

THE DOCTOR AND THE DRUNK DRIVER

- SHIFTING THE PARADIGM

by

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Summary

Injury and death on South African roads are at an unacceptably high level. Many of the causative incidents are due to drivers being under the influence of alcohol.

Preventative and post incident actions by law enforcement agencies are ineffective. The judicial system also allows too many perpetrators to escape justice.

This dissertation explores the possibility of the medical personnel, involved in treating the injured drunk driver, taking a more active role in delivering justice to the larger community.

It is argued that while the doctor has a duty of care to his/her patient, inclusive of a duty of confidentiality, he/she also has a duty to the community put at risk by the drunk driver. In order to perform this latter duty some of the rights of the patient may have to be limited.

In this study the current legal and ethical situation is considered and changes to the system are suggested to give better effect to the communal duty of the doctor. This is done with the Constitution and current South African law as a basis, whilst suggesting changes from an ethical and legal point of view. Applicable foreign law is also referred to.

It is suggested that it be made mandatory for the doctor treating the injured driver to test for alcohol consumption, even without the involvement of law enforcement. The results of such tests should then be available, on request, to all affected parties, such as other injured persons and insurance companies. Achieving this will require changes to existing law and regulations.

Key words: alcohol, blood alcohol concentration, breath alcohol concentration, drunk, drink-driving, driving, driving under the influence, driving while intoxicated, intoxicated, emergency physician, road safety, road deaths,

Declaration of originality

I, **Johan Heinrich von Willich**, student number **74186478**, declare as follows:

1. I understand what plagiarism is and am aware of the University of Pretoria's policy in this regard.
2. I declare that this **mini-dissertation** is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
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Signed at Pretoria on 29 April 2016.

(Signed)

JH von Willich

Supervisor: Prof PA Carstens

Preface

‘If you drink and drive you are a killer’. This is what the road signs said on my recent visit to Cape Town.

The world’s first human heart transplant operation was performed in the same city on 3 December 1969. The donor, Denise Darval, was rendered brain dead by a drunk driver.

I am a general surgeon and part of my practice is devoted to trauma care. As such I am often called upon to attend the victims of motor vehicle crashes. Many of these are the result of drivers being incapacitated by the inappropriate consumption of alcohol. Only very infrequently is there any involvement of law enforcement agencies in addressing this problem.

A while ago I treated a patient who had been involved in a single vehicle crash on his way to work (becoming quadriplegic as a result of his neck fracture). His blood alcohol concentration was over 0.2 mg/dl. His work: a bus driver.

For every fatality on our roads there are many more life changing injuries, each affecting the lives of many people.

It is my submission that the medical personnel treating these casualties must play a more active role in fighting the problem of the drunk driver.

Johan H. von Willich

Pretoria, April 2016

Author’s note: For the sake of brevity the masculine form is used throughout the text of this dissertation. ‘He’ and ‘his’ should be read as ‘he/she’ and ‘his/her’.

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Abbreviations used

| | |
|---------------------|---|
| A&E | Accident and Emergency |
| ACEP | American College of Emergency Physicians |
| ACHPR | African Charter on Human and People’s Rights |
| AMA | American Medical Association |
| BAC | Blood Alcohol Concentration |
| BrAC | Breath Alcohol Concentration |
| CDC | Centres for Disease Control |
| Constitution | The Constitution of the Republic of South Africa, 1996 |
| CrPA | Criminal Procedure Act 51 of 1977 |
| DUI | Driving under the influence |
| DWI | Driving while intoxicated |
| FST | Field Sobriety Test |
| GG | Government Gazette |
| GMC | General Medical Council of the United Kingdom |
| GN | Government Notice |
| HPCSA | Health Professions Council of South Africa |
| MADD | Mothers against Drunk Driving |
| NCADD | National Council on Alcoholism and Drug Dependence, Inc. (US) |
| NHA | National Health Act 61 of 2003 |
| NHTSA | National Highway Traffic Safety Association (US) |
| OAU | Organization of African Unity |
| PAIA | Promotion of Access to Information Act 2 of 2000 |
| PI | Personal Information |
| POPI | Protection of Personal Information Act 4 of 2013 |
| Reg/s | Regulation/s |
| RID | Remove Intoxicated Drivers |
| RSA | Republic of South Africa |
| RTA | National Road Traffic Act 93 of 1996 |
| SABC | South African Broadcasting Corporation |

| | |
|------------------------|--|
| SACC | South African Constitutional Court |
| SADD | South Africans against Drunk Driving |
| SAMA | South African Medical Association |
| SANAS | South African National Accreditation System |
| SANS | South African National Standard |
| SAPS | South African Police Service |
| Sec/s | Section/s |
| UPPL | Uniform Accident and Sickness Policy Provision Law |
| US | United States of America |
| US Constitution | The Constitution of the United States of America |
| USSC | United States Supreme Court |
| UK | United Kingdom |
| UN | United Nations |
| WHO | World Health Organization |
| WMA | World Medical Association |
| ZAR | South African Rand (currency) |

Chapter 1

Introduction and study rationale

1.1 Introduction

Ever since ancient man first picked up and tasted a fermenting piece of fallen fruit, alcohol has become a part of our everyday life. Through the ages, starting about 10,000 years ago, processes were developed for the production of the many alcohol containing drinks we find on the shop shelves.¹ The name 'alcohol' is derived from the Arabic 'al-kuhl', and was used by Paracelsus to indicate the volatile spirit of wine.² The use of alcohol has now become an everyday occurrence and the effects of over indulgence are only too well known.

On 2 November 1886 the *Kaiserliches Patentamt* issued a patent to Karl Benz for the first petrol powered automobile, introducing a new form of transport to the world.³ Especially in countries such as South Africa, where travelling distances are long and there is a lack of well-developed mass public transport systems, the motor vehicle has become part of everyday life.

Unfortunately alcohol usage and driving of motor vehicles do not mix well and this has led to a lot of tragedy on our roads. Apart from the human cost an enormous burden is placed on an already fragile national economy. The economic loss to the country ascribed to motor vehicle crashes amounts to ZAR 306 billion per annum.⁴ About 14,000 people die on our roads every year.⁵ This calculates to 25.1 deaths per 100,000 of the population.⁶ Various agencies regard these estimations as conservative. In January 2015 South African Transport Minister Dipuo Peters announced that there had been 1,368 road fatalities between 1 December 2014 and 5 January 2015.⁷ A SABC television news bulletin reported that for the period 1 December 2015 to 11 January 2016, this figure was 1755.

According to the *World Health Organization* (WHO), South Africa (RSA) has more deaths due to drunk-driving than anywhere else in the world.⁸ As much as 58% of the road deaths are

¹ Narconon: Alcohol History www.narconon.org .

² Cooper (1979) 68.

³ Wikipedia: History of the automobile.

⁴ Editorial (2015) 105 *SAMJ* 795.

⁵ SADD: Statistics www.sadd.org.za .

⁶ WHO: Global Status report on Road Safety 2015 : Country profiles 226.

⁷ Supra n5.

⁸ Supra n6.

alcohol-related.⁹ For drivers this number is 46.5%.¹⁰ The *South African Medical Association* (SAMA) describes alcohol abuse in the country as ‘a National Crisis’.¹¹

To make matters worse, many of the drunk drivers are repeat offenders. According to the *Centres for Disease Control and Prevention* (CDC) in the United States (US) the average drunk driver is guilty of Driving under the Influence (DUI) eighty times before his first arrest.¹² In 2010 three percent of drivers involved in fatal crashes in the same country had been convicted for the same offence in the preceding three years.¹³ In the US 40% of car crash fatalities involve alcohol.¹⁴

Containing the problem of the drunk driver has to be done on many levels. Official processes are conducted through the state law enforcement agencies and the judicial system. Campaigns such as *Arrive Alive* in South Africa and the volunteer organization *South Africans against Drunk Driving* (SADD) are also partners in the fight. In the US similar organizations are *Mothers Against Drunk Driving* (MADD) and *Remove Intoxicated Drivers* (RID).

South Africa, where the official processes are not very efficient, scores only 4/10 for its law enforcement against drunk drivers.¹⁵ Law enforcement agencies are understaffed and the individual officers are often not interested in or equipped to deal with the situations they encounter.¹⁶ It is rare indeed to find a police officer requesting a blood alcohol level on an injured driver in any of our accident and emergency (A&E) units.¹⁷ Ratshivumo states that South Africa’s high road carnage cannot be attributed solely to the increase in the number of road users, but mainly to the lack of efficient traffic law enforcement.¹⁸

When an injured, potentially drunk, driver is attended to in an A&E unit the treating physician is under obligation to attend to the patient’s medical needs first. Often multiple blood tests are done but routine testing for blood alcohol concentration (BAC) is for reasons to be discussed later, infrequent.¹⁹

It is this latter omission that has prompted me to undertake this study.

⁹ WHO: Global Status report on Road Safety 2015 - Country profiles 226 .

¹⁰ SAMA press release 21 December 2015.

¹¹ Ibid

¹² Hiber (ed) (2013) 96.

¹³ Ibid.

¹⁴ Drugfreeworld: Alcohol: A short history www.drugfreeworld.org.

¹⁵ Supra n9.

¹⁶ Personal conversations with paramedics.

¹⁷ Personal conversations with A&E unit physicians.

¹⁸ Ratshivumo (1996) Unpublished LLM Dissertation.

¹⁹ Supra n17.

1.2 Study rationale

It is my contention that the doctor treating the drunk driver in the emergency room, in addition to treating the patient as his first priority, should take a more active role in addressing the problem of drunk driving, thus also fulfilling his civil communal duty.

I submit that it should be mandatory for the physician to test all drivers for alcohol consumption. The results of these test should then be available to all interested parties, such as law enforcement, insurance companies, medical aid schemes and other injured parties.

It boils down to these questions: Can the doctor ethically and legally draw blood for alcohol testing from his patient, have it tested and then ethically and legally disseminate the results of the test?

Only by taking drastic steps can we curb the scourge of the drunk driver on our roads. These proposals will by necessity stage a conflict between the ethical and legal rights of the patient (the drunk driver) and the rights of the community (those injured by the drunk driver). The conflicting position of the physician, acting as both caregiver of the patient but also as member and agent of the community, must also be considered.

In order to justify the submitted proposals, this dissertation will consider the following aspects:

- i. The effects of alcohol consumption on the driver.
- ii. The testing of alcohol intoxication.
- iii. The crime of driving under the influence of alcohol.
- iv. The current position regarding the management of the drunk driver.
- v. Problems and obstacles regarding the current situation.
- vi. Suggested changes to the system and the ethical and legal principles underlying these.

The subject of drunk-driving is vast. The current discussion will be mainly limited to the interaction between the injured drunk driver and the treating physician in the hospital emergency unit.

1.3 Shifting the paradigm

Currently, in the contest between the drunk driver and his victims, the odds seem to be on the side of the driver. His rights to dignity, security and privacy are protected by the Constitution of the Republic of South Africa, 1996 (Constitution).²⁰ In the United States of America (US) the same function is performed by the IV and XIV amendments of the Constitution of the United States of America (US Constitution).²¹ US Supreme Court justices are reputed to have a history of being sympathetic to the cause of drunk drivers.²²

The actions of the doctor on the other hand are limited by his duty of confidentiality and the requirement of informed consent.²³

In South Africa the Constitution does, however, allow for the limitation of rights, given certain requirements, and it is here where the protection of the community is ensured.²⁴ In the US there is no such limitation clause.²⁵

In a dissenting opinion in the case *Virginia v Harris*, Chief Justice of the United States Supreme Court (USSC) John Roberts, supported by Justice Antonin Scalia, argued that drunk driving cases, posing unique dangers, required different standards of judgement. Protecting the lives of the innocent should take precedence over the sometimes dubious rights of the drunk driver.²⁶

Bonnie Steinbock, philosopher and bioethicist, takes a slightly more aggressive stance when she says “It is not unreasonable to require people to undergo great inconvenience to avoid killing other people...When they cause death by drunken driving, they murder”.²⁷ This sentiment is echoed by Sibongile Mashaba, a newspaper reporter, when she titled her article in the *Sowetan* of 16 January 2016 ‘Drunk driving equals murder’.

The goal of this dissertation is to promote a dispensation in which more emphasis is placed on the rights of the community, and less on those of the drunk driver, thus shifting the paradigm. The doctor in the emergency room is in an ideal position to achieve that.

²⁰ Secs 10, 12 & 14 Constitution, protecting dignity, security and privacy.

²¹ US Constitution.

²² Lerner (2011) 132.

²³ Secs 5.2, 5.3 & 5.4 HPCSA Ethical Guidelines; Secs 6, 7 & 14 NHA 61 of 2003.

²⁴ Sec 36 Constitution

²⁵ Currie (2013) 152.

²⁶ *Virginia v Harris* 558 US (2009), 130 S. Ct. 10, 10(2009), No 08-1385.

²⁷ Steinbock (1985) 14 *Phil & Pub Affairs* 278 at 290 and 295.

Chapter 2

Alcohol consumption and the driver

2.1 Alcohol and the driver

2.1.1 Driving skills

Driving a motor vehicle requires several skills. To control a heavy, fast moving, self-propelled piece of metal the driver needs to be aware of his vehicle and his surroundings and be able to respond in time to unexpected events. Amongst others the following skills and abilities are necessary: vision, hearing, orientation, muscular coordination, concentration, caution, anticipation, restraint and judgement.²⁸

The act of driving comprises being sensitive to visual, auditory, touch and proprioceptive inputs and the brain then initiating the necessary neuro-muscular output, in order to control the vehicle.²⁹

2.1.2 The effect of alcohol on the driver

Alcohol affects many of the body's systems. The effects vary for different people.³⁰ Alcohol has been described as the most potent suppressant of the central nervous system freely available without prescription.³¹ At low concentrations it tends to excite nerve-muscle responses while at higher concentrations the reverse is seen.³²

At the concentration levels commonly seen in intoxicated drivers the affected person tends to overestimate his ability to perform physical and mental tasks, while at the same time underestimating the effect of his mistakes – all important skills when it comes to driving.³³ Muscle control starts becoming affected at Blood Alcohol Concentration (BAC) levels as low

²⁸ Cooper (1979) 312.

²⁹ Id at 314.

³⁰ Id at 147.

³¹ Id at 151 quoting Harvard JDJ (1978) 1 'Alcohol and the Driver' *BMJ* 1597.

³² Id at 147.

³³ Id at 152.

as 0.01 mg/100ml of whole blood (0.01%).³⁴ Visual impairment is measurable at a BAC of 0.03%.³⁵ This influences reaction time which is vital when controlling a vehicle.

At levels of 0.05% judgement becomes impaired,³⁶ and this is also the level at which most jurisdictions start becoming legally involved. Many countries do have lower or varying levels for different types of drivers. The US still uses a level of 0.08% as a legal threshold.³⁷ The United Kingdom (UK) currently has 0.08% as a limit but is in the process of lowering it to 0.05%, as it is in most countries in Europe and also in South Africa.^{38 39 40}

For more information on the effects of alcohol on human physiology, the reader can refer to specialised literature.^{41 42 43}

2.2 Testing for alcohol consumption

2.2.1 Introduction

There are various ways of evaluating a driver for alcohol consumption. The oldest originated when ancient man first observed the antics of his fellow ancient man having eaten too many pieces of the fermenting fallen fruit, something we now call clinical evaluation.

