THE HIGH COURT
JUDICIAL REVIEW

[2023] IEHC 260

[2021 No. 1803 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857, AS EXTENDED BT SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961.

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA DANIEL LYONS)
RESPONDENT

AND

JOSEPH TOBIN

APPELLANT

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 31st day of March 2023

1. This is an appeal by way of case stated from a determination of the District Court. Joseph Tobin was convicted on 3 December 2020 of having driven a mechanically propelled vehicle on 21 March 2018 in a public place while being under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle, contrary to s.4(1) of the Road Traffic Act 2010 (the 2010 Act).

2. On 21 March 2018 Garda Daniel Lyons saw Joseph Tobin driving a car in an erratic manner in Celbridge, County Kildare. He appeared to put on his seatbelt and to put something down beside a seat. He drove the car into a supermarket car park and got out. He was unsteady on his feet. His speech was slurred. His eyes were bleary. A beer can was observed between the front seats.

3. Garda Lyons formed the view that Joseph Tobin had consumed an intoxicant and required him to provide a preliminary breath specimen which was positive for alcohol. Garda Lyons did not require Joseph Tobin to provide a specimen of oral fluid for drugs testing. He then arrested Joseph Tobin under s.4(8) of the Road Traffic Act 2010 (the 2010 Act).

4. Garda Lyons formed the opinion that he had consumed an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place and was committing an offence under s.4(1)(2)(3) or (4) of the Road Traffic Act 2010. Garda Lyons did not believe that he had committed an offence under s.4(1A) of the 2010 Act. Joseph Tobin admitted that he had taken 2 drinks before driving. He was arrested and taken to Leixlip Garda Station.

5. On arrival at Leixlip Garda Station he was advised of his right of access to a solicitor and to obtain legal advice at any time. He did not exercise this right.

6. He was then required to provide a breath sample for the purpose of determining concentration of alcohol under s.12(1)(a) of the 2010 Act. The apparatus did not function properly. This failed attempt to take a breath sample took place some 35 minutes after his arrival in the Garda Station.

7. Joseph Tobin was required to permit a designated doctor to take a sample of his blood or, at his option, give a sample of urine, pursuant to s.12(1)(b) of the 2010 Act. The penalties for non-compliance were explained to him . This requirement was made and sample given approximately one and a half hours after the failed attempt to take a breath sample.

8. Joseph Tobin opted to give urine. He did not exercise his right to take one of the two vials containing his urine specimen for independent analysis.

9. The specimens of urine were sent to the Medical Bureau of road Safety. On 3 April 2019 a certificate issued from the Bureau indicating a concentration of 47 mg of alcohol per 100 ml of urine. This was 20 mg below the threshold level specified by s.4(3)(a) of the 2010 Act.

10. On 4 July 2019 a further certificate issued from the Bureau stating presence of "CANNABINOIDS CLASS" drugs in the sample. This certificate did not quantify concentration of drugs in the sample or identify which cannabinoids were found. Not all cannabinoids are psychoactive drugs. Cannabidiol is a harmless cannabinoid which may be legally consumed without prescription. It has no intoxicating effects. The term "CLASS" in the certificate is unexplained.

11. The District Court Judge admitted this certificate into evidence. He may have concluded that Joseph Tobin had taken cannabis and that the effect of this consumption materially contributed to his intoxication.

12. The questions submitted to this Court ask whether a member of the Garda Síochána is obliged to provide detail of potential ramifications of exercise of a choice to give a urine sample in lieu of permitting the taking of a blood sample in response to a requirement made by that member under s.12(1)(b) of the 2010 Act.

13. These questions are framed as follows: "a. Was I correct to accept that fair procedures had been afforded to the appellant in circumstances where the ramifications of his decision to opt between a blood and urine sample were not explained to him? b. In the circumstances of this case , where the appellant had been informed of his right of access to a solicitor at any stage in the proceedings and did not invoke that right, would fair procedures dictate a member of an Garda Síochána, once the relevant legal requirement is made to provide a sample of blood or urine, to inform the defendant of

the ramifications of which sample he provides? c. Was I correct in law to convict the appellant?"

