

DRUNK-DRIVING WITH PARTICULAR REFERENCE TO MALTA

Mag. Dr Consuelo Scerri Herrera LL.D Dip. Matr. (Can.)

ABSTRACT

The effects of alcohol are no secret. Alcohol hinders the capacity to exercise self-control, it impairs judgement, and renders the person under influence more susceptible to danger, particularly if such person is behind the steering-wheel. Maltese Law has set several safeguards to ensure that drunk-driving is punished severely, given the grave consequences which may result therefrom. The introduction of the breathalyser test under Maltese Law has served to suppress the inclination to drink and drive to some extent; however, the number of accidents happening every year due to drinking and subsequent driving seem to suggest otherwise. This article goes through the relevant provisions of Chapter 65 of the Laws of Malta, while also making reference to judgments given by the Courts of Malta interpreting such provisions. It attempts to clarify the process as laid out under Maltese Law, illustrated by statistics which serve to prove how effective the law in fact is.

KEYWORDS: DRUK-DRIVING - THE BREATHALYSER TEST - PHYSICAL INCAPACITY - MENTAL INCAPACITY

DRUNK-DRIVING WITH PARTICULAR REFERENCE TO MALTA

Mag. Dr Consuelo Scerri Herrera LL.D Dip. Matr. (Can.)

1. Introduction

Alcohol has a euphoric effect, allowing drivers to believe that their driving is acceptable when in reality it is not the case. In fact, drivers under alcoholic influence tend to take chances that would not be taken under normal circumstances and the effect of such rash decisions is generally disastrous or fatal. Studies have shown that, like many Europeans, the Maltese are aware of what could happen as a result of drunk-driving yet still opt to take the risk and drive under influence, rather than take a taxi to their next destination, hoping that tragedy does not befall them. Alcohol impairs reflexes, affecting how one judges speed, distance and risk; it reduces one's coordination and slows down one's reactions; it impairs vision and judgement. This is why it is dangerous to drive under influence. This is a pity because drunk drivers pose a threat not only to their own selves, but also to the passengers they have with them and to other cars and passers-by who happen to be on the road at the same time in the same place.

2. The Breathalyser Test

Chapter 65 of the Laws of Malta, or rather, the Traffic Regulation Ordinance, has covered the topic of drunk-driving ever since its introduction in the first part of the century. With the passage of time, the Executive Police have embraced different means to quantify this breach at law. The methods used vary according to the latest technology available locally. One of the relatively recent additions to our national system was the introduction of the breathalyser test, which was introduced into Maltese law by Act VI of 1998, as subsequently amended by Act XXIII of 2000, by Act VII of 2010 and then again by Act V of 2011.

The legislator sought to introduce breathalyser to try and stop - or rather, reduce - the number of people willing to risk driving under the influence of alcohol. It is both a preventive measure and a scientific way of calculating what the law has been sanctioning for past decades, that is, driving under the influence of alcohol. The test involves taking a breath sample, by asking the driver to blow a steady and deep breath into a disposable pipe. The liquid crystal display on which the

alcohol level is shown on the apparatus is visible to the person taking the test at all times. The alcohol readings are printed and signed by the person taking the test and the police official who conducted the test. A copy of the test result is given to the driver, and a copy is kept by the Police in case they decide to proceed with Prosecution in court. The test is carried out at the Police Headquarters in Floriana or at the Victoria Police Station in Gozo at any time of the day, seven days a week, which place must be indicated by means of a legal notice if changed. Usually the Duty Officer on charge is called by the traffic or district police asking him to carry out a test on a driver who would have been stopped in connection with traffic offences. A blood or urine sample (or both) can also be requested in which case such latter tests are carried out under medical supervision.

