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LETTER REPORT

PRELIMINARY ASSESSMENT OF THE
LEGAL FEASIBILITY OF A SELF-TEST DEVICE
TO DETERMINE BLOOD ALCOHOL CONTENT (BAC)

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This is a letter report prepared under Contract DOT-HS-7-01536 that addresses the legal feasibility of so-called self-test devices. Such devices are intended for voluntary use by drivers who have consumed alcohol and who wish to determine whether they are too intoxicated to operate a vehicle safely. The research and analysis leading to preparation of this report was conducted by staff of the Policy Analysis Division of the Highway Safety Research Institute (HSRI) of The University of Michigan for the National Highway Traffic Safety Administration (NHTSA).

BACKGROUND

A number of self-test devices have been developed and made available to the drinking public. One version, developed by the U.S. Department of Transportation, known as the Alcohol Screening Device (ASD). The ASD, which has been used by police departments to conduct prearrest breath tests (Belardo and Zink 1975), is portable and is capable of providing instantaneous measurement of the subject's blood alcohol concentration (BAC). ASD units have recently been field tested at commercial drinking establishments and at private parties (Oates 1978).

Another self-test device is the Alcometer, a coin-operated device designed for use in commercial drinking establishments. This device recently was field-tested (Sharp and Perry 1978) in several Australian establishments. There also exists a simpler self-tester, the Luckey Sobermeter. This device is cheap, portable, and disposable; quantities of Luckey Sobermeters have been distributed to the public through Alcohol Safety Action Projects (ASAPs), the liquor industry, and community groups (Lincoln, Nebraska Alcohol Safety Action Project 1971). The ASD and Alcometer provide the subject with numerical BAC readings, while the Sobermeter provides only an approximation of the subject's BAC.

Two principal uses for the self-test device have been identified:

- self-test devices will be made commercially available, both to owners of drinking establishments and to the

general public; or

- the state liquor control authority will require licensed drinking establishments to install these devices and make them available for voluntary use by patrons.

It is assumed that persons who use the self-test device would alter their driving behavior--such as by using public transportation or allowing another person to drive--should they learn that they have consumed too much alcohol to operate a vehicle safely.

This report discusses possible law-based constraints on the installation and use of self-test devices, as well as possible legal consequences associated with the use of such devices.

DISCUSSION OF LEGAL CONSTRAINTS

There currently exist no constitutional or statutory restrictions on the distribution of alcohol testing equipment, and therefore a private individual or an owner of a drinking establishment would encounter no legal obstacles to acquiring a self-test device.

A state liquor control authority seeking to require the installation of self-test devices in licensed drinking establishments would encounter no constitutional obstacles to imposing such a requirement, since states have broad authority under the U.S. Constitution to regulate the sale and distribution of alcoholic beverages (1). Typical restrictions imposed upon holders of liquor licenses deal with the character and fitness of the licenseholders, hours of operation and permissible locations of drinking establishments, types of beverages that may be sold, and prohibited forms of entertainment (2); they also impose various health and safety requirements (3). In addition, state statutes, court decisions, and administrative rules generally prohibit the sale of alcoholic beverages to intoxicated persons (4). Given the state's broad authority to regulate the sale of liquor, and the strong public policies against the sale of alcohol to intoxicated patrons, requiring installation of self-test devices would be within the state's regulatory powers.

Assuming that a commercial drinking establishment has installed a self-test device on the premises (5), several legal issues arise from its use

by patrons. These deal with whether the device functions properly, the evidentiary impact of self-test results on court actions against a driver, and the effect of the presence of a self-test device on the establishment's civil liability.

In the event a self-test device functions properly, legal issues may be raised with respect to the test results. First of all, a driver who is charged with driving while intoxicated (DWI) may attempt to offer the self-test results, if they are favorable to him (6), as a defense. However, these results--even if they are admitted as valid scientific evidence (McCormick 1972, pp. 527-28)--would not be a complete defense to the DWI charge. Rather, they would be mere evidence of nonintoxication that could be considered by a judge or jury along with the BAC test results and other evidence relating to intoxication (7).

