After Heideman: Re-Defining "Evidence to the Contrary"

It is easier for a camel to go through the eye of the needle,
than for a rich man to enter the kingdom of God.
Matthew, 19:24

Introduction

Matthew's solemn admonition to the Christian believer about how difficult it is to achieve the heavenly kingdom may strike some as an odd passageway into a discussion of *R. v. Heideman*[1[1]], a relatively recent decision of the Court of Appeal for Ontario. But for me the *Heideman* case has such thundering implications that the scriptural analogy does not seem to be all that far-fetched. I tell you, sisters and brothers, that after *Heideman* it will be easier for defence counsel to go through the eye of the needle than to get an acquittal on the charge of exceeding the breathalyzer if the defence relies upon what is commonly referred to as "evidence to the contrary."

The defence of "evidence to the contrary" invariably includes evidence about how much alcohol the accused consumed and expert opinion evidence showing that his or her blood alcohol concentration level ("BAC") at the time of driving was less than 80 milligrams in 100 milliliters of blood. This defence, often referred to in Ontario as the *Carter*[2[2]] defence, has abided for nearly twenty years. Some of the hallowed principles set

out in *Carter* include:

[1[1]] *R. v. Heideman* (2002), 168 C.C.C. (3d) 542 (Ont. C.A.)
[2[2]] *R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.)

1. Evidence to the contrary is some evidence that tends to show an inaccuracy in the breathalyzer readings or in the manner of its operation;

2. In cases of evidence to the contrary, the trial judge would have to reject the evidence of the accused or find that the defence evidence did not raise a doubt as to the accuracy of blood or breath results from police testing;

3. Any evidence about how much alcohol the person tested had in fact consumed is relevant evidence and, if accepted, can raise a doubt about the accuracy of breathalyzer readings;

4. The accused is not obliged to speculate where the error might have occurred in the taking of the sample, the labeling or the testing;

5. When blood or breath testing does not reflect the consumption of alcohol testified to by the accused, then the accused, if believed, has raised a doubt about the accuracy of the reading, and it follows that there must have been a breakdown somewhere in the procedures followed in sampling and analyzing the accused's blood or breath.

From a defence lawyer's perspective, *Carter* was magical, brilliant, insightful. *Heideman* is, well, a prosecutor's case. A prosecutor holding a certificate of analysis providing a BAC greater than 80 milligrams in 100 milliliters of blood and a copy of *Heideman* has very nearly a lay-down hand. The only way open to the defence is to produce evidence establishing a choice for the court. The required choice is to reject the evidence of the breathalyzer results, accept the evidence of the accused (and perhaps other defence witnesses in support) as to the accused's consumption of alcohol, and accept the evidence of a toxicologist that the BAC at the material time was below .08. This strategy does not raise a doubt as to the accuracy of the police breathalyzer results. Rather, it is clear, cogent evidence to support a finding of a BAC lower than .08.

After *Heideman*, however, the prosecutor wins if the defence evidence merely "tends to show" or "can show" or "possibly shows" or presents evidence that "bears on

the subject", or even “probably shows” a BAC below .08. In fact, according to *Heideman*, if this is the best evidence the defence can muster, it does not qualify as evidence to the contrary within the meaning of section 258. Impaired and exceed trials have always been challenging for the defence. The eye of the needle just got narrower.

I know what you're thinking. The court’s interpretation is not consistent with the actual words of section 258. The only apparent requirement of s. 258 (1) (d.1) of the Code[3][3] is that the defence produce evidence "tending to show" that the BAC of the accused at the time when the offence was alleged to have been committed did not exceed .08. That is what the section says. But in Ontario apparently, that is not what the section means. The words, "tending to show" now mean "must show". If the defence evidence permits of any possibility that the accused’s BAC exceeds 80 milligrams, according to the *Heideman* decision, it is not evidence to the contrary. *Heideman*, as I say, is a prosecutor's case.

