test.

Hogan No, but

Blanchard J But surely an error in the result?

Hogan No it's not, with respect, an error in the result. It reads accurately for the material taken into it, into the device.

Blanchard J It's an erroneous test?

Hogan No, with respect Sir, it's not contended that it's erroneous because it reads accurately for the material taken in.

Blanchard J Gee I doubt that that's what Parliament meant.

Tipping J Pretty subtle.

Hogan Well, that's – I return to the observation that the defence was not excluded can thus be taken as Parliamentary recognition

Elias CJ Which paragraph?

Hogan It's paragraph 45.

Elias CJ Thank you.

Tipping J 45 of the second – the one you were referring to before?

Hogan No I believe it's the first one Sir, Livingston – no the second one, *Livingston v The Institute of Environmental Science*, page 265, paragraph 45. "Parliament must have been taken to have been aware

of these cases when it passed the 1998 Act [and I read 2001 Act] and the fact that the defence was not excluded, can thus be taken as Parliamentary recognition of it." So the fact that section

Tipping J But does this passage make the specific distinction that you've just been making that it's not in error because it accurately records what has been put into it?

Hogan No, no. I'm just referring to whether or not a line of defence is now closed off – that's Your Honour's point – that a pre-existing line of defence has now been closed off by an error result

Tipping J I'm just trying to read the words in a sort of normal, natural way and Parliament say you can't challenge the result for error. Now that seems to me to be very unlikely to have meant you can challenge for operator error but you can't challenge for internal reliability.

Hogan Well, I'm not sure with respect that that necessarily follows. That due process still has a part to play in all manner of legal procedures – in a search warrant or a DNA or some other procedure, or the hearsay notice under the Evidence Act, there are procedures for attending to the compliance and they, in my submission it's not a sufficient answer to say we got to the end game, therefore, all of the processes in the first place can be taken to amount to nought, and particularly when the statute, section 2 and section 64(2) remain in place and include the Court having a supervisory role.

Tipping J The only practical problem is this mouthpiece one isn't it?

Hogan No - that's the one that occurs to me Sir

Tipping J Yes.

Hogan That's

Tipping J That's the most likely source of introducing, if you like, false material.

Hogan Indeed – I am happy to debate that possibility I don't depart from a pickled onions or a breath freshener as potentially contaminating but the mouthpiece one is a very real operator

Tipping J Should we not see this as part of a package? Didn't they at the same time, or similar time as this, extend the blood that you get a blood test as of right so to speak?

Hogan I accept that meets the error result side of things. I accept – but it doesn't have – the legislation is perfectly workable. The section 64(a) regime is perfectly workable without having to latch on or now graft on and say that must mean you cannot challenge to manner compliance.

Tipping J Well it's actually, in my view, not grafting on but grafting off?

Hogan Well, it's with respect, I'm not sure why

Tipping J Well just reading the words, I think it's an unlikely proposition that Parliament intended to distinguish between the two types of error.

Hogan Why does section 64(2) remain in place, if section 64(4) was the complete answer?

Tipping J Well it's the complete in this particular field but it's still there to cope with the manifold things that can happen in this field.

Hogan But under a manner compliance inquiry?

Tipping J Anything.

Hogan Well but, section 64(2)?

Tipping J Yeah. The reasonable compliance is capable of dealing with any deficiency in the whole procedures.

Hogan But the foundation for manner compliance has to be that section 2 remains alive, the definition section, proscribing – still has force. The Court of Appeal observed that the judgment did not sit seamlessly with the retention of the definition section under section 2. I am with respect to them saying that, notwithstanding that shyness or that observation that it didn't sit seamlessly, in fact it renders it redundant by now.

Tipping J Well it may do in this context but it doesn't in the accompanying context.

Hogan Well, yes – my urging is that one rule is sufficient and jurisprudentially sound to guide us right through.

Tipping J Is there anything in the Parliamentary materials that might suggest that Parliament had this distinction in mind?

Hogan I did touch upon it in my submission Your Honour if I could take you to the Court of Appeal touched upon by referring in its judgment to what Parliament said, "I am proposing a legislative change that will prohibit the defence from challenging a properly administered breath alcohol user device." So in my submission by the Minister then re-stating that the foundation had to be properly administered, that's paragraph 64 of the Court of Appeal judgment, that in no way a

Tipping J That's not an evidential point really.

Hogan No but I am – if the question be, is there a hint as to what Parliament intended in terms of retaining versus manner compliance defence still to be a live animal or not, in my submission there is an indication and that

Tipping J My question was rather more specific as to whether there was anything to support the dichotomy that your drawing that certain errors wouldn't count and others would? I don't think there is. I've had a look myself.

Hogan No, no and I cast myself at the jurisprudential level and it's the point essentially that Your Honour touched upon in *Meda* that Your Honour said in *Meda* if we can overlook an officer saying these things, well why have a trial at all?

Tipping J Yes, well that was a fairly sort of extravagant observation.

Hogan Well, no with respect Your Honour, it's precisely the point I'm contending for here.

Tipping J Well, I would wish you had more better authority than that which you are claiming.

Blanchard J Even Homer nods.

Hogan Well with respect Your Honour, Your Honour's insight and observations in that

Tipping J Of course this is very acceptable to me Mr Hogan but I think my brothers are probably going to treat it with some degree of scepticism.

Hogan Well, why? With respect, I encourage you to

Tipping J Work on them.

Hogan Well, yes. That – Your Honour's point is as good then in 1992 I think it was, as it is today.

