

The Drager test in perspective

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The end of the 2011 festive season has marked the loss of over 1 400 lives on our national roads; surely we owe it to ourselves and the society at large to put an end to this bloodshed. The fight against drunk driving includes the Arrive Alive campaign, tougher liquor legislation and the well known breathalyzer or Drager test.

Research has shockingly revealed that the majority of fatality victims had a blood alcohol level which exceeded the legal limit. *In* the case of State v Clifford Joseph Hendricks the Western Cape High Court scrutinized the Drager breathalyzer and the outcome of this case has had some far-reaching implications, which in the long run will affect all road users and the insurance industry specifically.

In this matter the accused was arrested in January 2010 for allegedly driving under the influence of alcohol and was taken to an examination centre for the Drager test to be administered. The test revealed that the accused had a breath alcohol concentration of 0.24 mg/1 000 milliliters which is *far* above the legal limit.

The accused raised a plea of not guilty based on a variety of defenses. He disputed the test's readings; that the test was administered properly and by an appropriately qualified person; that the test was not calibrated correctly, and was not operated in accordance with the guidelines set out by the manufacturer.

The Court exonerated the accused and based its finding on the lack of proof that the test was operated by a properly qualified and certified person, that the State failed to maintain proper records of the maintenance of the test and that there were other factors that were not taken into consideration when the test was operated, such as body temperature, dentures and smoke, all of which could imitate alcohol and sway the test results.

The National Prosecuting Authority in the Western Cape has withdrawn all drunken driving cases where the Drager test was used following the Court's decision in this case

At first glance it may seem like a defeat in the fight against drunken driving and the horrible implications that this has on individuals, families and loved ones. But, if viewed in a different light and with the guidelines stipulated in the Court's ruling in mind, then we can appreciate that the State has now been afforded an opportunity to bring the Drager test within the scope of the necessary guidelines for its effective use. The remaining provinces are not bound by this case; however, this finding does give them a proper road map of how they can ensure a successful prosecution based on the Drager test.

For insurers *in* the shod run, there might be an influx of claims. But, they can safeguard against this by tightening up their policy wordings. For example, wordings should refer to an insured driving "under the influence of alcohol" rather than being above the statutory limitation. If insurers have to base their repudiation of a claim on the fact that the insured is over the statutory limitation at the time of the incident, this may, in light of the recent ruling against breath alcohol test, become a costly or more time-consuming procedure. This is because the insured will need to be referred for blood alcohol testing to a private laboratory (which will be a costly procedure) or to a public laboratory which has proven to be time consuming because results are only available between eight months and one year after the testing.

The Ombudsman's view is that an insurer can refuse to entertain a claim if it can demonstrate on a balance of probabilities that the insured had been under the influence. This means that the insured need not be convicted of a criminal offence for the insurer to succeed with the rejection. Circumstantial evidence is sufficient for an insurer to repudiate a claim, and each claim will need to be judged on its own merit to establish whether there is sufficient circumstantial evidence present.

In the long run, a structure will be put in place that will rectify the deficiencies of the Drager test, where after the test will be reinstated. This should result in drunken driving cases tried pursuant to the Drager test having a 100 per cent conviction rate, hopefully ridding our roads of those who jeopardize other people's lives and serving as an efficient alternative basis on which an insurer can repudiate a claim for the insured having driven under the influence