The Words of the Code

Prior to legislative amendments in 1996, s. 258 (1) of the Code included only paragraphs (c) and (d) that permitted an accused to lead “evidence to the contrary”, meaning evidence inconsistent with the readings obtained by the police either through analysis of the breath or blood of the accused. Before the 1996 amendment, Section 258 (1)(c) read in part as follows:

> 258.(1) In any proceeding under subsection 255(1) in respect of an offence committed under section 253 or in any proceeding under subsection 255(2) or (3)…evidence of the results of the analyses so made is, *in the absence of evidence*

[3][3] *Criminal Code of Canada*, R.S.C. 1985, c.C-46, as amended to date

> *to the contrary*, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses. (Emphasis added)

In 1996, subsection 258 (1) (d.1) was introduced, changing the wording slightly. The wording in this subsection is now, "in the absence of evidence tending to show that":

> 258.(1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3)…(d.1) where samples of the breath of the accused or a sample of the blood of the accused have been taken as described in paragraph (c) or (d) under the conditions described therein and the results of the analyses show a concentration of alcohol in blood exceeding eighty milligrams of alcohol in one hundred milliliters of blood, evidence of the result of the analyses is, *in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred milliliters of blood*, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed exceeded eighty milligrams of alcohol in one hundred milliliters of blood. (Emphasis added)

What is Evidence to the Contrary?

I believe that *Heideman* has dramatically altered the defence of evidence to the contrary, at least in Ontario. *Heideman* did not, however, purport to alter the defence based on the new wording of section 258. In fact, Carthy J.A., in delivering the judgment of the court, did not view the new wording as affecting the nature or quality of the evidence that qualifies to overcome the presumption accompanying the readings obtained by the police. The presumption is that the readings are accurate for the purpose of calculating the blood/alcohol concentration level at the time of driving. And Carthy J.A. did not consider that the new wording caused the defence evidence to be persuasive

because, as he put it, “the guilt or innocent stage has not yet been reached”.[4][4]

Evidence to the contrary must, however, offer a distinct choice to the acceptance of the evidence of the police. Defence evidence "tending to show" is insufficient if it merely supports a possibility or a probability of being under the permitted limit.

The “Straddling” Cases

In *Heideman*, a toxicologist gave evidence that if an average person of the height and weight of the accused consumed the amount testified to by the accused at regular intervals over the stated time period, he would register a BAC of 71 milligrams, rather than the 100 milligrams measured by the police. But the toxicologist also testified that a person of Mr. Heideman’s height and weight, with similar alcohol consumption, could have a BAC of between 47 and 95. In other words, the projected BAC “straddled” the legal limit. Evidence of a toxicologist as to someone's likely BAC is usually stated as a range, because different people, even people of similar weight and height, eliminate alcohol from their bodies at different rates.

Some people are slow eliminators; others are fast. So, in cases where the evidence of a toxicologist suggests a BAC straddling the legal limit, that evidence alone will not be treated as evidence to the contrary. The court will reject it as providing no more than a speculative prospect that the breathalyzer readings were not representative of the actual BAC at the time of driving.

In *Heideman*, the court distinguished its earlier decision in *Carter* on the basis that, in *Carter,* the evidence of two experts was that if the accused was believed his BAC

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[4][4] *Heideman*, *supra*, note 1 at p.547

readings had to be zero. In contrast, the evidence produced by Mr. Heideman supported only a probability that he was below the permitted limit. The evidence failed to establish a BAC under the legal limit.

Thus, in Ontario at least, on the authority of *Heideman*, an accused will not be said to have raised a reasonable doubt concerning her BAC if her evidence at best establishes that there may be people "out there" of similar height and weight who will be under the legal limit if they consume precisely as the accused. Does the court's attempt to distinguish *Carter* signify the development of a more particular and "objective" analysis of "evidence to the contrary" than the standard developed and supported by Finlayson J.A. in *Carter*? Critics of this decision will certainly think so.

Heideman: Not the Only Way

In *Carter,* Finlayson J.A. seemed to focus more on the subjectivity of the accused, on his credibility, as a pivotal consideration in evidence to the contrary. Evidence to the contrary, by *Carter's* standard, is acceptable if the evidence of the accused, combined with expert evidence, raises a doubt as to the accuracy of the breathalyzer readings. The court in *Carter* was refreshingly unimpressed by the "science" of the breathalyzer instruments despite Parliament having touted them as objectively reliable measures. In fact, Finlayson J.A. quoted with approval the dicta of Pigeon J. in *Crosthwait*[5[5]] that accused persons ought not to be at the mercy of breathalyzer technicians. Justice Finlayson pointed out that the results of the breathalyzer will establish BAC only in the absence of evidence to the contrary. And he adopted this interesting sentence from

[5[5]] *R. v. Crosthwait* (1980), 52 C.C.C. (2d) 129 (S.C.C.)