14. In substance, these questions ask whether the District Court Judge should have excluded the certificate from evidence because of failure to give an explanation to Joseph Tobin of the "pros and cons" of opting to provide blood or urine in circumstances where, unknown to Gardaí , Joseph Tobin may have had cannabinoids in his system while driving his motor vehicle. Joseph Tobin was provided with an opportunity to obtain legal advice prior to being required to provide the sample and did not avail of this right.

15. The answer to question "a" is "yes" and the answer to question "b" is "no".

16. Joseph Tobin was advised of his entitlement consult with a solicitor when he arrived at Leixlip Garda Station. Gardaí did not have any duty to give him legal advice. Their duty was confined to explaining his right of access to a solicitor and ensuring that he would receive timely advice if he requested it.

17. Joseph Tobin was obliged by law to provide a sample of blood or urine. His choice was to provide a sample or commit a criminal offence. All that was required was that he be told that he was required by law to provide the sample and that failure to co-operate would constitute a criminal offence.

18. The urine sample was taken from Joseph Tobin in accordance with statutory procedures. He was advised of his legal right to choose to give a sample of urine in lieu of blood and elected to give urine.

19. The 2021 Act does not require that Joseph Tobin be cautioned that if he gave a sample of blood or urine it could be forensically examined and results used in a particular way as evidence in criminal proceedings under the Road Traffic Acts. The law does not require that he be given any such warning. He did not enjoy any constitutional or other legal right which necessitated that Gardaí give him any such caution or warning.

20. This Court is not expressing a view on whether it might be necessary to provide further information to a person who has been deprived of an opportunity to obtain legal advice prior to completion of sampling under s.12(1)(b) of the 2010 Act. This would depend on whether deprivation of a right to prompt legal advice could be shown to have potentially adversely affected a person's interests.

21. Any person who has taken the trouble to read pharmaceutical instruction leaflets will know that some drugs should not be consumed by those who intend to drive motor vehicles or in combination with alcohol or other drugs. Users of recreational drugs and alcohol are taken to be aware of psychoactive, soporific, confusing and other effects of ingesting these substances.

22. The Oireachtas recognises that alcohol and drugs, taken alone or in combination, may impair capacity to control a motor vehicle. Section 3(1) of the Road Traffic Act 2010

specifies that: ` "intoxicant" includes alcohol and drugs and any combination of drugs or of drugs and alcohol'. This inclusive definition covers substances such as alcohol, drugs and medicines containing drugs which interfere with capacity to control a motor vehicle. The term "drugs" in this definition of "intoxicant" is not necessarily confined to drugs which have a similar range of effects to those of alcohol.

23. A member of the Garda Síochána who observes erratic driving of a motor vehicle and who forms an opinion that the driver is unable to have proper control of the vehicle due to an intoxicant may not be aware at time of arrest and subsequent processing of the driver that consumption of drugs may be contributing to intoxication which is causing incapacity. This may also arise where a person is arrested for dangerous driving under s.53(5) of the 1961 Act. It is not necessary to for a Garda have a belief that a person arrested for dangerous driving be intoxicated as a precursor to requiring a sample under s.12(1)(b) of the 2010 Act.

24. Section 4(1) of the 2010 Act specifies that: "A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle."

25. It follows from the definition of "intoxicant" that the offence under s.4(1) of the 2010 Act may be committed where evidence establishes that a person is incapable of having proper control of a motor vehicle by reason of the influence of "an intoxicant" consisting of a combination of drugs or a combination of one or more drugs and alcohol. Alcohol or one drug within an combination might not be sufficient to bring about incapacity.

