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Commonwealth v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984)

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COMMONWEALTH v. NEAL

I. INTRODUCTION

In *Commonwealth v. Neal*,¹ the Supreme Judicial Court of Massachusetts recognized the possibility that radio frequency interference with some blood alcohol level testing equipment may render the tests unreliable² and, as a result, formulated new standards for the admissibility of Breathalyzer test results. The court held that future admissibility of results of breath tests performed on Model 900A Smith & Wesson instruments³ will be contingent on the Commonwealth's laying an adequate foundation to establish that the "instrument used was not so susceptible to [radio frequency interference] as to create a significant risk that the result was inaccurate on that basis."⁴

Neal was arrested for operating a motor vehicle on a public way while under the influence of intoxicating liquor in violation of chapter 90, section 24(1)(a) of the Massachusetts General Laws.⁵ He took a Breathalyzer test, which revealed a blood alcohol level of .14.⁶ The

1. 392 Mass. 1, 464 N.E.2d 1356 (1984).

2. The *Neal* court identified the problem of radio frequency interference (RFI) as "the impairment of normal functions of electronic instruments by unwanted radio waves. The record indicates that RFI may produce a needle deflection of the Model 900A null meter, which, in turn, may influence the blood alcohol content reading obtained." *Id.* at 14 n.13, 464 N.E.2d at 1365 n.13.

The null meter is the pointer on the Breathalyzer instrument that gives the blood alcohol reading. The null meter may respond to radio waves rather than, or in addition to, the blood alcohol level of the suspect. The deflection may produce inaccurate readings by showing either too much or too little alcohol content.

Sources of radio frequency interference include radio and television stations, airports, military bases, "ham" radios, taxicabs, ambulances, fire trucks, and police cruisers. *Id.* at 15 n.15, 464 N.E.2d at 1365 n.15.

3. Smith & Wesson markets several different Breathalyzer models, all of which may be susceptible to radio frequency interference. Smith & Wesson Customer Advisory 2 (September 10, 1982). The *Neal* court faced and decided only the issue of the reliability of the 900A model. The 900A model may, in fact, be more susceptible to radio interference than the other models. See Feldman and Cohen, *The Questionable Accuracy of Breathalyzer Tests*, June 1983, 19 TRIAL 54, 57-58.

4. *Neal*, 392 Mass. at 19, 464 N.E.2d at 1368. The court specified three acceptable methods by which the Commonwealth might establish the reliability of the 900A model Breathalyzer test. *Id.* at 19-20, 464 N.E.2d at 1368. For a discussion of these three methods, see text accompanying notes 58-62.

5. *Id.* at 3, 464 N.E.2d at 1358. See MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a) (West Supp. 1984).

6. *Neal*, 392 Mass. at 4, 464 N.E.2d at 1359.

level of the reading created a presumption that Neal was under the influence of intoxicating liquor⁷ and he was convicted by a district court judge of driving while intoxicated.⁸ Neal appealed to the jury-of-six session of the district court.⁹

In the jury-of-six session Neal filed a motion to suppress the results of the Breathalyzer test, alleging that the 900A model is inherently unreliable due to its susceptibility to radio frequency interference.¹⁰ The district court judge denied the motion, Neal waived the jury trial, and the judge convicted Neal.¹¹ Neal appealed to the Massachusetts Appeals Court and applied to the Massachusetts Supreme Judicial Court for direct appellate review. The supreme judicial court granted Neal's application.¹²

On appeal, Neal asserted, *inter alia*, that the Breathalyzer test results should have been suppressed due to the possibility of radio interference.¹³ His expert testified that the susceptibility of the 900A

7. A breath reading of .10 or more creates a presumption of intoxication in Massachusetts. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1984). *See generally* Annot., 16 A.L.R.3d 748 (1967 & Supp. 1984) for a discussion of the application of statutes creating a presumption of intoxication from specified percentages of alcohol present in the system.

8. *Neal*, 392 Mass. at 4, 464 N.E.2d at 1359.

