



E9 Using Subsequent Blood Ethanol Determinations to Invalidate the Results of Breathalyzer Testing - The Best of Times, The Worst of Times

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Attendees will learn the importance of documenting the time blood samples were drawn from a subject when introducing the results of blood ethanol tests in court.

Miscarriages of justice can be avoided by paying attention to details, such as the time a blood sample was drawn. In this case, a defendant's rights were prejudiced because the judge failed to compel production of critical exculpatory evidence. This presentation will demonstrate why judges need to recognize that justice is not best served when trials are moved along too quickly prior to obtaining critical relevant evidence.

The Commonwealth of Massachusetts routinely utilizes infrared testing of expired air as a means of estimating an individual's blood alcohol concentration (BAC). While it is generally agreed that in the "typical" male, the mean ratio of the concentration of ethanol in blood compared to deep alveolar air will be 1:2400, breathalyzer testing is often criticized because it utilizes a fixed ratio (1:2100) for everyone, and does not account for the variability inherent in the population. In order to provide citizens who have been arrested for Operating Under the Influence of ethanol (OUI) with an opportunity to vindicate themselves and to demonstrate that a breathalyzer result was invalid, Mass. General Laws, Ch. 263, Sec. 5A, as amended provides that: "A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor shall have the right, at his request and at his expense, to be examined by a physician selected by him." Such an individual may request an independent testing of his/her blood for ethanol at that time or, proceed to a hospital, after release from custody. This case illustrates the complexities involved when a defendant charged with OUI tried to utilize a post-breathalyzer blood test result to clear himself.

Facts of the case: LW was a 40-year-old white male, approximately 6'2", 225 lbs. with a diagnosis of asthma. LW was stopped for alleged OUI just before midnight on December 26, 1996. Between 00:18 and 00:20, LW took a breathalyzer test on an Intoxilyzer 5000 utilizing infrared absorption which registered extrapolated BACs of 0.11% and 0.12%. Upon release from custody, LW took a taxi to the Massachusetts General Hospital where he was triaged at 01:15, the hospital note stating, "requesting blood test for ETOH". Beside the "triage time" on the hospital record are the numbers 0130. The laboratory slip bears a LOG-IN time of 05:15, and reports a plasma ethanol concentration of 585 mg/dl, which by decreasing the plasma value by 15%, converts to a whole blood ethanol concentration of 0.049%.

Prior to trial, the defendant requested a *Daubert* Hearing in an attempt to suppress the admission of the breathalyzer test results at trial, based on the fact that breathalyzer testing did not meet the criteria for scientific reliability in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 113 S.Ct. 2786 (1993). The defendant testified that he waited in the hospital for about 15 minutes before a technician came over and took his blood specimen, and then waited another 4 hours for the results of the test. This author testified as an expert that based on the mean burn-off rate for ethanol of 17 mg/dl/hr (0.017%/hr), a typical individual with a BAC of 0.049% at 1:15 am would have been more likely than not to have had a back-extrapolated BAC of 0.066% an hour earlier at 12:15 am than the reported breathalyzer result of 0.11%. During cross-examination, the Commonwealth asked the witness to assume that the blood sample had, in fact, been collected at 5:15 am, rather than the assumed 1:15 am, and asked him to calculate the back-extrapolated BAC under those conditions. The witness testified that assuming the 17 mg/dl/hr (0.017%/hr) burn-off rate over the 4-hour period from 1:15 am to 5:15 am, an individual with a BAC of 0.049% at 5:15 am would have had a back-extrapolated BAC of $0.049\% + (4 \times 0.017) = 0.117\%$ at 00:15, just as the breathalyzer had reported.

The judge would not suppress the results of the breathalyzer test. Following the hearing, the witness informed the defense attorney how important it would be to clearly establish the time the blood specimen was drawn from the client at trial, and urged the attorney to subpoena the hospital records showing the time of collection of the blood sample, rather than the LOG-IN time. Unfortunately, on the day of trial, the hospital had not responded to the subpoena and the witness encouraged the defense attorney to file a motion with the court to compel production of the critical laboratory slip before proceeding to trial. Despite the absence of the key laboratory slip, the court ordered the case tried on the appointed day, and the jury found the defendant guilty.

The defendant insisted that based on his body weight and the fact that he had consumed only 2-3 beers, he could not possibly have had a true BAC of 0.11%, and that the breathalyzer test was erroneous. Due to procedural problems, the time of collection of the blood specimen was never established unequivocally, and the results of the breathalyzer test could not be refuted. Furthermore, the court's eagerness to try the case in the absence of relevant evidence contributed to this miscarriage of justice.

Critical Relevant Evidence, Miscarriage of Justice, Paying Attention to Details