Second, where a drinking driver is involved in a traffic crash and is sued by the injured parties for negligence, the driver may attempt to introduce the favorable self-test results to show that he was not intoxicated. However, such evidence--even if accepted by the court--would not disprove negligence. Negligence is the failure to exercise the degree of caution and prudence that a reasonable person would exercise under similar conditions (Prosser 1971, pp. 143-44). A driver whose capabilities have been impaired by alcohol is more likely to cause a traffic crash, but intoxication is but one of many factors--such as speed, attention to traffic conditions, and the vehicle's mechanical condition--that are considered in determining driver negligence (Prosser 1971, p. 154). On one hand, alcohol impairment to any degree, whether above the level of legal impairment or not, is a factor in determining negligence; on the other hand, the mere fact that a driver is legally impaired does not by itself indicate negligence (8). Thus, self-test results will at best provide mere evidence of nonintoxication that could be considered at trial.

Third, a person injured by an intoxicated patron may sue the drinking establishment that served him, and attempt to use the self-test results to prove the patron's intoxication. Some states have enacted so-called "dram shop acts," which make drinking establishments civilly liable for serving

an intoxicated person who subsequently injures another (9). In other states, drinking establishments may be held liable, under a negligence theory, for serving alcohol to an intoxicated patron (10). In either situation, an employee of the drinking establishment observing a patron "failing" the self-test would be put on notice either to stop serving him, or to risk having the self-test results introduced as evidence in a later civil action. While the self-test results may not be conclusive evidence of the establishment's liability, they would probably increase the likelihood that it would be found liable.

When a self-tester functions improperly, legal issues also might be raised with respect to the test results. First of all, a driver may in fact be intoxicated but obtain a favorable test result from the self-test device; as a result he chooses to drive, and is arrested for DWI or causes a traffic crash. As pointed out earlier, favorable self-test results will at best be evidence of nonintoxication that may be considered by the court or jury; they would preclude neither criminal nor civil liability for alcohol-impaired driving.

However, it is conceivable that in such a situation the manufacturer, distributor, or maintainer of a defective self-test device would be sued by a driver found criminally or civilly liable for alcohol-impaired driving. This is because the self-tester is intended to be used by drivers as a basis for making decisions whether to drive after drinking, and it is possible that an improperly functioning device may cause a person to drive in situations where he would not have driven if he had obtained accurate information from the device. Although the defect would not excuse the driver's liability, it might give the driver grounds to sue for the damage to reputation or the loss of property caused by a DWI conviction or civil liability. The basis for such a suit would be a products liability theory, namely that a defect in the design, manufacture, or maintenance of the device resulted in damage to the driver (Prosser 1971, pp. 641-82).

However, a driver who brings such a suit would have to overcome several legal obstacles to prove that the defect in the device actually caused the injury. First of all, the driver would have to show that he in

fact based his driving decision on the test results, that is, he would not have driven had the test accurately reflected his impairment. Second, the driver must prove he was not aware that his driving capabilities were substantially impaired, that is, that the only means by which he could have learned the extent of his impairment would have been to use the self-tester. These factors apparently will defeat most lawsuits that impaired drivers would bring against manufacturers of self-test devices and establishments maintaining them. Relatively few drinkers are unaware that their capabilities are affected by consuming large quantities of alcohol, and few drivers apparently alter their driving habits in heavy drinking situations (Oates 1978, pp. 27-52). Thus, while it is conceivable that drivers might bring lawsuits on account of malfunctioning self-test devices, it is unlikely that many will succeed.

Finally, several considerations do not by themselves pose legal barriers to the installation and maintenance of self-test devices by drinking establishments, but they do flow from the legal considerations surrounding the use of such devices. The first of them is the reluctance of drinking establishments to install these devices voluntarily, for fear of civil liability or administrative action as a consequence of their serving intoxicated patrons (11). A second consideration is that a self-test device might actually encourage abusive drinking: for example, some patrons might continue to drink until they reach the level of legal intoxication, or treat the self-tester as a source of entertainment or amusement (Sharp and Perry 1978, pp. 6-7). Third, even when a self-test device is in proper operating condition, it could be improperly operated by the casual user; for example, the subject must not have consumed alcohol immediately prior to the test, and must blow into the device at the correct time or rate (Oates 1978, pp. 20-21; Sharp and Perry 1978, pp. 5, 11).

