

THE USE OF POLYGRAPH TESTS AND RELATED EVIDENTIARY ASPECTS IN LABOUR DISPUTES

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CHAPTER 1

INTRODUCTION

“Then you will know the truth, and the truth will set you free”. John 8:32

A. Background to Polygraph Testing

Since the beginning of time, man had an internal struggle with speaking the truth. A prime example of this is Adam and Eve in the Garden of Eden. God knew that Adam and Eve disobeyed Him and that they ate from the tree of Good and Evil, yet they chose to lie to Him. The snake (the devil) lied to Adam and Eve and their sin caused them to be evicted from the Garden of Eden.

The fact therefore is and remains that human beings lie. Why we do it, I don't know it may be because we fear something, that we don't want to hurt someone, we do it for personal gain or the most likely reason of all, that we do it to gain an advantage over someone or something. The fact that we lie also made us obsessive about being lied to.

We have been obsessing about finding the truth and have been searching for ways to detect deception or lies ever since. In West Africa, people suspected of lying or that they have committed a crime were forced to pass a bird's egg to one another. If a person broke the egg, then he or she was considered to be guilty.

The idea behind this principle is that when a person starts being nervous their hands would sweat¹.

In ancient China a suspect would hold a handful of rice in his or her mouth during the prosecutor's address, if the rice was dry at the end of the address the person was considered guilty. The reasoning behind this was that salivation ceases when emotional anxiety sets in².

The self proclaimed father of the polygraph test William Marston first measured breathing and galvanic skin response of German prisoners of war in an attempt to detect deception or if they were lying, his attempt proved unsuccessful. Later on William Marston developed the systolic blood pressure test. According to Marston's son the idea for this test originated from his mother saying that "when she got mad or excited, her blood pressure seemed to climb"³. Marston never acknowledged her as a collaborator in his work, but this was in fact the first polygraph test or testing method used for truthfulness. The basis was that if a person was being deceitful that their blood pressure would rise because of the fear of being caught.

B. The Polygraph Test- Introductory Remarks

The polygraph as a term literally means "many writings"⁴. The polygraph is a machine that simultaneously measures and records selected physiological activities or electro physiological activity⁵. The test is often referred to as a "lie detector test" although there is no scientific evidence that proves that the machine or test can detect truthfulness or deception.

¹ <http://www.wikipedia.org/wiki/polygraph>; Accessed on the 12th of January 2009.

² <http://www.wikipedia.org/wiki/polygraph>; Accessed on the 12th of January 2009.

³ <http://www.wikipedia.org/wiki/polygraph>; Accessed on the 12th of January 2009.

⁴ Kerry Knowles: Article Polygraph testing, Is it as reliable as everyone thinks 21 March 2002.

⁵ Kerry Knowles: Article Polygraph testing, Is it as reliable as everyone thinks 21 March 2002.

The polygraph instrument is used and will collect physiological data by measuring three systems in the body or physiological indicators of arousal. The first system or indicator is the rate and depth of respiration as measured by pneumographs that are strapped around the chest and the abdomen. Secondly cardiovascular activity is measured by a blood pressure cuff and the third being the test for perspiration by way of electrodes that are attached to the fingertips⁶. According to Colin Tredoux and Susan Pooley in their article⁷: “The underlying theory of the polygraph is in the physiological detection of deception that when a person lies his or her physiological activity increases”. They agree with many of the writers on polygraph testing that in order to detect deception, one must compare the rate of physiological activity at a point in time to the activity at another point in time. The theory as mentioned above together with the type of questions asked to the employee will be investigated in more detail in the following chapters⁸ as the polygraph machine and the polygraph test have been the subject matter of much controversy.

There can be no doubt as to why the employment industry jumped at the opportunity of a test proving that their employees are lying or that it can be used as a means to prove guilt on the side of the employee. The employer it would seem is content with the moral, social and legal implications that are synonymous with the outcome of a polygraph test.

Mr Trevor Manuel, the Minister of Finance, in his budget speech on the 11th of February 2009⁹ referred to the fact that fraud is rife in the country and that we as a country should guard against it.

This dissertation will explore the South African labour arena and the challenges it faces. I will set out a technical background in the following chapters on the scope

⁶ The measurement will be explained in depth in Chapter 2.

⁷ “Polygraph Based Testing of Deception and Truthfulness: An evaluation and commentary” (2001) 22 ILJ 819

⁸ Chapter 2 explains the detail of polygraph testing and the procedures that apply to the test.

⁹ <http://www.treasury.gov.za>

and application of a polygraph test. Moreover what is measured and how the machine works.

In this dissertation I will illustrate how a polygraph test assists the employer to prove the misconduct and/or the failure of a polygraph test to prove on a balance of probabilities that a person is guilty.

The issue will be raised and investigated whether a polygraph places the onus of disproving guilt on the employee and whether it proves guilt on the side of the employee.

At the outset of this dissertation the purpose was to prove how the polygraph test can assist employers in providing evidence against employees who steal or commit fraud. It is believed that if we can prevent theft and fraud or even limit it that employers would be profitable for longer and therefore ensure that employees have job security and that we can combat the high unemployment rate in South Africa.

It is acknowledged and accepted that employers are desperate to control workplace discipline and to keep losses due to theft and fraud to a minimum. It is therefore the opinion of some that should polygraph tests be valid and reliable, that it should be admitted as evidence.

However, the more the issue of polygraph testing in the employment environment was researched, the more it became apparent to me that we should prevent employers from using the result of polygraph tests as evidence in labour tribunals.

Polygraph evidence is not convincing scientific evidence and poses both practical and constitutional problems which will be assessed, discussed and reviewed during the course of this dissertation.

CHAPTER 2

THE POLYGRAPH TEST

“Pilate said to him, "What is truth?" Joh18:38

A. Introduction

The polygraph test or lie detector test has been the subject matter of many a discussion. This machine can allegedly detect deception or prove innocence and currently we use this device that measures physiological activity, known as the polygraph test.

The polygraph test has become part of our daily lives and it is also forms part of a game show in America called the “Moment of truth”¹⁰. A contestant will answer questions about their personal lives whilst they were being polygraphed to ascertain the truthfulness of their answers. They are then placed in front of a live audience and the questions are put to them again, when the contestant gives the answer they use the polygraph test answers to determine the truthfulness of the answer compared to the answer that was given during the polygraph test. If the polygraph test shows that the person lied the game comes to an end. The winner or contestants can win \$ 250 000 if the polygraph test indicates that he or she answered all the questions truthfully.

¹⁰ Moment of truth owned and produced by the Fox Broadcasting Company.