9. *Id.* Massachusetts permits criminal defendants in the district courts to choose between being tried by the court or by a jury-of-six. MASS. GEN. LAWS ANN. ch. 218, § 26A (West Supp. 1984). If defendants choose to waive their rights to jury trials, and are then found guilty of the offense with which they were charged, they may appeal to the jury-of-six session in the district court prior to further appellate review. MASS. GEN. LAWS ANN. ch. 278, § 18 (West 1981). The jury-of-six sessions exist to hear appeals by defendants found guilty of criminal offenses over which the district courts have original jurisdiction. MASS. GEN. LAWS ANN. ch. 218, § 27A (West Supp. 1984). The statute regarding drunk driving specifically provides that defendants charged with driving while intoxicated who waive their rights to jury trials nonetheless preserve their rights of appeal to the jury-of-six session of the district court. MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 1984). Neal took that path. *Neal*, 392 Mass. at 4, 464 N.E.2d at 1359.

10. *Neal*, 392 Mass. at 14, 464 N.E.2d at 1365. Neal also moved to dismiss the case on due process grounds, alleging that his rights were violated because the Commonwealth had not preserved samples of his breath, had conducted only one Breathalyzer examination, and had not provided him with the Breathalyzer test ampule. The district court denied Neal's motion to dismiss on all three grounds. *Id.* at 4, 464 N.E.2d at 1359.

11. *Id.* at 4, 464 N.E.2d at 1359.

12. *Id.* at 4, 464 N.E.2d at 1360.

13. *Id.* at 2, 464 N.E.2d at 1358-59. On appeal, Neal also reasserted his due process claims, arguing that the Commonwealth's failure to preserve the Breathalyzer test ampules for his subsequent examination and to conduct a second breath test deprived him of a fair trial, thus requiring exclusion of the results of the Breathalyzer test. *Id.* at 2-3, 464 N.E.2d at 1358-59. The supreme judicial court did not accept his arguments.

The court held that failure to preserve the ampules did not deprive the defendant of due process under the standard of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (criminal defendants have a constitutional right to obtain from the prosecution evidence either mate-

model Breathalyzer to radio frequency interference is of such magnitude that no single reading of the instrument can be considered reliable.¹⁴

The supreme judicial court found the likelihood of inaccuracy in the particular breath test given to Neal slim¹⁵ and affirmed the conviction.¹⁶ The court held, however, that although tests performed on the 900A Breathalyzer instrument were still generally admissible, the instrument no longer had the "status" of a "reliable" scientific device.¹⁷ In future cases, therefore, before the results of a test conducted on the 900A Breathalyzer will be admitted, the Commonwealth will have to lay an adequate foundation to establish that radio waves did not interfere with its results.¹⁸ Under the facts in *Neal*, the Commonwealth had met the foundation requirement.

rial to guilt or relevant to the punishment). The court reasoned that because the scientific community does not generally accept that retesting of physical examination of the ampules would yield evidence favorable to the defendant, he could not establish that preservation of the ampules would have provided exculpatory evidence. *Neal*, 392 Mass. at 13-14, 464 N.E.2d at 1364-65.

Just after *Neal*, the United States Supreme Court held that California did not offend due process by its failure to preserve breath samples produced by another device, the Intoxilyzer. *California v. Trombetta*, 104 S. Ct. 2528, 2535 (1984). Ten years before *Trombetta*, however, the California Supreme Court had held that the state's failure to preserve ampules from the Breathalyzer test did constitute a denial of due process, because a "reasonable possibility" existed that re-testing of the ampules could produce valuable exculpatory evidence. *People v. Hitch*, 12 Cal. 3d 641, 649, 527 P.2d 361, 367, 117 Cal. Rptr. 9, 15 (1974). The Intoxilyzer does not produce ampules capable of reasonable preservation, as the Breathalyzer does, perhaps explaining the difference in results. See *Trombetta*, 104 S. Ct. at 2531-32 n.5. Alternatively, the Supreme Court may disagree with *Hitch* and rule, with the *Neal* court, that failure to preserve Breathalyzer ampules does not constitute a denial of due process.

The supreme judicial court also rejected Neal's contention that the Commonwealth should administer two Breathalyzer tests to insure reliability, noting that the statute authorizing admissibility of Breathalyzer tests, see *supra* note 7, "does not condition the admissibility of Breathalyzer results on the availability of a corroborative test." *Neal*, 392 Mass. at 22, 464 N.E.2d at 1370.