In 1874 Anstie noted small amounts of alcohol in expired breath.⁴⁴ Widmark in 1920 reported studies investigating the distribution of gasses between the blood and alveolar air.⁴⁵ Haggard and Greenberg in 1934 established that Henry's law also applied to the distribution of alcohol in the body.⁴⁶ This led to the invention of the first apparatus to measure the concentration of alcohol in the expired breath of a person: the *Drunkometer* was developed by Rolla N. Harger, a biochemist at Indiana University, in 1931. It became available for use in 1937.⁴⁷ The next generation of breath alcohol measuring devices was introduced by Robert F. Borkenstein in

³⁴ Dada & McQuoid-Mason (eds) (2011) 290.

³⁵ Id at 289.

³⁶ Cooper (1979) 315.

³⁷ Books LLC (ed) (2011) *Drunk Driving* 10.

³⁸ Ibid.

³⁹ Road Traffic Act 1988 (Alcohol Limits) Amendment Bill – currently (April 2016) in committee stage in both the Commons and House of Lords.

⁴⁰ National Road Traffic Act 93 of 1996.

⁴¹ Cooper (1979).

⁴² Dada & McQuoid-Mason (eds) (2011) 281.

⁴³ Le Roux (2007) 2 *SACJ* 220 at 226.

⁴⁴ Simon (ed) (2011) 51.

⁴⁵ Cooper (1979) 268.

⁴⁶ Ibid.

⁴⁷ Lerner (2011) 24.

1954 and called a *Breathalyzer*.⁴⁸ Modern infrared spectroscopy or gas chromatography evidentiary breath analysis machines are of course much more sophisticated and accurate, but acceptable legal use thereof remains technically and administratively cumbersome.⁴⁹

Any consumed alcohol is absorbed into the blood stream of the drinker. The first quantitative chemical test for blood alcohol was developed by the Swedish physician and physiologist Erik Widmark in the late 1910's. His test utilised a few drops of blood obtained from a fingertip prick.⁵⁰ Methods of determining the concentration of alcohol in the blood have developed over time from wet chemistry procedures to the automated headspace gas chromatography used in today's evidentiary BAC testers.⁵¹ From a medical and legal point of view BAC is the most reliable indication of a patient's state of intoxication. The US state of South Dakota only accepts the BAC obtained by approved evidentiary testers as admissible evidence in court.⁵²

2.2.2 Clinical evaluation

This is the oldest method of determining a driver's, or any other person's, state of intoxication due to alcohol consumption. It is such a common occurrence that even the man on the street can usually give a fairly good opinion as to the degree of inebriation of the perpetrator.

A formal clinical examination would first entail just observing the patient. Signs to look for include a flushed face, tremor, difficulty in balancing, problems with focusing the eyes, increased respiratory tempo, diminished alertness and memory lapses.⁵³ Next would be a full physical examination by a qualified health care professional, including measurements such as pulse rate, pupillary light reaction and tendon reflexes.⁵⁴

Special tests dedicated to the examination of suspected drunk drivers have been used over the years. Some of these are the Horizontal gaze nystagmus test, the Walk and turn test, the One leg stand test, the Finger-nose test and the Romberg (standing steadiness) test.⁵⁵ It is to

⁴⁸ Simon (ed) (2011) 52.

⁴⁹ Jones (1996) 8 *Forensic Sci Rev* 13.

⁵⁰ Lerner (2011) 24.

⁵¹ Cooper (1979) 213, Jones (1996) 8 *Forensic Sci Rev* 13.

⁵² Simon (ed) (2011) 54.

⁵³ Cooper (1979) 160.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

be noted that only the first three of these test have US *National Highway Traffic Safety Administration* (NHTSA) approval.⁵⁶

When examining a patient in the emergency room the physician must remember that his first obligation is to the patient, and attending to medical conditions and traumatic injuries has priority. He must also bear in mind, when examining for alcohol intoxication, that various medical conditions, such as shock, head injury, fatigue, emotion, cerebrovascular and metabolic disorders, hypothermia and the effects of other medications and drugs can mimic the effects of alcohol.⁵⁷

The physical examination must take place in a well-lit, sufficiently equipped and private area.⁵⁸ When requested by a police officer in South Africa, a completed form SAP 308(a), used when a suspect has been arrested, must be presented by the officer.⁵⁹ The findings of the doctor will in turn be recorded on form Health 475, GW 4/75 or similar.⁶⁰ The person being examined may request the presence of his own medical practitioner.⁶¹

As stated before, alcohol affects different people differently and the clinical examination is therefore variable in outcome. In 1991 Dr Spurgeon Cole of Clemson University performed a study demonstrating the potential unreliability of a Field Sobriety Test (FST).⁶² These are the elementary tests that can be performed by a law enforcement officer on the scene of a crash to evaluate the driver for potential intoxication.

Clinical testing for intoxication in drunk driving cases has been largely superseded by BAC for the purpose of litigation.⁶³ Although it can still be used on its own, such as in the case of Judge Nkala Motata (arrested in 2007 for drunk driving),⁶⁴ physical examination is mostly used as supporting evidence.⁶⁵ See also *S v Edley*.⁶⁶

⁵⁶ Books LLC (ed) (2011) *Drunk Driving* 45.

⁵⁷ Cooper (1979) 176.

⁵⁸ Cooper (1979) 163.

⁵⁹ Dada & McQuoid-Mason (eds) (2001) 294.

⁶⁰ Cooper (1979) 164. SANC: Competencies- Forensic Nurse: May 2014.

⁶¹ Cooper (1979) 164.

⁶² Books LLC (ed) (2011) *Drunk Driving* 45.

⁶³ Cooper (1979) 163.

⁶⁴ *Motata v S* (A345/2010) [2010] ZAGPJHC 134 (29 November 2010).

⁶⁵ Le Roux (2007) 2 SACJ 220 at 235, referring to *S v Conradie* 2000(2) SACR 386 (C). In this case the evidence of the physical examination actually outweighed the BAC.

⁶⁶ *S v Edley* 1970 (2) SA 223 (N).

2.2.3 Breath alcohol testing

Testing Breath Alcohol Concentration (BrAC) is actually an indirect measurement of testing for alcohol in the blood. Physiology determines that the level of alcohol in the alveoli of the lungs will be proportional to the level in the blood of a person.⁶⁷ The unit of BrAC-measurement is milligrams per 1000 millilitres (mg/l).

In the past the ratio of breath alcohol to pulmonary blood alcohol was regarded as a constant of 2100 : 1.⁶⁸ However, factors such as temperature and blood haematocrit affect this ratio.⁶⁹ The BrAC-measurement is also influenced by residual mouth alcohol, the time since the last drink, any belching or regurgitation and the phase of respiration.⁷⁰

The technical requirements for performing this test are therefore very specific, and non-compliance with the prescribed procedure has come to the salvation of many accused. Laboratory personnel operating these pieces of apparatus have to undergo special training to ensure that correct and accurate results can be presented in court. These results have to be presented by means of an affidavit or verbal testimony.⁷¹ In *S v Ross* the lack of such an affidavit and substitution thereof by a certificate was found to be irregular and the accused was acquitted.⁷² In this case the BAC was found too high but the same rules of evidence apply. In *S v Hendricks* the court found that the operator had lacked sufficient training in operating the equipment, placing doubt on the results of the test, and the accused was again acquitted.⁷³

Evidentiary BrAC-testing equipment also needs to conform to specific standards. In South Africa the *South African National Standard (SANS) 1793* is prescribed by Regulation 332: 'Equipment used in ascertaining concentration of alcohol in breath'.⁷⁴ Reg 332 further determines that the equipment be regularly calibrated by an approved laboratory – this calibration to be confirmed by a certificate.⁷⁵ In *S v Hendricks* the court found that the breath analyser used, *Dräger Alcotest 711 MK III Breathalyser*, did not conform to all the technical

⁶⁷ Cooper (1979) 272.

⁶⁸ Id at 283.

⁶⁹ Id at 283.

⁷⁰ Id at 281.

⁷¹ Sec 212(10) Criminal Procedure Act 51 of 1977.

⁷² *S v Ross* (A33/12) [2012] ZAWCHC 171; 2013 (1) SACR 77 (WCC) (25 September 2012).

⁷³ *S v Hendricks* (cc46/2010) [2011] ZAWCHC 345 (9 September 2011).

⁷⁴ GN R890 of 2013. Published in GG 37048. Operational 19 November 2013. The Minister of Transport is empowered, in terms of s 75 of the National Road Traffic Act 93 of 1996, to make National Road Traffic Regulations.

⁷⁵ GN R890 of 2013. Published in GG 37048. Operational 19 November 2013.

and procedural requirements. The accused was not only acquitted, but use of the instrument was suspended and that left South African authorities without a usable evidential breath analyser until the deficiencies could be rectified.⁷⁶

The above is applicable in relation to evidential equipment. Police officers often carry portable breathalysers with them. These are only for screening purposes and their measurement are not deemed accurate enough to be admissible as evidence in court.⁷⁷

2.2.4 Blood alcohol testing

BAC has become the backbone of law enforcement in prosecuting DUI offenders. It is measured on a specimen of blood, at least 5ml in volume, usually taken from a vein of the suspect.⁷⁸ The skin of the patient has to be cleaned with a substance not containing alcohol. The specimen is then transferred, avoiding contamination, to a special evidentiary bottle (McCartney bottle used in South Africa), containing sodium fluoride and potassium oxalate. These chemicals act as preservative and anti-coagulant.⁷⁹ The specimen is sealed and sent, maintaining the chain of custody of evidence, via the *South African Police Service (SAPS)* to a Department of Health Forensic Chemistry Laboratory, where it is analysed by a sufficiently trained person in an evidentiary tester.⁸⁰ There are currently four such approved laboratories in the country: Pretoria, Johannesburg, Durban and Cape Town.

The result is reported as grams of alcohol per 100 millilitres of whole blood (g/100ml or g/dl written as a mass/volume percentage e.g. 0.05% rather than 0.05g/100ml). It is to be noted that the National Road Traffic Act, as do most similar acts worldwide, makes provision for the testing of the alcohol content of whole blood, not for the alcohol concentration in serum (whole blood minus the cellular components).⁸¹ The latter test is generally done in most pathology laboratories associated with hospitals.⁸² The serum concentration can be adequately converted mathematically to a whole blood value.⁸³

⁷⁶ *S v Hendricks* (cc46/2010) [2011] ZAWCHC 345 .

⁷⁷ Simon (ed) (2011) 53.

⁷⁸ Cooper (1979) 200.

⁷⁹ Id at 202.

⁸⁰ Cooper (1979) 204. Sec 212(8) CrPA.

⁸¹ National Road Traffic Act 93 of 1996.

⁸² Frajola (1993) 39(3) *Clin Chem* 337 at 378.

⁸³ Barnhill et al (2007) 31 *Jnl Analytical Tox* 23.

The importance of the preservative and anti-coagulant in the McCartney bottle has been questioned.⁸⁴ Winek and Paul showed in 1983 that storing blood without the preservative for as long as 14 days, did not lead to a significant change in alcohol content.⁸⁵ This finding was confirmed by Penetar et al in 2008, who also demonstrated that the anti-coagulant was not necessary.⁸⁶ This will become important in the discussion later in this study, as it means that no specialised collection tubes might be necessary and that the collection tubes currently in general use in hospitals could be adequate for the collection of blood to be submitted for alcohol testing. This approach will be new, and probably contested. It contradicts, amongst others, the formal attitude of the state of Missouri where only blood collected in a tube containing sodium fluoride is accepted.⁸⁷

The nature of the material used to clean the skin before obtaining the blood sample has also been questioned. It was assumed that any cleansing fluid that might contain alcohol would invalidate the BAC-test. In *S v Brumpton* an appeal was allowed against a conviction on the basis of the state not having proved that the cleansing fluid did not contain alcohol.⁸⁸ An Australian study by Tucker and Trethewy in 2009 demonstrated that cleaning the skin with a 70% isopropyl alcohol swab, as is commonly done in a hospital, does not affect the outcome of the test.⁸⁹

As in the case of BrAC measurement the testing equipment is important. The evidentiary BAC testers use gas chromatography to determine the levels of alcohol in whole blood.⁹⁰ The procedure used in South Africa is based on a method developed by Machata, who deemed the method so accurate as to be unlikely to be improved on soon.⁹¹ The equipment in common use in hospital pathology laboratories utilise an enzymatic rate method.⁹² Although these enzymatic tests can be performed on treated whole blood, it is generally done on centrifuged serum.⁹³ The enzymatic method is not as accurate (95%) as the gas chromatographic one (98%), but currently costs ZAR 141.80 compared to ZAR 905.00 for the more accurate test.⁹⁴

⁸⁴ Cooper (1979) 202.

⁸⁵ Winek & Paul (1983) 29 *Clin. Chem.* 1959 at 1960.

⁸⁶ Penetar et al (2008) 32 *Jnl Analytical Tox* 505.

⁸⁷ Editorial Missouri State Highway Patrol - Crime Laboratory Division (2001) 1(1) *Under the Scope*.

⁸⁸ *S v Brumpton* 1976 (3) SA 236 (T).

⁸⁹ Tucker (2010) 22(1) *Emerg Med Australas* 9.

⁹⁰ Cooper (1979) 215.

⁹¹ *Ibid.*

⁹² Beckman Coulter Synchron Systems Chemistry Information Sheet 474947.

⁹³ Personal communication with *Lancet Pathologists, Ampath Pathologists and Vermaak & Partners Pathologists*.

⁹⁴ Personal communication with *Vermaak & Partners Patholoaists*; Cooper (1979) 217.

The BAC-testers need to be calibrated regularly, and once again operator training and certification is necessary.⁹⁵

⁹⁵ GN R890 of 2013. Published in GG 37048. Operational 19 November 2013.

Chapter 3

Current Law in South Africa

3.1 The crime of drunk driving

3.1.1 Introduction

Commercial production of the motorcar in the UK started in 1896.⁹⁶ The first fatality caused by this new form of transport occurred in 1899.⁹⁷

In 1872 it had already become an offence to drive a carriage while drunk.⁹⁸ In 1925 it became illegal to be drunk when in charge of any mechanically propelled vehicle on a highway or a public place.⁹⁹ The first conviction for drunk driving came about on 10 September 1897 when George Smith, a London taxi driver, was fined 25 shillings for driving drunk.¹⁰⁰ In 1910 the US State of New York became the first jurisdiction to adopt laws against drunk driving.¹⁰¹ Norway in 1936 became the first country to have a per se law making it an offence to drive with a more than specified BAC.¹⁰² The limit chosen was 0.05%.¹⁰³

In South Africa the then province of Transvaal took the initiative in 1913, making it an offence to drive a motor vehicle while under the influence of intoxicating liquor.¹⁰⁴

The motor vehicle has become an indispensable form of transport in modern society. There are many dangers associated with high volume road traffic, the incapacitated driver being one of the more serious and unfortunately more common ones. In order to safeguard other road users it is necessary to regulate road use and to punish transgressors.

⁹⁶ Drink Driving: UK Law History www.drinkdriving.org.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Books LLC (ed) (2011) *Drunk Driving* 36.

¹⁰¹ Simon (ed) *Driving under the Influence* 90.

¹⁰² Lerner (2011) 27.

¹⁰³ Ibid.

¹⁰⁴ Cooper (1979) 1; Ordinance 6 of 1913 (T).

3.1.2 The law

The current situation in South Africa is governed by the National Road Traffic Act 93 of 1996 (RTA).