Crosthwait: "Thus, any evidence tending to invalidate the result of the tests may be adduced on behalf of the accused in order to dispute that charge against him."[6][6] Although the evidence of the two experts in *Carter* was to the effect that if the accused was believed then the readings would be zero, Finlayson J.A. also went on to say:

> Clearly, since the breathalyzer instrument is intended to measure the quantity of alcohol in the person being tested, any evidence as to how much alcohol the person tested had in fact consumed is relevant evidence and if accepted can raise a doubt as to the accuracy of the breathalyzer reading. If, for example, an accused person faced with evidence of a breathalyzer reading well in excess of the permissible maximum, testified that he did not drink on any occasion and had nothing to drink prior to being tested, then the trial judge must either disbelieve the accused or accept that, for some reason or other the breathalyzer reading is wrong.[7][7]

So, too, In *R. v. Chavez*[8][8], Duncan J. cautioned against the tendency to regard breathalyzer results as infallible. He wrote:

> It is important not to overstate the reliability of the results obtained with this instrument. The *Carter* defence has been around for at least 20 years and Parliament has never stepped in to bolster the probative value of the approved instrument test results to place them beyond the reach of this type of indirect attack. It would therefore be wrong to treat these test results as virtually dispositive of the issue, because Parliament has chosen not to go that far. The results are cogent but not conclusive evidence against the accused.[9][9]

In *R. v. Skeffington*[10][10], Feldman J. confronted expert testimony that suggested a BAC between .32 and .57. *Skeffington* is thus not a "straddle" case. Nonetheless, Justice Feldman highlighted the apparent philosophical differences in various court decisions leading to rather disparate judgments:

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[6][6] *Carter*, supra, note 2 at p.178
[7][7] *Ibid*, at p. 178
[8][8] *R. v. Chavez*, [2001] O.J. No. 3753 (Ont. S.C.)
[9][9] *Ibid*, at paragraph 10
[10][10] *R. v. Skeffington*, [2003] O.J. No. 358 (O.C.J.)

> The *Carter* principle is difficult in its application. On the one hand, Justice Finlayson reasserted the importance of the reasonable doubt standard and implicitly warned against the subtle shifting of onus to the accused in cases involving scientific evidence. Insight into the importance of this principle was subsequently enhanced in cases such as *R. v. W. D.* (1991), 63 C .C.C. (3d) 397 (S.C.C.) and *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.). But on the other hand, there is some concern that this fundamental principle may be, at times, hijacked and diminished by those who might raise a reasonable doubt on the basis of tailored evidence in the face of the results from an instrument recognized by Parliament as scientifically reliable, this even more so in relation to the relatively recent Intoxilyzer 5000-C. It must be recalled that *Carter* permitted the accused by means of evidence to the contrary to challenge the integrity and proper functioning of the instrument without having to demonstrate tangible error in this regard.[11][11]

In *R. v. Gibson*[12][12], Bayda C.J.S. wrote for the majority of the Saskatchewan Court

of Appeal in a case where the expert's opinion as to the likely BAC of the accused ranged

between 60 and 95 milligrams:

> The evidence under scrutiny in the present case meets Beetz J.'s definition from each of the three perspectives. The evidence (undisputed and accepted by the trial judge) of the accused and that of Dr. Michel is some evidence that at 10:40 PM the accused's blood-alcohol concentration could have been .79 milligrams in 100 milliliters of blood. In other words, it is some evidence tending to show (not establishing) that at 10:40 PM the proportion was .79 milligrams. (In my respectful view "could have been" and "tending to show" are interchangeable phrases in this context.) As such, the evidence clearly falls within the first perspective of the definition for it is clearly "[a]ny evidence… tending to show that at the time of the offence the proportion was within the permitted limit..."
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> It is true that the evidence of the accused and Dr. Michel is at the same time some evidence "tending to show" facts other than the fact that at 10:40 the proportion was .79. For example it is evidence tending to show that the proportion was more than .79 and, as well, less than .79. But syllogistically speaking "tending to show" these other facts does not mean that the evidence excludes and does not "[tend] to show" the fact that the proportion was .79. Because we are here concerned with "tending to show" (a probative function) and not "establishing" (a

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[11][11] *Skeffington*, *supra*, note 10 at paragraph 22
[12][12] *R. v. Gibson* (1992), 72 C.C.C. (3d) 28 (Sask. C.A.).

