

The Eyes Have It

Horizontal Gaze Nystagmus (HGN) has been used by law enforcement for decades as a field sobriety test to identify impaired drivers. The majority of states allow the HGN test into evidence as probable cause for arrest and/or evidence of impairment. Prosecutors in other states continue to struggle with getting this scientifically proven test into evidence. This struggle is fueled by many in the legal community who are not educated on the science behind HGN and, consequently, are apprehensive to endorse it.

What is HGN?

Nystagmus is an involuntary jerking or bouncing of the eyeball usually caused by disturbances in the body's inner ear or nervous system. HGN is caused when alcohol is introduced in the system. Alcohol affects muscle coordination, including the muscles surrounding the eyes.

The HGN test involves holding an object, typically a pen or pencil, slightly above eye level, approximately twelve inches from a subject. As the eyes attempt to follow or focus on the object, the muscles affected by alcohol continually try to keep up, causing a jerking of the eyes similar to marbles rolling across sandpaper. Normally, eyes can follow an object with a smooth tract similar to marbles rolling across glass.

In 1977, the National Highway Traffic Safety Administration standardized three field sobriety tests which, when tested, were the most effective and reliable. HGN was one of the three tests and throughout numerous studies, HGN has proven to be the most effective field sobriety test in establishing a correlation between alcohol impairment and performance on the test.

HGN on Trial

A common challenge prosecutors face is whether the HGN test is a scientific test. Twenty-nine states hold that it is scientific and it must meet the state's scientific standard. Eight states ruled the HGN test is not scientific and/or not new or novel and, therefore, can be admitted into evidence as any other field sobriety test.

If the test is ruled to be scientific, a prosecutor must then prove the HGN test meets the state's scientific standard. Sixteen states hold HGN meets the scientific standard. One state, Mississippi, ruled HGN does not meet the standard. Twelve states found not enough evidence was presented to decide if HGN meets the standard.

NTLC continually tracks the status of HGN cases and assists prosecutors throughout the country with test cases by offering strategic advice, identifying professional witnesses and funding resources, and providing HGN caselaw summaries, transcripts, and research studies. In addition, NTLC will be publishing a comprehensive booklet entitled *Horizontal Gaze Nystagmus - The Science and the Law: A Resource Guide for Judges, Prosecutors and Law Enforcement*. To receive a free copy of this publication when it is released, please fax requests to 703-836-3195.

Aluminum Anonymous

Nationally, close to 1,000 beer cans and liquor containers are tossed on every mile of our roadways. How do we know that? Because David Brezina, Director of *Aluminum Anonymous, Inc.*, a non-profit corporation, has logged more than 15,000 miles picking up cans and bottles since starting his self-funded survey three years ago. By tracking the roadside ratio of discarded beer and liquor containers to highway miles, Mr. Brezina has been attempting to get a handle on the extent of in-vehicle consumption.

The number of drivers who drink while behind the wheel may be much greater than you think. The numbers speak for themselves. Beer cans make up 70% of the roadside aluminum cans, and beer

bottles account for 90% of roadside glass bottles. Brezina will be the first to admit that his state-by-state "canology" surveys are not definitive or scientific. Nevertheless, it certainly gives you a sense of the problem. You can obtain additional information by contacting *Aluminum Anonymous, Inc.*, P.O. Box 683, Chesapeake City, MD 21915, phone 800-440-1345.

Drugged Driving Legislation: Per Se or Not Per Se?

All fifty states have incorporated language in impaired driving statutes to address the growing concern of drugged driving. Although most states require proof that the driver was under the influence of a drug or drugs at the time of driving, seven states have passed per se legislation: Arizona, Georgia, Illinois, Indiana, Iowa, Minnesota, and Utah have included clauses in impaired driving statutes that make the mere presence of enumerated drugs in the subjects system sufficient to prove drugged driving.

The drugs expressly included and excluded in the per se legislation vary significantly by state and provide a complicated backdrop in the ongoing battle of defining the "per se" in per se drugged driving legislation. For example, Indiana, Utah and Iowa limit these statutes to a controlled substance. Georgia qualifies controlled substance by excluding marijuana and tetrahydrocannabinols, Illinois extends the per se clause to include cannabis, controlled substances, and intoxicating compounds. Legally prescribed drugs are excluded in all of the per se legislation except in Minnesota. In addition, Utah adds an affirmative defense of an involuntarily digested drug.

If you find yourself a bit perplexed, per se, NTLC has a chart outlining the language used in drugged driving legislation. To receive a copy call NTLC at 703-549-4253 or fax 703-836-3195.

Criminal Sanctions for Refusal

Nine states have enacted statutes imposing criminal sanctions on a person who refuses to submit to an implied consent chemical test. These states include Alaska, California, Indiana, Minnesota, Nebraska, New Jersey, Ohio, Rhode Island and Vermont. In addition, two states, Nebraska and New York, impose criminal sanctions for refusing a preliminary breath test. The criminal sanctions for either refusal range from community service, to fines, license revocations, and imprisonment. Alaska has the toughest sanction for refusal, requiring a mandatory minimum 72 consecutive hours imprisonment and a mandatory minimum fine of \$250 for a first offense.

Arresting Developments

Stettler, Canada David Zurfluh was stopped and charged with DUI. While sitting in the back of the patrol car, Mr. Zurfluh ripped his underwear and stuffed the garment into his mouth. In court, Mr. Zurfluh briefly explained he tried to eat his underwear to beat the breathalyzer machine. He thought the cotton fabric would absorb the alcohol. He blew a .08 and was subsequently acquitted of the DUI charge.

Wrentham, MA A jury acquitted Kathleen Barrett of DUI after her attorney was stopped for failing to stay in her lane. She performed poorly on four field sobriety tests and refused a chemical test. During her trial, Ms. Barrett asserted her driving was impaired because of the effect of the abusive relationship with her husband. Ms. Barrett stated she was looking for her husband at the time she was stopped and feared she would be beaten if she didn't find him.

Panama City FL Jeffrey Sakemiller was convicted of DUI and vehicular homicide and sentenced to fourteen years for the death of his 6 year old daughter. Driving on a suspended license, Mr. Sakemiller allowed his daughter to sit in the back of his pickup truck in an empty plastic pool. While driving on a busy road, the wind caught the pool and both the pool and the girl were blown out of the truck. His daughter was killed by another car as she attempted to stand up in the street.

CALENDAR OF EVENTS

ABA Traffic Court Seminar
Tulane University School of Law
New Orleans, LA

October 13-15, 1999
312-988-5742

**Prosecution 2000: Moving Into the Next Century
Impaired Driving/Vehicular Crimes Track**

National Advocacy Center
Columbia, South Carolina
September 20-24, 1999
803-544-5050

WEB RESOURCES

**Validation of the Standardized Field Sobriety Test
Battery at BACs below 0.10 Percent (1998)**

This study can be downloaded from the National Highway Traffic Safety Administration website. The exact address is: www.nhtsa.dot.gov/people/injury/alcobol/limit.08/SFSTREP.pdf

A Florida Validation Study of the Standardized Field Sobriety Test Battery (1997)

This study evaluated the accuracy of the SFST battery in detecting suspects with BACs of .08 or higher. The report can be found on the web at: www.jacksonville.net/~kbarron/FloridaStudy.htm