

Authority to Demand Standardized Field Sobriety Testing

Standardized Field Sobriety Testing (SFST) was first developed in 1975 with funding from NHTSA. Early studies examined various roadside tests to determine which were most predictive of BACs above 0.10%. Based on the results of these studies, a set of roadside tests were developed which are now used in all 50 states to detect impaired drivers.¹ This set of tests, commonly referred to as SFST, has three components: the Horizontal Gaze Nystagmus (HGN), Walk-and-Turn, and One-Leg Stand tests.

Nystagmus, which is the “rapid involuntary movements of the eyes,” occurs naturally as the eyes gaze to the side. This eye movement is visibly affected by central nervous system depressants, such as alcohol. When a person is impaired by alcohol and attempts to track a slowly moving object, his or her eye will jerk perceptibly. The officer evaluates this reaction by observing a suspect’s eyes as he or she focuses on a slowly moving object, such as a pen or a penlight.² Of the three SFST components, HGN is the most predictive of impairment, accurately detecting 77% of those with a BAC above 0.10%. Moreover, it is the test most trusted to reflect the suspect’s level of impairment, because the eye movement is an involuntary or autonomic reaction. Consequently, even seasoned drinkers cannot control their eye movements to the same degree that they can control their physical co-ordination.

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¹ See M. Burns & H. Moskowitz, *Psychophysical Tests for DWI Arrest* (Washington: National Highway Traffic Safety Administration, 1977); and J. Stuster & M. Burns, *Validation of the Standardized Field Sobriety Test Battery at BACs below 0.10 Percent* (Washington: National Highway Traffic Safety Administration, 1998).

² The examiner looks for three indicators of impairment in each eye: (i) the eye cannot follow a moving object smoothly; (ii) jerking is distinct when the eye is at maximum deviation (*i.e.*, farthest from centre); and (iii) once the eye begins jerking, its angle of onset is within 45 degrees of centre (*i.e.*, halfway to the edge of the eye). *Ibid.*

The Walk-and-Turn test is a divided attention task that most unimpaired people can easily perform. Because impaired persons have difficulty performing tasks requiring their attention to be divided between simple mental and physical exercises, this test identifies impairment on a very basic level. During the test, the suspect takes nine steps, heel-to-toe, along a straight line, following the oral instructions and physical demonstration provided by the officer. After taking the steps, the suspect turns on one foot and returns in the same manner in the opposite direction.³

The One-Leg Stand test is also a divided attention task easily performed by most unimpaired people. After listening to the instructions and watching the officer's demonstration, the suspect stands with his or her heels together and arms down. The suspect is then instructed to stand on either leg, raising the other foot six inches off the ground and holding it out in front, while counting out loud for 30 seconds.⁴ Taken together, the three components of SFST can accurately predict BACs above 0.10% between roughly 85% and 90% of the time.⁵

Federal legislation should authorize the police to demand participation in SFST from any driver they reasonably suspect has any alcohol or drugs in his or her body. A driver's refusal or failure to comply, without a reasonable excuse, should constitute a Criminal Code offence. The police should be specifically authorized to videotape the test. The successful implementation of a SFST program is dependent on police officers being adequately trained and certified, and having a record-keeping protocol in place.

The ability to demand that a suspect participate in SFST would assist in impaired driving enforcement in several ways. First, SFST can be used as an alternative to an ASD test to establish the necessary grounds for demanding an evidentiary breath test on an approved instrument under section 254(3) of the *Criminal Code*. For example, the

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³ The suspect will accumulate points if he or she exhibits any of the following eight indicia of impairment: (i) losing balance during the instruction phase; (ii) beginning before the instructions are finished; (iii) stopping while walking to regain balance; (iv) failing to touch heel-to-toe; (v) stepping off the line; (vi) using arms to balance; (vii) making an improper turn; and (viii) taking an incorrect number of steps. *Ibid.*

⁴ The four indicia of impairment are: (i) swaying while balancing; (ii) using arms to balance; (iii) hopping to maintain balance; and (iv) putting the foot down. *Ibid.*

⁵ *Ibid.* See also M. Burns & E.W. Anderson, *A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery. Final Report to the Colorado Department of Transportation* (Denver: Colorado Department of Transportation, 1995).

need for an alternative would arise if the officer did not have an ASD readily available.⁶ Moreover, some courts have indicated that police only have authority to demand an ASD test from a person who is operating or has care and control of a motor vehicle.⁷ Therefore, the police may not be able to demand an ASD test from a driver who has left or been removed from the immediate scene for safety, medical or other reasons.⁸ In both situations, the results of SFST, coupled with the officer's observations, would provide a far stronger basis for demanding an evidentiary breath test than the officer's observations alone.