> persuasive function), the evidence here must be regarded not as exclusionary in its scope but rather as inclusive in nature and effect.[13][13]

Clearly, the view taken by the Court of Appeal for Saskatchewan cannot be reconciled with that of the Ontario Court of Appeal. In fact, Carthy J.A. disagreed even with the notion that requiring the accused to "establish" a choice to the acceptance of the breathalyzer readings was a persuasive function. He wrote:

> In applying the test levels to an offence time up to two hours earlier Parliament has built the elimination factor into the choice of 80 milligrams as a standard and, in doing so, has treated all drivers as one. In other words, Parliament may have inserted into the formula a slower than average elimination rate and, as a balance, a higher offence level then might otherwise have been imposed.
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> These contextual considerations lead me to conclude that "tending to show" does not mean evidence "bearing on the subject", or evidence that "could show". On the other hand, it need not be persuasive. The guilt or innocent stage has not yet been reached. However, the evidence must be probative of the issue before the court; that is, probative of the level of alcohol in this person's blood at the time of the offence. The opinion must offer a choice to acceptance of the certificate as indicating the blood level at the time of the offence, and must indicate that the level was below .08.[14][14]

Thus, whenever the evidence of a toxicologist in support of the defence evidence amounts to "straddling evidence", the courts in Ontario will decide that such evidence does not “tend to show” that a person’s BAC is below 80 milligrams. In R. v. *Usichenko*[15][15], Beaulieu J. was presented with expert evidence on appeal that the accused’s BAC was likely between .45 and .75, but possibly as high as .81. The trial judge had delivered judgment prior to *Heideman*. *Usichenko* was heard on appeal 13 days after *Heideman*. In dismissing the accused’s appeal, the court held:

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[13][13] *Ibid*, at p.38
[14][14] *Heideman*, *supra*, note 1 at p. 548
[15][15] *R. v. Usichenko* [2002] O.J. No.4998 (O.S.C.).

> [T]his sort of evidence, then, is only probative of a specific person if their specific elimination rate is known. However, since a person's elimination rate changes from time to time, a person's specific BAC rate at the time of the offence can never be proven. This sort of evidence, then, is only probative of a specific person if their specific elimination rate is known. However, since a person's elimination rate changes from time to time, a person's specific BAC rate at the time of the offence can never be proven.[16][16]

The court then concluded that Mr. Usichenko had not proven his own specific rate of elimination. In this way, the court went further even than *Heideman,* Beaulieu J. suggesting that the accused was incapable of proving his elimination rate at the time of the offence because BAC levels change from time to time.

Horkins J. in *Carstens*[17][17] certainly would not agree that it is impossible to present evidence of the BAC at the time of an offence. *Carstens* was not a case "straddling" the legal limits according to the expert testimony. In this respect it is different than *Heideman*. However, Horkins J. accepted expert testimony that the 10-20 mg elimination rate is the accepted range in the scientific community. In other words, there are some instances where it doesn't matter whether the accused is a fast eliminator or a slow eliminator. And the trial judge made some other valuable comments on the real issue to be decided in these cases:

> The issue involves an assessment of the credibility of the defence witnesses; it involves an assessment of the reliability of the defence witnesses....
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> Now, with respect to credibility, leaving aside the issue of the variance with the machine readings, there is no basis upon which I could, or would, conclude that

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[16][16] *Usichenko, supra,* note 15 at p.2
[17][17] *R. v. Carstens* [2002], O.J. No. 5312.

> the defence witnesses are anything other than sincere, in giving their evidence as accurately as they can.....
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> The threshold for evidence to the contrary is really quite low and has been expressed variously as "evidence which might reasonably be true, evidence that raises a reasonable possibility of innocence," as the legislation now says "... tending to show..."....
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> What Parliament is articulating is that the evidence need not be persuasive. It just has to raise with reality that which might reasonably be true. And it's expressed in all sorts of cases in this jurisdiction, but perhaps in my view best.... out of the Québec Court of Appeal... its 1990 decision reported at 62 C.C.C. (3d) 90..... "..... [T]his section does not impose an ultimate or persuasive burden of proof on the accused. The evidence to the contrary, to which it refers, must (And he emphasizes the three words) '... tend to show...', that it need not prove that the blood alcohol level of the accused did not exceed the statutory limits at the relevant time. The exculpatory evidence, in other words, must have probative value, but it need not be so cogent as to persuade the Court. If the trier of fact considers that the evidence to the contrary raises a reasonable doubt, or, as is sometimes said, that it might reasonably be true, then the incriminating breathalyzer result will no longer support a conviction...."[18[18]]

As a consequence, although Horkin J. described himself as "far from persuaded by the defence evidence"[19[19]] an acquittal was still registered on the basis that the defence

evidence raised a prospect of a reasonable possibility of being true. He did so while accepting the principles outlined in *Heideman* that have not altered the original principles of *Carter*.