Finally, one policy issue mentioned earlier is potentially critical: a recent field test of self-test devices suggested that relatively few drivers chose to alter their driving behavior as a response to learning of their BAC levels (Oates 1978, pp. 27-52), however, the researchers in that study were reluctant to conclude that the devices were an ineffective means of inducing impaired persons not to drive.

CONCLUSIONS AND RECOMMENDATIONS

There are no significant law-based constraints for voluntary purchase and installation of self-test devices by licensed drinking establishments. However, many establishments, fearing potential civil liability or loss of customer goodwill associated with the presence of such devices, are unlikely to install self-testers on their premises. This being the case, state liquor control authorities have the constitutional authority to require establishments to install them.

The possibility that impaired drivers may attempt to offer favorable self-test results as a defense to civil or criminal liability does not pose a significant constraint. Favorable results are mere evidence of nonintoxication, the weight of which will be considered at trial; and it is likely that such results would have little or no value as a defense to liability.

Self-tester malfunctions may give rise to products-liability suits against manufacturers, distributors, and maintainers of the devices. Such suits are also unlikely to pose a significant constraint: the impact of those suits that do succeed can be lessened by the purchase of appropriate liability insurance.

Therefore we conclude that there are few significant law-based constraints to the installation of self-test devices in commercial drinking establishments. It should be noted, however, that prior study has identified possible practical constraints. This analysis has not addressed these issues as these are the subject of analyses by NHTSA and by other NHTSA contractors.

FOOTNOTES

1. U.S. CONST. amend. XXI; see also, California v. LaRue, 409 U.S. 109 (1972) [state may prohibit conduct in licensed drinking establishment that could not be prohibited elsewhere]; New Safari Lounge v. City of Colorado Springs, --- Colo. ---, 567 P.2d 372 (1977); Erfor Corp. v. State Liquor Control Commission, 47 Ill. App. 3d 72, 361 N.E.2d 776 (1977); and Wayside Restaurant v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974). The power under the Twenty-First Amendment to regulate liquor is not absolute, however, and does not elevate the police power above all other provisions of the Constitution. See, Craig v. Boren, 429 U.S. 190 (1976).
2. Typical restrictions upheld by courts include: 4-D Brothers, Inc. v. Heckers, 522 P.2d 749 (Colo. Ct. App. 1974) [regulation prohibiting solicitation of drinks]; Peppermint Lounge v. Wright, 498 S.W.2d 749 (Mo. 1973) [requirement that licenseholders be of "good moral character"]; and the New Safari Lounge, Erfor, and Wayside Restaurant cases cited above. See also, e.g., CAL. BUS. & PROF. CODE § 23789 (West 1964) [prohibiting the issuance of liquor licenses to establishments located in immediate vicinity of churches, schools, and hospitals]. However, state power over the granting or denial of liquor licenses is not absolute. In this regard see, Frontier Saloon, Inc. v. Alcoholic Beverage Board, 524 P.2d 657 (Alaska 1974) [procedural due process governs revocation procedure], and Arizona State Liquor Board v. Ali, 27 Ariz. App. 16, 550 P.2d 663 (1976) [guarantee of equal protection prohibits state from denying license on basis of alienage].
3. See, e.g., MICH. ADM. CODE R. 436.6 (1954) [requiring hot and cold running water, flush toilets for both sexes, clean clothing and dishware; also setting minimum floor space requirements]; R.436.13 (1954) [prohibiting establishments from erecting blinds, screens, or other obstructions that would block view of the premises from outside]; and R.436.36 (Supp. 1976) [setting seating capacities].
4. Representative provisions include: CAL. BUS. & PROF. CODE § 25602 (West Supp. 1979); ILL. ANN. STAT. ch. 43, § 131(a) (Smith-Hurd Supp. 1978); N.Y. ALCO. BEV. CONT. LAW § 65(2) (McKinney 1970); OHIO REV. CODE ANN. § 4301.22(B) (Page 1973); and PA. STAT. ANN. tit. 47, § 4-493(1) (Purdon 1969). California and Pennsylvania prohibit sales to visibly intoxicated persons. One should see also the "dram shop" statutes cited below in note 9.
5. This report will not discuss the legal issues arising out of the presence of a self-test device in a private residence. The major

difference between commercial establishments and private residences will arise with respect to the host's liability for serving liquor to intoxicated guests. At present, only a small minority of states have held the host liable; one decision extending the tavernkeeper's liability to social hosts is Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