The latest use of the polygraph test is closer to home and whilst soccer is making all the headlines with the Confederations Cup being played and the soccer World Cup around the corner soccer features in most headlines and is more prominent than ever. The South African Football Associations (SAFA) Chairman of Referees Appointment Committee Ari Soldatos recently¹¹ confirmed that all top level referees in the country are to be polygraphed on “corruption and match fixing charges”, and will be given a chance to come clean.

The reason for Ari Soldatos requesting that all the referees undergo polygraph testing is because one referee “failed” a polygraph test. After the results of the polygraph test were given to him he was told to come clean which he then subsequently did and acknowledged his involvement in match fixing. SAFA will now on the basis of this one acknowledgement require that all their referees undergo a polygraph test.

In chapter 1¹² I briefly referred to the basis of the polygraph test. In this chapter I will review the polygraph machine, the polygraphist or examiner and the different questions or techniques used to conduct the polygraph test.

In this chapter we will look at Polygraph measuring devices, including pneumographs, a sphygmomanometer, and electrodes, which are placed on the subject person, either during the pretest interview or at its conclusion. This is used to measure respiratory cycles, blood pressure and heart rate. The dissertation will also cover the importance of the pretest interview and why it is considered to be an indispensable component of the polygraph test.

With a proper understanding of how the polygraph machine works and when and why the tests are conducted I will assess the different techniques of polygraph examinations. This will include but is not limited to the Relevant/Irrelevant

¹¹ Viewed on the website www.sport24.co.za/content/Soccer/liedetectorforrefs. Website visited on the 4th of March 2009, the same day the article was placed.

¹² Chapter 1.B The Polygraph Test, p4.

Technique (RIT), Control Question Technique (CQT), “stim” or stimulation test and the Concealed Information Test (CIT) with a summary of the tests.

I will then review the phases of the polygraph test as well as the application thereof. The questions and the role of the examiner will be researched and described in detail.

B. The Polygraph Test as Applied in South Africa

At the outset of a contract of service or employment, between an employer and employee there exists an ex lege trust relationship or fiduciary duty between the parties¹³. The employment contract's nature is one of the master-servant principal and in accordance with this an employee is expected to be obedient and respectful towards his or her employer¹⁴. This all implies that an employee will not lie, steal, defraud or further his own interest at a cost to the company or his employer.

In *Central News Agency (Pty)Ltd v Commercial Catering & Allied Workers Union and Another*¹⁵ the Labour Appeal Court stated the following:

“In my view it is axiomatic to the relationship between an employer and employee that the employer should be entitled to rely upon the employee not to steal from the employer. This trust which the employer places in his employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between the employer and employee”.

¹³ *Premier Medical & Industrial Equipment v Winkler* 1971 (3) SA (T) 867: “There can be no doubt during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his masters interest”.

¹⁴ Grogan, *Workplace Law*, (2007), 50. The Duties of Employers and Employees.

¹⁵ 1991 (12) ILJ 340 (LAC)

The fullest exposition in our law remains that of the Innes CJ in *Robinson v Randfontein Estates Gold Mining Co*: “Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty”¹⁶.

C. The Polygraph Machine

People often refer to the polygraph test or technique as a lie detector test, the polygraph test is not a lie detector and can not detect lies.

Polygraph as term refers to two things namely: “poly” meaning things and “graph” meaning to write. Polygraph in the sense it is normally used refers to mainly two things namely the technique applied and secondly the instrument used for such purposes¹⁷.

The “graph” in the word refers to the graphical display of tracing representing functions of the body when someone is answering questions. The recording that is made records and interprets psycho physiological changes in the body when someone answers the questions that are referred to above.

These changes are the result of messages received through the autonomic nervous system. “Autonomic” in its normal sense means automatic or involuntary, this means those functions which the body can not control voluntarily. There are two branches of the autonomic nervous system¹⁸, the first one has to do with growth and development and the second one is an emergency system.

¹⁶ 1921 AD 168 at 177-180

¹⁷ www.polygraph-sa.co.za Accessed on the 13th of February 2009.

¹⁸ This is according the Polygraph Institute of South Africa.

These two systems work against each other according to the Polygraph Institute of South Africa¹⁹ and the example that they use to explain it is as follows:

“The emergency system becomes dominant only when there is some threat to an individual and he or she becomes apprehensive. For example, if you are walking down the street and a man suddenly approaches you and pulls out a knife, you will be alarmed. That message will register in the brain, and the brain in turn will send a message back to the autonomic nervous system to put the emergency system in control. When that happens, a series of physiological changes takes place that helps you cope with that situation. Your heart, for instance, contracts more quickly and strongly, which sends more blood throughout the body and provides it with nourishment in order to function more effectively”.

The Polygraph Institute of South Africa, records the responses on paper for permanent record keeping. As referred to in chapter 1²⁰ the polygraph machine firstly measures the rate and depth of respiration by way of pneumographs that are strapped around the chest and the abdomen, secondly the cardiovascular activity is measured by a blood pressure cuff and the last being the test for perspiration by way of electrodes that are attached to the fingertips.

As referred to above, the first test is to measure the rate and depth of respiration. This is done by measuring the responses that are occurring from chest inhalations and exhalations, this is measured by two tubes around the upper and lower chest of a person. In most scenarios the responses are recorded from outside the body. This is done not to cause any harm to the person being tested.

The second test involves the testing of the person's cardiovascular responses by using a standard blood pressure cuff. The test records pulse rates, strengths of heartbeats and the increase and decrease of blood pressure as well as the functioning of heart valves. The galvanic or perspiration test is conducted by electrodes that are attached to the fingertips of the person. This test will measure the electrical conductivity of the skin.

¹⁹ www.pasa.co.za

²⁰ Chapter 1.B, p4.

I do not question the reliability of the polygraph physiological measuring instrument, but I agree with Colin Tredoux and Soosan Pooley²¹ and I wonder about the theory and method underlying the interpretation of these recordings and the conclusions that are drawn from these recordings.

D. The Polygraphist

The person conducting the polygraph was a subject that particularly interested me, as very few of the material that I read referred to the polygraphist and his qualifications. When I started to think about the person (polygraphist) conducting the test and the fact that he interprets the various readings of the polygraph test and ultimately determines the outcome and fate of the subject being tested, I thought that this person must be highly trained.

The Department of Defense's Counterintelligence field activity section of the United States of America gave the following admission requirements to become an examiner²² :

- (i) the person must be a US citizen;
- (ii) at least 25 years of age;
- (iii) earned a Baccalaureus degree from an accredited four year University or College;
- (iv) at least 2 years experience as an investigator with a United States Federal Agency;
- (v) must have high moral character and sound emotional temperament based on background investigation.