Second, unequivocal federal legislation would clarify the current uncertainty concerning both the police authority to demand that suspects participate in SFST and the consequences of a suspect's refusal. Québec is the only Canadian jurisdiction that specifically authorizes the police to demand field sobriety tests and imposes a penalty on drivers who refuse to participate. In other provinces, drivers are under no obligation to perform these tests, and cannot be penalized for refusing to do so. In these provinces, the police have common law authority to request participation in SFST, but a driver can refuse with impunity. General provisions in some of the provincial traffic acts have been interpreted as authorizing an officer to request that suspects submit to SFST, without first

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⁶ Currently, immediate access to an ASD is often critical to the legality of the demand for a sample. In *R. v. Grant*, [1991] 3 S.C.R. 139, the Supreme Court of Canada held that a 30-minute delay in the arrival of an ASD provided the driver with a reasonable excuse for refusing the test. Consequently, the suspect had to be acquitted of failing to provide a breath sample. However, if the police had been authorized to demand SFST, the results may have quickly provided them with grounds for demanding an evidentiary breath test.

⁷ In *R. v. Pierman; R. v. Dewald* (1994), 92 C.C.C. (3d) 160 (Ont. C.A.), Arbour J.A. (as she then was) suggested that a delay in ASD testing would only be justified if the police had reason to believe that an immediate test would provide a breath sample that was unsuitable for analysis, due to recent alcohol consumption. (In order to avoid false high readings due to alcohol in the mouth, ASD tests should be taken at least 15-20 minutes after the individual's last drink.) Arbour J.A.'s reasoning was affirmed by the Supreme Court of Canada in *R. v. Dewald*, [1996] 1 S.C.R. 68.

⁸ Ironically, delay in administering the breath test will almost invariably benefit a suspected impaired driver. Toxicological evidence shows that a person's BAC usually peaks approximately 20 minutes after his or her last drink, and then decreases by an average of 0.015% per hour. As a result, breath tests performed two to three hours after the alleged offence will likely provide a reading that is considerably lower than the driver's BAC at the time of driving. In some cases, drivers who were legally impaired while driving may obtain readings below 0.08%, thereby escaping criminal charges. T.A. Loomis, "Blood Alcohol in Automobile Drivers: Measurement and Interpretation for Medicolegal Purposes. I. Effect of Time Interval Between Incident and Sample Acquisition" (1974) 35 *Quart. J. Stud. Alc.* 458 at 468-71.

informing them of their right to counsel.⁹ However, in other provinces, the courts have held that the police must inform drivers of their right to counsel before they perform the test.¹⁰ Needless to say, counsel would likely advise the suspect not to consent to testing, unless provincial law required participation (hence the need for federal legislation – it ensures consist application of application of the law across the country).

Third, and probably of greatest importance, SFST can provide evidence¹¹

⁹ See, for example, *R. v. Smith* (1996), 28 O.R. (3d) 75 (C.A.); and *R. v. Bonin* (1989), 47 C.C.C. (3d) 230 (B.C. C.A.). The Courts stated that the police have the power to take steps to determine if there are reasonable and probable grounds to demand a breath sample, and that this implicitly includes the power to request a field sobriety test, even though the driver does not have to comply. While the test constitutes a detention, entitling the accused to the right to counsel under section 10(b) of the *Charter*, the Courts ruled that the officers' infringement of the accused's section 10(b) rights was justifiable under section 1 of the *Charter*. Given the test's short duration and minimal inconvenience, the infringement was held to be a reasonable limit that was justifiable in a free and democratic society. Thus, according to these cases, the police do not have to inform a driver of his or her right to counsel before requesting or conducting a field sobriety test.

¹⁰ See, for example, *R. v. Gallant* (1989), 48 C.C.C. (3d) 329 (Alta. C.A.); and *R. v. Baroni* (1989), 49 C.C.C. (3d) 553 (N.S. C.A.). Consistent with *Smith* and *Bonin*, these cases held that the police have the power to request a field sobriety test. However, unlike *Smith* and *Bonin*, *Gallant* and *Baroni* held that a denial of a driver's right to counsel under section 10(b) of the *Charter* was not justified under section 1. Therefore, according to *Gallant* and *Baroni*, the police must inform drivers of their right to counsel and give them an opportunity to contact counsel before conducting field sobriety tests.