Sec 65 of the act makes provision for three offences:

- i. Driving a vehicle while under the influence of intoxicating liquor having a narcotic effect.¹⁰⁵ Here one has to rely on the testimony of witnesses as to the driver's ability to control his vehicle in a safe and responsible manner. The doctor's clinical examination in the emergency unit can be of great importance.
- ii. Driving a vehicle while the BAC of the driver is not below a specified level.¹⁰⁶ Currently in South Africa the BAC limit is 0.05%. For professional drivers¹⁰⁷ this is lowered to 0.02%.¹⁰⁸
- iii. Driving a vehicle while the BrAC of the driver is not below a specified level.¹⁰⁹ The current BrAC limit is 0.24mg/l. For professional drivers it is 0.10mg/l.¹¹⁰

3.1.3 Examining the driver-patient

The doctor will in all cases perform a clinical examination when the patient presents at an emergency unit after having been involved in a motor vehicle crash. BrAC-analysis is not a test that can generally be performed in an A&E unit at present. It can in any case only be done on a patient capable and willing to cooperate. The following discussion will focus on testing the injured driver's BAC, by means of a specimen drawn from a vein.

Sec 65(9) of the RTA compels a driver to submit to a breath or blood test and refusal is therefore also a transgression. No sanction is, however, attached to refusal and it cannot therefore be regarded as a criminal offence. In *S v Binta* such refusal was not regarded as an obstruction of justice as there was 'no legal duty' on the accused to submit to a blood test on

¹⁰⁵ Sec 65(1) RTA.

¹⁰⁶ Sec 65(2) RTA.

¹⁰⁷ Sec 32 RTA.

¹⁰⁸ Sec 65(2) RTA.

¹⁰⁹ Sec 65(5) RTA.

¹¹⁰ Sec 65(6) RTA.

request.¹¹¹ An obstruction of justice would require a positive act and not merely an omission.¹¹²

3.2 Collecting the blood sample

3.2.1 Introduction

When the potentially drunk driver presents to the emergency room physician there are a few possible scenarios.

The patient may be injured but still awake and able to act in his own behalf, i.e. capable of giving informed consent. He may on the other hand be seriously injured, unconscious, intubated or just too drunk to be capable of consent. He may or may not have family with him, someone who could potentially give or refuse consent on his behalf. In any of these cases a police officer, with his completed form SAP 308 (a), may be present. The form SAP 308 (a), ‘Medical examination of a person with regard to physical condition, sobriety and mental condition’, is a request by the police for the medical examination of their arrested suspect. It is done in term of sec 37(2)(a) of the Criminal Procedure Act 51 of 1977.¹¹³

Irrespective of which of these scenarios prevail, the potentially drunk driver is primarily a patient and as such the doctor must consider his medical condition and needs as a first priority. This is the doctor’s ethical and legal obligation.¹¹⁴

3.2.2 The law

Underlying any medical intervention is the concept of informed consent.¹¹⁵ If the driver-patient is capable of giving informed consent he should be asked do so. The doctor must inform the patient of the nature of the blood tests he intends doing.¹¹⁶ If the patient is incapable of giving consent but a proxy or family member is available, they can be asked for

¹¹¹ *S v Binta* 1993 (2) SACR 553 (C).

¹¹² *Ibid* at 560 B.

¹¹³ The form SAP 308 (a) , see appendix, was originally created in terms of the Criminal Procedure Act 56 of 1955. It is still in use today.

¹¹⁴ Rule 27A(a) HPCSA Guidelines for good practice Booklet 2 as in GG R717/2006 20.

¹¹⁵ Rule 27A(g) HPCSA Guidelines for good practice Booklet 2 as in GG R717/2006 20, Sec 7 NHA 61 of 2003.

¹¹⁶ Sec 6 and 7 NHA 61 of 2003, relating to knowledge of and consent to the procedure.

consent.¹¹⁷ If a police officer requests the investigation for BAC on a duly completed form SAP 308a, the patient or his proxy or family members cannot refuse consent - doing so constitutes an offence.¹¹⁸

The problem arises when the patient/proxy/family member is incapable of giving consent or refuses consent and there is no policeman with a form 308 (a) to bail the doctor out. I am aware of a patient who refused consent for any blood tests until he was assured that no test for BAC would be done.¹¹⁹ If a doctor draws blood from a patient without consent, except in an emergency, it would not only constitute assault, but also be a transgression of sec 7(1) of the NHA, which requires informed consent. Some exceptions do apply – the one in sec 7(1)(d) concerning a danger to public health will be discussed in Chapter 5 of this study. Sec 12(2)(b) of the Constitution guarantees the security and integrity of a person's body.¹²⁰

Currently Sec 37(2)(b) of the Criminal Procedure Act 51 of 1977 (CrPA) allows the doctor to take a sample of blood from any person if the doctor is of the reasonable opinion that the contents of the blood may be relevant at any later criminal proceedings. This would apply if the doctor thought the patient might later be charged with the offence of drunk driving. It would not apply if it was done in the interest of a third party, e.g. an insurance company.

Another issue to be considered is that of performing a BAC-test on blood that was not primarily taken for the test, but as part of the medical treatment of the patient. In this case no physical procedure was performed on the patient without consent. This will be discussed in the next paragraph.

3.3 Testing the blood sample

3.3.1 Introduction

As mentioned previously there are four Forensic Chemistry laboratories in South Africa doing evidentiary BAC-determinations. The laboratory in Durban was only established in 2015. All samples currently taken for BAC-testing must be sent to these institutions. The procedure, as alluded to in paragraph 2.2.4, is very specific, associated with a lot of administrative work and

¹¹⁷ Sec 7(1)(b).

¹¹⁸ Sec 65(9) RTA.

¹¹⁹ Personal communication A&E doctor.

¹²⁰ Sec 12(2)(b) Constitution.

quite cumbersome.¹²¹ Results are also not available soon – more about this in chapter 4.

3.3.2 The law

Informed consent, similar to that for obtaining the sample, is also necessary for performing a BAC-test on a patient's blood. Not obtaining such consent would mean invading the patient's privacy and disrespecting his dignity.

The Constitution of the Republic of South Africa, 1996 places great emphasis on the protection of the dignity and privacy of its citizens. Sec 10 specifically promises to respect and protect everyone's dignity.¹²² Sec 14 concentrates on the protection of privacy.¹²³ Invading these right would be a transgression of the highest law of the land.

The blood specimen must be collected in a very specific way – see para 2.2.4.¹²⁴ The collection process needs to be documented.¹²⁵ Getting the blood specimen to the testing facility is also fraught with technical hurdles. The collection bottle has to be sealed and labelled. It is stamped by the receiving SAPS station and conveyed to the nearest forensic laboratory. The whole process must be documented to ensure maintenance of the chain of custody of the evidence.¹²⁶ In *S v Maqhina van Oosten* J said: '... [Dis]n vereiste dat die wetenskaplike resultate wat verkry is objektief verifieerbaar moet wees'.¹²⁷

The technical requirements of the test are strict. The equipment used must be of forensic evidentiary standard.¹²⁸ Certificates issued by the *South African National Accreditation System* (SANAS) approved laboratories are necessary to prove the accuracy of such equipment – prescribed by regulation 332A issued in terms of the RTA. Similar certificates are needed to prove that regular maintenance and calibration is performed on the testing equipment. The operator needs to have special training, enabling him to provide accurate results when doing the analysis.¹²⁹

¹²¹ See the requirements in sec 212 CrPA.

¹²² Sec 10 Constitution.

¹²³ Sec 14 Constitution.

¹²⁴ Sec 212(11) CrPA.

¹²⁵ Bellengère (2013) 337.

¹²⁶ Id at 338.

¹²⁷ *S v Maqhina* 2001 (1) SACR 241 (T) p252.

¹²⁸ Standards laid down in terms of the Trade Metrology Act, 77 of 1973. See sec 212(10)(a) CrPA

¹²⁹ See sec 212 (4)(a) CrPA.

Testimony regarding the above processes and facts have to be presented in court by means of affidavit or oral evidence.¹³⁰

3.4 Disseminating the test results

3.4.1 Introduction

One of main characteristics of the doctor-patient relationship is confidentiality. Originating in the Oath of Hippocrates, it now part of the doctor's ethical and legal duties towards his patient.¹³¹

Breaking this confidence will require ethical and legal justification.

3.4.2 The law

The Bill of Rights (chapter 2), specifically sec 10 (right to dignity) and sec 14 (right to privacy) of the Constitution apply. Sec 36, however, makes provision for the limitation of these rights. This will be discussed further in chapter 5.

As mentioned above the doctor is legally compelled to maintain his patient's confidence. The *Health Professions Council of South Africa* (HPCSA) in rule 13 of its Guidelines for good Practice, Booklet 2, emphasises professional confidentiality.¹³² These guidelines were promulgated as law in GG R717/2006, making it a legal compulsion. The same concept is underlined by sec 14(1) of the NHA.

Exceptions to the maintenance of confidentiality do exist. Both the ethical guidelines and the NHA make provision for the breach of confidentiality in cases where:

- i the patient gives consent;
- ii it is required by law or a court order; and
- iii it is justified in the public interest.¹³³

¹³⁰ Sec 212 CrPA, Bellengère (2013) 338.

¹³¹ Lloyd GER (ed) (1978) 67, Rule 13 HPCSA Guidelines for good practice Booklet 2 as in GG R717/2006 13, Sec 14 NHA.

¹³² Rule 13 HPCSA Guidelines for good practice Booklet 2 at 13

¹³³ Rule 13 HPCSA Guidelines for good practice Booklet 2at 13. Sec 14(2) NHA.

Relatively new on the scene is the Protection of Personal Information Act, 4 of 2013 (POPI). This act, signed into law on 19 November 2013, is aimed at giving effect to sec 14 of the Constitution by protecting Personal Information (PI), while still allowing access to PI in the pursuit of others' rights.¹³⁴

In terms of POPI information concerning a person's 'physical or mental health' is perceived as special PI.¹³⁵ Sec 26(a) determines that, unless allowed by sec 27, a responsible party (the person or institution controlling the data processing, in our case the doctor) may not process special PI concerning the health of any data subject (the person to whom the PI relates, here the driver-patient). Sec 27(1)(b) states that amongst others the prohibition does not apply 'if the processing is necessary for the establishment, exercise or defence of a right or obligation in law'.

Sec 32(1)(b) allows insurance companies and medical schemes access to PI where it is necessary for risk assessment, the performance of an agreement or the enforcement of contractual rights and obligations.¹³⁶

Sec 37 of POPI makes provision for the processing of PI, even if in breach of other conditions, if 'the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from such processing'.¹³⁷ The same section allows for processing if 'the processing involves a clear benefit to ... a third party that outweighs ... any interference with the privacy of the data subject'.¹³⁸

The 'public interest' mentioned above, includes 'the prevention, detection and prosecution of offences'.¹³⁹

The Promotion of Access to Information Act, 2 of 2000 (PAIA) is also relevant here. This act was designed to give effect to secs 8 and 32 of the Constitution (both sections are included in chapter 2 of the Constitution, the Bill of rights).¹⁴⁰ Sec 8 provides for the horizontal application of rights to juristic persons, while sec 32 stipulates the right of access to information held by the state or other persons when that information is required for the protection of any

¹³⁴ De Stadler (2015) 1.

¹³⁵ De Stadler (2015) 51.

¹³⁶ De Stadler (2015) 54, Sec 32(1)(b) POPI.

¹³⁷ Sec 37(1)(a) POPI.

¹³⁸ Sec 37(1)(b) POPI.

¹³⁹ Sec 37(2)(b) POPI.

¹⁴⁰ Sec 9 PAIA, Preamble PAIA.

rights.¹⁴¹ Information regarding the physical or mental health of an individual is again regarded as 'personal information'.¹⁴²

Secs 34 and 63 of PAIA prohibit the disclosure of a record, in the absence of consent, if this would involve unreasonable disclosure of personal information about a third party.¹⁴³

Secs 38 and 66 limit access to a record if its disclosure would prejudice or impair the security of a means of transport or the protection of the safety of the public or property.¹⁴⁴

Important to our cause are sections 46 and 70 which stipulate that the information officer of a public or private body must grant a request for access to a record if the disclosure would reveal evidence of a contravention of the law or an imminent and serious public safety or environmental risk.¹⁴⁵ Such disclosure is subject to the public interest in the disclosure outweighing the harm that may ensue from it.¹⁴⁶

From the above it is clear that while all these laws, in deference to the Constitution, protect the privacy of the individual, they also seek to protect the public interest. Making the results of a BAC-test on a drunk driver available to other parties may well be possible under certain circumstances.

¹⁴¹ Secs 8 & 32 Constitution.

¹⁴² Sec 1: definitions PAIA.

¹⁴³ Sec 34(1), Sec 34(2)(a), Sec 63(1), Sec 63(2)(a) of PAIA. Part 2 of PAIA refers to information held by public bodies and contains sections 11 to 49. Part 3 of PAIA refers to information held by private bodies and contains secs 50 to 73. These 2 parts are virtually mirror images of each other.

¹⁴⁴ Sec 38(b)(i)(bb), Secs 38(b)(ii)(bb) and (cc), Sec 66(b)(i)(bb), Secs 66(b)(i)(bb) and (cc) PAIA.

¹⁴⁵ Secs 46(a) and 70(a) PAIA.

¹⁴⁶ Secs 46(b) and 70(b) PAIA.

Chapter 4

The problem

4.1 Introduction

The problem with the existing system is that it doesn't work. Alcohol related crashes and fatalities remain high. The roads remain full of drunk drivers, many of them committing the same offences repeatedly.¹⁴⁷ The smashed vehicles are fixed, paid for by insurance companies, and the broken bones are mended, paid for by medical aid schemes. A large part of the insurance premiums and medical aid contributions come out of the pockets of the victims of the intoxicated drivers.

Large numbers of drunken-driving cases are withdrawn from the courts. This failure can be attributed to both the *Department of Health* and the SAPS.¹⁴⁸ Various studies have shown that when drunk drivers are taken to hospital they seldom face prosecution.¹⁴⁹ The more serious the driver's injuries, the less likely he is to be charged.¹⁵⁰ The hospitals have become safe havens for drunk drivers, like a 'get out of jail free card'.¹⁵¹

The judicial system has over time managed to close some legal loopholes:

- In *S v Burgers* the argument was whether a sample of blood was representative of the blood as a whole.¹⁵² In this case it was found that it was, as Art 140(2) of Ord 21 of 1966 (O) had been superseded by Art 9 of Ord 8 of 1975 (O). See also *S v Jubelius*.¹⁵³ Currently the RTA in Sec 65(3) makes provision for a presumption of representation.
- In *S v Greef* and *S v Pillay* the contention was the possible contamination of the blood specimen, leading to a false high BAC reading.¹⁵⁴ A second presumption is now contained in Sec 65 (4) of the RTA, which assumes the absence of any contaminating substance in either the syringe used to collect the blood or the container in which it is

¹⁴⁷ Fell J (1995) 85 NHTSA Traffic Tech.

¹⁴⁸ Barnard (2014) News (<https://www.da.org.za>).

¹⁴⁹ Green (2015) *Accid Anal Prev* 106, Biffi (2004) *J Trauma* 24, Goecke (2007) *Clin Invest Med* 26, Runge (1996) *Ann Emerg Med* 66, Cydulka (1998) *Ann Emerg Med* 349.

¹⁵⁰ Holmes (2014) *West J Emerg Med* 480.

¹⁵¹ Alton (1997) *Honolulu Star-Bulletin*, Belchetz (2015) *Huffington Post*. Chang et al (2001) *J Trauma* 551 challenges these statements somewhat.

¹⁵² *S v Burgers* 1976 (4) SA 578 (O).

¹⁵³ *S v Jubelius* 1976 (2) SA 295 (T).