As can be evidenced from the judgement in the names *Il-Pulizija vs Etienne Turner*⁵⁰⁰, it is imperative that the breath alcohol test record is signed by the prosecuting officer in whose presence the test was taken, and taken in a laboratory approved by the Honourable Minister and published in the Government Gazette.⁵⁰¹ Non-observance of this procedure would lead to an acquittal. The Court in this case held that “*Illi mill-provi prodotti l-breath alcohol test record huwa monk u għalkemm m’għandux il-firma tal-opertur tiegħu lanqas ma jirriżulta li ttieħed fil-laboratorju forensiku*”.⁵⁰²

Similarly, in the judgment delivered in the names *Pulizija vs Aldo Fenech* the Court disregarded the breath alcohol test when deciding on the case because it felt that

Dan id-dokument mhux wieħed komplet: stramb ukoll il-fatt li tidher li hemm il-firma tal-akkużat fuq it-tape, pero’ l-informazzjoni l-oħra kollha giet mistura anke jekk wieħed jara l-istess dokument kontra d-dawl. Il-Qorti għalhekk tqis l-istess dokument alterat u mhux komplet u ma tqisx li fuq tali prova in vista li żgur li ma jikkostitwix l-aħjar prova li għandha ssib ħtija fuq l-istess.⁵⁰³

Article 15A of Chapter 65 of the Laws of Malta specifically provides that, “*No person shall drive or attempt to drive or be in charge of a motor vehicle or other vehicle on a road or other public place if he is unfit to drive through drink or drugs*”. Sub-section (2) further explains that, “[*F*]or the purposes of this article, a

⁵⁰⁰Criminal Appeal Nr 300/2002 [2003] Court of Criminal Appeal.

⁵⁰¹Laws of Malta, Chapter 65, Article 15E (5).

⁵⁰²Reference can also be made to the judgement in the names *Il-Pulizija vs George Seguna*, Criminal Appeal Nr 175/2003 [2003] Court of Criminal Appeal.

⁵⁰³Criminal Appeal Nr 164/2002 [2002] Court of Criminal Appeal.

person shall be deemed to be unfit to drive if his ability to drive properly is for the time being impaired". Thus we immediately come across a broad sweeping statement that no one should be on the road in control of a vehicle once he is under the influence of alcohol.⁵⁰⁴

The Maltese Courts have elaborated on this statement through various judgements. For instance, in the judgement delivered in the names *Il-Pulizija vs Francis Pace*⁵⁰⁵ the Court held that,

[B]iex jiġi deċiż mill-Qorti jekk persuna kinitx qed issuq meta l-kapaċita tagħha li ssuq sew (kienet) għal xi ħin imnaqqsa minhabba xorb jew drogi bi ksur tal-Artikolu 15A wieħed jista' jiehū in konsiderazzjoni provi oħra bħal ma huma l-komportament u kundizzjoni fiżika tas-sewwieq.

Should the driver be charged with this offence as stipulated in article 15A, it is not necessary for the driver to be diagnosed as being under the influence of a higher level of alcohol than that prescribed.

In the judgment delivered in the names *Il-Pulizija vs Anthony Muscat*⁵⁰⁶ it was explained that,

Fil-każ tal-Artikolu 15B ir-reat, kif ingħad, hu marbut ma' livell partikolari ta' alcohol - fis-sens li appena jinqabeż dak il-limitu hemm il-presunzjoni *juris et de jure* li dak li jkun ma kienx f'kundizzjoni li jsuq minhabba xorb - fil-każ tal-Artikolu 15A (1) il-legislatur ma ppreskriva ebda livell partikolari ta' alcohol fis-sistema tas-sewwieq, b'mod li anke b'livell anqas minn dak 'preskritt' tista' tinstab ħtija taħt dan l-artikolu jekk oġġettivament ikun jirriżulta li s-sewwieq ma kienx f'kundizzjoni li jsuq minhabba xorb (jew drogi). Fi kliem ieħor, persuna li tkun akkużata taħt l-Artikolu 15B tista' ma tinstabx ħatja taħt dana l-artikolu, iżda minflok tinstab ħatja taħt l-Artikolu 15A (1).

This brings us to Article 15B of Chapter 65 of the laws of Malta which provides that, "*No person shall drive, attempt to drive or be in charge of a motor vehicle or other vehicle on a road or other public place after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit*".

⁵⁰⁴ Chapter 65, *op cit* Article 15B.

⁵⁰⁵ [1999] Court of Criminal Appeal.

⁵⁰⁶ [2007] Court of Criminal Appeal.