14. *Neal*, 392 Mass. at 17, 464 N.E.2d at 1366-67.

15. *Id.* at 21, 464 N.E.2d at 1369. The supreme judicial court relied on the fact that the 900A Breathalyzer had been tested for radio interference in accordance with the Smith & Wesson testing procedures, to conclude that the Commonwealth had met its burden of establishing the reliability of the test. *Id.* See *infra* note 27.

16. *Id.* at 3, 464 N.E.2d at 1359.

17. *Id.* at 20 n.20, 464 N.E.2d at 1368-69 n.20.

18. *Id.* at 19, 464 N.E.2d at 1368.

II. ANALYSIS

A. *The Problem of Radio Frequency Interference*

Since the Massachusetts legislature passed chapter 90, section 24(1)(e), authorizing introduction of evidence of chemical tests to prove blood alcohol levels,¹⁹ the supreme judicial court has routinely admitted the results of Breathalyzer tests.²⁰ The scientific community has generally accepted Breathalyzer tests as reliable, thus meeting the Massachusetts standard for admissibility of scientific evidence.²¹

In 1982, the problem of radio interference with Breathalyzer tests came to the attention of the legal and the law enforcement communities.²² In September, 1981, Smith & Wesson discovered that radio waves interfered with the Model 1000 Breathalyzer, and in January, 1982, the company warned the instrument's users of its defect.²³ Smith & Wesson then tested their other Breathalyzer models, including the 900A model, and discovered that all of the models had the capacity to act as receivers of radio transmissions, thus potentially skewing the results obtained from the tests.²⁴

In September, 1982, Smith & Wesson issued a customer advisory applying to all of their Breathalyzer models. In it, the company warned that "breath-testing instruments may be affected in an unpredictable manner by various frequencies and power levels," that "the extent of sensitivity to particular frequencies and particular power levels will vary from instrument to instrument," and, finally, that "the

19. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1984).

20. See *Commonwealth v. Andrade*, 389 Mass. 874, 453 N.E.2d 415 (1983); *Commonwealth v. Tessier*, 371 Mass. 828, 360 N.E.2d 304 (1977); *Commonwealth v. Bernier*, 366 Mass. 717, 322 N.E.2d 414 (1975); *Commonwealth v. Brooks*, 366 Mass. 423, 319 N.E.2d 901 (1974).

21. The Commonwealth's standard for admissibility of scientific evidence is "general acceptance by the community of scientists involved." *Commonwealth v. Fatalo*, 346 Mass. 266, 269, 191 N.E.2d 479, 481 (1963) (results of lie detector test properly excluded because not generally accepted as reliable by scientific community). See also *Commonwealth v. Kater*, 388 Mass. 519, 527-28, 447 N.E.2d 1190, 1196 (1983) (hypnotically-aided testimony inadmissible in criminal trial because hypnosis lacks general acceptance by experts as a reliable method of enhancing memory); *Commonwealth v. Whynaught*, 377 Mass. 14, 17-18, 384 N.E.2d 1212, 1215 (1979) (judicial notice taken of radar speedometer as accurate and reliable after a finding of its general acceptance by scientists); *Commonwealth v. Lykus*, 367 Mass. 191, 203, 327 N.E.2d 671, 678 (1975) (evidence of spectographic voice analysis admissible after finding of its general acceptance by relevant scientific community).

22. Lauter and Simon, *Breathalyzer Defect Jeopardizes Many Drunk Driving Convictions*, NAT'L. L.J., June 7, 1982, at 6, col. 2.