¹⁵⁴ *S v Greef* 1970 (4) SA 704 (O), *S v Pillay* 1969 (2) SA 248 (N).

transported for analysis. This presumption does not include the content of the material used for cleaning the skin when the specimen is taken.

More still has to be done to counter the problem of the drunk driver. Some of the problem areas where I feel improvements can be made are discussed in the following paragraphs.

4.2 The crash scene

The performance of law enforcement officers at crash scenes in South Africa is currently under suspicion. When police officers are present, they often don't show interest in the state of sobriety of the driver.¹⁵⁵ Bribery of officers where traffic offences are involved is common.¹⁵⁶ Police officers are also discouraged by the apparent lack of success in the prosecution of DUI offenders.¹⁵⁷

In many cases, especially where there are injuries involved, the patients get transported to hospitals before any evaluation can be made of the state of intoxication.¹⁵⁸ These cases are then lost to the judicial system.¹⁵⁹

4.3 Obtaining the sample

One of the problems in obtaining an evidentiary blood sample from a driver is the time limitation set by Sec 65(3) of the RTA. This determines that the specimen must be taken within two hours of the incident. In many countries where travelling distances are long, it takes some time before emergency personnel can get the injured to a hospital. This is even more so in developing countries, such as South Africa, where the emergency services are understaffed, under equipped and overburdened by the workload. If police officers accompany the driver, with the necessary form SAP 308 (a), taking a specimen in time might still be feasible. If not, taking the sample is left to the discretion of the A&E doctor, which makes it unlikely to be done. Doctors are in general loath to test drivers for alcohol consumption.¹⁶⁰ Often the drunk patient doesn't suffer from any serious physical injury, negating the necessity of any blood

¹⁵⁵ Personal communication with paramedics.

¹⁵⁶ Personal communication with persons involved in such situations.

¹⁵⁷ Cooper (1979) 337.

¹⁵⁸ Id at 335.

¹⁵⁹ Katella (1997) *New York Times* Aug 17.

¹⁶⁰ Personal communication with several A&E doctors.

tests.¹⁶¹ Taking a sample for purely legal reasons entails a cumbersome and time-consuming process, demanding special collection procedures, special collection bottles, maintaining the chain of evidence and then informing law enforcement, getting them interested enough to take on the case. When a patient is seriously injured the doctor's attention is directed to the medical condition and there is usually no time or enough personnel around to arrange for evidentiary specimens (2 hour time limit!). On top of this McCartney bottles are not generally kept in A&E units.

A further hindrance to the doctor's taking a blood sample from an injured drunk driver is the fear of being accused of assault or infringing on the patient's privacy and dignity.¹⁶² The demand for doctor-patient confidentiality, as originally imposed by the Hippocratic Oath, still sways many physicians.¹⁶³ The *British Medical Journal* supported them in this in an editorial in 1977.¹⁶⁴ Doctors in A&E units are often pestered by insurance companies trying to avoid paying claims by establishing the involvement of alcohol in the crash.¹⁶⁵ They then don't do the tests, just so as to not become involved.

4.4 Testing the sample

The first problem here is obtaining the patient's consent for a BAC test. This test is seldom necessary for medical reasons. The absence of a duly completed form 308 (a) intensifies the problem.

As stated previously, the BAC testing machines used in hospitals perform the measurements on serum and not whole blood. The results are not acceptable in criminal cases as the law stands currently. To get the courts to accept these results, several laws and regulations would have to be amended.

If the doctor collects an evidentiary specimen and manages to get the police to take an interest in the case, there is the problem of the limited capacity of the Forensic laboratories, leading to a severe backlog in the performance of evidentiary BAC tests. This problem was emphasised by a parliamentary question by the *Democratic Alliance* to the Minister of Health on 15 November 2013. In his reply the minister confirmed a backlog and said the government

¹⁶¹ Alton (1997) *Honolulu Star-Bulletin*..

¹⁶² Mello (2003) 239.

¹⁶³ Ibid.

¹⁶⁴ Cooper (1979) 335 quoting *BMJ* editorial (1977) 665.

¹⁶⁵ Personal communication with A&E doctors.

was addressing the problem and had recruited additional trained personnel.¹⁶⁶ The Minister of Health again confirmed a serious backlog in a media statement on 29 January 2015.¹⁶⁷ The backlog problem, however seems to still be there. Of the 48619 specimens sent for forensic BAC testing during the December 2014 to January 2015 festive season, only 29650 had been analysed by 21 Des 2015.¹⁶⁸

4.5 Making the information available

Where law enforcement has become involved, this is not problem as far as criminal proceeding are concerned.

Ruled by the concepts of privacy and confidentiality, doctors cannot run around spreading the results of BAC tests to third parties. This would also be a contravention of POPI and the Constitution. It is another matter if an insurance company were to request the results, aided in their quest by the relevant sections of POPI and PAIA.¹⁶⁹

This would, however, only be possible if the tests were in the first instance done, and secondly if the insurance company knew about the existence of the tests and where to obtain the results.

4.6 The law and lawyers

Until the late 1990's South Africa had a system of appointed district surgeons. These were medical practitioners appointed by the state to treat detainees and prisoners.¹⁷⁰ They also rendered clinical forensic medico-legal services.¹⁷¹ Often undergoing special training these doctors became very proficient in what they did, i.e. collecting evidence and performing forensic clinical examinations, like examining a patient for the physical and mental signs of intoxication. Subsequently the appointment of these dedicated medico-legal practitioners fell away and it then became expected of all state-employed doctors to fulfil these duties. This sudden loss of expertise and experience has negatively affected the criminal justice system.¹⁷²

¹⁶⁶ National Assembly (2013) Parliamentary Question 3183.

¹⁶⁷ South African Government Media Statement by the Minister of Health 29 Jan 2015. .

¹⁶⁸ Yende (2015) *City Press*.

¹⁶⁹ Sec 32(1)(b) POPI, Secs 46(a)(i) and 70(a)(i) PAIA.

¹⁷⁰ Strauss (1991) 3Ed 395.

¹⁷¹ Müller (2003) *SA Fam Pract* 41.

¹⁷² Müller (2003) *SA Fam Pract* 41. .

Another problem in combatting the drunk driver, though not directly related to the emergency room physician, is that of the law and some lawyers practising it.

Some lawyers specialise in the defence of DUI cases. They write books, present courses and even establish training institutions such as the *National College for DUI Defense*, headquartered in Montgomery, Alabama, USA.¹⁷³ The proclaimed mission of the college is ‘... to vindicate the promise of the United States Constitution, that a citizen accused has the right to the effective assistance of his or her counsel’.¹⁷⁴ The *American Bar Association* in 2003 recognised DUI Defense Law as a specialist area in the practice of law.¹⁷⁵

California Lawyer Lawrence Taylor authored *Drunk Driving Defense*. Regarded a national expert in the field, he concentrates on teaching lawyers how to get their clients off DUI charges.¹⁷⁶ He also founded the *Drunk Driving Law Centre*.¹⁷⁷

In the same vein was *How to Avoid a Drunk Driving Conviction* (1993), by ‘Judge-X’ an experienced state judge. In this book he gave readers advice on how to contest DUI charges.¹⁷⁸

Another legal problem is that defence lawyers and the courts seem to concentrate on the literal interpretation of laws, instead of the intent of the lawmaker. In *S v Vis* the Orange Free State court found that the state did not provide evidence that the BAC of the blood specimen taken was representative of the BAC of the blood ‘taken as a whole’ as required by Sec 140(2) of the uniform Road Traffic Ordinance.¹⁷⁹ This decision was not followed in *S v Jubelius* in the Transvaal.¹⁸⁰ My personal opinion is that the lawmaker made a syntactic mistake when the law was written. As previously mentioned, the term ‘whole blood’ indicates blood as it is found in the vascular system. The term ‘serum’ indicates whole blood from which the cellular components have been removed.¹⁸¹ When writing the law the concept of ‘whole blood’ was included as ‘blood as a whole’, initiating all the debate. In 1977 the same question was debated in the Appeal court in *S v Francis* (on appeal from the Cape court).¹⁸² Chief Justice

¹⁷³ Books LLC (ed) (2011) *Drunk Driving* 66.

¹⁷⁴ Ibid

¹⁷⁵ Supra n 173 at 67.

¹⁷⁶ Lerner (2011) 131.

¹⁷⁷ Ibid.

¹⁷⁸ Lerner (2011) 131.

¹⁷⁹ *S v Vis* 1974 (2) SA 437 (O).

¹⁸⁰ *S v Jubelius* 1976 (2) SA 295 (T).

¹⁸¹ Friel JP (ed) (1974) *Dorland’s Illustrated Medical Dictionary* 1205.

¹⁸² *S v Francis* 1977 (1) SA 643 (A).

Rumpff at the time said that he did not know what the term ‘blood as a whole’ meant.¹⁸³ Prinsen mentions ‘the legislators’ lack of knowledge surrounding human biology’.¹⁸⁴ Since then the RTA has been amended to exclude this confusing term.¹⁸⁵

¹⁸³ Strauss (1991) 3Ed 360. See also Prinsen (2003) *Orbiter* 522 at 527, where she opines that the law maker doesn’t seem to know much about human biology.

¹⁸⁴ Prinsen L (2013) 24(3) *Orbiter* 522 at 527.

¹⁸⁵ Sec 65(3) RTA.

Chapter 5

The ethical and legal arguments

5.1 Introduction

When considering the problem of the drunk driver and the role the emergency room physician might play in addressing this problem, it comes down to the issue of pitting the driver-patient's rights against the interest of the larger community.

Protecting the driver are various ethical principles and declarations in favour of privacy, confidentiality, dignity and informed consent. The community on the other side also has a right to life and security which deserves protection.

Several laws govern the actions of the doctor, under the supreme oversight of the Constitution, preventing him from infringing any of the basic human rights of his patients. The same constitution also protects the lives and security of the citizens of the county and guarantees them access to information that might be necessary for the protection of their rights. The Constitution therefore allows for the limitation of an individual's rights where the latter's actions might endanger or threaten fellow community members.

5.2 The ethical argument

5.2.1 The basis

Medical ethics finds its foundation in the Hippocratic Oath. This famous Greek medical writing is one of the five or six that can be ascribed to Hippocrates with a fair amount of confidence.¹⁸⁶ Hippocrates lived around 500 BC, his family claiming descent from Aesculapius, son of Apollo.¹⁸⁷

In the oath he writes (translated into English):

I will follow that system of regimen which, according to my ability and judgement, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. ...

¹⁸⁶ Moodley (ed) (2010) 355.

¹⁸⁷ Ibid.

Whatever in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.¹⁸⁸

A more modern translation reads:

I will use my power to help the sick to the best of my ability and judgement; I will abstain from harming or wronging any man by it. ...

Whatever I see or hear, professionally or privately, which ought not to be divulged, I will keep secret and tell no one.¹⁸⁹

An updated, modern version of the oath was incorporated into the *Declaration of Geneva* by the *World Medical Association* (WMA) in 1948. Since updated, recently in France in 2006, it contains the following:

At the time of being admitted as a member of the medical profession: ...

The health of my patient will be my first consideration; ...

I will respect the secrets that are confided in me, even after the patient has died; ...¹⁹⁰

The *WMA International Code of Medical Ethics*, first adopted in London in October 1949 and revised in Pilanesberg, South Africa in October 2006, incorporates an interesting addition:

A physician shall act in the patient's best interest when providing medical care. ...

A physician shall respect a patient's right to confidentiality. It is ethical to disclose confidential information when the patient consents to it or when there is a real and imminent threat of harm to the patient or to others and this threat can only be removed by a breach of confidentiality.¹⁹¹

5.2.2 Ethical theories

Through the ages various philosophies were introduced, all of them suggesting ways we should make decisions in life.¹⁹² Some of the better known theories are:

i. Utilitarianism

Here we are guided by the outcome of our actions. Whatever leads to the best results for the

¹⁸⁸ Moodley (ed) (2010) 353.

¹⁸⁹ Lloyd (ed) (1950) 67.

¹⁹⁰ WMA Declaration of Geneva as in Dhai (2011) electronic inclusion.

¹⁹¹ WMA International Code of Medical Ethics as in Dhai (2011) electronic inclusion.

¹⁹² Moodley (ed) (2010) 19.

most people is right. Only consequences, happiness and numbers matter.¹⁹³ In our case this would mean sacrificing the driver-patient's rights to benefit a much bigger society.

ii. Kantian deontology

Emanuel Kant (1724-1804) firmly established this theory. It emphasises the application of strict rules of behaviour in deciding actions.¹⁹⁴ The deed must be good and righteous, irrespective of the consequences. This approach, which many doctors agree with, compels the physician to maintain patient confidentiality at all costs. The potential fate of the community when the drunk driver again gets behind the steering wheel is not important.

iii. Virtue ethics

This is the oldest form of ethics in the Western tradition.¹⁹⁵ It is associated with the ancient Greek philosophers, notably Aristotle. Here the morality of an act is not decided by the nature of the act or the consequences thereof, but by the character of the person performing the act. The virtues of the actor will determine whether the act is good. In other words, the good man will know what to do. In our case this theory has limitations as it will be difficult for the doctor to decide whose interests are the most important, the patient's or those of the community. The virtue theory of ethics is for this reason regarded as incomplete by some.¹⁹⁶

iv. Social contract theory

Originally linked to John Hobbs (1588-1679) and later to Jean-Jacques Rousseau (1712-1778) this philosophy emphasises the good of all members of society.¹⁹⁷ Society is regarded as a communal effort where cooperative action to promote justice is the goal. The interest of the individual is less important. This would bias the doctor towards the rights of the community, of which he is also a member.

v. Liberal individualism

This theory deems the freedoms and rights of the individual the most important values.¹⁹⁸ This would give the poor community no chance in our scenario.

¹⁹³ Moodley (ed) (2010) 24.

¹⁹⁴ Id at 25.

¹⁹⁵ Id at 29.

¹⁹⁶ Id at 32, referring to Rachels J & Rachels S (2010) *The elements of moral Philosophy* 170.

¹⁹⁷ Id at 33.

¹⁹⁸ Id at 34.

vi. Communitarianism

The rights of the individual are here subservient to the interests of the community.¹⁹⁹ This is akin to the philosophy of 'Ubuntu', very common in Africa.²⁰⁰ 'People are people through other people' underlines the importance of the community of which the individual is a member. The family and community members are just as important, if not more so, than the individual when decisions have to be made. The actions of the doctor would be determined by the attitude of the community and not only by his interaction with the patient.

vii. The ethics of care

Emanating from feminist perspectives, this theory adopts a holistic approach to bioethics.²⁰¹ The traditional more authoritarian, less flexible approach ascribed to masculine theories such as utilitarianism and deontology is tempered by the more caring attitude such as often displayed by nurses.

viii. Casuistry

We have to learn from the past. Instead of planning our actions based on a theoretical contemplation, we must learn by studying cases.²⁰² If the same drunk driver comes back again time after time, the doctor will tend to have less sympathy with him and more with the public.

ix. Principlism

First developed by Tom Beauchamp and James Childress in 1979, this ethical approach has become probably the most accepted model in bioethics today.²⁰³ It is based on the so called four principles of biomedical ethics: Autonomy, Non-maleficence, Beneficence and Justice.

(a) Autonomy

This means the patient is involved in the decision-making process about his treatment.²⁰⁴ He has the final word. This concept has been introduced into many of the medical ethical guidelines we see today. It is also the foundation of informed consent – made law in secs 6 to 9 of the NHA. In the case of the drunk driver it would be the exception where the driver consents to testing his BAC and making the results widely known.

¹⁹⁹Moodley (ed) (2010) 35.