26. The offence under s.4(1) of the 2010 Act may be committed if evidence proves that, irrespective of measurement of blood or breath or urine alcohol level or of blood drug level, the defendant was under the influence of an intoxicant to such an extent as to be incapable of having proper control of the motor vehicle. For instance, a person driving a car might be shown to have had both alcohol and a scheduled drug in the blood in quantities less than the prescribed minimum thresholds, but the overall evidence might still demonstrate that the person was so intoxicated at the time as to be incapable of having proper control of a motor vehicle.

27. Drugs which may produce or contribute to incapacity of a person to have proper control of a motor vehicle are not confined to psychoactive substances listed in the Schedule to the 2010 Act. Many drugs may have effects which impair capacity to drive. Testing of a sample of blood or urine might point to presence in the system of a driver of a non-scheduled drug proved to affect a person's capacity to maintain proper control of a motor vehicle.

28. This schedule was inserted into the 2010 Act by s.8 of the Road Traffic Act 2016. It sets out maximum permitted levels of concentration of specific psychoactive constituents of cannabis, cocaine and heroin in blood of a person driving or attempting to drive or being

in control of a motor vehicle. These drugs include " Δ9-Tetrahydrocannabinol (Cannabis)" and "11-nor-9-carboxy-Δ9-Tetrahydrocannabinol (Cannabis)."

29. The associated offence is set out in s.4(1A) of the 2010 Act, as inserted by s.8 of the 2016 Act. This provides that: "Subject to subsection (1B), a person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of a drug specified in column (2) of the Schedule such that, within 3 hours after so driving or attempting to drive, the concentration of that drug in his or her blood is equal to or greater than the concentration specified in column (3) at the same reference number."

30. Section 4(1B) of the 2010 Act permits an exception where the scheduled drug found in the blood is lawfully prescribed Δ9-tetrahydrocannabinol. The circumstances in which this drug may be lawfully prescribed in a medicine are very tightly controlled by regulations under the Misuse of Drugs Act 1977. A person who has consumed this drug in a prescribed medicine may not drive if the result of such consumption is incapacity to properly control a motor vehicle.

31. Section 4(2), (3) and (4) of the 2010 Act create similar "over the limit" offences of driving or attempting to drive where concentration of alcohol found on testing in the blood or urine, or on the breath of a person who has driven or attempted to drive a motor vehicle within 3 hours prior to sampling exceeds stated thresholds.

32. The offences under s.4(1A), (2), (3) and (4) of the 2010 Act do not involve proof that a person was incapable of having proper control of a mechanically controlled vehicle at the time of driving or attempted driving.

33. Section 5 of the 2010 Act creates similar offences to those specified in s.4 of that Act where a person is in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle and is incapable of having proper control of the vehicle as a result of being under the influence of an intoxicant or is "over the limit" for alcohol in the blood or urine or on the breath or "over the limit" for psychoactive drugs specified in the Schedule to the 2010 Act in the blood.

34. By s.4(5) of the 2010 Act: "A person who contravenes this section commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or both."

35. The mandatory consequential disqualification order on conviction of an offence under s.4(1) of the 2010 Act is not less than 4 years in the case of a first offence. The minimum consequential disqualification order on conviction of a first offence under s.4(2),(3) or (4) of the 2010 Act dealing with "over the limit" offences of driving or attempting to drive with excess alcohol in the blood, urine or breath range from 6 months to 3 years, depending on the reading. The minimum consequential disqualification order on conviction of a first offence under s.4(1A) of the 2010 Act is 1 year. These periods are set out in s.26 of the 1961 Act, as amended. Seriousness of

offending may merit a greater period of disqualification than the prescribed minimum period.

36. The offences set out in ss. 4(1A), (2), (3) and (4) of the 2010 Act are not alternatives to the offence set out in s.4(1) of that Act. A person may be convicted of both driving while "over the limit" and driving while so under the influence of an intoxicant as to be incapable of having proper control of a motor vehicle. A person might at the same time contravene a number of prohibitions in s.4. That person might be found to have excess concentration of alcohol and of the specified psychoactive ingredients of one or more or all of cocaine, cannabis and heroin in the blood. That person might also be found to be incapable of having proper control of the motor vehicle by reason of intoxication.