23. *Id.*

24. Lauter, *Breathalyzer's Maker Discloses New Problem*, Nat'l. L.J., Nov. 8, 1982, at 5, col. 1.

possibility exists, although unlikely, for higher or lower than normal test results."²⁵ The company recommended that "as a matter of preparedness for possible courtroom testimony,"²⁶ each Breathalyzer unit be tested for radio interference.²⁷ Smith & Wesson further advised that the Breathalyzers not be operated within 150 yards of a transmitting mobile unit (police cruiser) nor within 25 yards of a portable unit (walkie-talkie).²⁸

Independent researchers have also conducted tests on the Breathalyzer units to assess their susceptibility to radio frequency interference. Two researchers tested the 900 and 900A models in connection with litigation in Rhode Island in which a defendant arrested for operating under the influence of alcohol challenged the reliability of Breathalyzer tests due to radio frequency interference.²⁹ The researchers found the 900A model to be so susceptible as to render it "unsuitable for use as a reliable indicator of percentage of blood alcohol."³⁰

B. *The Judicial Response*

Courts have responded to the discovery of the potential unreliability of Breathalyzer tests in various ways. On one end of the spec-

25. Smith & Wesson Customer Advisory, *supra* note 3, at 1-2.

26. *Id.*

27. Smith & Wesson warned purchasers of the Breathalyzers to test each instrument for two possible sources of radio interference: background interference, such as AM/FM radio stations, TV broadcasts, and military installations; and base-station interference, such as the police station's own radio transmissions. Smith & Wesson advised that if the tests were negative, the instrument was reliable and subsequent retesting would not be necessary unless one of the following four events occurred: 1) the base-station or background transmission environments changed; 2) the base-station antenna was moved; 3) the operating position of the Breathalyzer instrument changed; or 4) the Breathalyzer instrument was repaired or calibrated. Smith & Wesson Customer Advisory, *supra* note 3, at 2.

28. Smith & Wesson Customer Advisory, *supra* note 3, at 12. Police conduct most breath tests at the police station or barracks due to the difficulties in transporting the instruments and the need for strong electrical currents. Telephone interview with Trooper Gradowski, Massachusetts State Police Officer (January 3, 1985).

In light of this reality, Feldman and Cohen question the practicality of Smith & Wesson's distance requirements. "Given the wide variety of activity that often goes on concurrently at an urban police station, we cannot see how the operator of a Breathalyzer can be sure that he or she is at least that far away from active transmitters at all times." Feldman and Cohen, *supra* note 3, at 58.

29. *Durand v. City of Woonsocket*, No. 82-4808 (Superior Court, R.I. Dec. 15, 1982). The researchers were Drs. Harvey Cohen and James Feldman, whom the defendant in *Neal* also employed as experts. 392 Mass. at 5, 464 N.E.2d at 1360.

30. Feldman and Cohen, *supra* note 3, at 58. Specifically, the researchers found that radio transmissions could displace the 900A Breathalyzer null meter reading in either direction anywhere from 0.05 to 1.4%. *Id.*

trum are several courts that have concluded that Breathalyzer test results remain reliable and admissible despite the possibility of radio frequency interference.³¹ On the other end lies the Supreme Court of New Jersey, finding the danger of interference to be so serious as to warrant detailed and mandatory foundation requirements before the results may be admitted.³² In *Neal*, the supreme judicial court positioned itself somewhere between the extremes.

In Rhode Island, for example, the supreme court in *State v. Williams*³³ held that the issue of radio frequency interference does not affect the admissibility of the Breathalyzer results.³⁴ The defendant had moved to suppress the results of a Breathalyzer test on the grounds that the state's failure to preserve the test ampules deprived him of due process by denying him the opportunity to examine exculpatory, material evidence.³⁵ He argued that the ampules were potentially exculpatory in part because of the possibility that radio waves altered the results of the test. In rejecting this claim and denying the motion to suppress, the court noted that "results of the Breathalyzer examination can be impeached at trial by establishing that such changes in background-frequency interference occurred."³⁶ The court thus suggested that the issue of radio frequency interference goes to the weight, and not the admissibility, of the Breathalyzer results.³⁷

Similarly, in *People v. Hochheimer*,³⁸ the Supreme Court of Monroe County, New York, while acknowledging the 900A model's sensitivity to radio frequency interference, nonetheless refused to alter