²¹ "Polygraph Based Testing of Deception and Truthfulness: An Evaluation and Commentary" (2001) 22 ILJ 819

²² *Federal Physiological Detection of Deception Handbook*, Examiners handbook, Counterintelligence Field activity Technical Handbook, 2 October, 2006.

However the Polygraph Association of South Africa have less strict admission requirements²³ and state that as “a general guideline, the association strongly recommends that the following criteria should apply as a minimum”:

- (i) be over the age of twenty five;
- (ii) qualifications: A B- degree;
- (iii) strong moral character;
- (iv) a stable personal life; and
- (v) investigative experience.

The conclusion that I come to when examining the selection criteria to become a registered polygraphist, is that it is not too difficult. I also find it quite unsettling to think that a person is regarded as a professional and will give an opinion that will influence the subject's life, without having a degree in Psychology or at least a degree in Law.

E. The Questions Test and the Techniques Used in the Polygraph Test

1. Introduction

Polygraph examinations usually take between 1 and 3 hours to complete, although shorter or longer examinations can take place. Examinations are usually divided into three stages namely; pretest interview, question procedure and post test interview. I will now explain the aspects of the polygraph examination.

2. The Pre- Test Interview

When you think of the polygraph test we tend to think that it involves a machine and a list of questions that needs to be answered. Very few people realise that

²³ www.pasa.co.za . Website accessed on the 16th of July 2009.

one of the most important if not the most important facets of a polygraph test is the pre-test interview and is considered by polygraphist as an indispensable component of the polygraph test.

The importance of the pre-test is twofold, namely to inform the subject on the formalities of the test as well as their legal rights and of utmost importance to enable the polygraphist to generate the physiological climate that is necessary for a polygraph test. It also allows for the examiner to assess the effect of special conditions or circumstances which might affect the physiological responsiveness.

The polygraphist must query the subject on their current medical problems and the usage of drugs that could influence their autonomic response. It is recommended that this part must obtain hard evidence such as a urine sample or a blood test.

3. The Stimulation Test

This stimulation test or “stim” test is most commonly used as a first test to prove to the subject being tested that the polygraph test is indeed accurate and to provoke anxiety in deceptive subjects²⁴. It has been widely accepted that the “stim” test increases the validity of the polygraph test.

The most common way in which the “stim” test is applied is the number or card test. The test is simple and will require the subject to select a card from a pack and to remember the number or symbol on it, or to write down a word or to pick a number between 1 and 10 and to write it down. What the examiner will then do is to ask the subject a range of random questions relating to the card, word or number and repeatedly asking him if that is the concealed card, number or word.

²⁴ Source assessed on the 14th of January 2009, the title is Varieties of Polygraph Testing and its Uses. As viewed at the following address:
<http://www.fas.org/sgp/othergov/polygraph/ota/varieties.html>

It is believed that the card, number or word that is actually concealed will invoke greater physiological activity or response in the subject's test pattern.

It is important to note that the "stim" test is and should only be applied to show the subject that the polygraph machine is efficient and reliable in detecting deception.

4. The Relevant- Irrelevant Question Test (RIT)

Many of the critics of the polygraph test have pointed out that there is no reason why physiological activity increases when a subject is lying or is in fact being deceitful. This is assumed rather than demonstrated by the polygraph test.

As referred to earlier in the chapter²⁵, the polygraph test is based on the fact that physiological activity in the body increases when a subject is being questioned about certain events, these questions in conjunction with his supposed knowledge of the event should activate his physiological arousal and this in turn will then be recorded by the polygraph machine.

This just indicates how important the comparison test or questions are for this test and must be formulated very carefully. It is widely acknowledged that a subject may show more arousal to a critical question than to an irrelevant question.

The relevant-irrelevant test was the first type of polygraph test as used by Mr William Marston²⁶. This technique uses questions that are relevant and irrelevant to the incident and is used to extract certain physiological responses.

²⁵ Chapter 2.B, The Polygraph Machine, p12.

²⁶ As referred to in Chapter 1.

Two main problems exist according to Ronel Prinsloo²⁷ with this technique, the first issue is that if the questions are transparent and honest the subject may show a greater sense of arousal and physiological response, simply because the question is relevant to the issue and it arouses emotion. The second issue according to Ronel Prinsloo is that the questions are not formulated with the subject and that in itself may cause surprise to the subject and it may lead to greater physiological activity and response.

I have to agree with the views of Prinsloo and the problems that she identified with the relevant-irrelevant test. Of interest to me relating to the RIT is that the following procedures were identified by the Federal Bureau of Investigations²⁸ when formulating questions relating to an incident and are applicable to the relevant question technique:

- (i) questions must be clear and concise;
- (ii) avoid legal terms where possible;
- (iii) questions must be constructed so that they can be answered yes or no;
- (iv) questions should not be worded in a form of an accusation or contain an inference that presupposes guilt; and
- (v) only address one issue in one question.

In summary of this technique, I agree with Pooley and Tredoux²⁹ if you ask me the question “Did you kill John?” or “Did you shoot John?” that my heart rate and perspiration will increase more and probably jump through the roof as opposed to you asking me “Do you live in Pretoria?” or “Is your hair black?”. This is not science, it is just human nature, the bigger the risk the more nervous we get and therefore the increased physiological activity.

²⁷ “Exploring the use of the Polygraph Test in the Workplace and as Evidence in Labour Disputes” unpublished LLM Dissertation, (2007), University of Cape Town.

²⁸ *Federal Physiological Detection of Deception Handbook Examiners handbook*, Counterintelligence Field activity Technical Handbook, 2 October, 2006.

²⁹ “Polygraph Based Testing of Deception and Truthfulness: An Evaluation and Commentary” (2001) 22 ILJ 819

5. The Control Question Test (CQT)

The polygraph test that is widely recognized as the most frequently used test in criminal matters, the workplace and in security organizations is the control question test. The test compares the physiological arousal of subjects in response to critical questions to their level of arousal when telling an unrelated lie. The best example that I have come across to explain this test is the following: The examiner will for example ask: "Before today, did you ever take something that didn't belong to you?". As we are all aware most of us in our lives have taken something that does not belong to us, it is also commons cause that we will reluctantly admit to it. The activity recorded when the subject answers this question is recorded and will be used as the benchmark against which the employees physiological reaction to critical questions relating to the incident will be measured³⁰. It is important to note that the examiner does not tell the employee that there is a distinction between the two types of questions (relevant or irrelevant).

Although this method is the most popular it is also the most widely criticized in scientific literature. The main criticism to the test is that it uses improper control questions, which enhance the risk of false- positives³¹.