Blanchard J It seems to be *per incurium Falesiva*.

Hogan No I'm happy to bait

Tipping J My brother is being kind. No, Mr Hogan, I have to say although it's got a nice little attractive ring to it we've moved on a long way since 1991.

Hogan Well, I'm not sure with respect Sir we have in terms of

Tipping J We're going back.

Hogan In terms if the point be that we can now rely upon all these devices and all these officers and the road toll now justifies us short-cutting what are hitherto been methods of proof in a criminal case well so be it, but I am

Tipping J What I said there was you've got to put it in issue and that's exactly as it appears subject to the Crown's arguments about accompanying. This ones been closed off by section 64(4) and that I'm afraid is a problem you face.

Hogan Well I hear what Your Honour says and I say with respect that it's not comparing apples with apples. It's apples and oranges. The error result is a substantive issue. Due process remains a separate element and to confuse or to say that – if they have as it were a hierarchy of elements and to say if we get home on the substantive issues we can safely conclude that all the lesser elements have been met, then in my submission that is a departure and an unnecessary watering down as to how elements in a criminal case are to be proven. Particularly in this modern day. In terms of not just excess alcohol cases but there are plainly procedural issues alive in respect of fisheries prosecutions, DNA, search warrants, all of those issues. If we simply say well let's examine the end point and if we are satisfied that the end point is made out then all of the steps along the way must have been proven or – then in my submission that's a day we should not

Blanchard J Well, that's very scary stuff Mr Hogan but we are dealing with a statute which has got provisions in it of the nature that we have been discussing and they don't appear in that other legislation.

Hogan I am happy to rest my argument on statutory, on the traditional statutory interpretation grounds, section 2 and section 64(2), that they compliment each other and they permit and call for the Court to have a supervisory role. But to say it's no longer necessary for the officer in the first place to give evidence, or he can produce a certificate or he can simply say that he had a roadside test, that a roadside test was carried out – in my submission that is a day

Blanchard J Well if he just said that a roadside test was carried out that mightn't be sufficient?

Hogan Well, roadside breath test; or a roadside breath screening – we get into, with respect, where does the burden shift to the defence to elicit from the prosecution satisfactory evidence as to proof? Now if the proposition becomes, well you've got to do it, well with respect that's a day that this Court should not usher in.

Elias CJ That concludes your argument?

Hogan I believe it does.

Elias CJ Yes it's a good point, a rousing note to end on Mr Hogan. We'll take the morning adjournment. Thank you.

11:27am Court adjourns
11:45am Court resumes

Elias CJ Thank you. Yes Mr Pike. Mr Pike I don't think it will be necessary for you to develop your written argument further. I'm talking about the historical review but you might concentrate

Pike The front part

Elias CJ You might concentrate really on some of the issues we were discussing this morning perhaps.

Pike Yes well I hope those were covered in the fore-part of the case. There are essentially two parts of the case and I please the Court, and I take the Court's message as to the second essentially. The first is more or less the question of proof in our case with respect is I would submit as a starting point that the Police would not wish it to be thought that these were mere, that the section 2 in the compliance provisions were simply merely to be taken or not taken on a whim. They are absolutely to be taken as what must be done. There are two very different questions and I think my friend was really suggesting to the Court that there was some element of the whimsy coming into this

Elias CJ You mean following the procedure is given but proof of whether it has been followed is different?

Pike It is different but again the Police would wish to have their prosecutors and their enforcement officers to get it right. There is not a question here of seeking a yardstick which is

Elias CJ What's right?

Pike Get the evidence right to say what they did do, if they did in fact do it then it is expected of them that they will say that, give the evidence that they did assemble the device in accordance with the Breath Test Notice and that they administered the test in the steps that it proscribed, their instructions, at least that much. It is unfortunate that in cases it goes wrong. We say that our case is that these compliance provisions are really designed for those cases where either the enforcement officer does make a mistake but it doesn't affect the reliability of the result in any way or the enforcement officers fail properly as in this case, they failed properly to get out in testimony what they had done. That's my friend's complaint. But what we say, where our major point of departure comes in, where we with respect uphold the Court of Appeal's reasoning which slightly shifts it away from the High Court, shifts it further on in the development of the law, we agree that it is not in a matter of statutory interpretation the proof of compliance with the

Notice is not part of the actus reus of the offence. It is not like a drugs charge, its not like DNA, its not like any other ordinary criminal offence. There is a statutory regime and it is a balanced regime we submit that divides up the community expectations as to how drunk drivers will be dealt with and procedural fairness and balances them in a subtle but effective manner.

Elias CJ What then do you say is the actus reus of the offence?

Pike Essentially the elements of the actus reus will be driving. Obviously the core, the key actus – parts of the offence – we say are driving a motor vehicle on a road while the proportion of breath alcohol exceeds 400 micrograms per litre of breath. The requirement or the requirement that having undergone, there is certainly a requirement having undergone an evidential breath test and the evidential breath test as Mr Hogan rightly says, takes you back to a section 2 definition which takes you back to the 1989 No. 2 Notice and it has a good number of commandments, all of which it may be parathentically noted are no more or less than the manufacturer's specifications for the proper use of their particular devices. But we say that, with the Court of Appeal with respect, that what the statute has done is taken out in the sense of any argument that it is a *sine qua none* known of the proof of the charge that there be evidence of compliance with all of the steps. We know that and Mr Hogan now agrees with that. He says it is proof of sufficient compliance with all of the steps. Also many of them are as necessary to get a reliable result

Tipping J How much do you say it is necessary strictly, never mind what may be best practice to get to the point where some sort of evidential onus comes on the accused?