²⁰⁰ Van Niekerk (ed) (2010) 1288.

²⁰¹ Moodley (ed) (2010) 36.

²⁰² Id at 37.

²⁰³ Id at 37, Beauchamp (2009).

²⁰⁴ Beauchamp (2009) 101.

(b) Non-maleficence

Non-maleficence implies doing no harm.²⁰⁵ The question here is to whom? Disclosing the driver's elevated BAC would obviously not be to his benefit, exposing him to criminal sanction and financial loss. On the other hand, not exposing him as intoxicated, especially if it might be a recurring problem, would constitute ignoring his unlawful act and potentially putting the public at risk. Breaching the patient's confidence, thereby infringing his rights to dignity and privacy, would clearly be contrary to the principle of non-maleficence.

(c) Beneficence

Doing something to the advantage of the doctor's patient is the central argument.²⁰⁶ Not testing the BAC on the drunk driver might prevent criminal sanction and financial loss, but it could also deprive him of a chance of rehabilitation. Disclosure and potentially removing the repeat offender from the roads would clearly benefit society.

(d) Justice

Different categories of justice can be distinguished.²⁰⁷

- **Legal justice**

It stands to reason that to cover up the drunk driver's transgression of the law would not amount to justice.

- **Rights justice**

This implies that the patient's rights to privacy, security of the body and dignity should not be infringed. Contrary to this the rights of the public to safe roads should be protected. The right of the insurance company to the information that the driver was drunk and had therefore not complied with the stipulations of his contract are equally important.

- **Distributive justice**

In a country such as South Africa with limited resources, distributing those that are available equitably and appropriately are of major importance.²⁰⁸ Distributive justice means *fairness* in utilising the resources that we do have, in this case health resources. Spending a lot of these limited resources on the

²⁰⁵ Beauchamp (2009) 150.

²⁰⁶ Id at 202.

²⁰⁷ Id at 249, Moodley (ed) (2010) 73.

²⁰⁸ Moodley (ed) (2010) 74, quoting Beauchamp and Childress (2011) 226 equivalent to (2013) 253.

consequences of a drunk driver's deeds – caused by his illegal actions, in the process depriving others of the same, is clearly in conflict with this principle.

5.2.3 The Health Professions Council of South Africa and other relevant declarations

i. Health Professions Council of South Africa

The *Health Professions Council of South Africa* (HPCSA) is a statutory body controlling the training and practice of the healthcare providers registered with it. Medical practitioners fall into this category.²⁰⁹ The motto of the HPCSA is 'Protecting the public and guiding the profession'.

Various guidelines have been issued, especially in a series of booklets, collectively labelled *Ethical guidelines for good practice in the health care professions*. Of import here are booklets 1, 3, 9 and 10, respectively called *General ethical guidelines for health care professions*, *National patient's rights charter*, *Seeking patient's informed consent* and *Confidentiality: Protecting and providing information*. More important is booklet 2, *Ethical and Professional Rules of the Health Professions Council of South Africa as promulgated in Government Gazette R717/2006*. Being promulgated transfers the guidelines contained in booklet 2 into the legal ambit, making non-compliance a sanctionable offence.

For the purpose of this discussion mainly the guidelines in booklet 2 will be discussed, as many of them overlap.

Rule 27A 'Main responsibilities of health practitioners' stipulates:²¹⁰

A practitioner shall at all times

- (a) act in the best interest of his or her patients;
- (b) respect patient confidentiality, privacy, choices and dignity; ...
- (g) except in an emergency, obtain informed consent from a patient or, in the event that the patient is unable to provide consent for treatment himself or herself, from his or her next of kin; ...

Rule 13 'Professional confidentiality' states:²¹¹

²⁰⁹ Health Professions Act, 56 of 1974.

²¹⁰ HPCSA (2008) Guidelines for good practice booklet 2 at 20.

²¹¹ HPCSA (2008) Guidelines for good practice booklet 2 at 13.

- (1) A practitioner shall divulge verbally or in writing information regarding a patient which he or she ought to divulge only –
 - (a) in terms of a statutory provision;
 - (b) at the instruction of a court of law; or
 - (c) where justified in the public interest.
- (2) Any other information other than the information referred to in subrule (1) shall be divulged by a practitioner only-
 - (a) with the express consent of the patient; ...

Booklet 1 *General ethical guidelines for the health care professions*, states in section 2 ‘Core ethical values and standards for good practice’:

- 2.3.8 Confidentiality: Health care practitioners should treat personal or private information as confidential in professional relationships with patients - unless overriding reasons confer a moral or legal right to disclosure.

In the same booklet, sec 3 ‘How to resolve ethical dilemmas’ the following guidance is given:

- 3.3.4 Making a moral assessment: The ethical content of each option should be weighed by asking the following questions:
- 3.3.4.1 What are the likely consequences of each option?
 - 3.3.4.2 What are the most important values, duties, and rights? Which weighs the heaviest?
 - 3.3.4.3 What are the weaknesses of the health care practitioner’s individual view concerning the correct option?

Booklet 10 *Confidentiality: Protecting and providing information*, in the ‘Introduction’ states:

- 1.2 *Health care practitioners hold information about patients that is private and sensitive. The National Health Act (Act No. 61 of 2003) provides that this information must not be given to others, unless the patient consents or the health care practitioner can justify the disclosure....*
- 1.3 *When a health care provider is satisfied that information should be released, he or she should act promptly to disclose all relevant information. This is often essential to protect the best interests of the patient, or to safeguard the well-being of others.*

In section 8.2.4 ‘Disclosures in the public interest’ it elaborates:

- 8.2.4.1 In cases where health care practitioners have considered all the available means of obtaining consent, but are satisfied that it is not practicable to do so, or that patients are not competent to give consent, or exceptionally, in cases where patients withhold consent, personal information may be disclosed in the public interest where the benefits to an individual or to society of the disclosure outweigh the public and the patient's interest in keeping the information confidential, (e.g. endangered third parties such as the spouse or partner of a patient who is HIV positive, who after counselling refuses to disclose his or her status to such spouse or partner; or reporting a notifiable disease).
- 8.2.4.2 In all such cases the health care practitioner must weigh the possible harm (both to the patient, and the overall trust between practitioners and patients) against the benefits that are likely to arise from the release of information.

ii. Other declarations

The HPCSA based a lot of its guidance on that provided by the WMA, see para 2.5.1.

The British *General Medical Council* (GMC) in its booklets *Confidentiality* and *Consent: patients and doctors making decisions together*, generally mirror the guidelines provided by the HPCSA.²¹²

The *Universal Declaration of Human Rights*²¹³ states in article 3:

Everyone has the right to life, liberty and security of person.

In article 29:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The *African (Banjul) Charter on Human and People's Rights* (ACHPR) was adopted on 27 June 1981.²¹⁴

Chapter II: Duties reads:

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow human beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4.XI.1950) states in Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

²¹² General Medical Council (GMC) guidelines www.gmc-uk.org/guidance.

²¹³ United Nations (UN) General Assembly (1948) *Universal declaration of Human Rights*.

²¹⁴ Organization of African Unity (OAU) (1981) *African Charter on Human and People's Rights*.

5.2.4 Discussion

From the above a number of common concepts emerge:

- i. The doctor-patient relationship is one of confidentiality.
- ii. A breach of confidence is ethically acceptable if
 - the patient consents thereto;
 - it is required by law or a court order; or
 - it is in the public interest, and the benefit to the public sufficiently outweighs the harm caused to the patient by infringing his dignity and privacy.
- iii. The driver-patient is a member of society. He doesn't live in isolation and owes society his cooperation in achieving a harmonious co-existence.
- iv. The doctor encountering the drunk driver in the A&E unit is likewise a member of society and has a duty to protect this society.

The concept of Dignity is very important in medical ethics. Charles Foster says 'Dignity is the bioethical theory of everything'.²¹⁵ Dignity underlies all the other rights, such as equality, autonomy, security and privacy from which again flows confidentiality. A person can still maintain his dignity, even when all other rights have been taken away – Foster gives the example of a tortured prisoner.²¹⁶

Dignity is difficult to define. Foster calls it 'a slippery notion', comparing it to the proverbial elephant: you know it when you see it, but it is difficult to describe.²¹⁷ Burchell, in an article on the protection of privacy, includes dignity along with identity, privacy and reputation as facets of personality.²¹⁸ In the same article he also mentions the need for balance between respect for privacy and the involvement of others in a person's life.²¹⁹ Retired judge of the South African Constitutional Court (SACC) Laurie Ackermann equates human dignity with a lodestar – a star used to guide the course of a ship.²²⁰

It can be argued that the drunk driver, merely by getting drunk in the first place and exacerbated by then driving a vehicle and endangering the public, has already voluntarily

²¹⁵ Foster (2011) 11. Currie (2013) 253.

²¹⁶ *Id* at 4.

²¹⁷ *Ibid*.

²¹⁸ Burchell (2009) 13(1) *Elec Jnl Comp Law* 2.

²¹⁹ *Ibid*.

²²⁰ Ackerman (2014) title, Oxford concise SA dictionary (2002) 688.

sacrificed his own dignity. Maimonides (1135-1204) wrote almost a thousand years ago in his 'Laws concerning character traits', chapter 5:

'(3) When the wise man drinks wine, he drinks only in order to loosen the food in his intestines. Anyone who becomes drunk commits a sin, is contemptible, and loses his wisdom.'²²¹

Further infringement by means of an innocuous blood test is unlikely to cause much further harm to an already much damaged dignity.

The Hippocratic Oath was written in a time long before germs and viruses were discovered. The art of medicine was still in its infant shoes. Insurance policies didn't exist. The motor vehicle was not even conceivable. It was unlikely that the irresponsible actions of any one man could detrimentally affect the lives of many others. The concept of absolute confidentiality as embodied in the Oath is not practical in the modern world anymore.

There are still doctors who disagree with the last statement. Zachary Meisel, an emergency physician in Pennsylvania, is one and posted an article titled 'Spare the Needle: Doctors shouldn't have to draw blood on behalf of cops' in 2006.²²² More agree and support mandatory reporting (up to 78% of doctors in a 1990 study)²²³ – more later. The rights of the single transgressor of society's rules just cannot be afforded more respect than those of the community whose rights he wantonly disregards. Most ethical theories would support this.

The financing of the driver's medical care is contributed to be other members of his medical insurance scheme or the taxpayer – clearly not something they would choose to do, rather keeping their contributions to help finance their own needs. The same argument is to be made for the short term insurance company covering his vehicle. Why should the other policy holders pay for the damage caused by the illegal act of the drunk driver.

In the 1940's the Uniform Accident and Sickness Policy Provision Law (UPPL) was passed in the US. This law allowed insurance companies to exclude paying for injuries sustained while under the influence of alcohol. Since then the *National Association of Insurance Commissioners* (NAIC), the *American College of Emergency Physicians* (ACEP), MADD, The *American Bar Association*, the *American Medical Association* (AMA) and a few other organisations have attempted to have the alcohol exclusion clauses removed from insurance policies. The argument is that refusing to remunerate doctors and hospitals for the treatment

²²¹ Weiss & Butterworth (eds) (1975) 1 and 42.

²²² Meisel (2006) "Spare the Needle".

²²³ Chang (1992) 21 *Ann Emerg Med* 284-290.

of such injuries would discourage the health care providers from treating such patients and also prevent those injured while under the influence from seeking medical help. Currently (April 2016) fourteen of the fifty states as well as the District of Columbia prohibit exclusionary clauses for alcohol intoxication.²²⁴

In South Africa no such exclusions exist as far as medical insurance is concerned. In the case of short term insurance these clauses are a reality and the insurers will not pay for damages to a vehicle or other property if they can prove that the driver had consumed alcohol shortly before the crash.²²⁵ They can do this without evidentiary BAC levels because of the difference in burden of proof between criminal and civil cases. In criminal cases proof has to be beyond reasonable doubt, while in civil cases only the balance of probabilities apply.²²⁶ I have no doubt that the physician attending a drunk driver is ethically justified in testing his patient's BAC and that this information should be made available to other affected parties. This would ensure that he takes responsibility for his deeds and that the public and taxpayers don't end up paying for his transgressions.

5.3 The legal argument

5.3.1 Introduction

The law is applicable on various levels:

- i. The Constitution.
- ii. Statutory law.
- iii. Legal precedence.
- iv. Common law
- v. International and foreign law (in an advisory capacity).

These will be looked at briefly.

²²⁴ Wikipedia: Alcohol Exclusion Laws.

²²⁵ Personal communication with Outsurance, Iwyze and PSG insurance.

²²⁶ Kemp (2012) 16.

5.3.2 The law

i. The Constitution

The Constitution of the Republic of South Africa, 1996 is the supreme law of the land. All legislation and jurisprudence is subject to it. In sec 2:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.²²⁷

The sections relevant to this discussion are secs 10, 12, 14, 35 and 36 (edited):²²⁸

Sec 10 **Human dignity**

Everyone has inherent dignity and the right to have their dignity respected and protected.

Sec12 **Freedom and security of the person**

(1) Everyone has the right to freedom and security of the person, which includes the right – ...

(e) not to be treated or punished in a cruel, inhuman or degrading way. ...

(2) Everyone has the right to bodily and psychological integrity, which includes the right -...

(b) to security in and control over their body; ...

Sec 14 **Privacy**

Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;

Sec 35 **Arrested, detained and accused persons**

(1) Everyone who is arrested for allegedly committing an offence has the right – ...

(c) not to be compelled to make any confession or admission that could be used in evidence against that person; ...

(3) Every accused person has a right to a fair trial, which include the right - ...

(j) not to be compelled to give self-incriminating evidence; ...

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Sec 36. **Limitation of rights**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

²²⁷ Sec 2 Constitution. See also Currie & de Waal (2013) *The Bill of Rights Handbook* 6th Ed 2, Klug (2010) *The Constitution of South Africa* 85.

²²⁸ Constitution.

- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

ii. Statutory law

Most of the applicable laws have been referred to. They are in the main:

- a. National Health Act 61 of 2003 (NHA).
- b. National Road Traffic Act 93 of 1996 (RTA),
with associated regulations: National Road Traffic Regulations, 2000.
- c. Criminal Procedure Act 51 of 1977 (CrPA),
- d. Protection of Personal Information Act 4 of 2013 (POPI).
- e. Health Professions Act 56 of 1974 (HPA), with associated reg R 717 (2006):
Ethical rules of conduct for practitioners registered under the Health Professions Act, 1974.
- f. Promotion of Access to Information Act 2 of 2000 (PAIA).

iii. Legal precedence

Various cases have and will be referred to. They are mentioned in the discussion. For a complete list see the Bibliography.

iv. Common law

Although the motor vehicle was invented long after the common law era, there are a few principles that apply.

Self-incrimination

In *S v Binta Ackermann* J said :

The common law principle 'nemo tenetur se ipsum accusare (prodere)' does not apply to the ascertaining of bodily features or the taking of blood samples in general, and in particular not to such acts as are performed in terms of s 37(1) or (2) of the Criminal Procedure Act. A distinction is drawn between being obliged to make a statement against interest and furnishing 'real' evidence.²²⁹

²²⁹ *S v Binta* 1993 (2) SACR 553 (C).