6. As used in this report, "favorable" test results are results indicating a BAC level below .10%, the level at which legal intoxication is presumed in most states. It should be noted that in most states, BAC levels between .05% and .10% are evidence of intoxication that, when considered together with other evidence, such as erratic driving, slurred speech, and bloodshot eyes, could support a DWI conviction. See generally, UNIFORM VEHICLE CODE §§ 11-902 et seq. (Supp. II 1976).
7. See, UNIFORM VEHICLE CODE § 11-902.1(b) (Supp. II 1976).
8. See, e.g., State ex. rel. Miser v. Hay, 328 S.W.2d 672 (Mo. 1959); McMichael v. Pennsylvania R. Co., 331 Pa. 584, 1 A.2d 242 (1938); and Scott v. Gardner, 137 Tex. 628, 156 S.W.2d 513 (1941); see also, McCoid, Intoxication and Its Effect Upon Civil Responsibility, 42 IOWA L. REV. 38 (1956).
9. Representative "dram shop" acts include: ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1978); IOWA CODE ANN. § 123.92 (West Supp. 1978-79); MICH. COMP. LAWS ANN. § 436.22 (1978); MINN. STAT. ANN. § 340.95 (West Supp. 1979); and PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969). In Michigan and Pennsylvania, it must be shown that the patron was "visibly intoxicated" when served.
10. Some states have found the establishment liable on the basis of statutes prohibiting the sales of alcohol to intoxicated persons (see note 4 above). See, e.g., Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973) [applying Alaska law]; Pence v. Ketchum, 326 So.2d 831 (La. 1976); and Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1958). However, some states refuse to recognize the establishment's liability on the grounds that in the absence of a dram shop act (see note 9 above), an injured party cannot recover for negligence. See in this regard, Griffin v. Sebek, — S.D.—, 245 N.W.2d 481 (1976). The reasoning in this case was criticized in Comment, Negligence Actions Against Liquor Perveyors: Filling the Gap in South Dakota, 23 S.D.L. REV. 481 (1978).
11. The Lincoln, Nebraska Alcohol Safety Action Project (ASAP) attempted to distribute self-test devices to the public through licensed off-sale liquor establishments. Of the twenty-one establishments contacted by ASAP through the Lincoln Chamber of Commerce, eighteen agreed to stock the devices and accompanying

promotional materials (Lincoln, Nebraska Alcohol Safety Action Project 1971, p. 20). On the other hand, when Dunlap and Associates attempted to place survey teams and install ASDs in taverns, a reported 75% of those establishments approached by Dunlap refused to cooperate. However, there primary reason for refusing ws not the fear of legal consequences but the prospect of offending patrons who might object to the presence of survey teams and testing devices in the tavern (Oates 1978, pp. 8-9).

REFERENCES

Belardo, S., and Zink, J. 1975. New York State Police evaluation of the National Highway Traffic Safety Administration alcohol screening device. Albany: New York State Police.

Cleary, E.W., ed. 1972. McCormick's handbook of the law of evidence. 2d ed. St. Paul: West Publishing Company.

Comment, Negligence Actions Against Liquor Purveyors: Filling the Gap in South Dakota, 23 S.D.L. REV. 481 (1978).

Lincoln, Nebraska Alcohol Safety Action Project. 1971. Sobermeter promotion. Report of Lincoln ASAP on countermeasure activity.

McCoid, Intoxication and Its Effect Upon Civil Responsibility, 42 IOWA L. REV. 38 (1956).

Oates, J.F. 1978. Study of self-test devices. Final report. National Highway Traffic Safety Administration technical report HS-5-01234.

Sharp, K.G., and Perry, D. 1978. Behavioral observations of alcometer use. Victoria, Australia: Australian Road Research Board.

Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. St. Paul: West Publishing Company.