31. See, e.g., *Walker v. State*, 454 N.E.2d 425, 428 (Ind. App. Ct. 1983) (newly-discovered evidence of radio frequency interference with 900A model Breathalyzer not considered by appeals court because evidence would merely impeach the test results); *Heddan v. Dirkswager*, 336 N.W.2d 54, 62 (Minn. 1983) (defendant's liberty interest in driving not infringed by suspension of license after finding that defendant was driving while intoxicated because of slight chance that radio frequency interference with Breathalyzer resulted in erroneous suspension); *Dodds v. North Dakota Highway Comm'r*, 354 N.W.2d 165, 170 (1984) (administrative officer's suspension of defendant's license following arrest for driving while intoxicated not erroneous despite un rebutted evidence at the administrative hearing of radio frequency interference with the 900A model Breathalyzer); *People v. Hochheimer*, 119 Misc. 2d 344, 351-52, 463 N.Y.S.2d 704, 708-09 (1983) (900A model Breathalyzer remains presumptively reliable despite evidence of radio frequency interference); *State v. Williams*, 480 A.2d 1383, 1388 (R.I. 1984) (results of 900 model Breathalyzer generally admissible, but may be impeached on the issue of radio frequency interference).

32. *Romano v. Kimmelman*, 96 N.J. 66, 474 A.2d 1 (1984). See *infra* notes 47-51 & accompanying text.

33. 480 A.2d 1383 (R.I. 1984).

34. *Id.* at 1389.

35. *Id.* at 1386, 1388.

36. *Id.* at 1388.

37. *Id.*

38. 119 Misc. 2d 344, 463 N.Y.S.2d 704 (N.Y. Sup. Ct. 1983).

the Breathalyzer's status as presumptively reliable.³⁹ The particular instrument in question had been tested according to the Smith & Wesson procedures⁴⁰ six months prior to its use on the defendant.⁴¹ He argued that, given the danger of radio frequency interference, the fact that the machine had once passed the Smith & Wesson test did not guarantee its reliability six months later.⁴² After examining the evidence of radio interference with Breathalyzer tests,⁴³ the court held that "there appears to be no reasonable basis for finding model 900A generally unreliable simply because it is acknowledged to be sensitive to radio interference."⁴⁴ The *Hochheimer* court did recommend, however, that a hearing be held to explore the "practical effect of radio interference on the accuracy of Model 900A" in order to ensure uniformity among the lower courts that would face the issue.⁴⁵

Other courts have acknowledged that while interference does affect reliability, the results of the tests will nonetheless be admissible if the state can show compliance with the testing procedures outlined in the Smith & Wesson Advisory. In Alaska, for example, the court of appeals recently held that before the Breathalyzer test results would be admitted into evidence, the state must "at a minimum, demonstrate that the Breathalyzer instrument in question was tested successfully for [radio frequency interference] at least once in a manner substantially complying with Smith & Wesson's recommendations."⁴⁶

On the other end of the judicial spectrum lies the Supreme Court of New Jersey, which, when confronted with evidence of radio frequency interference with the 900A Breathalyzer, issued a strict warning to those seeking to admit the test results. In *Romano v. Kimmelman*,⁴⁷ the court held that although the 900A model remained a generally reliable indicator of blood alcohol levels, the danger of radio interference required some showing that the particular instrument

39. *Id.* at 351-52, 463 N.Y.S.2d at 708.

40. Smith & Wesson Customer Advisory, *supra* note 3, at 4-11.

41. *Hochheimer*, 119 Misc. 2d at 346, 463 N.Y.S.2d at 706.

42. *Id.*

43. *Id.* at 346-50, 463 N.Y.S.2d at 706-09. The *Hochheimer* court relied largely upon the findings of the Smith & Wesson tests and on affidavits from Smith & Wesson. The defendant did not produce any independent evidence about radio frequency interference, and the court concluded that the evidence established merely that Breathalyzers were sensitive to radio frequency interference, not that the interference impaired the results of the particular test administered to the defendant. *Id.* at 352, 463 N.Y.S.2d at 709.

44. *Id.* at 350, 463 N.Y.S.2d at 708.

45. *Id.* at 351, 463 N.Y.S.2d at 709.

46. *Thayer v. Municipality of Alaska*, 686 P.2d 721, 727-28 (Alaska Ct. App. 1984).