The Latin ‘*nemo tenetur se ipsum accusare/prodere*’ means no one is bound to accuse/incriminate himself.²³⁰

The common law principle prohibiting self-incrimination refers only to communications, i.e. oral or documentary testimonials by the accused.²³¹

Privacy

The right to privacy is recognised in common law. The right of a health professional to disclose confidential patient information is also acknowledged under certain circumstances. Disclosure is allowed -

- when the patient consents;
- when ordered to by a court of law;
- when disclosure is necessary for the defence of the health professional in an enquiry;
- when disclosure is necessary for the medical treatment of the patient; and
- when there is a moral or legal duty to share that information with affected parties.²³²

v. International and foreign law

The Constitution determines:

Sec 39 Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum – ...
 - (b) **must** consider international law; and
 - (c) **may** consider foreign law.

Some foreign cases will be referred to. For the sake of convenience an extract from the US constitution is referred to for comparison:

The Constitution of the United States of America²³³

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

²³⁰ Hiemstra (1992) (3Ed) *Trilingual Legal Dictionary* 237.

²³¹ *S v Huma and Another* 1996 (1) SA 232 (W) p237, Dias Unpublished LLM dissertation UP.

²³² Moodley (2010) 136.

²³³ US Constitution.

nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5.3.3 Discussion

Some of the legal aspects surrounding the management of the drunk driver have been alluded to. What will be discussed now are the legal aspects pertaining more directly to the doctor–patient interaction.

When the driver-patient arrives at the A&E unit, his medical condition becomes the doctor’s first priority. This duty is imposed by the ethical guidelines of the HPCSA.²³⁴ If there is no involvement of the law-enforcement agencies – no completed SAP 308 (a), as will most likely be the case, the doctor may in terms of the CrPA take a blood sample for BAC-testing if the patient has been admitted to the hospital and he suspects that the result of the test may be relevant to a criminal case.²³⁵ The relevant part of the act read as follows:

Criminal procedure Act 51 of 1977

37 Powers in respect of body-prints and bodily appearance of accused and convicted persons.

(2) (a) ... if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person ... has any mark, characteristic or distinguishing feature or shows any condition or appearance.

(b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken.

Note the word ‘criminal’ in sec 37(2)(b). There is no provision for civil matters.²³⁶

A technical legal problem may arise in the sense that most of the A&E units at private hospitals in South Africa are run by general practitioners as their own practices, even though they are situated in the hospitals. The practitioners usually rent the space from the hospital. Although partly staffed and administratively assisted by the relevant hospital these units are not under the control of the hospital. Patients seen here are only formally admitted, and sometimes not at all, after they have been assessed by the emergency physician and the medical condition found serious enough to warrant admission for further specialist treatment. Stabilising a seriously injured victim of a motor vehicle crash may take quite some time, even a few hours,

²³⁴ See para 5.2.3.i

²³⁵ Sec 37(2)(b) CrPA.

²³⁶ *Seetal v Pravitha and Another NO* 1983 (3) 827 (D) at 830 H.

delaying formal admission of the patient to the hospital. The question is therefore whether Sec(2)(b) of the CrPA would apply as it stipulates 'person admitted'. Blood drawn after a long resuscitation, bearing in mind that it might take some time for the paramedics to deliver the patient to the hospital, would then not fall within the two hour requirement of sec 65(3) of the Road Traffic Act.

In public hospitals the situation is somewhat different in that the doctors there are all in the employment of the hospital. The A&E departments and the personnel are therefore under control of the health department. Patient seen there are 'admitted' to the A&E department which forms part of the hospital and discharged if the medical condition does not warrant further treatment. Sec (2)(b) of the CrPA would then allow the doctor to obtain the blood sample as soon as he sees the patient.

The above argument is akin to the 'blood as a whole' debate, and probably does not reflect the intent of the law maker, but is one that might come up if the court prefers a text-based interpretation. Botha, however, states: 'The text-based approach no longer has any place in statutory interpretation'.²³⁷ He quotes from *R v Hildick-Smith* and prefers to 'ascertain the true intention of the legislature as expressed in the Act'.²³⁸

If the patient is clinically under the influence of alcohol and the paramedics have identified him as the driver, the doctor may take a blood sample. The problem is that the patient may not display clear signs of intoxication or he may be so seriously injured that a clinical examination is not possible, making the reasonable opinion of the doctor difficult.

Sec 63 (1) of the RTA makes driving a vehicle in a negligent or reckless way on a public road an offence. Driving without regard to the safety or property of others is considered reckless (sec 63(2)). It is also an offence to drive a vehicle without showing reasonable consideration to other road users (sec 64).

It can be argued that the drunk driver transgresses both of the above stipulations. Even if he doesn't appear drunk the mere fact that he was involved in a crash could be interpreted as negligent or reckless. The same reasoning applies if the crash involved a fatality. This makes his action criminal and sec 37(2)(b) of the CrPA would therefore make the A&E doctor taking a sample of the driver's blood legal.

²³⁷ Botha (2012) 111.

²³⁸ *R v Hildick-Smith* 1924 TPD 68 81.

Having collected the sample the doctor, in terms of the current judicial process in SA, has to contact the SAPS to request their involvement and hand over the sample for further processing. The problem that could arise in court is the method of collecting the sample – the correct procedure has to be followed.²³⁹ Blood collected as part of the blood drawn for medical purposes would in all likelihood not be acceptable in court.

Even though the doctor has the authority of the law of his side, by sticking a needle into the patient's vein without consent he infringes on the patient's constitutional rights as guaranteed in sec 10, 12 and 14.

No rights are, however, absolute. In *Bernstein v Bester NO* Ackerman J stated :

The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life ... which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen ... [As] a person moves into communal relations and activities ... the scope of personal space shrinks accordingly.²⁴⁰

The Constitution in sec 36 makes provision for the limitation of rights under certain circumstances and for specified purposes. See para 5.3.2.i, p38. In contrast the US Constitution has no such limitation clause. The IV and XIV amendments protect the citizens against invasion of their rights. Their courts have to rely on the phrase 'unreasonable' in the IV amendment and the well-known 'due process' clause in the XIV amendment when considering similar cases.

In *S v Orrie*, Bozalek J refers to the statement by of Moodley AJ, in *D v K* at 2201, that '[t]he taking of a blood sample is a relatively painless procedure and can hardly be described as a cruel, inhuman or degrading treatment or punishment to the person submitting thereto.'²⁴¹ Bozalek J goes on to say that the taking of a blood sample is a common procedure that almost everyone in modern society has had experience of. He continues:

It has long been, furthermore, a vital tool in the administration of the criminal justice system. Indeed, a criminal offence frequently prosecuted is that of driving a motor vehicle whilst having an excessive amount of alcohol in the blood stream. Without the taking of blood samples such a charge could not be pursued.²⁴²

²³⁹ See para 2.2.4 p10.

²⁴⁰ *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) para 65, Also quoted in Basdeo (2009) LLM Dissertation UNISA.

²⁴¹ *S v Orrie* 2004 (1) SACR 162 (C) at 14, *D v K* 1997 (2) BCLR209 (N). Moodley J is referring to sec 12(1)(e) of the Constitution.

²⁴² *S v Orrie* at 15.

In *Seetal v Pravitha*, Didcott J calls the taking of a blood sample a ‘harmless medical procedure’ and says: ‘...the right of the individual must yield to the needs of the common good, and the common good requires that justice shall be duly administered’.²⁴³

In the case of a patient this is even more applicable as he is already injured and possibly even unconscious. Often a blood sample will in any case be taken for medical purposes.

In *Ferreira v Levin*, Sachs J makes the statement:

To equate freedom simply with autonomy or the right to be left alone does not accord with the reality of life in a modern, industrialized society. Far from violating freedom, the normal rules regulating human interaction and securing the peace are preconditions for its enjoyment. Without traffic regulation, it would be impossible to exercise freedom of movement in a meaningful sense.²⁴⁴

Even the privacy of the doctor-patient relationship was considered subservient to the public’s right to safety in a New Jersey DUI case.²⁴⁵

In *Soobramoney v Min of Health KwaZulu-Natal*, the Constitutional Court found that limiting the rights of the individual in favour of the public is constitutional, especially where resources are limited.²⁴⁶

In *Jansen van Vuuren v Kruger*, Harms AJA, quoting Melius de Villiers, said ‘a doctor may be justified in disclosing his knowledge “where his obligations to society would be of greater weight than his obligations to the individual” ‘.²⁴⁷

To limit the drunk driver’s rights to dignity, security and privacy in order to protect those same rights of the public is therefore both ethically and legally acceptable.

Another aspect to be considered is that of self-incrimination. The driver provides the blood containing the evidence against himself. The common law, the Constitution in sec 35, and amendment V of the US Constitution prohibits a person from testifying against himself.²⁴⁸ This applies, however, only to oral or documentary evidence.

In *S v Huma and Another*, Claassen J held that

²⁴³ *Seetal v Pravitha and Another NO* 1983 (3) 827 (D) at 840 E and C.

²⁴⁴ *Ferreira v Levin NO and others* 1996 (1) BCLR (CC) at para 250, referring to *Thomson Newspapers v Canada* 67 DLR (4th) 161.

²⁴⁵ *State v Bodtmann*, 590 A 2d 259 (New Jersey Superior L. 1990).

²⁴⁶ *Soobramoney v Min of Health KwaZulu-Natal* 1998 (1) SA765 (CC).

²⁴⁷ *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA842 (A) at 850G, Dutton (2015) 22.

²⁴⁸ See para 5.3.2 p 35.

[the] privilege against self-incrimination does not apply to procedures relating to the ascertainment of bodily features such as the procedures involved in identification parades, the taking of finger- and footprints, blood samples and the showing of bodily scars...[t]hese procedures relate to the furnishing of what has been termed 'real' evidence, as opposed to the furnishing of oral or testimonial evidence by the accused.²⁴⁹

In the injured drunk driver scenario, blood might be collected and sent to a hospital pathology laboratory for testing as part of the medical treatment of the patient. The tests requested could include a BAC. Using the apparatus currently in general use in hospital laboratories (see para 2.2.4 p 10), these results would not be acceptable in any criminal proceedings. In any civil dispute it would be sufficient as the onus of proof is different.²⁵⁰ This would be the case where the driver-patient institutes claims against his medical and short-term insurance.

POPI and PAIA both allow these companies access to the BAC results.²⁵¹ If they were to request the information, there should be no legal objection. One counter argument that might arise is that of obtaining the evidence in an illegal way, as the blood sample was not collected with criminal proceedings in mind as specified in sec 37(2)(b) of the CrPA. Sec 35(5) of the constitution determines that evidence thus obtained can be allowed as it is not 'detrimental to the administration of justice'.²⁵²

A further consideration is the concept of warning the public about the drunk driver. As already mentioned, many drunk drivers are repeat offenders and likely to put other road users at risk if their actions were not curtailed. I envisage something like a register of convicted drunk drivers, available for scrutiny by anyone interested.

Warning the public about potential danger was the case in the well-known US case of *Tarasoff v Regents Univ of California*.²⁵³ The judgement in this case to a large extent influenced later jurisprudence.²⁵⁴ See also *Goodwill v British Pregnancy Advisory Service*, *W v Egdell* and *Palmer v Tees Health Authority*.²⁵⁵ In all these cases the principles that were upheld were:

- The danger had to be real and imminent.

²⁴⁹ *S v Huma and Another* 1996 (1) SA 232 (W) at p237.

²⁵⁰ Currie (2013) 310.

²⁵¹ see discussion in para 3.4 p 16.

²⁵² Sec 35(5) Constitution.

²⁵³ *Tarasoff et al v The Regents of the University of California* (1976) 17 Cal (3d) 358.

²⁵⁴ Stauch (2015) 240, Zonana (1989) 40(2) *Hosp Comm Psych* 162.

²⁵⁵ *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161, *W v Egdell* [1990] 1 Ch 359, *Palmer v Tees Health Authority* [1999] EWCA Civ 1533.

- There was no way to avoid it but for the disclosure of confidential information.
- The harm caused to the patient by disclosure must be less than the potential harm to the victim.
- The potential victim had to be clearly identifiable or belong to a clearly identifiable group – just being a member of the public was not good enough.

The latter finding contrasts somewhat with the judgement in *MoH W Cape v Goliath*, where a patient with multiple drug resistant tuberculosis was confined against his will.²⁵⁶ The defence of necessity in limiting the patient's rights in order to protect the public came to light here.²⁵⁷ In this case there were no specific people at risk, apart from his family, were the patient to roam about freely. The whole of the community would have been at risk if his rights had not been limited. There was also no immediate danger as the risk of infecting other people was not quantifiable. I suggest that the same approach be followed in the case of a drunk driver – see chapter 6.

In the same case Griesel J referred to Art 25 of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.²⁵⁸

This Article reads:

Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

Limiting a person's rights must be 'justifiable' in terms of sec 36 of the Constitution. This means that it must have a purpose that 'most people would regard as compellingly important'.²⁵⁹ I am sure this is applicable in the case of the drunk driver.

There is thus sufficient legal authority for the limitation of an individual's rights, where this would be of greater benefit to the larger community.

²⁵⁶ MEC W Cape v Goliath 2009 (2) SA 248 (C).

²⁵⁷ Kemp et al (2012) 88, Carstens (2007) 911, Dutton (2015) 57.

²⁵⁸ UN Economic and Social Council (1985) U.N. Doc. E/CN.4, Annex.

²⁵⁹ Currie (2013) 151.

Chapter 6

Conclusion and recommendations

6.1 Concluding discussion

The consumption of alcohol, even though a very common occurrence, is fraught with danger. Too often do imbibers overestimate their limits, leading to a lot of tragedy, including interpersonal violence, social neglect, loss of jobs and alcohol addiction. In spite of these we still use terms like ‘social drinking’.

Drunk driving is one of the more serious consequences causing injury and disability, damage to property and even loss of life to many innocent and unsuspecting victims. Six out of ten drivers that die in motor vehicle crashes do so with dangerously high BACs.²⁶⁰ At night, one out of every seven drivers on the road with you are drunk.²⁶¹ 11.9% of binge drinkers will drive within two hours of drinking.²⁶²

In spite of the high injury statistics and the high cost to the economy, the problem of the drunk driver is not being addressed aggressively enough. Detection of DUI cases are not done often enough, prosecution takes too long and is seldom successful, sentences are too lenient and the transgressing drivers commonly return to commit the same offence again, injuring yet more innocent victims.²⁶³

A number of strategies have been tried to try and curb the problem. One of these is the mandatory reporting of drunk drivers by emergency room physicians. This approach is fairly prevalent in the US where several states require doctors to report drivers who are guilty of DUI, while many more allow the doctors to break doctor-patient confidentiality to report them for drunk driving if they so choose.²⁶⁴

Jacob Appel of New York University opposes mandatory reporting as he argues that it will scare patients away from obtaining treatment when they need it.²⁶⁵ *The American College of*

²⁶⁰ *Alcoholism: Statistics* www. alcohol co.za.

²⁶¹ Ibid.

²⁶² Naimi (2009) 37:4 *Am Jnl Prev Med* 314.

²⁶³ See also Barbeau (2014) *Daily News* where police corruption is mentioned. Blood samples are tampered with by leaving them in a hot car or putting them in a microwave.

²⁶⁴ Books LLC (ed) (2011) *Drunk Driving* 43.

²⁶⁵ Ibid.