Heideman still leaves open the possibility of an expert's opinion offering a choice to acceptance of the certificate. *Heideman* suggests only that the evidence to the contrary must indicate a BAC below .08. The accused cannot take the position that she is "an average person" when it comes to elimination of alcohol without demonstrating that she is, in fact, average. Moving from an average person to a particular person is

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[18[18]] *Carstens*, *supra*, note 17 at paragraphs 5, 8, 9, 14, 24 and 25
[19[19]] *Ibid* at paragraph 29

"impermissible speculation" in the context of section 258.

What To Do In "Straddling" Cases

If your toxicologist's opinion suggests a BAC that possibly exceeds .08, further experimental breath alcohol testing is necessary. Specific expert evidence is necessary to establish a BAC that permits the court to choose either to accept the readings obtained by the police or to accept the evidence to the contrary. Still, in keeping with the principles in *Carter,* if the defence evidence raises a doubt in relation to the accuracy of the police BAC, that doubt will be resolved in favour of the accused. But the accused now has to be excluded as a person who could possibly exceed .08. The accused must bring herself within a category of persons that would not exceed .08.

One institute that will perform this experimental testing is The Forensic Toxicology Institute[20[20]], operated by Dr. Michael Corbett and Mme. Rita Charlebois, both seasoned Forensic toxicologists well-known to and respected by the judiciary throughout Ontario.

To perform this experimental testing the experts require an individual to present herself in an alcohol-free state at the test site. She will be asked to consume specific quantities of alcohol over time and her rate of elimination will be calculated by multiple, consecutive measurements of breath samples in the elimination phase of a BAC profile.

[20[20]] The Forensic Toxicology Institute, 6911 Yarrow Avenue, Mississauga, Ontario.
P: (905) 785-9977; F: (905) 785-7672

The experts will determine a specific rate of elimination applicable to this individual. The particularized rate of elimination will then be applied to the drinking scenario provided by the accused person, and presumably her drinking scenario will eventually be provided to the court. If the results of this particularized testing lead to an opinion that the projected BAC would be less than .08, then the opinion will support evidence "tending to show" evidence to the contrary within the meaning of *Heideman*.

Dr. Corbett has said that such experimental testing will eventually provide a secondary, yet significant, benefit. It will provide reliable, usable data for the future. All breathalyzer instruments presently employ a 2100: 1 blood-to-breath-alcohol ratio. This, Dr. Corbett says, has remained an acceptable ratio because most experts believe that it tends to underestimate the BAC. Other jurisdictions, including some in Europe, prefer a 2300: 1 ratio. The 2100: 1 ratio is more beneficial to the accused. Dr. Corbett believes that one significant outcome of the *Heideman* decision is that toxicologists are now receiving useful data based on actual clients in reality-based scenarios. Eventually the accumulation of this data will provide much-needed information about assumptions that are now made in programming breathalyzer instruments. These data may not have been collected had it not been for the *Heideman* decision.

Dr. Corbett says that today's breathalyzer devices still rely upon essentially the same technology and the same ratios used in the 1960's. The scientific community perhaps feels comfortable with the *status quo* because the ratios of blood-to-breath-alcohol are thought to demonstrate a low bias. The low bias exists whether the instrument used is an Intoxilizer 5000-C, or Breathalyzers 900 or 900A. All are, of

course, approved instruments by Parliament and all are still in use throughout Ontario.

Expert Testimony: *Viva Voce* Evidence or Expert's Written Report and Notice Requirements

The toxicologist's opinion may be presented to the court by the *viva voce* evidence of the expert. Or it may in some instances be presented by means of a report of the expert along with an affidavit or solemn declaration of the expert setting out, in particular, the qualifications of the expert, provided the court recognizes the person as an expert and provided the party intending to produce the report in evidence has before the proceeding given to the other party a copy of the affidavit or solemn declaration, and the report, and reasonable notice of the intention to produce it in evidence.[21[21]] Section 657.3
outlines the specific requirements for the use of a report. Section 657.3 (2) provides that the court may require the expert to appear before the court for examination or cross-examination on the issue of proof of any of the statements contained in the affidavit or solemn declaration or report.

In addition, to promote the fair, orderly and efficient presentation of the testimony of expert witnesses, section 657.3 has been recently amended to provide for more specific rules regarding notice. Now, a party, either prosecution or defence, intending to rely upon an expert, whether *viva voce* or by way of a report, is required to provide:

1. the name of the proposed witness;

[21[21]] See section 657.3 (1) (a) and (b) of the Criminal Code

2. a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise; and
3. a statement of the qualifications of the proposed witness.