Pike Well the starting point for that answer with respect Sir is the accused has to, well the defendant in a blood alcohol case, has to get the result card out and I think that's been overlooked in this case. The result card is conclusive proof that the person in the Court

Tipping J I'm talking about the accompany.

Pike Sorry in the accompany side of it.

Tipping J I'm talking about the accompany first, because I think the position is, if my present thinking is different with the excess breath.

Pike Yes, there is a logical attraction to that. It's slightly tempered by the, I think, the observation that there's very few accompanying charges alone where there is not also an evidential one

Tipping J Well, never mind that. What you have to say as an enforcement officer in evidence in order to get home is a minimum in your submission?

Pike There has to be, well, we come at it from a slightly different – so I'm not answering your question directly and I hope the reason for that becomes clear. What our case is in a nutshell is that there must be sufficient evidence on the record, not necessarily from the officer involved, sufficient evidence on the record to satisfy the Court beyond reasonable doubt that there was reasonable compliance with the provisions of the Notice in relation to the breath screening device. There must be a reference

Elias CJ Is sufficient compliance different from compliance?

Pike Sorry reasonable compliance.

Elias CJ Yeah reasonable compliance.

Pike I will stick to that. Reasonable compliance so that the Court can be satisfied, and it has to be beyond reasonable doubt there must be sufficient evidence on the record so the Court can be satisfied that a person, a Police Officer, administered an evidential breath test – sorry a roadside screening test and that administration was sufficiently in accordance for law for the result to be admissible.

Blanchard J Is it enough to say "I carried out a breath screening test"?

Pike If that is the only evidence in the case one would have to say it is open to the Judge and that can't be bettered, it is open to the Judge to say that is not reasonable compliance because at the minimum and we agree with the observation made by the Court there is a division between an approved device, and I think Mr Hogan makes the same point, whether there was an approved device is more important in a sense as to whether there was an approved manner. And so I think it was Justice Blanchard who mentioned that. If you couldn't satisfy the Court there is nothing to show an approved device had been used and the charge was solely on failing to accompany then a Court would most likely be entitled to find it not proved. Because there is nothing

Blanchard J Where did I say that?

Pike There is nothing on the record.

Blanchard J Is that what I said?

Pike There was a distinction Sir. I understood you

Blanchard J I thought I was suggesting in argument that if the officer uses the statutory terminology by referring to a breath screening test then it is to be taken that that is a test in accordance with the statute and the orders under it, unless the defence chooses to raise some matter.

Pike Yes indeed Sir I take the point of what you are saying.

Blanchard J But you don't want us to say that that is the position?

Pike It's open. The answer to the question Sir is that it would be open to a Court to go either way on that. That's the difficulty

Tipping J Well, that's extraordinarily helpful. I mean really Mr Pike open to go either way, I mean if that's the only evidence either it's sufficient proof or it isn't.

Pike If there is no doubt in the matter I would agree that it is sufficient proof.

Blanchard J Well if the officer simply says that as a tender of proof of that part of the case and it isn't challenged

Pike If it isn't challenged yes. It's implicit that the test carried out then, inference can be drawn that the test carried out was the only test that the Police know, that is the Breath Test Notice was complied with, with a proscribed breath testing device.

Blanchard J Thank you.

Elias CJ But I thought you said it would be open

Pike I'm sorry I'm quite at cross-purposes with an unchallenged

Tipping J But we're only talking about before you get to the defence case?

Pike Yes.

Tipping J That's what we're talking about. If it's enough, if you like, to satisfy before you get to any challenge. That's the context.

Pike Yes and if it goes on, one wouldn't accept a no case submission at the end of that, that is the point. Yes I would accept that because it is clear that an inference can safely be drawn that the officer is referring to the only devices that are available and the only process that is known to law and has not got some device of his own which he thinks is better.

Elias CJ I understood you earlier to be saying that there was some threshold that had to be followed and that there would have to be identification of the device used, but

Pike No with respect Your Honour,

Elias CJ Your not?

Pike Again I was confusing the Court and I just want to take two steps back and breathe deeply, the – we had suggested that in terms of challenged

evidence, or in terms of reliability, that it was important that the Court could at least be satisfied that an authorised proscribed instrument could be used, or had been used. In the circumstance I agree with Justice Blanchard now, we've levelled on that issue, that that could be inferred that no other sort of device other than a proscribed device was in fact used because one would have to get into speculation that something that was ordinarily unavailable and not authorised was in an officer's possession and that would be plainly a silly presumption to make.

Tipping J Well it would be deceptive really to come along and give that evidence if you hadn't followed the statutory processes.

Pike Yes indeed, so we agree on that point. I'm sorry for taking a rather long trail to get it restored.

Elias CJ So in terms of, because you started off by talking about the actus reus.

Pike Yes.

Elias CJ In terms of the actus reus of the offence of refusing to accompany, you are disavowing reliance on any argument that following proper procedures is not a necessary preliminary. Your simply saying that as a matter of evidence if an officer says I administered a breath test that's sufficient evidence from which the Judge can conclude that proper procedures were followed?

Pike Yes it is. Because as night follows day the defence will cross-examine if there is something to be cross-examined on. If they do not cross-examine and put in issue that something had gone wrong the evidence then stands as sufficient which is exactly I think what happened in this case. There was no cross-examination on it and the fact of course the District Court Judge had thought there was no dispute at all.