The methodology behind the CQT is that control and critical questions are asked in pairs when they are put to the subject, the physiological response or activity is then compared against the other paired questions. There is another form of the CQT called the Zone of Comparison test, in this test a quasi numerical method of scoring is used. Score from 3 to -3 is assigned to the pairs of critical- control pair questions. The scoring will be dependant on the extent to which the physiological

³⁰ "Polygraph Based Testing of Deception and Truthfulness: An Evaluation and Commentary" (2001) 22 ILJ 819

³¹ Behavioral and Physiological Measures in the Detection of Concealed Information: Published in the Journal of Applied Psychology 2005, Vol 90, No. 1, p147-158 by Gronau, Gershon Shakhar and Cohen at The Hebrew University of Jerusalem.

activity or reactions deviates from one pair of questions to another pair of questions. Scores that are greater than 0 will be judged to indicate deception and scores smaller than 0 will indicate truthfulness.

The Federal Bureau of Investigations (FBI) in America uses this technique in their interrogation matters. The FBI method of testing differs from the conventional way in that, if the subject does not admit to wrongdoing, the examiner may keep on questioning him until he admits to a crime even as small as stealing an ice cream when the subject was younger.

F. Summary

The polygraph test, polygraph machine and the scientific basis of it, is extremely weak. I agree with the views of Tredoux and Pooley in their article³²: "It is based on an implausible theory and methodology, and the accuracy of the machine is in considerable doubt. The test may literally be no more accurate than tossing a coin".

Furthermore, it is imperative for any person conducting a polygraph test to understand that a polygraph test consists of three elements namely, the polygraph machine, the polygraphist, and the form of polygraph test. The person must understand that all three elements are of vital importance to the result of the test, both individually and collectively.

³² "Polygraphed Based Testing of Deception and Truthfulness: And Evaluation and Commentary" (2001) 22 ILJ 819

CHAPTER 3

ADMISSABILITY OF POLYGRAPH EVIDENCE IN SOUTH AFRICAN LABOUR LAW

“I have not written to you because you do not know the truth, but because you do know it, and because no lie is of the truth”. 1 Joh 2:21

A. Introduction

In chapter 2 I reviewed various aspects of the polygraph test, including the role of the examiner and the various types of testing involved. Polygraph examinations are often used in the workplace to investigate irregularities, the result of the polygraph test usually then follows through to an internal disciplinary hearing being held and most of these hearings result in a dismissal of the employee and are then referred either to the CCMA³³ or the Labour Court. In many instances employers argue that because of the employee's refusal to be subjected to a polygraph test, that his refusal must be viewed as an indication of deception and a breach of the employee's duty of good faith towards his employer.

South Africa does not have any specific legislation or codes of good practice that deal with the issue of polygraph testing. The only act that comes close to dealing with the issue of polygraph testing is the *Employment Equity Act*³⁴, in section 8 which states:

“8 Psychological testing and other similar assessments

Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

- (a) has been scientifically shown to be valid and reliable;

³³ Counsel for Conciliation Mediation and Arbitrations.

³⁴ Act 55 of 1998

- (b) can be applied fairly to all employees; and
- (c) is not biased against any employee or group”.

It is very unlikely according to Sunita Parbhoo that polygraph tests will be seen as psychological or psychometric testing and therefore section 8 can not be applied to polygraph testing³⁵.

Colin Tredoux states the following with reference to polygraph testing:

“However, the polygraph cannot and does not measure deception or lying. It merely records physiological activity, and any attempt to use it to detect deception involves drawing an inference from the physiological activities that it records”³⁶.

The only protection that the *Labour Relations Act*³⁷ provides is the right of every employee to fair labour practices and not to be unfairly discriminated against or dismissed.

In this chapter I will review various cases to establish how our courts and the CCMA apply the results that are obtained from a polygraph test. Furthermore, I will endeavor to indicate how the polygraph test is interpreted and applied in South African Courts and CCMA proceedings, as well as the views of the Courts and Commissioners thereon. Cases such as *Mahlangu v CIM Deltak*³⁸ and *Truworths v Commission for Conciliation, Mediation and Arbitration*³⁹ as well as various other cases will also be discussed and investigated in depth. It is prudent to note at this stage that the result of a polygraph on its own is not sufficient evidence and must be corroborated with evidence by the person who conducted the test. Grogan states the following:

³⁵ Sunita Parbhoo, cited in Ronel Prinsloo "The Validity of Polygraph Testing- A South African and American Perspective", CCMA, Sept 2003 at 24.

³⁶ *Psychology and Law*, (2005), First edition, Chapter 6 159. Colin Tredoux an associate Professor in psychology at the University of Cape Town

³⁷ Act 66 of 1995

³⁸ 1986 (7) ILJ 346 (IC)

³⁹ 2009 (30) ILJ 677 (LC)

“Proof that the employee actually committed the offence charged presupposes a proper investigation of the allegation against the employee, and the presentation of evidence that links the employee with the offence”⁴⁰.

It is important to note that an employer needs not be satisfied beyond reasonable doubt that the employee committed the offence but is subject to the civil law test of proof on a balance of probability. I have already indicated that I will not consent to being subjected to a polygraph test and therefore trust that our courts will indeed apply their minds to the outcome of polygraph tests and I will now review the courts viewpoint on the subject of polygraph testing.

The issue will be raised and investigated whether a polygraph places the onus of disproving guilt on the employee and whether it proves guilt on the side of the employee.

Furthermore, I will measure the polygraph against the Constitution of South Africa⁴¹, and ascertain whether the polygraph infringes on the employee's constitutional rights. I will refer to section 10 The Right to Human Dignity, section 14, The Right to Privacy, section 23 The right to Fair Labour Practices and section 35 The Right to Remain Silent

B. Application of Polygraph Testing in South African Law

This section of my dissertation will provide an overview of the approach that our Courts and the Council for Conciliation, Mediation and Arbitration (CCMA) take when they are confronted with a polygraph test as evidence.

⁴⁰ Grogan, *Workplace Law*, (2007), Eighth Edition, p92

⁴¹ Act 108 of 1996

The case that most of the writers that I have reviewed refer to is the case of *Mahlangu v CIM Deltak*⁴² which was heard before the Industrial Court and the court found that the use of voice analyst tests administered by an unregistered psychiatrist was unscientific, invalid, unethical and unlawful. This case was seen as the ground braking case for polygraph tests. Grogan⁴³ in *Sosibo & Others v Ceramic Tile Market*⁴⁴ sets out the approach to polygraph testing as follow⁴⁵:

“Following the *Mahlangu* case, attitudes to Polygraph test evidence have followed the several and divergent lines:

- 1) Some cases have held the view that ‘our courts do not accept the polygraph tests as reliable and admissible. Nor do they draw an adverse inference if an accused employee refuses to undergo such a test’.
- 2) Polygraph test evidence is not admissible as evidence if there was no evidence on the qualifications of the polygraphist, and if he or she was not called to give evidence.
- 3) Although admissible as expert evidence, polygraph results standing alone cannot prove guilt’.
- 4) Where there is other supporting evidence, polygraph evidence may be taken into account”.