37. Evidence relevant to proof of "driving while incapable" contrary to s.4(1) may consist of or speak to results of tests on samples taken under the procedures set out in the 2010. A certificate issued by the Bureau stating presence or concentration of alcohol or any drug in blood or urine may be introduced into evidence for this purpose or were consumption of alcohol or drugs is relevant to any issue relating to dangerous or careless driving.

38. By s.4(8) of the 2012 Act: "A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section.

39. Section 12 of the 2010 Act deals with the basic obligation to provide breath, blood or urine samples following arrest under various provisions of the Road Traffic Acts.

40. The relevant parts of s.12 of the 2010 Act specify as follows:

> "(1) Where a person is arrested under section 4(8), 5(10), 6(4), 9(4), 10(7) or 11(5) of this Act or section 52(3), 53(5), 106(3A) or 112(6) of the Principal Act, a member of the Garda Síochána may, at a Garda Síochána station or hospital, do either or both of the following- (a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his or her breath and may indicate the manner in which he or she is to comply with the requirement, (b) require the person either- (i) to permit a designated doctor or designated nurse to take from the person a specimen of his or her blood, or (ii) at the option of the person, to provide for the designated doctor or designated nurse a specimen of his or her urine, and if the doctor or nurse states in writing- (I) that he or she is unwilling, on medical grounds, to take from the person or be provided by him or her with the specimen to which the requirements in either of the foregoing subparagraphs related, or (II) that the person is unable or unlikely within the period of time referred to in section 4 or 5, as the case may be, to comply with the requirement, the member may make a requirement of the person under this paragraph in relation to the specimen other than that to which the first requirement related. (2) Subject to section 22, a person who refuses or fails to comply immediately with a requirement under subsection (1)(a) commits an

offence. (3) Subject to section 22, a person who, following a requirement under subsection (1)(b)- (a) refuses or fails to comply with the requirement, or (b) refuses or fails to comply with a requirement of a designated doctor or designated nurse in relation to the taking under that subsection of a specimen of blood or the provision under that subsection of a specimen of urine, commits an offence. (4) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or to both."

41. Section 12(1) of the 2010 Act allows a member of the Garda Síochána at a Garda Station or hospital to require any person arrested under s.4(8) of the 2010 Act to submit to either or both a test for concentration of alcohol in the breath and provision of a sample of blood or, at the option of the person, urine. It is not necessary for the member making this requirement to form any suspicion that the person has committed any particular offence under s.4. The member making this requirement need not be the same member who has arrested that person under s.4(8) or under any other power of arrest set out in s.12(1).

42. The Oireachtas has elected not to create an "over the limit" offence for concentration of any scheduled drug found in a urine sample taken under the 2010 Act. This Court assumes that there are technical reasons for this. S.13B of the 2010 Act, as amended, provides for a special testing regime following arrest where a member of the Garda Síochána, having carried out a preliminary oral fluid test under s.9(2A) or s.10.4 or impairment tests under s.11 or an oral fluid specimen test under s.13A following arrest, is of the opinion that a person has committed an offence of driving or attempting to drive or being in control of a motor vehicle with excess of drugs specified in the Schedule to that Act in the blood.

43. This provision enables the member who has carried out the preliminary tests on a person and formed the requisite opinion to require that such person permit the taking of a blood sample. That person is not given a choice to provide urine and refusal or failure to comply with the requirement to provide a blood sample is a criminal offence.

44. The preliminary testing procedures under ss.9, 10, 11,12, 13A, 13B and 14 of the 2010 Act permit members of an Garda Síochána to require the persons requested to provide samples requested in the sense that any failure or refusal to co-operate, save in exceptional circumstances allowed by the 2010 Act, is a criminal offence. Some of these demands may be made before arrest and some may be made after arrest at a Garda station or hospital.