Elias CJ Sorry, I just want to be sure that I'm understanding this. So, you are really putting everything on the evidential foundation meeting Mr Hogan's argument. You are not running the argument that wherever it is in the section, the accompanying section 69, your not relying on the appearing to the officer?

Pike Well that would be implicit with respect.

Tipping J Well you would have to say that.

Pike Yes.

Tipping J You couldn't let that be implied?

Pike No.

Blanchard J The officer would have to say that the test had appeared to have failed?

Pike Yes that he failed the test. Indeed. So we do, we agree that we must go on and say it was a failed general in the case of an adult driver.

Blanchard J Which is what he did say here actually.

Pike Yes. That he applied a test and the result was fail general all of which is a reference back to the fact that that is how the test operates and gives the words failed general on the screen and so that it's reasonable for a Court to draw an inference that's what he had, even if it wasn't said he didn't specify, as he did here what the breath screening device was. It still would be open and a Judge ought to draw the inference if unchallenged that he used a device that did exactly that and the fail general was enough to authorise the officer to require that person to accompany and for the motorist to be under an obligation to accompany. So we do pitch our case at that most fundamental level as a matter of proof and ultimately there is no challenge

Tipping J You can get out of it if your the defendant but you've got to make the running in other words and there may be a distinction here between this one and when we turn over to the other one where it appears that you can't challenge the test for error?

Pike Yes the difficulty with the may be able to get out of it one is the very point Your Honour had made earlier with "if it appears to the officer", those words have been retained for a good long time. They may go back to the time when it literally had to appear because the officer had to look at crystals under very

Tipping J It may be more in theory than in reality but it's not an – there's nothing absolute about this. There's enough to pass the no case and then it all depends on what the defendant says and the defendant may not have much to go on.

Pike There will be very little to go on because if the Police Officer said it appeared to me that it was a failed – that he had failed, and that I required him to accompany – there's very little to say how you could challenge. Whether it was pickled onions, or ingestion of large amounts of rice as we had in one case

Tipping J Well we wouldn't want to close that off as a matter of law would we?

Pike Well the difficulty is

Tipping J You can't.

Pike The difficulty is that it appeared, if the device registered a failed general it would appear to the officer that there was over 400, that

might be wrong, that's the difficulty. So you make the request to accompany on that basis.

Tipping J So you are effectively inviting us to say there's no escape once it appears to the officer bona fide this is what the device was saying, that's it?

Pike The purpose of it is, if we come back with respect, the purpose yes there is an argument for that. Come back

Tipping J Well are you arguing for that?

Pike Yes. Coming back to the – unless I'm just told to stop. On the Breath Test Notice if, this is under 6Biii, "if the display panel shows fail general the result shall be taken to indicate that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath". But the purpose of the offence is to prevent the need to move to arrest and to prevent simply roadside altercation. So there ought to be, one wouldn't want to have a situation where it was highly or even moderately contestable that where you have got the base elements right, the device had been produced, the screen had screened up fail general and the Breath Test Notice indicates that that shows, or it shall be taken to indicate that the proportion of alcohol – that is alcohol and the proportion exceeds 400 micrograms, that we want to have a roadside argument about the fact that it's an arbitrary detention, I want legal advice; I've had pickled onions; I've had rice; I've had a mouthwash.

Tipping J What was that reference in the Notice? The paragraph in the Notice that you referred to?

Pike It's under clause 6A, it's the Alcotest, the clause referring to the Alcotest AR1005, step 3 results of test. You will see under (C)iii if the display shows failed general the instruction is that that is taken to indicate that proportion of breath as I read out. So the essential difficulty with providing a range to make this contestable in that sense is that it will lead to two situations. Contest at the roadside which is an undesirable element to introduce into it. Secondly, the possibilities that there will be a greater use which again is undesirable of arrest in those circumstances. So what we say is that the law is clearly enough for accompanying that a motorist has an obligation to accompany a Police Officer where that person has a breath screening test administered and that in respect of the Alcotest and there are slight differences for others, failed general appears on the screen. The motorist is then obliged as a matter of law to accompany for a specific purpose, a breath or a blood test. So that's the point of the whole thing and taking failure to accompany in isolation was the point I had made earlier with respect that it is a little difficulty in trying to put it into its own compartment because it is not a stand alone offence. It's not just one part of the Act dealing with accompanying and screening tests, it's

a continuum. The continuum is passive breath tests normally these days. Step 2 is of course if you fail the passive go to screening. If you fail screening, you fail general, you are obliged to then make yourself available to accompany an officer for the next phase. The next phase of course is the evidential breath test, breath or blood. So there is a difficulty with respect of building in the idea that it is quite unique and discreet and looking at it in that way and that was the point I made earlier on and seemingly not directly answering Your Honour's question. I regret. Because it seemed evasive. But the point is, that that was the point I was trying to make. It's rare for it to occur in an isolated step.

Tipping J So de facto once you have got to the point of a breath screening test returning failed general

Pike Yes.

Tipping J And it appears to the officer

Pike Yes.

Tipping J And that's the end of it? You must accompany?

Pike Yes. You must accompany.

Tipping J Right, thank you. That's what I wanted to clarify in my mind.

Pike Yes that's the case.

McGrath J Mr Pike if we follow the course that you are now proposing, I take it that the general practice in prosecutions would simply to be for the evidence to be given in what I might call the short form, that simply reflects the elements of section 69(1)(a) but the officer would always have to be totally familiar in his or her mind with what had been done and to be ready for cross-examination from whatever direction it came on the day. Is that right?