It is also important to note that in the case of *Sosibo* the court noted that the onus placed on the employer in terms of section 192 of the LRA is not discharged by the sole reliance on the test results of a polygraph test.

The most recent case reported on polygraph testing is the Case of *Truworths v Commission for Conciliation, Mediation and Arbitration*⁴⁶, in which an application to review and set aside an award made by the Commissioner on 8 March 2007 was referred to the Labour Court. In terms of this award the Commissioner found the dismissal of the Respondent substantively unfair.

⁴² 1986 (7) ILJ 346 (IC)

⁴³ See also *Workplace Law*, (2007) Eighth Edition.

⁴⁴ 2001 (22) ILJ 811 (CCMA)

⁴⁵ Cited in the case of *Truworths v Commission For Conciliation, Mediation and Arbitration & Others* 2009 (30) ILJ 677 (LC)

⁴⁶ 2009 (30) ILJ 677 (LC)

In this case Ms. Masilela (The Respondent) was employed as a supervisor of four departments. She was responsible to oversee these four departments and to perform duties incidental thereto. On 31 March 2006 eight watches were stolen / removed from the fine jewel department. Ms. Bulelwa Wali was usually responsible for the fine jewelry department. During teatimes she will, however, hand over the department to another employee who will then be responsible for the department until she returns. It was common cause that Ms. Wali handed over the responsibility of the department to Ms. Masilela on this day. It was further common cause that Ms. Masilela was in charge of the jewel department between 15H30 and 16H00 on 31 March 2008. The Applicant alleged that it was during that period that the watches went missing. This was strongly disputed by the Respondent. The dispute was referred to the CCMA and as stated above the CCMA found that the dismissal was substantively unfair.

In the Commissioners finding he noted that he drew a negative inference from the fact that a witness was nervous during the arbitration hearing and due to the fact that she “emphatically” refused to undergo a polygraph test. The Commissioner eventually came to the conclusion that the witness knew something about the watches that went missing.

With reference to the respondents initial refusal to take a polygraph test Basson J stated in her judgment as follow:

“If the evidence in respect of the polygraph is perused it appears that the respondent had obtained very low scores in her polygraph test and was in fact found to be dishonest. Although it is trite law that the probative value of a polygraph test on its own is not sufficient to find a person guilty, the result of a polygraph test is, however, one of the factors that may be considered in evaluating the fairness of a dismissal”.

Basson J continues and states the following:

“ However, a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards. At the very least, the result of a properly conducted polygraph is evidence in corroboration of the employer's evidence and can be taken into account as a factor in assessing the credibility of a witness and in assessing the probabilities. The mere fact that an employee, however, refuses to undergo a polygraph is not in itself sufficient to substantiate an employee's guilt.”

The opinions of people might differ from those of Judge Basson and I would like to make a couple of points that might indicate a different thought process to polygraph results. Firstly a polygraph test and the result thereof does not indicate that a dismissal is fair or not. For a dismissal to be fair you need both procedural and substantive fairness, in other words a fair procedure must be followed and that there should be enough evidence that a crime or offense was committed. I agree with the view mentioned above in the case of *Sosibo* that a polygraph test does not lift the responsibility that section 192 places on the employer. Tredoux and Pooley in their article: “*Polygraph based testing of deception and truthfulness: and evaluation and commentary*”⁴⁷ states this issue as the main concern with a polygraph test. They also disagree with the practice of employees being subjected to “blanket tests” this would occur when a crime is committed and all the employees are subjected to a polygraph test, even the innocent ones and without an investigation being done.

Secondly, the view might be taken that a Chairman at hearing or a Commissioner who does not understand the use and application of a polygraph test will simply ignore the result of the polygraph test and the evidence that was given regarding the accuracy of the polygraph test. In this case the Judge referred and discussed the admissibility of the polygraph test in great depth and special notice should be

⁴⁷ 2001 (22) ILJ 819

taken of her comment that great caution should be taken when commissioners consider the outcome of a polygraph test⁴⁸.

Thirdly, what would happen if an employee refuses to be subjected to a polygraph test? Christianson's⁴⁹ opinion is that: "an employee who alleges that a dismissal is automatically unfair as a result of a refusal to take a polygraph examination or a refusal to sign a release form, for example, may seek to rely on the 'dismissal' in section 187(1)(c) of the LRA".

Section 187 (1)(c) of the Labour Relations Act⁵⁰ states:

- (1) "A dismissal is automatically unfair if the employee, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is-
- (c) To compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee".

Employers however have engineered new ways to compel employees to take the polygraph test. It is disturbing to me that employers are including clauses in employment contracts that oblige the employee to undergo a polygraph test when he or she is requested to do so by the employer. It is a fact that where employees refused or objected to be subjected to a polygraph test that they have been dismissed as a result⁵¹. In the case of *Fidelity Cash Management Services v Commission for Conciliation, Arbitration and Mediation & Others*⁵² the employee faced 4 charges, one such charge was his failure and refusal to undertake a polygraph test. The court had to examine the employee's contract of employment and found that the contract clearly provided that the employee's refusal would only constitute an act of misconduct if his refusal was found to be unreasonable. Clause 18.3 read as follows:

⁴⁸ 2009 (30) ILJ 689 [38]

⁴⁹ "Polygraph Testing in South African Workplaces: Shield and Sword in the Dishonesty Detection versus compromising Privacy Debate". 2000 21 ILJ 16

⁵⁰ Act 66 of 1995

⁵¹ This was the case in *Cunningham v Benquela Operations (Pty) Ltd* C 542/98 before the Labour Court. The matter was eventually settled by the respondent.

⁵² 2008 (29) ILJ 964 (LAC)

“As part of the company’s disciplinary or investigation procedure, the employee may be required to undergo a polygraph test. He shall not unreasonably refuse to undergo such test”.

The court further noted that the provision of clause 18.3 can be mistaken to mean that the third respondent was obliged to undergo a polygraph test whenever the appellant required him to undergo one and that, if he refused, he would be in breach of clause 18.3 and, therefore, guilty of misconduct unless he advanced a good reason for his refusal.

The onus to show that the refusal was unreasonable rested on the company. The company in this matter refused to discharge the onus. It is important to note that in this matter the reason why the employee was requested to undertake a polygraph was as follow: to show the company and it’s clients the lengths that the company would go to, to prove the innocence of their employee’s. The court found that this is not a legitimate reason to ask an employee to be subjected to a polygraph test.

“Item 7 of Schedule 8: Code of Practice: Dismissal

Guidelines in cases of dismissal for misconduct:

Any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard”.

