

Impaired Driving in the Era of “Legal” Cannabis Use

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As New Jersey is poised to join a growing number of jurisdictions that have created adult-use regulated cannabis businesses, you are likely to hear concerns about an increase in impaired motor vehicle operation. Of course since there has been an utter failure to prohibit the illegal consumption of cannabis, this concern is not really about creating access to “legal cannabis” but rather a challenge to the tools available to law enforcement to monitor and cite cannabis-impaired driving.

For example, you are on your way home from dinner with your friends, you hear a siren and see lights in your rearview and are being pulled over. You know the routine (or maybe you don’t). The officer asks for your license and registration and says, “have you had anything to drink tonight?” You respond truthfully, “No, sir.” He then asks, “have you smoked or ingested any cannabis products tonight?” Well, that’s new. Your mind is racing, maybe you took a hit off of a cannabis cigarette at the party, but it’s legal—so what do you do/say? The officer then asks you to step out of the car and indicates his belief that you may be under the influence of drugs. You comply, but are thinking now what? Field sobriety tests—walking a straight line, touching finger to nose, following a pen with your eyes? Am I going to be taken to the hospital for a blood test?

The answer is likely all of the above and more. Currently in New Jersey, police officers perform a series of tests called DRE (Drug Recognition Evaluations) to determine if someone is impaired by drugs or alcohol. The officer uses the results of these tests to determine whether the subject is likely under the influence of drugs or alcohol. Often, the officer will indicate which category of drugs the officer believes is impairing the subject. First, the officer will administer a breathalyzer to rule out alcohol. The officer will then ask questions to attempt to determine if you are injured, on any medication, or under the influence of drugs. Next, the officer will perform an eye exam in which the officer looks at your pupils and evaluates whether nystagmus is present (repetitive, uncontrolled eye movements). Next you will be asked to perform the classic field sobriety tests—the one leg stand, walk and turn, balance test, and finger to nose. The officer will then evaluate your vital signs—heart rate/pulse, blood pressure, body temperature. Next is the dark room test, in which the officer takes measurements of your pupil with a machine called a pupilometer while exposing the eye to three different lighting conditions. The officer then examines your muscle tone, looks for injection sites, and takes your statement after giving you your Miranda warning. Finally, the officer will make and issue an educated opinion as to your intoxication and request that you submit to a urine, blood, and/or saliva test to verify.

Even before the widespread acceptance of cannabis consumption, there are many challenges with this process: is this a police officer or a trained medical professional? What is the officer’s level of training? In the cannabis era we now must determine: What does it mean to be impaired or under the influence of cannabis? Can you be under the influence of cannabis without being impaired? If so, what residual level of THC is acceptable given that it can remain in your saliva and blood for two days and far longer in your urine?

Cannabis use and education about consuming it responsibly must be based on sound science—not roadside guesswork—in order to protect the consumer and others on the roads. There is hardly a consensus on the issue and opinions range from zero tolerance to a belief that cannabis users are better drivers. The core issue—the proper way to evaluate cannabis-impaired operation—will likely mimic the path established by law enforcement in the pre-breathalyzer days. Reliance on field observations of the officer will be central as technology develops to objectively measure driver impairment. Of course there are apps being developed as well. DRUID, for instance, measures reaction time and distraction to score your impairment after several screen challenges. Devices to field measure THC are being propagated. Expect more in the near future.

The scientific measurement of THC in the body to create a “standard” is also a work in process. Canada, which has nationwide regulated cannabis, has adopted graduated penalty standards ranging from two nanograms to five nanograms in the blood, with

penalties increasing with concentration. Commentators there have suggested this is essentially a ZERO TOLERANCE level that will make any cannabis consumption within a day of driving problematic.

The fact is that there is no universally accepted level of THC in the body that equates to impaired operation. This means the road ahead will be a patchwork quilt of state-by-state regulation and enforcement. We will watch carefully for the application of good science and be on guard for overzealous law enforcement. It would be foolhardy for the government to replace one form of failed prohibition with flawed law enforcement of our driving laws. In the meantime—if consuming cannabis—call an Uber.