Emergency Physicians opposes the mandatory or permissive reporting of a driver's BAC by doctors to law enforcement. They feel it conflicts with the fundamental role of the doctor in the physician- patient relationship. At the same time they support legal sanctions for persons found guilty of DUI, including license suspension, vehicle impoundment and even public disclosure²⁶⁶. Mandatory BAC testing is advocated by MADD and the US *National Council on Alcoholism and Drug Dependence* (NCADD) for persons driving under the influence or for those involved in crashes that result in injury.²⁶⁷

For the A&E doctor to test a driver's BAC consent is needed (except in case of request by a law enforcement officer). The concept of implied consent considers this. Implied consent is not expressly given by an individual, but is inferred from a person's actions and the circumstances of the actions. The term is most commonly used in the US with regard to US drunk driving laws.²⁶⁸ This means that the driver accepts that his right to privacy will be limited the moment he gets behind the wheel of a motor vehicle. The state of New York in 1953 became the first state to adopt an implied consent law. Refusing to undergo BAC testing would lead to automatic suspension of a person's driving license.²⁶⁹ The concept was underlined in *People v Perlos* where it was held that there was no reasonable expectation of privacy where the results of BAC were concerned.²⁷⁰ No such provision has yet been incorporated in South African law, although sec37 (2)(b) of the CrPA does afford the doctor some discretion.

Another possibility is to make the A&E doctor a peace officer while on duty, somewhat akin to a police reservist. Sec 334(1)(a) of the CrPA reads:

The Minister may by notice in the Gazette declare that any person who by virtue of his office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.

The National Health Amendment Bill (2011), wherein it is provided for the establishment of the *Office of Health Standards Compliance*, makes provision for the appointment of health

²⁶⁶ Holmes et al (2014) XV:4 *West Jnl Emerg Med* 480 at 483, ACEP policy statement Oct 2011. By appearing in court an accused's BAC or state of intoxication is already public knowledge.

²⁶⁷ MADD (2011) "Mandatory BAC Testing for Drivers who Survive" www.madd.org, NCADD "Alcohol and Drug Impaired Driving" www.ncadd.org .

²⁶⁸ Books LLC (ed) (2011) *Drunk Driving* at 57.

²⁶⁹ Lerner (2011) 58.

²⁷⁰ *People v Perlos* 436 Michigan 305, 462 N.W. 2d 310 (1990). Am Bar Ass (2013) 84.

officers and inspectors.²⁷¹ They are in in sec 80(4)(c) afforded the powers of a peace officer as defined in sec 1 of the CrPA.

Were this possible, the doctor could complete his own SAP 308 (a), making the formal request by a police officer unnecessary. The A&E unit of the hospital might be regarded as a type of roadblock, similar to those set up by traffic officials, and allow the doctor or nurse to test every driver for blood alcohol levels.

The drunk driver is a national health problem and a serious threat to the country's economy. Almost any measure that can assist in containing this 'disease' is essential. The driver who chooses to drive drunk must know that the chances of him being exposed and prosecuted are great. He must know that he will lose his vehicle and have to pay his own and his victim's damages.

The Uppsala University in Sweden has the legal philosophy that 'criminal law can be used to educate or create morality'.²⁷² Deterrence plays an important role in such a philosophy: the perpetrator must not only know that his chances of getting caught are good – he must also be aware of and fear the severity of the consequences when convicted.²⁷³

In the *WMA Statement on traffic injury*, recommendations art 2, reads: 'Physicians must view traffic injury as a public health problem and recognise their responsibility in fighting this global problem'.²⁷⁴ Müller reminds the doctor of his dual obligation: he must treat the injured patient in front of him but he also has a legal responsibility, and at times the rights of society may be more important than the rights of the individual patient.²⁷⁵

We as society go to great lengths to make our living space safe. We tell people to wear bicycle helmets and seat belts, not to speed on the roads, not to leave children alone and to lock up our houses and cars.²⁷⁶ We wash our hands diligently, these days even when entering large shopping centres, we combat superbugs with isolation precautions and the world spends a fortune on investigating Ebola and Zika viruses, but we mainly ignore one of the things we can do something about. If we attack the problem of the drunk driver with the same fervour as displayed by the lawyers defending him, we would get far.

²⁷¹ Sec 80 National Health Amendment Bill. See also Whitepaper on NHI (Des2015) para 218.

²⁷² Lerner (2011) 27.

²⁷³ Ibid.

²⁷⁴ WMA (2006) Statement on traffic injury www.wma.net.

²⁷⁵ Müller (2003) 45(6) *SA Fam Pract* 41 at 43.

²⁷⁶ Kahn (2015) 66 *Ann Emerg Med* 670.

6.2 Recommendations

Courts cannot arbitrarily decide whether the limitation of a person's rights are within the requirements of sec 36 of the Constitution, i.e. 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.²⁷⁷ Evidence, based on statistical data, regarding the impact of the limitation on society is usually needed.²⁷⁸ In *S v Meaker* Cameron J stated that there is not always a need for such evidence when considering the validity of a limitation.²⁷⁹ Sometimes a 'common sense analysis' would suffice, considering the 'social ... milieu' that underlies the need for the limitation.²⁸⁰ The link between the limitation and its purpose is often self-evident.²⁸¹

The advantages to society in curbing the activities of the drunk driver are obvious and the following is proposed:

- Educate the medical community and the public to regard drunk driving as a serious public health problem, to be combatted by all means.
- In sec 37(2)(b) of the Criminal Procedure Act:

Change the phrase 'any person admitted to such hospital' to 'any person presenting at such hospital'.

Change the phrase 'criminal proceedings' to 'criminal or civil proceedings'.

- Investigate the feasibility of accepting the current hospital procedures of collecting blood and testing for BAC as sufficient for evidentiary use.
- Create laws to implement the concept of implied consent.
- Make it mandatory for the emergency unit physician to test all drivers, no matter what the degree of injury, for blood alcohol levels, and to report those that are over the legal limit to law enforcement and licensing authorities.
- Examine the possibility of making the A&E doctor a temporary peace officer while on duty.
- Making the results of BAC tests on drivers available to insurance companies on request. These same companies could be approached to set up a fund to cover the cost of routine BAC testing.

²⁷⁷ Currie (2013) 154, Sec 36 Constitution.

²⁷⁸ Currie (2013) 154.

²⁷⁹ *S v Meaker* (1998) (2) SACR 73 (W).

²⁸⁰ Ibid.

²⁸¹ Currie (2013) 154.

6.3 Final remarks

In the last week my eye fell on a report in the *News24*.²⁸² The author reports that the person driving the truck, involved in the crash in which Public Services and Administration Minister Collins Chabane and his two assistants were killed, had pleaded guilty to driving under the influence of alcohol. In the last few days as I was writing this, I admitted a patient to hospital who had lost control of his vehicle while driving with a BAC of 0.25% - five times the legal limit.

In *Business Day LIVE* on 30 March 2016 the *Democratic Alliance* deputy transport spokesman is reported to have called for 'a major shift' in the approach to road safety.²⁸³

My hope is that the physician working in the emergency unit, being confronted by a drunk driver-patient, will not only treat the patient in front of him, but also the much larger one outside on the roads – thus shifting the paradigm.

²⁸² News24 (2016) "Truck driver in fatal ... crash pleads guilty" 14 April 2016 *News24* www.news24.com.

²⁸³ Ensor & West (2016) "Road accidents rob SA of 10th of GDP" 30 March 2016 *Business Day LIVE* www.bdlive.co.za.

Appendix

Form SAP 308(a)

Obtained from SAPS Lyttelton Station on 25 April 2016.



SOUTH AFRICAN POLICE SERVICE

**MEDICAL EXAMINATION OF A PERSON WITH REGARD
TO PHYSICAL CONDITION OR SOBRIETY**

(N.B.—Refer to directions at foot of form)

I,

am a member of the South African Police Service, stationed at

I am at present investigating an alleged offence of

The offence is alleged to have been committed at : on

at and at : on

(i)

was arrested in connection therewith.

For purposes of police service investigation and possible criminal action it is necessary to determine the physical condition or sobriety of the said (i) at the time of the commission of the alleged offence. I therefore request that the aforesaid (i) be examined by (ii)

in terms of the provisions of section 37 of the Criminal Procedure Act (Act 51 of 1977).

.....
Signature

Place

Date

- Directions.—*
- (i) Name of person to be medically examined.
 - (ii) Office/Name of medical practitioner, e.g.:
 - (a) District Surgeon; or
 - (b) Dr X. Burger.

Bibliography

Statutes : South African

The Constitution of the Republic of South Africa, 1996.

National Health Act, 61 of 2003.

Criminal Procedure Act, 51 of 1977.

National Road Traffic Act, 93 of 1996.

Promotion of Access to Information Act, 2 of 2000.

Protection of Personal Information Act, 4 of 2013.

Health Professions Act, 56 of 1974.

Nation Health Amendment Bill [B 24-2011] published in GG 34739 of 8 November 2011.

National Road Traffic Regulations 2000.

South Africa (2013) Amendment of the National Road Traffic Regulations. (Proclamation No. R. 890, 2013) *Government Gazette* 37048, November 19.

White Paper

South Africa (2015) Department of Health. *White Paper on National Health Insurance*. GN 1230, *Government Gazette* 39506, 11 December 2015.

Health Professions Council of South Africa Guidelines (May 2008)

Guidelines for Good Practice in the Health Care Professions:

Booklet 1: General Ethical Guidelines for the Health Care Professions.

Booklet 2: Ethical and Professional Rules of the Health Professions Council of South Africa as promulgated in *Government Gazette* R717/2006.

Booklet 3: National Patient's Rights Charter.

Booklet 10: Confidentiality: Protecting and {providing Information.

Above available from the HPCSA website: <http://www.hpcsa.co.za>

Case law : South African

Bernstein and Others v Bester NO and Others 1996 (4) BCLR 449 (CC); 1996 (2) SA 751.

D v K 1997 (2) BCLR209 (N).

Ferreira v Levin NO and others 1996 (1) BCLR (CC).

Jansen van Vuuren and Another NNO v Kruger 1993 (4) SA 842 (A).

Minister of Health W Cape v Goliath 2009 (2) SA 248 (C).

Motata v S (A345/2010) [2010] ZAGPJHC 134 (29 November 2010).

R v Hildick-Smith 1924 TPD 68 81.

S v Binta 1993 (2) SACR 553 (C)

S v Brumpton 1976 (3) SA 236 (T).

S v Burgers 1976 (4) SA 578 (O).

S v Conradie 2000(2) SACR 386 (C).

S v Edley 1970 (2) SA 223 (N).

S v Francis 1977 (1) SA 643 (A).

S v Greef 1970 (4) SA 704 (O).

S v Hendricks (cc46/2010) [2011] ZAWCHC 345; [2011] All SA 402 (WCC).

S v Huma and Another 1996 (1) SA 232 (W); 1995 (2) SACR 411 (W).

S v Jubelius 1976 (2) SA 295 (T).

S v Maqhina 2001 (1) SACR 241 (T) p252.

S v Meaker 1998 (2) SACR 73 (W); 1998 (8) BCLR 1038 (W).

S v Orrie 2004 (1) SACR 162 (C).

S v Pillay 1969 (2) SA 248 (N).

S v Ross (A33/12) [2012] ZAWCHC 171; 2013 (1) SACR 77 (WCC).

S v Vis 1974 (2) SA 437 (O).

Seetal v Pravitha and Another NO 1983 (3) 827 (D).

Soobramoney v Min of Health KwaZulu-Natal 1998 (1) SA765 (CC).

Foreign law

United States of America:

The Constitution of the United States of America.

People v Perlos 436 Michigan 305, 462 N.W. 2d 310 (1990).

State v Bodtmann, 590 A.2d 259 (New Jersey Superior L. 1990); 248 N.J. Super. 100 (1990).

Tarasoff et al v The Regents of the University of California (1976) 17 Cal (3d) 358; 83 ALR 3rd 1166 (1976).

Virginia v Harris 558 US (2009), 130 S. Ct. 10, 10(2009), No 08-1385.

United Kingdom:

Road Traffic Act 1988.

Road Traffic Act 1988 (Alcohol Limits) (Amendment) Bill [HL].

Goodwill v British Pregnancy Advisory Service [1996] 2 All ER 161.

Palmer v Tees Health Authority [1999] EWCA Civ 1533.

W v Egdell [1990] 1 Ch 359.

Books

Ackermann L (2012) *Human Dignity: Lodestar for equality in South Africa* Cape Town: Juta.

American Bar Association (2013) *ABA Standards for Criminal Justice 3rd Ed: Law Enforcement Access to Third Party Records* Washington: American Bar Association.

Beauchamp TL & Childress JF (2013) *Principles of Biomedical Ethics 7th Ed* New York: Oxford University Press.

Bellengère A et al (2013) *The Law of Evidence in South Africa: Basic Principles* Cape Town: Oxford University Press.

Books LLC (ed) (2011) *Drunk Driving* Memphis: Books LLC® (Wiki Series).

Botha C (2012) *Statutory Interpretation: an introduction for students 5th Ed* Cape Town: Juta.

Carstens PA & Pearmain DL (2007) *Foundational Principles of South African Medical Law* Durban: LexisNexis.

- Cooper WE & Schwär TG & Smith LS (1979) *Alcohol, Drugs and Road Traffic* Cape Town: Juta.
- Currie I & de Waal J (2013) *The Bill of Rights Handbook* 6th Ed Cape Town: Juta.
- Dada MA & McQuoid-Mason DJ (eds) (2001) *Introduction to Medico-Legal Practice* Durban: Butterworths.
- De Stadler E & Esselaar P (2015) *A guide to the Protection of Personal Information Act* Cape Town: Juta.
- Dhai A & McQuoid-Mason DJ (2011) *Bioethics, Human Rights and Health Law: Principles and Practice* Cape Town: Juta.
- Dutton I (2015) *The Practitioner's guide to Medical Malpractice in South African Law* Cape Town: Siberink.
- Foster C (2011) *Human Dignity in Bioethics and Law* Oxford: Hart Publishing.
- Foster C (2013) *Medical Law: a very short introduction* Oxford: Oxford University Press.
- Friel JP (ed) (1974) *Dorland's Illustrated Medical Dictionary* 25th Ed Philadelphia; WB Saunders.
- Hiber A (ed) (2013) *Drunk Driving* Farmington Hills, Michigan: Greenhaven Press.
- Hiemstra VG & Gonin HL (1992) *Trilingual Legal Dictionary* 3rd Ed Cape Town: Juta.
- Joyner K (ed) (2010) *Aspects of Forensic Medicine: An Introduction for Healthcare Professionals* Cape Town: Juta.
- Kemp G et al (2012) *Criminal Law in South Africa* Cape Town: Oxford University Press Southern Africa.
- Klug H (2010) *The Constitution of South Africa; A Contextual Analysis* Oxford: Hart Publishing.
- Lerner BH (2011) *One for the Road: drunk driving since 1900* Baltimore: The Johns Hopkins University Press.
- Lloyd GER (ed) (1978) *Hippocratic Writings* Harmondsworth: Penguin Books.
- Maree JG (ed) (2012) *Complete your thesis or dissertation successfully: Practical guidelines* Cape Town: Juta
- Moodley K (ed) (2010) *Medical Ethics, Law and Human rights* Pretoria: Van Schaik.
- Nadasen S (2000) *Public Health Law in South Africa* Durban: Butterworths.
- Simon L (ed) (2011) *Driving under the Influence: A look at drunk driving laws, enforcement, and prevention* (A collection of Wikipedia articles) LaVergne, Tennessee: Webster's Digital Services.
- Stauch M & Wheat K (2015) *Text, Cases and Materials on Medical Law and Ethics* 5th Ed Oxon: Routledge.
- Strauss SA (1991) *Doctor, patient and the law* 3rd Ed Pretoria: JL van Schaik.

Van Niekerk T & Wolfaardt J (eds) (2010) *Oxford South African Concise Dictionary 2nd Ed* Cape Town: Oxford University Press.

Weiss R & Butterworth C (eds) (1975) *Ethical Writings of Maimonides* New York: Dover Publications.