On a closer inspection of this part of the *Labour Relations Act*, I struggle to see, that when the polygraph test forms part of the evidence in a hearing how it will

comply with Item 7. In my opinion it does not prove whether an employee contravened a rule or not or if a standard was contravened nor can it be applied as test if a rule was reasonable or not. Furthermore, I remain unconvinced that polygraph evidence will assist a chairman in a disciplinary hearing in determining facts and whether the evidence has an unfairly prejudicial effect, I believe that this is indeed the case and that it substantially outweighs its probative value.

During my review of several cases related to polygraph testing I found very few if any where the employee requested legal representation at the polygraph test. I agree with Robert V. Massey Jr.⁵³ that should an employee be requested to undertake a polygraph test that he or she requests advice from their union or from a legal advisor. I will now proceed to outline a subject's rights and obligations with reference to the Constitution⁵⁴.

C. Polygraph Testing and The Constitution

1. Introduction

We are all aware of the function, role and impact of the Constitution, not only in our law but also the huge role it plays in our society. Chapter 2 of the Constitution is entitled the 'Bill of Rights' and entitles every person including foreigners within the Republic certain rights which they may exercise freely. Chapter 2 also prohibits certain actions from taking place, for example the right not to be discriminated against on the basis of race, sex, gender, pregnancy, marital status, ethnic or social origin, colour and sexual orientation⁵⁵.

Our field of study and interest is labour law and the legislature decided to specifically include a section on labour law in the Constitution. Section 23(1) of

⁵³ "Polygraph Testing in Arbitration: What are the Rights and Responsibilities of the Advocates"? Article published on the Website of West Virginia University at www.edu/depts/list/polygraph-testing. Site accessed on the 9th of August 2009.

⁵⁴ The Constitution of the Republic of South Africa, Act 108 of 1996.

⁵⁵ Section 9(3) of the Constitution

the Constitution states that: “Everyone has the right to fair labour practices”. This particular section and its application in respect of polygraph testing will be discussed in point 4.

As a basis for understanding the effect of the Constitution in labour law we have to start with section 8(1) which states: “The Bill of Rights applies to all law, and binds the legislature, the executive and the judiciary and all organs of state”. Furthermore, section 8(3)(a)⁵⁶ implies that when the courts apply the provisions of The Bill of Rights they may develop the Common law to the extent that legislation does not give effect to that right.

It is also quite clear and I agree with Van Niekerk⁵⁷ that constitutional rights have the potential to affect labour law in three ways⁵⁸:

- (i) “to test the validity of legislation that seeks to give effect to the fundamental rights;
- (ii) to interpret legislation enacted to give effect to the fundamental rights; and
- (iii) to develop the common law”.

In chapter 2 I pointed out that there is no legislation or code of good practice applicable to polygraph testing. The closest form of law on the subject of polygraph testing in South Africa that I could find was an info sheet that was issued by the CCMA⁵⁹ which contained the following guidelines on what the employee’s rights are and what the subject should be informed of prior to testing:

- (i) the examinations are voluntary

⁵⁶ Section 8(3)(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)

⁵⁷ Van Niekerk A.O, *Law @ Work*, (2008) First edition, 34

⁵⁸ As referred to in footnote 8 in *Law @ Work*, First Edition, p34 “ For this categorization we are indebted to Halton Cheadle, speaking at the Annual Butterworths Lexis Nexis Current Labour Law seminar 2007”.

⁵⁹ CCMA: POLYGRAPH TESTING(JAN 2002) info sheet

- (ii) he/she has the right to an interpreter
- (iii) no abuse whatsoever may be allowed
- (iv) no discrimination will be allowed
- (v) no threats will be allowed
- (vi) only questions that were asked prior to the examination will be used.

I am not aware of a matter concerning polygraph testing and the validity thereof being referred to the Constitutional Court for review on the constitutionality of polygraph testing and the application thereof. It is against these guidelines that I will review the Constitutionality of polygraph testing with specific reference to the Right to Privacy, the Right to Remain Silent and the Right to Fair Labour Practices.

2. The Right to Privacy in terms of Section 14 of The Constitution

The right to privacy and the debate as to what privacy is, is often an emotional debate. Privacy can have an impact on our bodily privacy, personal information, communication and even our intellectual capacity. This right is not absolute as we know and a balance of interests needs to be achieved in order to maintain law and order, as for example in the investigation and prosecution of criminal cases.

Neethling defines privacy as follow⁶⁰:

“Privacy is an individual condition of life characteristics by seclusion from the public and publicity”.

Section 14 of the Constitution states that:

“Section 14. Everyone has the right to privacy, which includes the right not to have

⁶⁰ *Law of Delict* (2002), fourth Edition, Neethling J, Potgieter JM, Visser PJ, p 382

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed”.

The definition of privacy has always created problems for legal practitioners. In the matter of *National Media Ltd and others v Jooste*⁶¹ the Supreme Court of Appeal accepted the following definition of privacy:

“Privacy is an individual condition of life characterized by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private (translation from Afrikaans)”.⁶²

By informing or giving the employee the assurance that the undertaking of the polygraph test is voluntary does not safeguard the employer against the infringement of the employee’s Right to Privacy. The balance of power remains in favour of the employer, should the employee decline to take the polygraph test it is almost certain that the employer will view the refusal as an admission of guilt.

3. The Right to Remain Silent in terms of Section 3 of The Constitution

When we deal with the right to remain silent, it is prudent to point out that procedural fairness was developed by the labour courts from the rules of natural justice of the common law. Employers are also required to act in a semi judicial manner before handing down a particular sanction, it is however not expected of an employer to apply the same standards that apply in a court of law⁶³.

⁶¹ 1996 (3) SA 262 (A)

⁶² As reviewed in the submission made by the SAHRC: CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL [B2 - 2009], Submission to the Parlemantary Portfolio Committee on Safety and Security, 03 February 2009

⁶³ Grogan, *Dismissal*, (2002), First Edition at 133

I am not totally convinced by this statement and would like to take a different view. If we take into account that by charging an employee with an offence in terms of his contract of employment, that we immediately have to consider victimization, bias, reputational risk and possible termination of employment. My question is then, why we do not institute standards that would apply to a court of law to ensure that the correct result is achieved? It is with this problem in mind that I look at the issue of an employees right to remain silent at a disciplinary hearing and/or when requested to undertake a polygraph test.

Section 35 of the Constitution states the following:

“Section 35. Arrested, detained and accused persons

- (1) Everyone who is arrested for allegedly committing an offence has the right
 - (a) to remain silent;
 - (b) to be informed promptly
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person”

What does this mean for the accused and how does it benefit him? Well we know that he who alleges bears the onus of proof and in inquiries or hearings that onus must be proved on a balance of probabilities.