45. In general, a person to whom such a request has been validly made has no choice but to comply. Statute compulsion has the effect of removing any right to claim a privilege against incrimination where such demands are made. At most, a member of the Garda Síochána is only required to make clear to the person to whom the demand is made is compulsory by law and that failure or refusal to comply and cooperate is a criminal offence.

46. By s.17(1) of the 2010 Act, as amended by s.14 of the 2016 Act: "As soon as practicable after it has received a specimen forwarded to it under section 15 (blood or urine taken or given to a designated doctor or nurse) the Bureau (established under s.37 of the Road Traffic Act 1968) shall analyse the specimen and may determine as appropriate, all or any of the following: (a) the concentration of alcohol in the specimen; (b) the presence of a drug or drugs in the specimen; (c) the concentration of a drug or drugs in the specimen."

47. Where a blood sample has been taken in accordance with the statutory procedure , that sample may be used to test for presence and concentration in blood of alcohol and of drugs specified in the Schedule to the 2010 Act. The result of that test on the sample may be used to prove that the blood concentration of a drug specified in the Schedule is in excess of that allowed for the purposes of the offence under s.4(1A) of the 2010 Act. It may also be used to test for presence and concentration of alcohol and of other drugs which are not scheduled in the 2010 Act. Similarly, a sample of urine may be tested to see what drugs it contains. There is nothing in the 2010 Act which prevents a sample of blood or urine taken under Chapter 4 of that Act from being tested for presence and concentration of any drug which may impair capacity to drive a motor vehicle.

48. By s.20(3) of the 2010 Act: "A certificate expressed to have been issued under section 17 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts 1961 to 2010 of the facts stated in it, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence with compliance by the Bureau with the requirements imposed on it by or under Chapter 4." This allows the certificate from the Bureau to be used as evidence of presence or concentration of any drug in blood or urine in prosecutions under the Road Traffic Acts. A drug identified in the certificate need not be one of those listed in the Schedule to the 2010 Act.

49. If a drug listed in the Schedule to the 2010 Act is found in a urine sample, this cannot be used to support a conviction of contravention of s.4(1A) of the 2010 Act. Except where excess concentration of scheduled drugs in blood is established, a Bureau certificate which shows presence or concentration of a drug in a sample of blood or urine will not, without expert interpretation, tell anything about likely effect of that substance on capacity of a person who has provided that sample to have proper control of a motor vehicle at time of driving.

50. This gives an advantage to a driver who has consumed drugs and who, having been required to provide a sample of blood under s.12(1) of the 2010 Act, opts to give a urine sample instead. That person cannot be convicted of an offence under s.4(1A) of that Act. Other advantages are given to a person who has consumed a scheduled drug and opts to provide a urine sample . A Bureau certificate showing or quantifying a drug or a drug residue in urine may not be capable of meaningful interpretation. It may tell an expert little about quantity consumed, when consumption took place and likely consequential impairment of capacity to drive at time of driving.

51. The appellant was summonsed for an offence under s.4(1) of the 2010 Act. The criminal case was heard by Judge Gerry Jones at Blanchardstown District Court on 3 December 2020. In the course of a defence application for a direction following the prosecution evidence an issue was raised as to whether the District Court Judge should have excluded the Bureau Certificate of 4 July 2019 from consideration. The grounds were that Garda Lyons did not explain that Joseph Tobin that a Bureau analysis result on a urine sample could be used in a prosecution under s.4(1) as evidence of presence of drugs in his system.

52. It was claimed that Joseph Tobin was thereby deprived of making an informed choice in deciding whether to permit a sample of his blood to be taken or to give urine.

53. Does the law oblige Gardaí exercising powers under s.12(1) of the 2010 Act to give these types of warnings or cautions and if so, what must they tell a person who is required to provide a sample? How does presence or absence opportunity to consult a solicitor affect the position?