¹¹ If the police think that they might wish to use the results and videotape of the test in evidence to establish the accused's impairment, they should comply with section 10(b) of the *Charter*. The accused should be informed of his or her right to counsel and given an opportunity to contact counsel before the test is undertaken. In *R. v. Milne* (1996), 28 O.R. (3d) 577 (C.A.), the Ontario Court of Appeal ruled that field sobriety tests constituted a "detention," thereby triggering the accused's right to counsel under section 10(b) of the *Charter*. The Court also indicated that an infringement of this right was justified under section 1 of the *Charter* only if the purpose of the tests was to form the necessary "reasonable and probable grounds" to demand an evidentiary breath test. However, the infringement would not be justified under section 1 if the police wished to use the results of the field sobriety test to establish the accused's impairment at trial. Moldaver J.A. stated that field sobriety tests "were not meant to provide the police with a means of gathering evidence that could later be used to incriminate and convict the motorist of impaired driving at trial" (at 587).

Therefore, the results of field sobriety tests performed in violation of the accused's right to counsel will be ruled inadmissible if introduced to establish the accused's impairment. This decision was followed by the New Brunswick Court of Appeal in *R. v. Oldham* (1996), 49 C.R. (4th) 251. The Court held that a suspect should not be asked to give incriminating evidence without first being informed that he or she does not have to comply with the police officer's request. In the absence of a statutory obligation to comply with an SFST demand, this reasoning will likely be followed in other jurisdictions as well.

establishing that the suspect's ability to drive was impaired by alcohol and/or drugs.¹² The police commonly complain that judges refuse to accept their evidence that the accused's ability to drive was impaired.¹³ SFST, conducted by nationally certified officers using standard record-keeping procedures and supported by a videotape record, would greatly enhance the weight given to an officer's testimony. Indeed, two-thirds of officers who participated in a recent Canadian survey felt that a videotape record of traffic stops would increase the likelihood of guilty pleas "a great deal."¹⁴ The benefits of a video record were confirmed in a recent experiment conducted by the Oregon Department of Transportation, which provided video cameras to law enforcement agencies to record traffic stops.¹⁵ The study found that impaired driving cases involving video evidence were resolved sooner than those without such evidence (64 versus 80 days to disposition). Cases involving video evidence were also somewhat more likely to result in resolutions favourable to the state than cases without video evidence (86.7% versus 81%).

Finally, the results and videotape of SFST may be essential if an approved instrument is unavailable, the evidentiary breath tests cannot be conducted within the

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¹² A recent Australian study found that SFST was reliable in detecting impairment by marijuana, both at moderate and high levels. The "One Leg Stand" test was a particularly good indicator of drug impairment, and the authors also supported the use of a new component – "head movements/jerks" – to assess impairment. See K. Tzambazis and C. Stough, "The SFST and Driving Ability. Are they related?" in D. Mayhew & C. Dussault, eds., *Proceedings of the 16th International Conference on Alcohol, Drugs and Traffic Safety* (Montreal: Société de l'assurance automobile du Québec, 2002), CD-ROM.

¹³ As indicated, 29% of Canadian police officers who participated in a recent survey felt that judges give greater credibility to defence witnesses than to the police at impaired driving trials, and three-quarters felt that impaired drivers sometimes or frequently escape conviction due to legal technicalities. "Police Perceptions," *supra* note at 426, 432 and 435.

¹⁴ *Ibid.*

¹⁵ See B. Jones, "In-vehicle Videotaping of Drinking Driver Traffic Stops in Oregon" (1999) 31 *Accid. Anal. and Prev.* 77 at 83.

In addition, a recent survey polled police, Crowns, defence counsel, and judges on a pilot project that installed video cameras in police cruisers and breath-testing rooms. Sixty-one per cent recommended the adoption of video equipment in cruisers, and 92% recommended its use in breath-testing rooms. The respondents felt that the video cameras had a calming effect on the arrestee, reducing the incidence of disruptive behaviour. Finally, 86% of those surveyed felt that video evidence increased the proportion of guilty pleas. B. Pavic *et al.*, "Fast-track Courts and Video Cameras as Drinking-Driving Countermeasures" in C. Mercier-Guyon, ed., *Alcohol, Drugs and Traffic Safety, T'97* (Annecy, France: Centre d'études et de recherche en médecine du trafic, 1997) 73 at 76-77.

prescribed time, or there is some other successful challenge to the evidentiary breath-test results. Similarly, the SFST evidence may be pivotal if a driver is impaired solely by drugs or by a combination of drugs and alcohol in circumstances in which his or her BAC is below 0.08%.