Pike Again it's a guarded yes to that because the way the Court of Appeal's approached it is to really say something that's quite radical but I submit right and that is once the person is facing – now we're moving on, I'm away from the accompany to the breath test result itself – that there is no defence whatever to what happened beforehand including in the evidential breath test itself, unless if you are declined blood you are finished in a nutshell. There is no arguable basis for popping away at the Police Officer on whether he or she took a particular step with any of the devices used. So what the legislation has done in 2001 has said there is no defence to the central piece of evidence, and it always comes back to this, the central piece of evidence in the Courtroom is the result card which says identifies you as x, y, z, apprehended with

600 millilitres of breath alcohol, that is conclusive proof of the guilty of the charge.

Elias CJ That might be right but from your argument you do accept it seems to me that both the questions which were approved in the grounds of appeal should be answered yes, but you say that there was evidence that that's the answer is it?

Pike Yes there was evidence but also it's a highly qualified yes with respect. Of course overall the elements of the charge have to be proved.

Elias CJ But you accept, as I understand it, that the elements of the charge include that you've validly and the correct manner administered an approved test?

Pike No with respect I'm sorry if I didn't make that clear. I understand the Court of Appeal's decision to have said that, that is not a part of what we would call an actus reus of something that has to be proved.

Elias CJ I'm sorry, look – just stop the torrent of words for a moment. I think it might be that perhaps you know so much more about it than I do, but I'm just trying to understand – I had thought that your submission was that the accompanying charge was part of a continuum of charges and therefore that you accepted that it was necessary for the Police to prove that a test had been administered in the proper manner before the result would justify the request to accompany is that not right?

Pike There must be sufficient evidence. The difficulty is we are getting – it's like there are terminology issues between I think Mr Hogan and me – Mr Hogan of course talks about what the prosecution must prove and I was putting it more in general terms as to there must be on the record sufficient evidence to satisfy the Judge. It may come from the defence who unwisely says something.

Elias CJ Yes.

Pike To satisfy the Judge that there was a proper test carried out, a test carried out in accordance with law. The most minimal level is Justice Blanchard's point which we have now stabilised on I trust. The most minimal point is unchallenged the officer saying that he carried out a roadside breath screening test would be enough if it was not challenged.

Elias CJ That's directed at the evidence and what's sufficient.

Pike Yes.

Elias CJ But in terms of the element of the offence your accepting that it's necessary for there to be proof that a test was validly administered in accordance with the regulations?

Pike Was carried out in reasonable compliance with the regulations with respect. That's the difficulty. The Court of Appeal came to that point with Mr Hogan's argument that on the what's called the jurisprudential level of the actus reus, each element must be proved. It all works. That's fine. But then the Court says we have to stop here because where does Section 64, 2 and 4 for that matter, fit in?

Blanchard J But you don't get to that if the officer has said that he administered the breath screening test and it appeared to him that the test indicated that so on in accordance with Section 69(1)(a) unchallenged

Pike No unchallenged you don't get to it.

Blanchard J You don't get to reasonable compliance, that is taken to be complete compliance.

Pike Yes it is. Evidence of complete compliance.

Blanchard J Yes.

Pike If challenged, and we come to the challenge point where it gets more complex

Blanchard J Well, that's different.

Pike Then the 64, then they will have to come in and we get the Court of Appeal analysis that at the end of the challenge the Judge may still be left with a view that there has despite some errors or failures been sufficient compliance

Elias CJ Reasonable

Pike Reasonable compliance whether it is such that the result is valid or the test is valid so it becomes a defence. What has happened is that what has been seen as, you could say as on a systematic rather basic analysis of the criminal law, element by element by element, Mr Hogan's challenged. The Court of Appeal says not this one. When it's challenged or if it's not, the fact of the matter is that the compliance with the Notice is a matter of defence. It comes in as a defence. Of course the initial charge won't even arise at all if it is not challenged because we've already established that a reference to a roadside breath screening test is sufficient proof in and of itself.

Blanchard J Can I just ask about the linkage between the two offences. Assume that we accepted Mr Hogan's argument on failing to accompany and we found that wasn't proved, does that get Mr Hogan home in relation to the second offence? In other words

Pike I know the point Sir.

Blanchard J The man should not have been taken

Pike That's right.

Blanchard J Taken to the place where the evidential breath test was administered. Assume Mr Hogan were in isolation not to get home on that second defence, does the lack of the necessary preliminary, does the fact that he shouldn't have been taken to the Police Station, if it was a Police Station, where the evidential breath test was administered, render the evidential breath test invalid?

Pike We would say no it doesn't Sir and the reasoning for that would have to come back to what is the purpose of the nature of the actual steps in themselves which are to ensure accuracy and reliability. They are not a sort of tabulated list of legal empowering requirements.

Tipping J Would you find that Section 64(4)(b) was of some relevance to this issue Mr Pike?

Pike Yes it is indeed, it's very relevant to the issue. That the idea is that the statute has tried to make it clear throughout that it's purpose, the purpose of the Breath Test Notice, the rather elaborate set of instructions, is for one reason and one reason alone is to ensure that motorists are faced with accompany orders and prosecutions only if it is highly likely, if not certain, that they have committed an offence. So that it is reliability that is the key.

Elias CJ Well then does that mean that the answer to the second question which was posed in the grounds is no because that suggests that both the breath screening test and the evidential breath test have to be carried out whereas are you arguing that it's only the evidential breath test and that is in any event to be read subject to 64(4) and reasonable compliance?