54. There is no way of anticipating what results of testing of blood or urine for drugs will show. A person who provides a sample in response to a requirement under s.12(1)(b) can have no legitimate expectation that it will not be tested for scheduled and non-scheduled drugs as well as for alcohol or that results of such tests will not be used either by themselves or as foundation for expert interpretation if such material has probative value in a prosecution for any offence under the Road Traffic Acts. A person who gives a sample of blood which comes back "under the limit" for both alcohol and a scheduled drug may still be prosecuted for an offence under s.4(1) of the 2000 Act because the combination of their effects may be proved to produce a state of intoxication rendering a person incapable of having proper control of a motor vehicle.

55. A certificate of analysis of blood or urine may show presence or concentration of a non-scheduled drug known to affect capacity to control a motor vehicle. Where a certificate shows that concentration of a scheduled psychoactive drug in blood tested is in excess of the statutory threshold it is open to the Director of Public Prosecutions to prove that the driver of a motor vehicle is guilty of contraventions of both s.4(1) and s.4(1A) of the 2010 Act.

56. A member of the Garda Síochána who exercises power under s.12(1)(b) of the Road Traffic Act 2010 (the 2010 Act) to require a person to permit a designated doctor or designated nurse to take a sample of blood, or at the option of that person, to provide for the designated doctor or nurse a urine sample must warn that person that failure or refusal to comply with the requirement and co-operate in the procedure is a criminal offence.

57. This warning must be given because the Garda member is making a requirement in exercise of statutory power and failure or refusal to co-operate is a criminal offence. That member must inform the person from whom the sample is required in simple

terms that the law requires cooperation and that failure or refusal to co-operate in providing the sample is a criminal offence.

58. If these matters are advised by that member to a person requested to permit or provide the sample of blood or urine, then that person knows that the member is exercising power conferred by law and can decide whether or not to submit to the process in the knowledge that failure to cooperate will carry criminal consequences.

59. The member need not provide any more information when making the requirement. It is not necessary to state the maximum penalty which the law can impose on a person convicted of committing an offence of failing or refusing to cooperate or that that a conviction for this offence also carries a minimum period of consequential disqualification from driving a motor vehicle.

60. These propositions are established judgments of the Supreme Court in *Brennan v. Director of Public Prosecutions* [1996] 1 ILRM 267, *McGarrigle v. Director of Public Prosecutions* [1996] ILRM 271, *Director of Public Prosecutions v. Mangan* [2001] 2 I.R. 273

61. A member of the Garda Síochána who invokes s.12(1)(b) of the 2010 Act is not obliged to explain that any sample taken or given may be tested for presence and concentration of both drugs and alcohol and that results may be used in evidence in a criminal prosecution for both "unfit to drive" and "over the limit" offences. That member need not explain that a blood sample may be used to prove a special offence of having excess concentration of specified drugs in the blood following driving and or that no equivalent offence exists for concentration of those specified drugs if the person elects to give a urine sample.

62. That member need not explain that persons convicted offences relating to driving while unfit due to intoxication carry greater minimum mandatory consequential disqualification than those convicted for the first time of "over the limit" offences of having alcohol or drugs in their system at time of driving. The member need not explain that Bureau certificates setting out presence of drugs in a blood or urine sample may be introduced in evidence in prosecutions under s.4(1) of the 2010 Act.

63. It was submitted to this Court that if Joseph Tobin elected to give blood, a test result might show concentration in his blood of specified psychoactive drugs in cannabis at a level less than the threshold set out in the Schedule to the 2010 Act and that this potential evidence was now lost. It was claimed that if the level of scheduled psychoactive cannabinoids in a blood sample was greater than the statutory threshold Joseph Tobin would have been prosecuted for an offence under s.4(1A) of the 2010 Act. This carries a lower mandatory period of disqualification following conviction than that specified in s.4(1) of that Act.