This notice must be given "at least 30 days before the commencement of the trial or within any other period fixed by the justice or judge". When the prosecutor intends to call an expert witness, more requirements must be met. In addition to complying with the above three requirements, the Crown must also provide to the other party or parties:

4. a copy of the report, if any, prepared by the proposed witness for the case; and
5. if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based.

The notice requirements are somewhat different for the defence. In addition to complying with the thirty-day notice, an accused, or counsel, is required, not later than the close of the case for the prosecution, to provide to the other party or parties a copy of the report, if any, prepared by the expert witness or if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based.

If the specific notice requirements are not met by either the prosecution or the defence, the court shall, at the request of the non-offending party, grant an adjournment to allow for preparation for cross-examination, or order the party calling the expert witness to provide the other party with the material disclosure required by this section, or order the calling or recalling of the expert witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony, unless the court

considers it inappropriate to do so.[22][22]

It appears that the practices in various jurisdictions across the Province of Ontario vary on whether or not to permit testimony by report rather than *vive voce* evidence. Counsel should thus determine well before trial the permissible procedures of the particular jurisdiction.

Should a Report be Used?

While an expert's report may save the expense of having to have the expert testify in person, there are certain negative aspects to using a report to provide an expert's opinion. It is not uncommon that an accused person is vigorously cross-examined on the amount of alcohol consumed or on the specifics of the drinking scenario presented by the defence. The report of the expert is usually prepared long before trial and is based on information provided by the accused to defence counsel who in turn sends the information to the expert. But of course the expert's report is only helpful to the defence if the evidence of the defence remains consistent with the specifics provided to the expert and contained in the expert's report. If the actual testimony diverges from the information provided to the expert, the absent expert is simply unavailable to recalculate the projected BAC on the spot. Minor discrepancies or differences as to the height or weight of the accused, commencement time of drinking, time of arrest, amount of alcohol consumed, type of alcohol consumed, manner or timing of consumption can often be addressed by an expert who is present at the trial. The expert's ability to recalculate the BAC and offer an opinion on the BAC based on the "new" evidence may make the defence evidence

[22][22] Section 657.3(4) of the Criminal Code

viable despite the differences.

The success or failure of the defence is not usually determined on the basis of an expert's opinion. Instead, the determination by the court as to the credibility or reliability of the evidence presented by the defence is usually pivotal to success. A review of many court decisions on "evidence to the contrary" also reveals that certain judges seem predisposed to varying degrees of skepticism about the defence. Some tend to overstate or overestimate the scientific reliability of the results obtained by breathalyzer instruments; others remain openly receptive to the defence, refusing to treat the machines as unerring and as dispositive of the issue.

Whatever silent and invisible bias may be present in the courtroom, one thing is certain: success will rarely find a defence that does not present detailed, cogent, credible evidence as the foundation for the toxicologist's opinion. At the very least, the evidence will not pass muster unless it includes:

1. the age and sex of the accused;
2. the specific amount of alcohol consumed;
3. the timing and drinking patterns of the accused;
4. the type(s) of alcohol consumed;
5. the commencement time of consumption;
6. the completion time of consumption;
7. the time of arrest;
8. the state of health of the accused;
9. the amounts and times of food consumption.

For the expert presenting evidence by means of a report, counsel should advise the expert of the time and results of roadside screening tests and breathalyzer tests and provide a copy of the alcohol influence reports. Anomalies or evident errors in the

testing procedure may be discovered by the expert.

Conclusion

The *Heideman* decision has posed a new challenge for defence counsel attempting to produce “evidence to the contrary”. In Ontario it no longer suffices to present evidence that probably shows the readings obtained by the police or reported in a certificate are inaccurate. To qualify as "evidence to the contrary" within the meaning of section 258 the evidence must offer a clear and distinct choice to the court. The evidence must establish that the accused person, not just an average person, had a BAC not in excess of .08. If the expert’s report or the expert’s evidence establishes only the likelihood that the accused was under that permitted limit, the evidence will fail.

Evidence to the contrary is still available as a defence, provided the defence evidence includes a properly qualified toxicologist’s opinion demonstrating that the accused’s BAC at the material time did not exceed .08. The most important aspect of this defence is credible, reliable evidence from the defence that at least raises a doubt in the mind of the court as to the accuracy of the police readings. This evidence, as always, will most likely be presented by witnesses who are properly prepared and who are clear and cogent and believable in the delivery of their evidence.