One has to examine whether such driver consumed enough alcohol such that the proportion of his breath, blood or urine exceeds the prescribed limit, the legal limit being 35 milligrams per 100 millilitres of breath, 80 milligrams per 100 millilitres of blood or 107 milligrams per 100 millilitres.⁵⁰⁷

However, despite the above, the law provides for a further amount of alcohol that can be consumed before the driver can be convicted of an offence under this law. The proportion of alcohol in the breath, blood or urine can exceed the prescribed limit by eight microgrammes or more in the breath or by twenty milligrammes or more in the blood or by twenty-three milligrammes or more in urine.⁵⁰⁸

It goes without saying that it is very difficult to equate 35mg with an exact amount of alcohol whether they are beer pints, whiskey tots or glasses of wine. One drink is capable of pushing one over the legal limit, even if such person remains unaffected by alcohol. Amounts vary according to the percentage of alcohol in the drink, and the consumer's metabolism, physical fitness, fat distribution, liver function and age. Thus the level of alcohol intake that can be recorded as above the prescribed limit varies from one person to another. On average, it takes about one hour for the body to break down one unit of alcohol.

However, this can vary depending on one's weight, sex, age, metabolism, stress levels, type and strength of alcohol, and/or any medication the person in question would have consumed prior to consumption of alcohol. It can also take longer if one's liver is not functioning properly.

The current law allows the authorities the possibility, through a Legal Notice⁵⁰⁹, to change the country's maximum blood alcohol content, which currently stands as the European Union's most generous at 80mg of alcohol per 100ml of blood – a limit Malta shares with the UK and Ireland.⁵¹⁰

It should be pointed out that the prescribed legal limit for alcohol consumption while driving is rather generous despite the fact that a recent EU survey showed how a startling 91% of the Maltese population does not know the legal limit beyond which drink driving is punishable by law. The percentage is the highest among EU member states and was followed by Greece (76%) and Romania (74%).

Way back in 2010, *Agenzija Sedqa* had called on the authorities to review existing legislation that establishes the 80mg limit, and recommended that the limit be

⁵⁰⁷Laws of Malta, Chapter 65, Article 15I.

⁵⁰⁸ibid Article 15H.

⁵⁰⁹Chapter 65, *op cit*, Article 15B(2).

⁵¹⁰ 'New Legislation provides for Crackdown on Drink Driving' *Malta Independent* (Valletta, 1 August 2010).

lowered to 50mg, as it put forward its anti-drunk-driving campaign on all the local media. Likewise, a recent report drawn up by the British medical regulator, the National Institute for Health and Clinical Guidelines (NICE), advised that legal limits for drinking and driving in the UK should be reduced from 80mg to 50mg.⁵¹¹

A single alcoholic drink triples a driver's risk of dying in a vehicle crash, and a small beer or glass of wine can increase a driver's blood-alcohol level by more than half the legal limit, a report commissioned recently by the British Government has found. The study found that even at the one-drink level, the chances of a fatal accident are three times higher than in the case of a driver who has drunk no alcohol at all. That is half the risk of the 80mg drink-drive limit, which increases the chances of a fatal crash by at least six times. In the case of drivers who are just over the limit, at up to 100mg blood alcohol level, the risk is 11 times higher. The exponential increase in the danger for drivers who have drunk a relatively small amount of alcohol is spelt out in the report.

In younger people the effects are particularly acute, as, according to the NICE report,⁵¹² they are "*less experienced drivers, are immature and have a lower tolerance to alcohol than older people*". Young people aged between 18 and 25 are more likely to die in road accidents than from any other cause.

In fact, when the 50mg limit was introduced in 15 countries in Europe, it resulted in an 11.5% fall in fatal drunk-driving accidents involving 18 to 25-year-olds, the group at highest risk.

The highest per capita alcohol consumption in the world is seen in Europe. In fact harmful and hazardous alcohol consumption is the third largest risk factor for ill health in the EU, responsible for 195,000 deaths each year and accounting for 12% of male and 2% of female premature mortality. The estimated economic cost to the EU is in the region of €125 billion per year.⁵¹³

3. When can a Police Officer subject a driver to such a test?

The answer emerges from the law, which states that a police officer can request a driver to give a sample if he reasonably suspects that:

⁵¹¹Centre for Public Health Excellence NICE, *Review of Effectiveness of Laws limiting Blood Alcohol Concentration Levels to reduce Alcohol-Related Road Injuries and Deaths* (Final Report, March 2010).