Tipping J You can't go behind the result card it seems to me on any premise based on the failure or inaccuracy of the earlier procedures.

Pike Yes.

Blanchard J Even if the evidential breath test should never have taken place? It seems to me it's a Bill of Rights issue.

Pike Well,

Elias CJ Balance will take care of it.

Tipping J That's why we're exploring it I suspect, that that could be said to be a pretty draconian reading and consequence. But it seems, at least at first blush, to be what they are saying in 4(b).

Pike Yes.

Tipping J You can attack it on any pre-condition that's necessary except occurrence or likely occurrence of relevant error.

Pike Yes indeed there's all the – there are still collateral attacks left.

Blanchard J I would have thought you could read that down or should read that down.

Elias CJ I would have thought you had to read it down really.

Blanchard J So that it refers only to errors in the process, not an error about whether you are entitled to administer it in the first place.

Tipping J It wouldn't cope with an error for example in what's that – is it 68 – it wouldn't cope with the absence of a qualification under 68(1).

Pike It wouldn't cope with a motorist who wasn't actually on a road.

Tipping J Exactly.

Pike Or wasn't driving.

Tipping J Exactly.

Blanchard J Okay, I think we've probably got that clear.

Tipping J I think we are ad idem on that.

Blanchard J I mean I'm not sure if it's going to arise in this case.

Tipping J No.

Blanchard J But I just wanted to be clear about that.

Pike No, no. It isn't

Tipping J Oh you don't assume everything. It's only certain things that can't be challenged. You can challenge whether you were driving?

Pike Yes of course. The collateral attacks you could challenge whether there was an arbitrary detention because it's still open.

Tipping J Or whether you were on a road

Pike The Police Officer said look stay in the back of the car I'm going home for my dinner and I'll carry on when I finish dessert. In the

circumstance we could probably get to arbitrary detention so it's entirely collateral attacks. They are still available

Tipping J It's unrelated to the reliability of the testing procedures then you can challenge it?

Pike Yes and it is

Tipping J But if it is related to that it seems to me you can't challenge it?

Pike No you can't.

Tipping J You just look at the result at the end.

Pike Yes there is no reliability challenge left in any process

Tipping J Whether that reliability turns on operator error or machine error

Pike Yes.

Tipping J Do you support that view?

Pike Oh yes.

Wilson J Just following on from that Mr Pike, how do you reconcile subsections 4 and 5 of Section 64 with subsection 2 of the same section? Reasonable compliance.

Pike Yes.

Blanchard J Well it wouldn't have been reasonable compliance if he shouldn't have done the test?

Wilson J Quite, but as a matter of law – more generally?

Pike Well, I don't make any – there's no proposition from counsel as to the effect that any of the provisions of the Act that relate to defences or the lack of them, exclude areas where it is plain that the test ought never have to have been administered. What we come

Wilson J I accept that. But I'm moving on to a situation where there was a justification for the test but only reasonable compliance and the way it was carried out, I'm still unclear as to how that's reconcilable with subsections 4 and 5?

Pike I know we have to get to *Falesiva* but I haven't got it in front of me, that's the difficulty.

Elias CJ It is a bit extreme though. If you have a test that is wholly defective are you making that submission that if the screening device is

demonstrated to have been erroneous to have led to an erroneous result, that subsection 4 means too bad, you are properly convicted?

Pike Not failing to accompany.

Blanchard J No.

Elias CJ No.

Pike Or of the breaths, of the evidential -. Because it wouldn't matter how defective it was, you have to get the evidential breath test to give a positive result and it is no defence of course and never has been for any defect or fault in the breath screening test process in relation to the result that it comes from the evidential

Elias CJ No I understand that, but this applies to the evidential breath test which is little surprising.

Pike Sorry the?

Elias CJ Well the evidence of the actus reus.

Pike Yes.

Elias CJ The fact that you were driving with more than 400 whatever

Pike Yes.

Elias CJ Can't be challenged on this reading of subsection (4)?

Pike No it can't be challenged. No not at all. That was the whole basis of the 2001 Amendment that we had if I can recapitulate. I'm sorry there's so many tangles.

Elias CJ No, no. You don't need to recapitulate it's fine, carry on.

Blanchard J What if it produced a result that was so high that it was impossible?

Pike Well with cases like that I imagine

Blanchard J You might get advice to take a blood test.

Pike It would be – we would have to leave that to the sense hopefully of operators of these devices but you can certainly get ones up over 1000 and somewhere, most of us would be dead but

Blanchard J I was thinking of one which you'd be dead several times over.

Pike I'm not sure. I can't answer the question. I don't have the machine blanks out. But itself, it will probably kill the machine.

Elias CJ So that the whole answer to that is you have the option of getting the blood test?

Blanchard J You have an absolute right to it.

Pike There's an absolute right to a blood test. The confusion that's bedevilled this area of the law for a very long time is now hopefully behind us and I won't spend any time on it at all. It's essentially there was always thought to be a so-called defence to the accuracy of an over 600 test – 400-600 before 2001 you had an option to take a blood test. There was always that option. So that is how it was. Over 600 there was never a blood test option. It was conclusive evidence but what happened was because of words attributed to me in *McKay* it was, well I did say them but

Blanchard J I knew we'd get on to that.

