

Authority to Demand A Drug Evaluation and Classification Test

The federal government should enact legislation authorizing police to demand a drug evaluation and classification test¹ from a driver they have reasonable grounds to believe is impaired by one or more drugs, or a combination of alcohol and drugs. A driver's failure or refusal to comply, without a reasonable excuse, should be a *Criminal Code* offence.²

This recommendation is intended to address a gap in the current law regarding the apprehension, prosecution and conviction of drivers who are impaired by substances other than alcohol. Although the *Criminal Code* makes it an offence to operate a motor vehicle while one's ability to do so is impaired by drugs,³ enforcement of this provision is difficult, given the lack of drug detection procedures. While ASDs and approved instruments enable officers to identify and quantify the amount of alcohol in a suspect's breath and blood, the *Criminal Code* provides for drug testing only in very limited circumstances.⁴ Moreover, the fact that a suspect tests positive for drugs does not

¹ These tests are known by different names in different jurisdictions. To avoid confusion, we will use the more generic term, drug evaluation and classification test.

² As described with respect to SFST, Québec is currently the only province that requires drivers to comply with a demand for field sobriety tests. While the courts in other provinces have found that police have authority to request such a test, there are no sanctions for drivers who refuse to comply.

³ *Criminal Code*, *supra* note, s. 253(a).

⁴ As explained earlier, police have very limited authority to demand a blood sample from an impaired driving suspect. The provisions governing judicial warrants authorizing the taking of blood samples from unconscious impaired driving suspects are even more narrowly defined. See *supra* text at 28-31. Nevertheless, if a blood sample has been lawfully obtained under these provisions or with the accused's consent, section 258(5) of the *Criminal Code* enables a qualified technician to test it for drugs.

necessarily mean that he or she is impaired.⁵ Presently, there is no standard or accepted procedure to identify and detain drug-impaired drivers. Therefore, as noted by the R.C.M.P., “drug-impaired drivers go unreported and the courts dismiss drug-impaired driving charges because there are no means to test and provide the necessary proof.”⁶ Accordingly, this recommendation seeks to provide police with a reliable means of detecting and establishing drug impairment.

Studies from various jurisdictions indicate that drug use is not uncommon among drivers, particularly among those subsequently involved in fatal crashes. For instance, an Australian study found that drugs were detected in 22% of fatally injured drivers, 13% of whom had only drugs in their systems, and 9% of whom had a combination of drugs and alcohol.⁷ These findings are similar to a British Columbia study of 227 fatally injured drivers. It found that 9% of fatally injured drivers tested positive for drugs only, and 11% tested positive for a combination of alcohol and drugs.⁸ A more recent study of fatally injured Québec drivers reported that 17.8% tested positive for drugs, and that 12.4% tested positive for both alcohol and drugs.⁹ In both Canadian studies, cannabis was by far the most prevalent drug, followed by cocaine and benzodiazepines.¹⁰

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⁵ Since some drugs and their metabolites remain in the body long after their psychoactive and impairing effects have worn off, the presence of a drug in the driver’s blood or urine does not necessarily mean that the driver was impaired at the time of testing. Depending on the drug, a positive test may simply indicate that the driver had used that drug sometime in the recent past. S.B. Karch, *The Pathology of Drug Abuse* (Boca Raton: CRC Press, 1993) at 18. It is for this reason that the suspect must be subject to a detailed examination for evidence of impairment.

⁶ H. Richter, “Marijuana’s effect on traffic safety in Canada: an educator’s guide” (Developed by Drug Awareness Service, RCMP, 1999) [unpublished] at 77.

⁷ O.H. Drummer, “Drugs and Accident Risk in Fatally-Injured Drivers,” online: Schaffer Library of Drug Policy, <www.druglibrary.org/schaffer/Misc/s16p6.htm> (date accessed: 9 August 2001). See also D. Brookoff *et al.*, “Testing Reckless Drivers for Cocaine and Marijuana” (1994) 331 N.E.J.M. 518.

⁸ G.W. Mercer & W.K. Jeffery, “Alcohol, Drugs, and Impairment in Fatal Accidents in British Columbia” (1995) 27 *Accid. Anal. and Prev.* 335 [Mercer & Jeffery]. See also *Estimating the Presence of Alcohol and Drug Impairment*, *supra* note at 15-24.