Journal articles

Barnhill MT *et al* "Comparison of Hospital Laboratory Serum Alcohol Levels obtained by an Enzymatic Method with Whole Blood Levels Forensically determined by Gas Chromatography" (2007) 31 *Journal of Analytical Toxicology* 23-30.

Biffi WL *et al* "Legal prosecution of alcohol-impaired drivers admitted to a level 1 trauma center in Rhode Island" (2004) 56 *Journal of Trauma* 24-29.

Brightman K *et al* "Patient confidentiality: when can a breach be justified?" (2013) 14(2) *Continuing Education in Anaesthesia, Critical Care & Pain* 52-56.

Burchell J "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid" (2009) 13(1) *Electronic Journal of Comparative Law*. Retrieved from <http://www.ejcl.org> on 21 March 2016.

Chang G "Reporting Alcohol-Impaired Drivers: Results from a National Survey of Emergency Physicians" (1992) 21 *Annals of Emergency Medicine* 284-290.

Chang S "The injured intoxicated driver: analysis of the conviction process" (2001) 51 *Journal of Trauma* 551-556.

Cydulka RK *et al* "Injured intoxicated drivers: citation, conviction, referral, and recidivism rates" (1998) 32(3 Pt 1) *Annals of Emergency Medicine* 349-352.

Frajola WJ "Blood Alcohol Testing in the Clinical Laboratory: Problems and Suggested Remedies" (1993) 39(3) *Clinical Chemistry* 377-379.

Gentilello LM *et al* "Effect of the Uniform Accident and Sickness Policy Provision Law on alcohol screening and intervention in trauma centers" (2005) 59 *Journal of Trauma* 624-631.

Goecke ME *et al* "Characteristics and conviction rates of injured alcohol-impaired drivers admitted to a tertiary care Canadian Trauma Centre" (2007) 30 *Clinical and Investigative Medicine* 26-32.

Green RS *et al* "Legal consequences for alcohol-impaired drivers injured in motor vehicle collisions: A systematic review" (2015) 80 *Accident Analysis & Prevention* 106-116.

Holmes JF *et al* "Successful Conviction of Intoxicated Drivers at a Level 1 Trauma Center" (2014) XV(4) *Western Journal of Emergency Medicine* 480-485.

Jones AW "Biomarkers of recent drinking, retrograde extrapolation of blood-alcohol concentration and plasma-to-blood distribution ratio in a case of driving under the influence of alcohol" (2011) 18 *Journal of Forensic and Legal Medicine* 213-216.

Jones AW "Measuring Alcohol in Blood and Breath for Forensic Purposes – A Historical Review" (1996) 8 *Forensic Science Review* 13-44.

Kahn CA "Commentary: drugs and driving" (2015) 66 *Annals of Emergency Medicine* 670-672.

Lemmer BH "The art of medicine" (2012) 379 *The Lancet 1870-1871*.

Le Roux A "Medico-legal aspects regarding drunk driving" (2007) 2 *South African Journal of Criminal Justice* 220- 242.

Mello J *et al* "Physician's attitudes regarding reporting alcohol-impaired drivers" (2003) 24(4) *Substance Abuse* 233-242.

Müller K & Saayman G "Forensic science in medicine: What every doctor should know" (2003) 45(6) *SA Family Practice* 41-45.

Naimi TS *et al* "Driving after Binge Drinking" (2009) 37(4) *American Journal of Preventive Medicine* 314-320.

Penetar DM *et al* "Comparison Among Plasma, Serum, and Whole Blood Ethanol Concentrations: Impact of Storage Conditions and Collection Tubes" (2008) 32(7) *Journal of Analytical Toxicology* 505-510.

Prinsen L "Flawed law: A critical analysis of the faults and shortcomings of chapter 8 of the National Health Act of 2003" (2013) 24(3) *Orbiter* 522-532.

Runge JW *et al* "Enforcement of drunken driving laws in cases involving injured intoxicated drivers" (1996) 27 *Annals of Emergency Medicine* 66-72.

Seggie J "Data → information → knowledge → wisdom: When is South Africa going to get her act together?" (2015) 105 *South African Medical Journal* 795.

Shan X *et al* "A study of blood alcohol stability in forensic antemortem blood samples" (2011) 211(1-3) *Forensic Science International* 47-50.

Steinbock B "Drunk Driving" (1985) 14(3) *Philosophy & Public Affairs* 278-295.

Tucker A & Trethewy C "Lack of effect on blood alcohol level of swabbing venepuncture sites with 70% isopropyl alcohol" (2010) 22 *Emergency Medicine Australasia* 9-12.

Winek CL & Paul LJ "Effect of Short-Term Storage Conditions on Alcohol Concentrations in Blood from Living Human Subjects" (1983) 29 *Clinical Chemistry* 1959-1960.

Zonana H "Warning third parties at risk of AIDS: APA's policy is a reasonable approach." (1989) 40(2) *Hospital and Community Psychiatry* 162-164.

Dissertations

Basdeo V (2009) *A Constitutional perspective of police powers of search and seizure in the criminal justice system*, unpublished LLM dissertation, University of South Africa.

Dias BG (2012) *Strengthening the fight against crime: Is DNA-Database the answer?*, unpublished LLM dissertation, University of Pretoria.

Ratshibvumo NJ (2011) *Procedural decriminalization of certain traffic offences*, unpublished LLM dissertation, University of Zululand.

Zwart L (2015) *An Analysis of informed consent and clinical aspects regarding mental capacity in context of the Mental Health Care Act 17 of 2002*, unpublished LLM dissertation, University of Pretoria.

Other declarations and reports

European Union *Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950* http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 25 March 2016).

General Medical Council (UK) (2009) *Guidelines for Good Medical Practice : Confidentiality* http://www.gmc-uk.org/guidance/ethical_guidance/confidentiality.asp (accessed 2 April 2016).

General Medical Council (UK) (2008) *Consent: patients and doctors making decisions together (Guidelines for Good Medical Practice)* http://www.gmc-uk.org/guidance/ethical_guidance/consent_guidance_index.asp (accessed 2 April 2016).

Organization of African Unity (1981) *African (Banjul) Charter on Human and Peoples' Rights*. (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 25 March 2016).

South Africa National Assembly (2013) Internal question paper no 38: Question no. 3183: Ms D Kohler-Barnard (DA) to ask the Minister of Health: ... 15 November 2013. https://pmg.org.za/question_reply/451/ (accessed 25 March 2016).

United Nations Economic and Social Council (1985) *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex(1985). <https://www1.umn.edu/humanrts/instreet/siracusaprinciples.html> (accessed 17 April 2016).

United Nations General Assembly (1948) *Universal Declaration of Human Rights* Resolution 217 A (III) of 10 December 1948 <http://www.un.org/en/universal-declaration-human-rights/> (accessed 2 April 2016).

World Health Organization (2015) *Global Status report on Road Safety*. Geneva: WHO Press http://www.who.int/violence_injury_prevention/road_safety_status/2015/en/ (accessed 4 April 2016).

World Medical Association (2006) *WMA International Code of Medical Ethics* (Adopted by the 3rd General Assembly of the WMA, October 1949 and amended October 2006)
<http://www.wma.net/en/30publications/10policies/c8/> (accessed 2 April 2016).

World Medical Association (2006) *WMA Statement on Traffic Injury* (Adopted by the 42nd World Medical Assembly, October 1990 and revised by the 57th WMA General Assembly, October 2006)
<http://www.wma.net/en/30publications/10policies/i15/> (accessed 30 March 2016).

Internet sources

Alcoholism (2007) *Statistics* <http://www.alcohol.co.za/statistics.htm> (accessed 30 March 2016).

Alton H (1997) "The DUI loophole: Drunken drivers are getting off scot-free, three doctors say" 6 February 1997 *Honolulu Star-Bulletin* <http://archives.starbulletin.com/97/02/06/news/story3.html> (accessed 7 February 2016).

American College of Emergency Physicians "Addressing the Public Safety Dangers Associated with Impaired or Distracted Driving" (2011) in *Clinical & Practice Management* October 2011
<https://www.acep.org/Clinical---Practice-Management/Addressing-the-Public-Safety-Dangers-Associated-with-Impaired-or-Distracted-Driving/> (accessed 7 February 2016).

American College of Emergency Physicians (2002) *Issue Paper: BAC Reporting* March 2002
<https://www.acep.org/content.aspx?id=8888> (accessed 7 February 2016).

Barbeau N (2014) "Cops under Fire in drunk driver cases" 6 January 2014 *DailyNews*
<http://www.iol.co.za/dailynews/news/cops-under-fire-in-drunk-driver-cases-1.1628969> (accessed 26 September 2015).

Barnard DK (2014) "36% increase in drunken-driving cases not making it to court" 12 August 2014
<https://www.da.org.za/2014/08/36-increase-drunken-driving-cases-making-court-2/> (accessed 15 September 2015)

Belchetz B (2015) "The Hospital Loophole Drunk Drivers Use as a 'Get Out of Jail Free Card' " 2 February 2015 http://www.huffingtonpost.ca/dr-brett-belchetz/drunk-driving-ontario_b_6594646.html (accessed 7 February 2016).

Centres for Disease Control (2011) "Vital Signs: Alcohol-Impaired Driving Among Adults - United States, 2010" *Morbidity and Mortality Weekly Report*, 4 October 2011
<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6039a4.htm> (accessed 24 April 2016).

Drinkdriving "Drink Driving UK Law History"
http://www.drinkdriving.org/drink_driving_information_uklawhistory.php (accessed 7 April 2016).

Drugfreeworld "Alcohol: A short history" in *The Truth about Alcohol*
<http://www.drugfreeworld.org/drugfacts/alcohol/a-short-history.html> (accessed 2 April 2016).

Ensor L and West E “Road accidents rob SA of 10th of GDP” 11 January 2013 *Business Day LIVE*
<http://www.bdlive.co.za/economy/2013/01/11/road-accidents-rob-sa-of-10th-of-gdp> (accessed 30 March 2016).

Fell J (1995) “Repeat DWI Offenders in the United States.” Washington DC: National Department of Transportation, National Highway Traffic Safety Administration Traffic Tech No. 85, February 1995
<http://www.nhtsa.gov/people/outreach/traftech/1995/TT085.htm> (accessed 24 April 2016).

Kaiserliches Patentamt (1886) “Patentschrift No 37435” 2 November 1886
https://commons.wikimedia.org/wiki/File:Patentschrift_37435_Benz_Patent-Motorwagen.pdf
(accessed 2 April 2016).

Mothers Against Drunk Driving (2011) “Mandatory BAC Testing for Drivers who Survive” April 2011
<http://www.madd.org/laws/mandatory-bac-testing-for-drivers-who-survive.html> (accessed 1 September 2015).

Mothers Against Drunk Driving: Statistics <http://www.madd.org/statistics/> (accessed 1 September 2015).

Meisel Z (2006) “Spare the Needle: Doctors shouldn’t have to draw blood on behalf of cops”
Slate.com 19 September 2006
http://www.slate.com/articles/health_and_science/medical_examiner/2006/09/spare_the_needle.html (accessed 30 August 2015).

Missouri State Highway Patrol – Crime Laboratory Division (2011) “Lab Implements New Requirements for Ethyl Alcohol Testing” *Under the Scope* May 2001
<https://www.msdp.dps.missouri.gov/MSHPWeb/Publications/OtherPublications/documents/underTheScope1-1.pdf> (accessed 31 March 2016).

Narconon “Alcohol History” <http://www.narconon.org/drug-information/alcohol-history.html>
(accessed 2 April 2016).

National Council on Alcoholism and Drug Dependence “Alcohol and Drug Impaired Driving”
<https://ncadd.org/images/stories/PDF/factsheet-alcoholanddrugimpaireddriving.pdf> (accessed 1 September 2015).

National Council on Alcoholism and Drug Dependence “Drinking and Driving”
<https://ncadd.org/about-addiction/driving-while-impaired-alcohol-and-drugs> (accessed 1 September 2015).

National Highway and Traffic Safety Administration (2008) “Alcohol Exclusion Laws” in *Traffic Safety Facts : Laws* January 2008
<http://www.nhtsa.gov/Laws+&+Regulations/Traffic+Safety+Legislative+Fact+Sheets> (accessed 12 April 2016).

News24 Correspondent (2016) “Truck driver in fatal Collins Chabane crash pleads guilty” 14 April 2016 News24 <http://www.news24.com/SouthAfrica/News/truck-driver-in-fatal-collins-chabane-crash-pleads-guilty-20160414> (accessed 14 April 2016).

United Kingdom (2016) Parliament *Road Traffic act 1988 (Alcohol Limits)(Amendment) Bill [HL]*
<http://www.publications.parliament.uk/pa/1d201516/ldhansrd/text/160311-0002.htm> (accessed 7 April 2016).

South African Press Association (2012) “Suspended breathalyser nearly ready after adjustments” 26 September 2012 <http://www.timeslive.co.za/local/2012/09/26/suspended-breathalyser-nearly-ready-after-adjustments> (accessed 12 March 2016).

South African Government (2015) “Minister Aaron Motsoaledi responds to statement by Dr. Wilmot James on Forensic Chemistry Laboratories” Media Statement 29 January 2015
<http://www.gov.za/minister-aaron-motsoaledi-responds-statement-dr-wilmot-james-forensic-chemistry-laboratories> (accessed 9 April 2016).

South African Medical Association (2015) “Alcohol Abuse in South Africa – A National Crises” Media release 21 December 2015
<https://mcx.mweb.co.za/Print.aspx?folderpath=INBOX&messageid=29283> (Accessed 27 December 2015).

South African Nursing Council (2014) *Competencies for Forensic Nurse* May 2014
<http://www.sanc.co.za/pdf/Competencies/SANC%20Competencies-Forensic%20Nurse%202014-05.pdf> (accessed 31 March 2016).

South Africans Against Drunk Driving “Statistics” (2015) SADD’s comments on 2014/2015 festive season statistics 23 January 2015 <http://www.sadd.org.za/education/statistics> (accessed 30 August 2015).

South Africans Against Drunk Driving (2013) “Friends don’t let friends drink then drive”
<http://www.sadd.org.za/education/crash-advice> (accessed 26 September 2015).

Staff writer (2015) “South Africa worst in the world for drunk Driving” 19 October 2015
<http://businesstech.co.za/news/lifestyle/101626/south-africa-worst-in-the-world-for-drunk-driving/> (accessed 26 January 2016).

Wikipedia contributors “Alcohol Exclusion Laws”
https://en.wikipedia.org/wiki/Alcohol_exclusion_laws (accessed 12 April 2016).

Wikipedia contributors “History of the Automobile”
https://en.wikipedia.org/wiki/History_of_the_automobile (accessed 2 April 2016).

Newspaper articles

Katella K (1997) “Drunken Drivers in the Emergency Room” 17 August 1997 *New York Times*
<http://www.nytimes.com/1997/08/17/nyregion/drunken-drivers-in-the-emergency-room.html?pagewanted=all> (accessed 7 February 2016).

Mashaba S (2016) “Drunk driving equals murder” 16 January 2016 *Sowetan*
<http://www.sowetanlive.co.za/news/2016/01/16/drunk-driving-equals-murder> (accessed 9 April 2016).

Yende SS (2015) “Lab blood sample backlog on DUIs delays justice” 21 December 2015 *City Press*
<http://city-press.news24.com/News/lab-blood-sample-backlog-on-duis-delays-justice-20151221> (accessed 09 April 2016).

Other sources

Beckman Coulter Synchron Systems (2015) Chemistry Information Sheet A18490 AM: ETOH Alcohol ref 474947 Brea, California: Beckman Coulter Inc.