Pike It was thought there was a defence to the accuracy of any evidential machine, breath testing device. Essentially the Court of Appeal in *Livingston v ESR* accepted there probably wasn't ever but it had been recognised by Parliament, that's the point my friend makes and he's got it out of context, what was recognised in *Livingston* is that Parliament had specifically said there is no defence now to reliable, to these results which the Court took to be an acknowledgement that there had been one before. That's all that provision is about. But now we've got the position that there is no defence whatever to the accuracy of a breath test result card based on reliability, well on any point. You have one option. You take a blood test at the time the result card is printed out. If you do not take the blood test and you'll notice in Section 77(3) I think it is, that's where Parliament has been very clear here, the breath test – if anything goes wrong with the 10 minutes – and that's where the Courts have been pretty firm, and we accept all that. Right to counsel the 10 minutes must be strictly observed. If there's any problems with that, the breath test result is inadmissible and that comes back to the proposition that these cases are proved by the breath test result. There's no need to prove anything else. The question of compliance goes to whether that should be admitted or not, the reasonable compliance. So our case with respect is one where it is starkly opposed. We do say that there's a minimal level of evidence that need be given informally, simply to point to the fact that there has been a test in accordance with law that will be satisfied if unchallenged on a rather minimalist basis. That if it is challenged, it's for the defence. The defence has an onus and if met by reasonable compliance they have to overcome that but their argument is that the Breath Test Notice can no longer be evidence in the case. Sorry the breath test result card can no longer be evidence in the case. It must be excluded. If they win on that, of course, there's no prosecution. It's clear in New Zealand and elsewhere there must be a challenge from the defence to the compliance process and that is a defence. It is not a part

of the actus reus and that what has happened is that there has been a scythe taken to the blood alcohol law since 2001 to say that essentially there is no room for error related defence whatsoever, compliance or otherwise once you have gone past the point of having your blood sample option properly put, properly administered, you've had your right to counsel, you've had everything else done right, then there is no further basis for a hearing. There is nothing to try. It comes back to a point where Mr Hogan says there's no point in having a trial. Some of these cases if there isn't a collateral issue that's right. There is nothing to be gained. That's the summary of the overview of what we are saying.

Elias CJ Yes, thank you. Is there anything more you want to add?

Pike No.

Elias CJ No. Thank you Mr Pike. Yes Mr Hogan.

Hogan Well I come back to the question that posed of my friend by Your Honours is how much is sufficient? And can I, in terms of what is required of the prosecution evidence and I'm not sure with respect that we are any clearer as to what the Crown are contending now as to the sufficiency of evidence required at that first level – the roadside level, or at the tail end of the procedure and I refer specifically to the question posed by Your Honour Justice Wilson as to what is the utility of Section 64(2) if 64(4) and (5) is the complete answer and that trumps every other consideration. Now, all I'm contending for is that the Court does not need, as it were, to buy into solving all of those issues. The utility of the reform of the 2001 Amendment remains without any need to interfere with the hitherto procedure of compliance evidence that's been called. They are separate strands of jurisprudence. Essentially, and Your Honours posed the question in terms of what was the sufficiency of evidence as to well, do we need to hear of an approved device being employed; or is it merely sufficient for the officer to say that roadside breath test was carried out. Does that invoke and embrace all the statutory notices and all of the prescriptions? Unless, but my friend – and the question remains, and my friend commenced in argument by saying well in light of the Court of Appeal judgment there is no defence challenge possible. But I understood his fall-back position then became that it could become a defence area if – it could become and issue for consideration if the defence challenged. Well with respect that again becomes a novel proposition that it only becomes in issue, the fact only has to be proven if the defence as it were makes the running. Now that with respect is a novel proposition in a criminal case. I accept entirely that if matters are left unchallenged if there is a sufficiency of evidence in the first place and left unchallenged by the defence that is a complete answer to the point. But I, at the risk of hopefully the elegance and simplicity of my argument is that in the first place if the base is not covered by a sufficiency of evidence then there is no burden on the defence to open

the topic up. That, I grasp the point and convey it as simply as that. Now all else follows. If that sufficiency is established it does permit Section 64, the reasonable compliance, Section 64(2) to kick in. It's no longer redundant – that's Your Honours' point that it still has force and effect and it still allows the Section 64 no error result challenge, that provision remains intact. If this Court embarks upon as it were a task of cementing over or trying to say well, it becomes unending the possibilities that have to be covered off. That was, as I grasped some of the challenges being put to my friend is that it goes on, it becomes a task that becomes unending as to cover off all the statutory and Bill of Rights issues

Tipping J Mr Hogan, if it's no defence, if error in the statutory sense is no defence, why does the prosecution have to cover it off in advance?

Hogan Well no, it's still – they still have to establish, the statute says there is no capability of challenge as to error result. It touches upon partly what His Honour Justice Blanchard raised as the impossible result. His Honour Justice Hillyer in *Falesiva*, the *Costello* case spoke of the impossible result being accounted and that's one of the examples, that in reality you can get aberrant results. Or you could get results that where the contamination issue and the manner compliance, I bring along – I know my procedures inside out, and I can see that the mouthpiece is being employed time and time again, it's a cold night, condensation occurs, I call the scientist to come along and my reading is 440

Tipping J That's a fairly lengthy answer to a quite simple question.

Hogan I'm sorry Sir. Well I'm saying that you can – to preclude it

Tipping J Why do you have to cover matters that are no defence if you are a prosecutor?