⁵¹²NICE Report, *op cit.*

⁵¹³*ibid.*

- (a) a person is driving or attempting to drive or is in charge of a motor vehicle or other vehicle on a road or other public place and has alcohol in his body or has committed an offence against the provisions of this Ordinance or against any regulations made thereunder whilst the motor vehicle or other vehicle was in motion; or
- (b) a person has been driving or attempting to drive or has been in charge of a motor vehicle or other vehicle on a road or other public place with alcohol in his body and that that person still has alcohol in his body; or
- (c) a person has been driving or attempting to drive or has been in charge of a motor vehicle or other vehicle on a road or other public place and has committed an offence against the provisions of this Ordinance or against any regulations made thereunder whilst the motor vehicle or other vehicle was in motion; or
- (d) a person was driving or was attempting to drive or was in charge of a motor vehicle or other vehicle on a road or other public place when that motor vehicle or other vehicle was involved in an accident.⁵¹⁴

In the judgement in the names *Il-Pulizija vs Carmelo Rapinett*⁵¹⁵ the court held that,

[I]s-suspett raġonevoli msemmi fl-Artikoli 15C tal-Kap 65 hu rikjest mil-liġi unikament sabiex l-uffiċjal tal-pulizija jkun jista' jeħtieġ (*may require* fit-test Ingliż) li persuna tagħti kampjun tan-nifs għat-test tan-nifs, għat-test (ara d-definizzjoni ta' *test tan-nifs* fl-Artikolu 151(I)) u mhux għall-finijiet tal-ammissibilita' bħala prova tar-riżultat tal-analiżi tal-kampjuni tan-nifs meħud skond l-Artikolu 15E. In-nuqqas ta' 'suspett raġonevoli' imsemmi fl-artikolu 15C iġib bħala konsegwenza li l-uffiċjal tal-pulizija ma jkunx jista' legalment jarresta lill-persuna in kwistjoni skond il-paragrafu (b) ta' l-artikolu 15D jekk din il-persuna tonqos milli tagħti kampjun tan-nifs għat-test tan-nifs u dan għas-sempici raġuni li f'tali sitwazzjoni (cioe' meta m'hemmx is-'suspett raġonevoli' imsemmi fl-Artikolu 15C) dik il-persuna ma tkunx meħtieġa tagħti tali kampjun [...]

⁵¹⁴[2000] Court of Criminal Appeal.

⁵¹⁵Chapter 65, *op cit*, Article 15C.

In fact as was indicated in the judgment in the name *Il-Pulizija vs Emmanuel Camilleri*⁵¹⁶, where it was stated that, “[B]iex jigi radikat dan is-suspett raġonevoli l-uffiċjal konċernat jista’ jieħu anke in konsiderazzjoni dak li jkun qallu ħaddiehor.”

Should the Police be of the opinion that a person has committed an offence in relation to drunk-driving, such police officer may require such person to provide a breath sample for analysis by means of the approved device, or to provide a specimen of blood and urine for laboratory analysis, which takes place at an approved laboratory. However, before doing so, the police officer must explain to the person that failure or refusal to take such a test would render such person guilty of an offence, and, unless the contrary is proved, it is presumed that the level of alcohol in that person’s blood exceeds the prescribed limit.⁵¹⁷

This can be best exemplified by what was stated in the judgment *Il Pulizija vs Carmelo Briffa*⁵¹⁸ wherein the Court held,