47. 96 N.J. 66, 474 A.2d 1 (1984).

was reliable before results from it may be admitted into evidence.⁴⁸ The court established the standard of clear and convincing evidence that the particular results were not affected by radio frequency interference.⁴⁹ Furthermore, the court adopted detailed and mandatory conditions that the state must comply with in order to meet its burden of proof.⁵⁰ Finally, the court declared its decision retroactive, holding that prior convictions based on the results of a 900A test may, in certain situations, be set aside.⁵¹

C. *The Massachusetts Response*

When faced for the first time with the possible unreliability of the 900A Breathalyzer, the Supreme Judicial Court of Massachusetts in *Neal* positioned itself midway between the extreme positions. The court held that the test results would still be generally admissible, subject to a demonstration by the Commonwealth of the accuracy of the particular unit at the time of the test.⁵² The supreme judicial court did not, as did the New Jersey Supreme Court, detail mandatory procedures for the demonstration but neither did it rule the Breathalyzer absolutely reliable and admissible as other courts had.⁵³

The supreme judicial court heard evidence from the defendant's

48. *Id.* at 73, 474 A.2d at 4.

49. *Id.* at 90-91, 474 A.2d at 14.

50. *Id.* at 87-89, 474 A.2d at 12-13. The *Romano* conditions for admissibility are as follows:

1. Two tests should be administered. If the results consist of two readings or tests within a range of 0.01% of each other, the results are fully admissible.

2. If the above condition is not met, then a determination of the RFI-sensitivity of the Breathalyzer must be made in accordance with the New Jersey police procedures. The procedures are similar to those recommended by Smith & Wesson, except that they require periodic retesting of the instruments.

- a. If the procedures show that the Breathalyzer is not RFI-sensitive, then the results of the test are fully admissible.

- b. If the procedures show that the Breathalyzer is RFI-sensitive, then the results of the test are admissible only upon a showing that, when the test was administered, neither walkie-talkies nor police cars with transmitters were "in close proximity" to the instrument, and, further, that particular care was used to shield the instrument from outside radio interference.

Id. at 73, 474 A.2d at 4.

51. *Id.* at 73, 474 A.2d at 4-5. If defendants bring motions within two years of their convictions they may have the convictions set aside provided: that the Breathalyzer test was administered prior to June 1, 1983; that the results of the Breathalyzer test were the only significant evidence of intoxication upon which the defendant was convicted; and that the state was unable to satisfy the conditions of admissibility outlined above, *see supra* note 50. *Id.*

52. *Neal*, 392 Mass. at 19, 464 N.E.2d at 1368.

53. *See infra* note 31 & accompanying text.

expert, who testified that in his opinion no single reading from a 900A instrument could be considered reliable.⁵⁴ Because only that single member of the scientific community testified concerning the reliability of the Breathalyzer, the court did not conclude that the test was “no longer generally accepted by the scientific community.”⁵⁵ Results of Breathalyzer tests are thus still generally admissible in Massachusetts. The court warned, however, that the *Neal* decision would not necessarily end the court’s consideration of the subject.⁵⁶ If a defendant could amass more evidence than *Neal* had to show that the Breathalyzer is no longer generally accepted by the scientific community, the court may find that Breathalyzer tests are no longer generally admissible.

Having resolved the issue of threshold admissibility, the court next faced the problem of determining the reliability of the 900A unit in light of radio frequency interference. It resolved that issue by requiring that admission of the results of the 900A unit be contingent upon “presentation by the Commonwealth of an adequate foundation establishing that the instrument used was not so susceptible to RFI as to create a significant risk that the result was inaccurate on that basis.”⁵⁷

The court declined to adopt an exclusive mandatory method for establishing the lack of radio interference⁵⁸ but did suggest three ways for the Commonwealth to meet the foundation requirement:⁵⁹

1. A showing that the Breathalyzer was “hardened”⁶⁰ at the

54. *Neal*, 392 Mass. at 17, 464 N.E.2d at 1367. The defendant’s experts, Drs. Cohen and Feldman, testified that while most Breathalyzer test results would be reliable, some would not be, and that the Smith & Wesson testing procedures were insufficient to sort out the reliable from the unreliable results. Thus, no test could be considered absolutely reliable. According to Cohen and Feldman, the Smith & Wesson procedures were insufficient because the Breathalyzer may not have been susceptible to the particular transmissions occurring at the time the machine had been tested for radio frequency interference, but may have been sensitive to transmissions on other frequencies or of different power occurring at different times, such as the time the Breathalyzer was used to test a suspect’s blood alcohol level. *Id.* at 16-17, 464 N.E.2d at 1366.