Hogan Well it could be if I established that the manner of collecting the evidence that produces the end result is unfair, this Court should be slow to preclude an unfairness being aired. It's not an argument as to accuracy because I accept that it's still reliable as to the material coming in but it may not be fair in the first place and that's a manner compliance issue and the Court should, the defence should still be allowed to bring on a suitable basis a manner compliance evidence. I hope I have answered your question that that's the distinction. That highlights the distinction. It's not challenging the error but it's challenging the result.

Tipping J The machine must be deemed infallible but not the operator?

Hogan Indeed. That is the nature of human affairs that the machine, its a fiction that it's infallible, but it's deemed be that as it may but the human content, the human participation must be capable of scrutiny.

So long as it has an evidential foundation and hopefully I have demonstrated how that could arise in practice, condensation, the need for – the rationale for fresh mouthpieces must be underpinned by that rationale

Tipping J So your answer to my question depends on the distinction you draw in relation to error and you accept that the prosecutor doesn't have to validate the machine but you say the prosecutor does have to validate the operator?

Hogan Correct.

Tipping J Speaking colloquially?

Hogan Correct.

Tipping J I understand yes. Thank you.

Hogan Yes. It boils down to that simple notion. That that's logically tight and consistent. That human endeavour has to be capable of scrutiny.

Tipping J How could you ever challenge the breath screening test?

Hogan On the same basis Sir. That's a fair question and I'll take you to the distinctions in the carrying out of the breath screening test because its the same mouthpiece

Tipping J It's the same answer is it? It's the same dichotomy?

Hogan It's the same dichotomy.

Tipping J That's all right, unless you feel it essential you needn't elaborate.

Hogan I'd like to take you. Could I take Your Honour because it does illustrate the variations between the devices that Your Honours, that one size does not fit all. Could I take Your Honours under tab 4 to the two sorts of devices under discussion, 6(a) is Alcotest AR1005 and 6(b) is the Drager 6510 and they are both devices employed. If I could take you to 6(b), step II, the enforcement officer must before or after the step II attach a mouthpiece. So he is – it's left as loose as leaving it to the officer as to whether or not he does it before or afterwards, and now if I can take you to III, the situation of where there is an insufficient volume result. The officer is called upon to repeat step II. Does that mean that he puts a new mouthpiece on a second time if he repeats it? And does he have to do it before or after? Now, my point being that so long as you use the same mouthpiece repeatedly then the possibility of contamination cannot be eliminated.

Tipping J You are looking at 6(b)?

Hogan And then 6(b)II which speaks of before or after step II attach a mouthpiece. And then if I can take Your Honour to III

Tipping J So it's 6(b)AII?

Hogan Yes.

Tipping J Yes.

Hogan And then take you to 6(b)III.

Tipping J Yes.

Hogan Where he speaks of the officer may depress the okay button on the device and repeat step I(i). Now that of itself, does that direct the officer to employ a fresh mouthpiece to apply it before or after the testing process. That's to be contrasted with 6(a) at

Tipping J Well it says repeat step I(i) not repeat step I(ii)?

Hogan Yes.

Tipping J That seems to suggest you don't have to put on another mouthpiece?

Hogan Indeed.

Elias CJ Why are we

Tipping J I don't quite understand where this is all going to anyway

Elias CJ I'm totally lost.

Hogan The point I'm endeavouring to illustrate is that there are variable requirements for each animal, each breath screening test.

Elias CJ Yes.

Hogan So Your Honours are being invited to make a general one size fits all pronouncement.

Tipping J But the legislation does that?

Hogan Well no, it says for each device there are particular rules.

Tipping J Yes, but it also says in the head legislation no error etc. It doesn't make distinctions between different types of devices and different steps and so on?

Hogan No, this is the reasonable compliance because no error doesn't apply on a refusing to accompany charge.

Tipping J I'm sorry I didn't know you were into reasonable compliance. I'm sorry I'm just not following it.

Blanchard J Aren't we repeating arguments that we've been over before? This is only reply.

Hogan I'm simply endeavouring to illustrate the point that His Honour – the question posed of me as to how in a breath screening test situation there could be situations where the officer has demonstrated to have gone astray in the manner

Tipping J Well there might be but Parliament has clearly indicated that that's tough. Your ultimate fail safe is the blood.

Elias CJ Not if the distinction that Mr Hogan is putting to us.

Tipping J Not if that distinction

Elias CJ Applies.

Tipping J But if it all comes back to that distinction different type of error then I've got that fully on board. All you needed to say was that that distinction applies both to the screening test and the evidential test.

Hogan Indeed Sir.

Tipping J And I have that fully on board too.

Hogan As I apprehend to address one of the points arising out of the Court of Appeal decision is a differentiation between preserving approval of device as an element necessary of proof. That's one limb of the Section 2 definition but not the manner compliance. Now I'm submitting that there is in logic and there should be no need for a differentiation as it were attributing a status of you having to cover device approval evidence but not manner compliance. It should be one or the other and in my submission it should be both.

Tipping J Of course it could be neither?

Hogan It could be neither but that's going further. If this Court concluded it's neither that's going beyond any situation which has been contemplated by the Court of Appeal or as I understand it what the Crown, on behalf of the Police, acknowledge. They are still saying we accept we have got to come along and cover some basis. We've got to give some evidence so the obvious question that Your Honour has posed to my friend is what is the sufficiency of evidence and I'm simply saying you don't – the existing law is sufficient to meet that. It doesn't require a re-engineering by this Court. Those are my submissions unless -.

Elias CJ Thank you Mr Hogan. Thank you counsel. We will reserve our decision.

12.43pm Court adjourned.