

DRYSTONE

CHAMBERS



Following the long awaited NPCC report in to the Synlab drug-driving analysis investigation, **Stephen Donnelly** looks into what this could mean for the 1,700 affected cases caught up in the scandal.

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Drug driving – miscarriages of justice?

In 2012, following government concerns over cost, the state-funded national Forensic Science Service (FSS) was closed, with the burden of much of its work being contracted to the private sector or carried out by individual police forces. Subsequently, in 2015, a National Audit Office report, commissioned by the House of Commons Science and Technology Select Committee, raised concerns about a cut in spending on forensic examinations leading to a potential failure to supply courts with DNA and scientific evidence; the overriding concern was the potential for miscarriages of justice.

In a January 2015 report by The Independent¹, Professor Peter Gill, the pioneer of mass genetic profiling, said that the shift to in-house DNA testing would be “disastrous”, with scientists under pressure to come up with results to secure convictions. He was concerned that because forensic science was becoming increasingly police-controlled there was a significant risk that *“the more vulnerable forensic scientists are going to report cases wrongly”*.

The 2019 annual report by the Forensic Science Regulator², stated that *‘currently, all decisions regarding (forensic) commissioning are the responsibility of policing, which is not a national body but a collection of specialist capabilities together with 43 independent territorial forces, each run by a chief officer with oversight from an elected PCC or mayoral equivalent. This means that overall there are over 90 decision-makers in relation to forensic science provision... Despite any national strategy or guidance that may be issued, ensuring sustainable, high quality, efficient provision of forensic science nationally can currently only be achieved by persuasion.’* Somewhat worryingly, in its 2018 Annual Report, the Regulator had expressed concern that commercial forensic science providers continued to be under significant financial strain and had warned that the risks to forensic science provision were close to

¹ 21 January 2015, <https://www.independent.co.uk/news/uk/crime/privatisation-of-forensic-services-a-threat-to-justice-and-putting-the-work-in-police-hands-would-be-disastrous-warn-experts-9991356.html>

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877607/20200225_FSR_Annual_Report_2019_Final.pdf

existential. This followed warnings of underfunding and the resultant risks to the sustainability of the market in 2015, 2016 and 2017 annual reports.

Concerns with regard the risk of miscarriages of justice in relation to failings within the field of forensic science have been further highlighted with the release of a report³ by the National Police Chiefs' Council (NPCC) into Synlab Laboratory Services Ltd's (Synlab) analysis of drug driving samples, specifically Section 5A Road Traffic Act 1988⁴ toxicology testing for controlled drugs. Beyond there being an indication in the press release announcing the summary of the report that the report findings concluded that 'analysis and processes were not conducted to the appropriate standard', there is no detail presently in the public domain as to the specific failings in the Synlab system of analysis.

The offence at s.5A RTA 1988 is driving, attempting to drive or being in charge of a motor vehicle with a specified controlled drug in the blood or urine in excess of the specified limit for that drug. It is a summary only offence that came into force on 2 March 2015⁵ and it brought enforcement of drug driving into line with that of drink driving, by introducing a strict liability offence to avoid the need to prove impairment. The legislation sought to enable more effective law enforcement to take place, with the aim of improving road safety by deterring potential drug drivers and bringing more drug drivers to justice.

In December 2020, Synlab had self-reported an issue to the Forensic Science Regulator and its accreditation for testing of drug driving samples was suspended. The period of concern was testing conducted by Synlab (based in Abergavenny) between April 2019 and December 2020; during that period the company had conducted analysis of 4,255 samples submitted by police in relation to potential drug driving prosecutions. Of those samples, Synlab reported that 1,778 had drug levels above the prescribed limit.

As a consequence of the NPCC review, *'due to issues identified with the quality assurance processes utilised by Synlab, all results produced by Synlab between April 2019 and December 2020, where they reported results above the prescribed drug driving limit, need to be withdrawn as evidence. No evidence was found during the review of any malicious intent.'* Chief Constable Nick Dean, the NPCC Lead for Forensics said, *'It is hugely regrettable, whenever evidence that has been submitted to the courts in good faith has to be withdrawn. We know that this will have significant knock-on effects for people. The CPS have been or will be contacting all those whose samples have been rescinded.'*

Given that the s.5A offence is a 'summary only' matter, it must be right to assume that there will have been up to 1,778 individuals subjected to court proceedings and, therefore, conviction and sentencing. The potential impact upon an individual with such a conviction is

³ <https://news.npcc.police.uk/releases/npcc-concludes-review-into-drug-driving-samples>

⁴ 5A Driving or being in charge of a motor vehicle with concentration of specified controlled drug above specified limit:

(1) This section applies where a person ("D")—

(a) drives or attempts to drive a motor vehicle on a road or other public place, or

(b) is in charge of a motor vehicle on a road or other public place, and there is in D's body a specified controlled drug.

(2) D is guilty of an offence if the proportion of the drug in D's blood or urine exceeds the specified limit for that drug.

⁵ The Crime and Courts Act 2013 inserted a new section 5A into the Road Traffic Act 1988

obvious – insurance premiums will certainly have increased, careers may have been jeopardised, and there will undoubtedly have been a broader impact on the family of many of those convicted. Of greatest concern, however, must be those who may, unjustly, have been sentenced to immediate or suspended terms of imprisonment.

There is presently no sentencing guideline from the Sentencing Council in relation to s.5A offences. However, guidance provided by the Sentencing Council is that a conviction will have the following consequences aside from the potential for imprisonment and an unlimited fine: (a) the court must endorse and disqualify an offender for at least 12 months; (b) must disqualify for at least 2 years if the offender has had two or more disqualifications for periods of 56 days or more in preceding 3 years; and (c) must disqualify for at least 3 years if offender has been convicted of a relevant offence in preceding 10 years. Standard aggravating and mitigating factors apply.

It is apparent from its website that Synlab Laboratory Services no longer conduct forensic testing for law enforcement agencies. What cannot be overstated, however, is that for the past decade (and longer) the criminal justice sector has been pushed to the back of the cupboard; privatisation and cost-cutting has been prioritised ahead of ensuring that sufficient funding is provided for an effective, fully functional system. When money (or, rather, the lack of it) takes priority over ensuring just outcomes, we cannot be surprised when miscarriages result.

The Crown Prosecution Service press office was invited to provide comment with regard to this issue and responded:

“Following the conclusion of the review into Synlab’s drug testing results between April 2019 and December 2020 we are contacting the defence in cases where there was a conviction. This process will take time and whether a conviction is set aside will be different in each case depending on all the available evidence.”

About the author

Stephen Donnelly was called to the Bar in 2001. A considerable proportion of his work is on behalf of the defence in serious criminal cases where he acts as leading junior or junior alone. He has significant experience dealing with cases involving sensitive disclosure issues and ‘intrusive’ policing methods and has delivered lectures specifically dealing with disclosure, evidential presentation and RIPA 2000. He has presented lectures to local authority enforcement teams in relation to the Protection of Freedoms Act 2012 and RIPA 2000.