64. Charging is a matter for the Director of Public Prosecutions. No defendant has a legitimate expectation that the Director of Prosecution will elect not to charge for a

particular offence if there is potential evidence which supports conviction on that charge. The Director of Public Prosecutions is not obliged by law to elect to prosecute on either s.4(1) or s.4(1A),(2),(3) or (4) of the 2010 Act. The same set of facts may support convictions for a "drunk driving", "over the limit for scheduled drugs driving" and "over the limit for alcohol" driving.

65. Counsel for the applicant submitted that an extra-statutory warning of relating to potential "ramifications" was warranted in light of the approach taken by members of the Supreme Court in judgments in *Director of Public Prosecutions v. McDonagh* [2009] 1 I.R. 767 ([2008] IESC 57) and *Director of Public Prosecutions v. Cagney* [2013] 1 I.R. 493 ([2013] IESC 13).

66. The first of these authorities concerns the statutory obligation to provide specimens of breath under s.12(1)(a) of the 2010 Act in a particular sequence. The facts related to technical characteristics of a breath sampling machine which required that two valid samples be given consecutively in a cycle of testing and which used the lower reading and deducted a margin for error. Para.31 of the judgment of Denham C.J. at page 779 canvasses a possibility that some exculpatory level of reading might be excluded if there could not be a mix and match between a partially successful result which is capable of giving one reading in a failed overall attempt and a subsequent exercise which produces two specimens. The first readings might be lower than readings selected as the basis for prosecution.

67. The second of these authorities concerns an extra-statutory obligation where a member of the Garda Síochána exercises the power under s.12(1)(a) of the 2010 Act to require a person to provide breath specimens for testing. The member should also warn that person that failure or refusal to offer a blood or urine sample will preclude that person from being able to rely on a statutory defence of having a special and substantial reason for failure or refusal to offer breath specimens under s.22(1) of the 2010 Act.

68. This warning is only relevant in the context of prosecution of a person for the offence of failing or refusing to comply with a requirement under s.12(1)(a) of the 2010 Act, contrary to s.12(3). This warning has no relevance if the person requested to provide breath specimens complies with a requirement to provide these samples.

69. If a person charged with an offence of failing or refusing to comply with the requirement to provide breath specimens was not warned or informed of the obligation to offer blood or urine instead, then that person may establish the statutory defence under s.22(2) of the 2010 Act by establishing to the satisfaction of the court "…that there was a substantial reason for the refusal or failure and that, as soon as practicable after the refusal or failure concerned he or she complied with (or offered but was not called upon, to comply) with a requirement under the section concerned in relation to the provision of a specimen of blood or the provision of a specimen of urine".

70. Neither of these situations has any relevance to the matter under consideration here. This is not a case where a potential power of selection has been to prosecuting

authorities to cherry-pick on the basis that an earlier sample was taken which might yield a more favourable result. It does not involve a prosecution for failing or refusing to give a sample.

71. If the submission on behalf of Joseph Tobin is correct any member of the Garda Síochána who makes a demand under s.12(1)(b) of the 2010 Act must provide a law lecture on a variety of potential evidential ramifications of results of tests on blood and urine to cover speculative scenarios. The member making a demand for a sample has no way of knowing whether results of testing may show presence or concentration of scheduled or other drugs in blood or urine, or of anticipating how results of testing may be interpreted or used in proof or in deciding whether or not to prosecute for an offence under s.4(1) of the 2010 Act.

72. If there is to be such a duty to advise or warn, why is it imposed and where does it begin and end? Is any Garda making invoking the statutory requirement obliged to speculate that the person required to provide the sample may also have taken a scheduled psychoactive drug and advise the person that he or she should avoid giving a blood sample if he or she has taken these drugs prior to driving as his will exclude the prospect of a prosecution under s.4(1A)? Should the Garda brief on all the other permutations of possible evidence derived from analysis of a sample of blood or urine if that sample shows that a person has taken some drug along with alcohol?