The basis on which a person is requested to undergo a polygraph test would be in most cases on the presumption of wrongdoing by the subject. I agree with Ostrovsky S and Boniwell A⁶⁴ when they say:

“where a presumption of fact has the effect of prematurely placing a burden on an accused to establish his innocence on a balance of probabilities, without the state having proved every element of an offence beyond a reasonable doubt, the presumption will be regarded as creating a reverse onus”.

⁶⁴ <http://www.polity.org.za>. “Shifting the Burden of Proof: The Nature of Director’s Liability”. Site accessed on the 10th of September 2009.

This was confirmed in the case of *Davis v Tip NO and Others*⁶⁵ where *Davis* did not want to proceed with the disciplinary hearing fearing that he might incriminate himself. The chairperson's decision not to allow the postponement went on review.

The review judge stated that *Davis* might be required to give evidence in civil proceedings before the matter is heard before a criminal court. This decision could have various implications, because the accused now has to make a decision between keeping his job and prejudicing his case with regards to the criminal proceedings pending against him.

My point is exactly that, an employee is requested to undertake a polygraph test on a presumption of fact and he is in all likelihood induced into breaking his silence and answering the questions that are put to him as part of the polygraph test. In the employee breaking his or her silence they might face the risk of failing the polygraph test. The risk is that if an employee refuses to undertake a polygraph test by way of exercising his or her right to remain silent that the presumption would be made that the employee is guilty. Such a presumption would definitely infringe on the employee's right to remain silent and the right to a fair hearing.

4. The Right to Fair Labour Practices in terms of Section 23 of The Constitution

The constitution guarantee's the right to fair labour practices, even though neither the Constitution nor the Labour Relation Act defines a fair labour practice.

Section 23 of the Constitution reads as follow:

"Section 23 Labour relations

⁶⁵ 1996 (1) SA 1159 (T)

(1) Everyone has the right to fair labour practices”.

In applying section 23 it is important to note that ‘Everyone’ has the right, this includes workers, employees, trade unions and employers. In *NEHAWU v University of Cape Town*⁶⁶ Ngcobo J held:

“Where the rights in the section are guaranteed to workers or employers or trade unions or employers organizations as the case may be, the Constitution says so explicitly. If the right in s 23(1) were to be guaranteed to workers only, the Constitutions should have said so”⁶⁷.

My viewpoint is that submitting an employee to a polygraph test is not a fair labour practice. I have already indicated that neither the polygraph test nor the polygraph machine can detect deceit or lies. There is also no scientific research that proves a polygraph to be 100% reliable. The only aspect that I can agree with is that the polygraph test measures physiological responses when a person answers questions.

Khan Freund states in his article “*Collective Laissez Faire*” that the purpose of collective bargaining is to restore social justice and:

“The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. However, the power to command and the duty to obey can be regulated. An element of co-ordination can be infused into the employment relationship”⁶⁸.

These statements are also found in the conventions and constitution of the *International Labour Organisation*⁶⁹. It is my opinion that a polygraph test reverses the onus of proof and places the burden on the employee. The employee will have to disprove the polygraph test at great cost by calling experts to testify. Usually employees are not afforded the time for such preparations

⁶⁶ 2003 (24) ILJ 95 (CC)

⁶⁷ Van Niekerk, *Law @ Work*, (2008), 35

⁶⁸ Kahn Freund, *Labour and the Law*, (2008) 3rd edition, P Davies and M Freedland, p18

⁶⁹ International Labour Organisation Constitution

because employers hold the enquiry 48 hours after the notice to attend was served on the employee. This practice is not a fair labour practice.

Furthermore, it is practice in South Africa that a employee signs a form that he or she consents that the polygraph test is conducted voluntary and that they (the subject) has been informed of his or her rights. I question the validity of the consent forms and am of the opinion that it infringes the employee's fundamental human rights. I also argue that it is not a fair labour practice as the balance of power remains with the employer in that if the employee refuses to take the test, the assumption will be made that he is guilty or that he is not being honest.

D. Summary

Polygraph testing in the workplace is not going to go away with the passing of time. It is therefore imperative that ground rules are established for the circumstances under which polygraph tests will be conducted as well as the process that needs to be followed.

Furthermore, employers should draft internal polygraph testing procedures to ensure that polygraph testing complies with the values of the employer if the choose that their employees will be submitted to polygraph testing.

CHAPTER 4

A COMPARATIVE PERSPECTIVE ON POLYGRAPH TESTING

“Whoever says “I know Him” but does not keep His commandments is a liar, and the truth is not in him”. 1 Joh 2:4

A. Introduction

In chapter 2 the view was expressed that South Africa needs to implement a code of good practice to prescribe policy and procedures when conducting a polygraph test. In this chapter we will do a comparison between the view of South African Courts and the fathers of the polygraph, the United States of America. America is constantly in search of ways to interrogate people and to find the truth. In this quest Congress saw a need to govern the use of polygraph testing and its application and implemented the *Employee Polygraph Protection Act*⁷⁰.

I will review and give an overview of how polygraph tests are applied and used in the United States of America with specific reference to *Daubert v Merrel Dow Pharmaceuticals*⁷¹ case which seems to be the ground breaking case on polygraph testing. Another case that I will also review and discuss to point out how the polygraph was used is, *United States v Posado*⁷².

Lastly, I will review an emerging country's view on Polygraph tests namely Australia by reviewing a case that was heard in New South Wales in 1982 of

⁷⁰ Act of 1988 Pub L No 100-347 (28 June 1988)

⁷¹ 113. C. Ct Supreme. 2789 (1993)

⁷² 57F 3d 428 as cited in Collier D “*Truth or Dare?*” *What Lies Beneath the Polygraph Test?*” De Rebus July 2001, Issue 402

*Raymond George Murray*⁷³ will be reviewed. The Australian court expressed an interesting view on the polygraph test and its application, which will be discussed in more detail. It was also highlighted that the Americans are the “fathers” of the polygraph test and it would therefore be fitting to review the use of polygraphs in disciplinary hearings and in criminal matters as it is applied within the American courts later in this chapter.

B. English Law- Recent Developments in Polygraph Testing

English law plays a major role in South African law as most of our legal principles are based on either English or Roman Dutch Law. In the United Kingdom there is no legislation that regulates the use of polygraph machines or polygraph testing. However the polygraph test has assumed greater prominence in the U.K in recent times.

An example of this is that sex offenders are now required to undertake polygraph tests as condition of their license or parole conditions. It is for this reason that the Ministry of Justice developed rules to govern the testing known as “The Polygraph Rules”⁷⁴. These rules relate to the conduct expected during testing and the qualifications of the polygraph examiner or operator. The main purpose of the rules remains to establish if polygraph testing can be useful as a management tool for sexual offenders. This is a pilot project that will run for 3 years from the 8th of April 2009.