⁹ C. Dussault *et al.*, “The Contribution of Alcohol and Other Drugs Among Fatally Injured Drivers in Quebec: Some Preliminary Results” 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 [Dussault *et al.*].

¹⁰ *Ibid.*; and Mercer & Jeffery, *supra* note 8 at 335.

A significant percentage of young Canadians drive after smoking cannabis. In a 2001 Ontario high school survey, almost 20% of licensed grade 10 to OAC students reported driving within an hour of smoking cannabis.¹¹ A recent Québec study found that 24.3% of 16 to 19-year-old drivers and 22.4% of 20 to 24-year-old drivers who provided a sample in a nighttime roadside survey tested positive for cannabis.¹² Given that Canada's youth population is increasing,¹³ and that young people are among the most likely to drive after using drugs, it is likely that drug-impairment among drivers will increase in the near future. Thus, it is increasingly important that the police be given broader legal authority to gather evidence of drug impairment.

This recommendation includes three major components. First, the police should be authorized to demand that a suspected drug-impaired driver submit to standardized procedures to detect and classify drugs in his or her system. The tests performed under this protocol have been used for several decades in American jurisdictions and have been proven to assist in detecting drug impairment in motorists. Second, to improve the value of the officer's evidence, police should be explicitly authorized to videotape the procedure. Finally, this recommendation encourages driver compliance by making it an offence to refuse to participate in a test without a reasonable excuse. Drivers who refuse to participate should also be subject to a *Criminal Code* offence.

The drug evaluation and classification test has several distinct steps, beginning with preliminary questioning and a physical examination.¹⁴ This stage is meant to ensure that the suspect is not suffering from a medical condition that has symptoms similar to drug impairment. Next, the officer conducts various tests of the suspect's eye movements, including both horizontal and vertical gaze nystagmus. This is done because certain drugs are known to cause nystagmus or to impede an individual's ability to converge (cross) his or her eyes. The suspect is then asked to perform divided attention tasks, such as the Walk-and-Turn and One-Leg Stand tests, which require him or her to balance, co-ordinate body movements, remember instructions, and perform more than one task at once. During the next phase, the officer examines the suspect's blood pressure, body temperature and pulse, and tests the suspect's pupils for reaction to

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¹¹ Adlaf, *supra* note. See also G.W. Walsh & R.E. Mann, "On the High Road: Driving Under the Influence of Cannabis in Ontario" (1999) 90 C.J.P.H. 260.

¹² Dussault *et al.*, *supra* note 9.

¹³ *Youth and Road Crashes*, *supra* note at 2.

¹⁴ This brief summary of the procedure is based on T.E. Page, "The Drug Recognition Expert (DRE) Response to the Drug Impaired Driver: An Overview of the DRE Program, Officer and Procedures," online: Los Angeles Police Department, <www.ci.la.ca.us/LAPD/traffic/dre/drgdrvr.htm> (date accessed: 29 August 2001).

varying light levels. The officer then examines the suspect's muscle tone, since certain drugs can cause an individual's muscles to become either rigid or flaccid. The officer will also visibly inspect the suspect's arms and ankles for injection sites. Finally, the officer conducts a structured interview with the suspect about the use of drugs.

Based on the above tests, the officer forms an opinion regarding the suspect's possible drug impairment, and attempts to determine the category of drugs causing the impairment. The test is designed to distinguish between seven categories of drugs: (i) *Central Nervous System Depressants*, such as alcohol and barbiturates; (ii) *Inhalants*, such as gasoline, glue and paint; (iii) *Phencyclidines*; such as PCP and ketamine (Special K); (iv) *Cannabis*; (v) *Central Nervous System Stimulants*, such as cocaine and amphetamines; (vi) *Hallucinogens*, such as LSD, ecstasy and mescaline; and (vii) *Narcotic Analgesics*, such as morphine, codeine and heroin. Based on his or her conclusion, the officer may demand that the suspect provide a blood, urine or saliva sample to confirm or refute that a specific drug is in the suspect's system. This last test forms a separate recommendation, described below.