73. A person who has genuine legal choices available in respect of the taking of samples must not be deprived of access to a solicitor where it would reasonably be necessary to have legal advice before making any such choice: see para 20 of the judgment of Donnelly J in *Director of Public Prosecutions v. Parker* [2014] IEHC 652, referring to People (*Director of Public Prosecutions v. Gormley and White* [2014] 2 I.R. 591 ([2014] IESC 17). This right to advice on choices does not extend to a right to receive advice to commit a criminal offence by refusing to provide samples.

74. In order to determine whether absence of legal advice has an impact on fairness of taking of evidence which should result in it being excluded in exercise of discretion it is necessary to analyse what happened and whether a failure to afford a person a right could have resulted in a different outcome. For example, in In People (Director of Public Prosecutions) v. Gormley and White it was considered that nothing flowed from the fact that forensic samples consisting of a hair sample and buccal swab were taken from Mr White prior to the arrival of his solicitor. These were samples of a sort which could be taken without consent or cooperation. The Supreme Court emphasised that the law distinguishes between circumstances in which incriminatory statements are obtained and circumstances in which incriminatory objects are obtained. This distinction is well-established.

75. In the unusual circumstances which gave rise to this case, legal advice on whether to give blood or urine could, potentially, make a difference to the legal outcome. This difference arises from potential use to which results of a certificate from the Bureau might be put. If Joseph Tobin plumped to give blood, the certificate might have shown

that he "was under the limit" for scheduled psychoactive substances in cannabis. This would exclude him from prosecution for an offence under s.4(1A) of the 2010 Act.

76. However, he might still be prosecuted under S.4(1) on the basis of evidence that he consumed both alcohol and a scheduled drug and a court might conclude on overall evidence presented that he was incapable of having proper control of the motor vehicle.

77. An analysis of blood might show minute amounts of a scheduled substance in the blood at levels not likely to contribute to incapacity to control a motor car or no level at all, consistent with consumption at some distant time prior to the driving and the drug having passed through his system. An analysis of presence of scheduled psychoactive substances in urine is incapable of being used to support a conviction under s.4(1A) and does not, without further expert interpretation, give any indication of a time period within which drugs found in the sample were consumed or whether they were capable of affecting capacity to drive. The certificate giving results of analysis of Joseph Tobin's urine sample does not identify or quantify scheduled psychoactive constituents of cannabis. It has very little evidential value. The questions posed by this case stated are premised on a view that this piece of "non-evidence" could advance the prosecution case.

78. A person who has been arrested under the relevant provisions of the Road Traffic Acts will know what alcohol or drugs or medicines were consumed and when they were consumed. Advice can be sought from a solicitor on these issues. Joseph Tobin knew matters which Gardaí were not privy to. He could have sought legal advice on these matters. The time to seek legal advice was before samples were attempted or taken under s.12(1) of the 2021 Act .

79. It was sufficient vindication of the right to legal advice to afford Joseph Tobin general access to legal advice prior to commencement of testing under s.12 of the 2010 Act. The Act does not contain any statutory requirement to opt for s.12(1)(a) or (b) and any solicitor advising is taken to know that Gardaí may opt to require both and use results of different samples as evidence in a number of possible ways and as relevant to a number of different offences.

80. In the course of argument of this appeal this Court expressed reservations about whether the certificate which showed presence of "CANNABINOIDS CLASS" drugs in the urine sample taken capable of proving that Joseph Tobin was capable of establishing anything.

81. No submission was advanced in relation to the question "c" asked by the District Court Judge. If this question is solely related to issues canvassed in the first two questions, the answer it is "yes". If question "c" relates to whether the District Court Judge correctly concluded that there was sufficient evidence to convict Joseph Tobin, this depends on whether he was of the view that the evidence other than that contained in the Bureau certificate relating to "CANNABOIDS CLASS" drugs persuaded him of the guilt of Joseph Tobin. If he was not of that view, the proper verdict was an acquittal.