55. *Id.* at 18, 464 N.E.2d at 1368.

56. *Id.* at 18 n.19, 464 N.E.2d at 1368 n.19. The court stated, “[w]e do not foreclose reconsideration of this issue if a defendant demonstrates that the results of the breath examination are no longer accepted by the relevant scientific community.” *Id.*

57. *Id.* at 19, 464 N.E.2d at 1368.

58. *But c.f. Romano*, 96 N.J. at 87-89, 474 A.2d at 12-13 (adopting exclusive and mandatory conditions predicating the admissibility of 900A model Breathalyzer test results).

59. *Neal*, 392 Mass. at 19-20, 464 N.E.2d at 1368.

60. *Hardening* is a procedure whereby, through the insertion of radio frequency interference filter components and the sealing of openings in the Breathalyzer, the instrument

2. A second test corroborative of the initial test and conducted after a correct simulator reading;

3. "At a minimum,"⁶¹ a showing that the operator had followed the Smith & Wesson radio frequency interference testing procedures.⁶²

The court further stated that the burden of proof would belong to the prosecution to establish that the Breathalyzer unit was not susceptible to radio frequency interference.⁶³

III. CONCLUSION

In *Neal*, the Supreme Judicial Court of Massachusetts greatly altered the status of admissibility of the 900A Breathalyzer test. It also left several questions unanswered, suggesting future litigation. The admissibility of the results of tests from Breathalyzer models other than the 900A that are affected by radio frequency interference remains an open question. The standard of proof that the Commonwealth must meet in demonstrating lack of radio frequency interference is also unknown.⁶⁴ By declining to set precise guidelines for the corroborative nature of a second Breathalyzer test, the court left room for future defendants to raise this issue.⁶⁵

Perhaps more significantly, the door is left open for defendants to present scientific evidence challenging the reliability of the 900A model in general, thereby showing that the test is no longer generally accepted by the scientific community. As more cases of radio frequency interference with the 900A model reach the courts and as more researchers produce more data on the effects of radio transmis-

can be immunized from susceptibility to radio frequency interference. *Id.* at 17, 464 N.E.2d at 1367.

61. *Id.* at 20, 464 N.E.2d at 1368.

62. Smith & Wesson Customer Advisory, *supra* note 3, at 4-11. Reliance on the Smith & Wesson procedures to establish lack of radio frequency interference has been widely criticized. See *Hochheimer*, 119 Misc. 2d at 350-51, 463 N.Y.S.2d at 709 ("[a]lthough Smith & Wesson has recommended procedures to test for radio interference . . . those tests appear to be inadequate to discover the effect of isolated or sporadic radio signals which were not present when the tests were conducted"). See also Nichols, *Toward a Coordinated Judicial View of the Accuracy of Breath Testing Devices*, 59 N.D.L. Rev. 329, 337 (1983) (a court's reliance on the Smith & Wesson testing procedures is "arguably misplaced" given the length of time it took the company to warn Breathalyzer users of its defect and to test the other models after discovering the susceptibility of one model to radio frequency interference).

63. *Neal*, 392 Mass. at 20 n.20, 464 N.E.2d at 1368-69 n.20.

64. *But c.f. Romano*, 96 N.J. at 90-91, 474 A.2d at 14 (state must prove lack of radio frequency interference by clear and convincing evidence).

65. *But c.f. Id.* at 73, 474 A.2d at 4 (second test must be corroborative of first within 0.01%).

sions on Breathalyzers, it is possible that the court will be confronted with the necessity of drawing a line. The hard question must arise of when an instrument loses its status in the scientific community as a reliable indicator and its status in the courts as generally admissible. Given the countervailing objective of encouraging drunk drivers not to drive, one can expect that the court will be reluctant to bar admissibility of the Breathalyzer test results altogether.

Nancy L. Winkelman