In the Spirit of the Law

Local OUI Cases May Have Broad Ramifications

By GEORGE O'BRIEN

When the state Legislature amended the Commonwealth's drunk-driving measures in 2003, it enacted the so-called 'per se' law, which criminalizes the act of driving with a .08 blood-alcohol level at the time of operation.

This is an irrebuttable provision, said Stephen Monsein, a lawyer with Bacon and Wilson, P.C./Monsein & MacConnell in Amherst, meaning that if a Breathalyzer records that number or higher, then a jury is to consider the operator intoxicated, and thus guilty under the new law. And for that reason, Monsein, in a case that may soon have a far-reaching impact in the Commonwealth, argued that the state must have the burden of proving *everything* stated in the amended measure — Chapter 90, Section 24 of Mass. General Laws.

And that means the part about "at the time of operation."

Breathalyzer tests take place, on average, more than 30 minutes after a driver has been pulled over, said Monsein, adding that in the case of one of his clients, Anne Colturi of Orange, the time lapse was more like an hour and a half. One's blood-alcohol level could rise (or fall) over that much time, he continued, adding that for this reason, he asked that the state provide someone known as a "retrograde extrapolation expert" to attempt to gauge the blood alcohol level when Colturi was last operating her vehicle.

When the state balked, for reasons ranging from the cost of providing such an expert for every case to the lack of such individuals, Monsein argued that the Commonwealth was unfairly shifting the burden of proof in his case to the defense.

Staff Photo

Attorney Stephen Monsein says two Franklin County decisions regarding Breathalyzer tests may change the state's driving-under-the-influence law.

And, to make a long story short, an associate justice of the Orange District Court agreed with him, ordering, among other things, that the Commonwealth may not offer evidence of a Breathalyzer test result obtained more than an hour after evidence of the defendant's last operation of a vehicle to prove "per se" offense unless it offers expert testimony establishing the defendant's blood-alcohol level at the time of operation.

The Commonwealth moved quickly to appeal that decision, which has subsequently been joined with a similar case from Greenfield, *Commonwealth v. Thomas,* with a similar judge's ruling about the admissibility of a Breathalyzer test without retrograde extrapolation. And, in an indication of the gravity of the twin cases and their impact, the appeal was forwarded to the state Supreme Judicial Court, which is scheduled to hear it this week.

If the SJC upholds those rulings, said Monsein, it is likely that the Legislature will have to amend Section 24 — or the state will have to provide retrograde extrapolation analysis experts. Either way, he said, change would come to OUI cases and the way they're argued, and for the better.

In the meantime, the two cases and the pending SJC ruling have had the effect of bringing most OUI cases, especially those with questions about Breathalyzer tests, to a grinding halt, as defense lawyers and prosecutors alike wait to see what happens with the Commonwealth's appeal.

Looking back, Monsein, a specialist in OUI cases who spoke at length with *BusinessWest* about *Commonwealth v. Colturi* and its possible impact, said his client didn't appear to be the type who could record a .08 blood alcohol while operating; she had a clean driving slate and no previous brushes with the law.

Thus, he questioned the Breathalyzer test in relation to its finding and its timing, and petitioned for retrograde extrapolation testimony from the Commonwealth to prove his client's guilt.

In refusing to do so, he said, the state was shifting the burden of proof in the case, essentially forcing the defense to somehow prove she *wasn't* guilty.

"The Commonwealth suggested in its argument that it was up to the defendant to prove otherwise," he explained. "And there is clear case law in Massachusetts that you cannot shift the burden of proof to the defendant.

"The court said that it's *not* the defendant's burden," he continued, "and that it's up to the Commonwealth to prove each essential element of a crime."

Such indisputable proof is necessary, Monsein and other defense lawyers have argued, because the amended OUI law

leaves no gray area when it comes to Breathalyzer readings and a determination of guilt.

"Before the 2003 amendment, there was no strict liability, there wasn't an irrebuttable presumption, what we call the 'per se' law," he explained. "If someone blew a .08 or greater before the amendment, there were arguments one could raise to the jury; you could try to convince the jury not to give a lot of weight to the reading.

"But now, with the 2003 amendment," he continued, "the instruction to the jury is, essentially, that if you believe the Breathalyzer machine was operating properly and you believe there was a .08 or greater, then you *must* find that the individual was operating under the influence."

Prior to the amendment, he said, defense lawyers could argue the weight of a Breathalyzer test. Now, they can't, a scenario that he believes has prompted judges in Franklin County and now elsewhere to seek some way to give more validity to those tests — or simply not admit them as evidence.

Indeed, the two Franklin County cases and the pending SJC ruling come at a time when defense lawyers are enjoying higher levels of success when it comes to convincing judges to exclude the results of breath tests, forcing juries to decide a vehicle operator's guilt or innocence without that often-critical bit of evidence.

Mass Lawyers Weekly reported recently that lawyers who specialize in drunk driving cases are finding that the law passed in 2003 has not led to more convictions or pleas, in part because breath-test evidence, one of the prosecutor's strongest weapons in such cases, isn't reaching the jury. Indeed, defense lawyers have been able to point out deficiencies ranging from the government's failure to present expert testimony, such as retrograde extrapolation analysis to determine blood alcohol level at the time of operation, to an inability to show that the machines are in compliance with Massachusetts regulations.

Monsein said the two Franklin County rulings show that some judges clearly want the Commonwealth to assume a greater responsibility for proving guilt, and he and many others are waiting anxiously to see if the SJC will take that same position.❖

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