Illi dak li irriżulta lil din il-Qorti minn dak li semgħet hi, jidher, kif sewwa qed jilmenta l-appellant, li f’dan l-incident ħadd mill-uffiċjali tal-pulizija qatt ma kien avzah li n-nuqqas jew rifjut tiegħu li joqgħod għal test tan-nifs kien fih innifsu reat. Anke jekk għall-grazzja tal-argument, hu tassew kien irrifjuta li jagħmlu xorta mill-provi ma jirriżultax li hu qatt kien gie avżat li dak ir-rifjut tiegħu kien jikkostitwixxi r-reat li hu akkuzat bih taħt is-sitt akkuża. L-arikolu 15D(b) tal-Kap 65 fuq kwotat testwalment jirrikjedi kjarament li sabiex dak ir-rifjut ikun jista’ jigi meqjus bħala reat fih innifsu, irid l-ewwel ikun hemm dan l-avviż f’dan is-sens mill-uffiċjal tal-pulizija u minkejja dan l-avviz dak li jkun jibqa’ jirrifjuta li joqgħod għal dan it-test tan-nifs.

In fact the law also allows a Police officer to arrest a person if:

- (a) [A]s a result of a breath test the Police officer reasonably suspects that the proportion of alcohol in that person’s blood exceeds the prescribed limit; or
- (b) that person fails to provide a specimen of breath for a breath test when required to do so in pursuance of the provisions of article 15C provided that such person had been warned that the failure or refusal to comply with such a request was an offence.⁵¹⁹

⁵¹⁶[1999] Court of Criminal Appeal.

⁵¹⁷Chapter 65, *op cit*, Article 15E(4).

⁵¹⁸[2000] Court of Criminal Appeal.

⁵¹⁹Chapter 65, *op cit*, Article 15D.

In the judgment in the names *Il-Pulizija vs Anthony Cutajar*⁵²⁰ it was established that,

[L]-Artikolu 15D tal-Kap 65 jipprovdi li l-pulizija jistgħu jarrestaw persuna li tonqos milli tagħti kampjun tan-nifs meħtieġ (skond l-Artikolu 15C) kemm-il darba dik il-persuna tkun ġiet avzata li n-nuqqas jew ir-rifjut li tagħti dak il-kampjun tan-nifs hu reat. Tali twissija, iżda, hi meħtieġa biss sabiex il-pulizija jkunu jistgħu jeżerċitaw is-setgħa tagħhom li jarrestaw fiċ-ċirkostanzi kkontemplati fl-imsemmi Artikolu 15D(b).

Furthermore, in the judgment given in the names *Il-Pulizija vs Emanuel Camilleri*⁵²¹ it was held that,

It-twissija li n-nuqqas jew rifjut li wieħed jagħti kampjun tan-nifs hu reat, hi meħtieġa biss sabiex il-pulizija tkun tista' tarresta lil minn hekk jonqos milli jagħti dak il-kampjun għat-test tan-nifs (mhux għall-analiżi) u dan skond l-Artikolu 15D(b). Għall-finijiet tar-reat kontemplat fl-Artikolu 15E(4) ebda twissija mhi meħtieġa.

However, the law also provides that the person asked to take a test can bring a defence to prove that his failure to provide a specimen was due to a physical or mental incapacity to provide it or because its provision would entail a substantial risk to his health.⁵²²

In the judgment delivered in the names *Il-Pulizija vs Joseph Bonnici*⁵²³ the court explained the term *physical or mental incapacity* as an incapacity "*li trid tezisti indipendentement mill-ansjeta' dovuta għal fatt li dik il-persuna tkun involuta fin'incident awtomobilistiku.*" This was also maintained in the judgment in the names *Il-Pulizija vs Marlon Montebello*⁵²⁴, wherein it was stated that

[K]if ġie ritenut f'diversi sentenzi Ingliżi in materja '*normally expert medical evidence of the physical or mental incapacity to provide the specimen is required to support the defence and demonstrate the existence of the necessary causative link between the incapacity and the failure to provide a specimen*' (Blackstone Criminal Practice – 2000, Blackstone Press Limited (London) 2000

⁵²⁰ [1999] Court of Criminal Appeal.

⁵²¹ [1999] Court of Criminal Appeal.

⁵²² Chapter 65, *op cit*, Article 15E(4).

⁵²³ [2000] Court of Criminal Appeal.