The drug evaluation and classification test would be used in conjunction with the *Criminal Code's* existing impaired driving provisions. A police officer who suspects or has reasonable grounds to believe that a driver is impaired will likely demand that the driver provide a breath sample on an ASD or approved instrument, as the case may be. If the driver's BAC exceeds 0.08%, he or she will be charged under section 253(b) of the *Criminal Code*. However, if the driver's BAC is less than 0.08%, but he or she nevertheless appears to be impaired, the officer will then have grounds to believe that the driver is impaired by one or more drugs or a combination of alcohol and drugs. In such cases, the officer will demand that the driver participate in the drug evaluation and classification test.¹⁵ If the officer concludes, based on this test, that there are reasonable and probable grounds to believe that the suspect is impaired by a drug, he or she will demand a saliva, blood or urine sample to provide chemical confirmation of the presence of the drug.

Since its inception by the Los Angeles Police Department in the 1970s, the drug evaluation and classification test has spread to almost all American states. This is due, in large part, to the reported accuracy rates of its practitioners. A double-blind study conducted by Johns Hopkins University found that drug recognition officers were over 90% accurate in determining impairment and the category of drug causing it.¹⁶ A later

¹⁵ Because the test will undoubtedly be classified as a "detention," the officer should first inform the driver of the right to counsel and allow him or her a reasonable opportunity to consult counsel. This is particularly important because the test is used to gather evidence of drug impairment, which will be introduced in court. After the driver has had a reasonable opportunity to consult counsel, the officer can proceed with the test.

¹⁶ G.E. Bigelow, *Identifying Types of Drug Intoxication: Laboratory Evaluation of a Subject Examination Procedure* (Washington: National Highway Traffic Safety Administration, 1984).

NHTSA double-blind study reported a 94% accuracy rate in identifying impairment by a drug other than alcohol. The participating officers correctly identified at least one drug other than alcohol in 87% of the cases.¹⁷

Like various other enforcement provisions, the drug evaluation and classification test will likely be challenged under the *Charter*. It will most likely be argued that requiring suspects to provide incriminating evidence under threat of punishment violates their right to silence and the privilege against self-incrimination contained in sections 11(c) and 13 of the *Charter*.¹⁸ However, as long as the suspect's right to counsel is respected, compelled participation in the drug evaluation and classification test should not be found to violate these rights. In our view, the obligation to participate in this test is no more intrusive or incriminating than the requirement to provide breath or blood samples in impaired driving cases, which has already been upheld by the courts.¹⁹

¹⁷ R.P. Compton, *Field Evaluation of the Los Angeles Police Department Drug Detection Procedure* (Washington: National Highway Traffic Safety Administration, 1986).

¹⁸ Section 11(c) of the *Charter* provides that an accused cannot be compelled to testify at his or her own trial. Pursuant to section 13, self-incriminating testimony that a witness has given cannot be used against him or her in a subsequent criminal proceeding.

¹⁹ For example, in *R. v. Curr*, [1972] S.C.R. 889, the Supreme Court of Canada held that the privilege against self-incrimination, then contained in section 2(d) of the *Canadian Bill of Rights*, was limited to statements, and not to "incriminating conditions of the body." Similarly, sections 11(c) and 13 of the *Charter* have been found to be restricted to testimonial compulsion and not to encompass compulsory breath tests. See *R. v. Altseimer* (1982), 1 C.C.C. (3d) 7 (Ont. C.A.); and *R. v. Gaff* (1984), 15 C.C.C. (3d) 126 (Sask. C.A.), leave to appeal to S.C.C. refused (22 November 1984).

An accused might also argue that the legislation violates the principles of fundamental justice in section 7 of the *Charter*. That section states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Supreme Court of Canada has held that "fundamental justice" includes the right not to be forced to provide incriminating evidence, and thereby supplements the right to silence contained in sections 11(c) and 13. See *R. v. White*, [1999] 2 S.C.R. 417. Nevertheless, given that the courts have summarily dismissed arguments to the effect that compulsory breath tests violate section 7, similar arguments regarding drug testing are likely to receive short shrift.