⁵²⁴ Criminal Appeal Nr 225/00 [2001] Court of Criminal Appeal.

p 378), l-inkapaċita fiżika ma kinitx waħda assoluta, iżda waħda relattiva dipendenti fuq l-ansjeta' dovuta għall-fatt li kien ħabat bil-karozza ta' missieru.

As was reiterated in the judgment in the names *Il-Pulizija vs Claire Falzon*⁵²⁵

Il-fatt li persuna ma tkunx tista tonfoħ tajjeb minħabba l-istat ta' tossikazzjoni li tkun fiha, jew, minħabba l-istat ta' eċitament li jaħkimha, tkun ħabtet, jew għax tkun giet arrestata mill-pulizija, ma jammontax għall-inkapaċita' fiżika jew mentali li teżoneraha għall-finijiet tas-**sub-artikolu (4) tal-Artikolu 15E tal-Kap 65**, b'mod li f'każ simili għandu jiġi ritenut li jkun hemm 'nuqqas li wieħed jagħti l-kampjun tan-nifs kif rikjest bil-liġi' (**P vs Joseph Bonnici**).⁵²⁶

A person required to provide a specimen of breath or body fluid who consents to such procedure may be detained by the Police until such person provides the necessary specimen or until the person no longer poses a threat to himself or to others.⁵²⁷ Moreover, a person required to provide a specimen of breath, blood or urine may also be detained by the Police until it appears to the Police that such person is fit to drive.⁵²⁸ This is a safety precaution measure, taken so that no one under the influence of alcohol or drugs is allowed on the road.

4. Punished as a Crime

There is no doubt that a vehicle driven by an intoxicated person is a lethal weapon. Hence the law deals with such an offence as a crime and not as a contravention. As provided for in the Criminal Code, penalties for crimes include imprisonment. For a first conviction on drunk-driving, the offence carries a punishment of a fine of not less than one thousand and two hundred euro (€1,200) or to imprisonment not exceeding 3 months or to both such fine and imprisonment. On a second or subsequent conviction, the punishment is raised to a fine of not less than two thousand three hundred and twenty nine euro and thirty seven cents (€2,329.37) or to imprisonment not exceeding six months or to both such fine and imprisonment.

In addition the court must disqualify the offender from holding or obtaining a driving license in the case of a first conviction for a period of not less than 6

⁵²⁵Criminal Appeal Nr 286/2000 [2001] Court of Criminal Appeal.

⁵²⁶ibid.

⁵²⁷Chapter 65, *op cit*, Article 15F.

⁵²⁸ibid Article 15G.

months and in the case of a second conviction for a period of not less than one year.⁵²⁹

It must be pointed out at this stage that should the person found to be driving under the influence of alcohol above the prescribed limit be involved in a traffic accident, his motor insurance policy will not cover him to make good for any damages that the driver could have caused. Besides criminal prosecution by the Executive Police, such driver may eventually face a civil case, wherein the victim may choose to demand thousands of Euro in damages in the case of a fatality or disabilities of a permanent nature.

5. Conclusion

In conclusion, it would be interesting to list a number of statistics showing criminal arraignments regarding this offence:⁵³⁰

Breathalyser Charges	Arraigned	Guilty	Acquitted	Sub-Judice
2013	222	124	61	37
2014	235	70	32	133
2015 (Jan - Mar)	39	11	6	22
Total	496	205	99	192

It is to be noted that in the above cited cases no one was sentenced to an effective prison term.

A survey carried out by *Malta Today* in April 2010⁵³¹ revealed that only 1% of the population know the legal drunk-driving limit, 26% of the population have more than five drinks a week, 10% of the population have more than 10 drinks a week, 29% of the population had abstained from alcohol over the previous year, and 17% of the population drink on a daily basis. Thus from such results it appears that the problem is rather severe and should be addressed in a stricter fashion. Perhaps the time has come that, as happened in Britain, random testing be introduced, a measure by virtue of which more arraignments and more awareness of this acute problem might be raised.

⁵²⁹Chapter 65, *op cit*, Article 15H.

⁵³⁰Malta Police Association, Principal Citation Office (PCO).

⁵³¹James Debono, 'Drink Driving – 99% of Maltese do not know legal limit' *Malta Today* (Valletta, 28 April 2010).