Rule 3 of the Polygraph rules relates to the qualifications of polygraph operators and states the following:

“3.-(1) A polygraph operator will be suitably qualified if the polygraph operator has

(b) completed the following courses-

(i) a polygraph training programme accredited by the American Polygraph Association; and

⁷³ 1982 7A Crim R48

⁷⁴ *The Polygraph Rules 2009*, Statutory Instruments, 2009, No. 619.

- (ii) a post conviction sex offender testing programme accredited by the American Polygraph Association; and
- (iii) carried out a minimum of 20 post conviction sex offender testing polygraph examination under the supervision of an American Polygraph Association examiner

Another important rule, is *Rule 5* which relates to the polygraph session requirements namely:

“5-(1) Polygraph session must be conducted by suitably qualified polygraph operators.

- (2) Polygraph sessions must be electronically recorded by using audiovisual recording equipment
- (3) a polygraph session must include a pre-test interview, one or more polygraph examinations and a post test interview
- (4) a polygraph examination must include one or more comparison questions and at least one, but not more than four, relevant questions.

C. The Legal position in the United States of America

1. Introduction

As pointed out above, the Americans are the fathers of the polygraph test and implemented legislation that governs the use of polygraph testing. We will continue to review the application of polygraph testing in America below, to see if it can assist countries like South Africa and England.

In the United States the *Employee Polygraph Protection Act* ⁷⁵(EPPA) was enacted in 1988 and became federal law on the 27th of December 1988. In 2007, polygraph testimony was admitted in 19 states, and was subject to the discretion of the trial judge in Federal court. The EPPA applies to most private employers but does not cover Federal, State and Local Governments.

⁷⁵ Title 29 United States Code Chapter 22.

Furthermore, the act generally prevents employers from using lie detector tests in pre employment screening or during the course of employment. It is against this background that we will review the scope and application of the EPPA and then review the application and admissibility of polygraph tests in the American legal system.

2. The Employee Polygraph Protection Act

At the outset it is important to note that the EPPA distinguishes between “lie detectors” and a “polygraph” and defines these tests as follows:⁷⁶

“(3) Lie detector

The term “lie detector” includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(4) Polygraph

The term “ Polygraph” means an instrument that-

- (A) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and
- (B) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonest of an individual”.

The distinction between a lie detector and a polygraph test or machine is not clear at this stage as all polygraph instruments used for testing credibility records measures from at least three physiological systems that are controlled by the autonomic nervous system.

⁷⁶ Section 2001.(3) and (4)

The above definition is of importance when one looks at the Prohibitions on lie detector⁷⁷ use. The section refers specifically to “lie detectors” and states the following:

“Sec. 2002. Prohibitions on lie detector use:

Except as provided in section 2006 and 2007 of this title, it shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce-

- (1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit a lie detector test”;

To argue if the abovementioned section will apply to polygraph tests as well, may be proved to be a moot point if you look at section 2007. This section must give the subject a great deal of reassurance in that he or she can in their own view decide to terminate the test without fear of further prosecution. It is also prudent to point out that with such a section included into the act, that one has to believe that the onus of proof has not shifted by subjecting a subject to a polygraph test or lie detector test. The section reads as follow:

“Sec. 2007. Restriction on use of exemptions:

(b) Rights of examinee

(1) All phases- Throughout all phases of the test

(A) the examinee shall be permitted to terminate the test at any time”.

Furthermore, the act is also prescriptive on qualifications and requirements to qualify as an examiner. The examiner is required to have a valid license as issued by the regulatory authorities in the state where the test is to be conducted and must have professional liability cover coverage for a minimum of \$ 50 000.⁷⁸ The examiner is also required to keep reports, opinions, charts, written questions and lists relating to the test for a minimum period of 3 years after the test.⁷⁹

⁷⁷ Section 2002

⁷⁸ Section 2007. (c).(1)

⁷⁹ Section 2007.(c).(2).(B)

In conclusion to the EPPA, when one reviews the content of the act it creates the perception that the polygraph test and the outcome thereof will not carry a lot of weight in determining innocence or guilt. In the remainder of the chapter, the effect of the EPPA will be measured against case law and the interpretation of the courts with reference to test being conducted for pre-employment, dismissals and to prove guilt in criminal matters.

3. American case Law on Polygraph Evidence

The case of *Daubert v Merrel Dow Pharmaceuticals*⁸⁰ was used by the American courts to overturn the test for the admission of scientific evidence that was established in *Frye v United States*⁸¹. The court stated in the *Frye* matter as follows:

“while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the things from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. Just when a scientific principle crosses the line between experimental and demonstrable is difficult to define”⁸².

It is of interest to note that in the *Frye* case the defendant was convicted, this conviction was later overturned due to a confession by another man. The *Daubert* standard stated that all forensic evidence, including polygraph testing had to meet a standard: “In which the underlying reasoning or methodology is scientifically valid and can be properly applied to the facts at issue it also gave us the following factors to apply when we review whether a scientific opinion is reliable or not:

⁸⁰ 113. C.Ct Sup 2789 (1993)

⁸¹ 54 App. D.C. 46, 293 F 1013 (1923)

⁸² 433 F.2d 431 (6th Cir 1970) as cited by Ronel Prinsloo.

- (i) whether the theories and techniques employed by the scientific expert have been tested;
- (ii) whether they have been subject to peer review and publication;
- (iii) whether the techniques employed by the expert have a known error rate;
- (iv) whether they are subject to standards governing their application; and
- (v) whether the theories and techniques employed by the expert enjoy widespread acceptance.

In the case of *United States v Posado*⁸³ the court agreed with the assessment that frequently the error in polygraph testing is as a result of poor training and competence of the examiners, as a result of this the court suggested a three step inquiry process into the admissibility of the polygraph test results be followed:

- (i) whether the evidence is relevant and reliable;
- (ii) whether the evidence assists the court in determining the facts in issue:
and
- (iii) Whether the evidence has unfairly prejudicial effect, if it does, that would substantively outweigh its probative value.

These views were also expressed in the matter of *United States of America v Wyatt Henderson*⁸⁴ where the Magistrate Judge was asked to exclude the use of polygraph evidence in the trial. The Magistrate excluded polygraph evidence as it did not constitute scientific knowledge and for being sufficiently irrelevant to the facts of the case and stated that polygraph tests and techniques were subject to peer review and publication.

⁸³ 57F 3d 428, as cited in Collier D "Truth or Dare"? What Lies Beneath the Polygraph Test"? De Rebus July 2001, Issue 26, p58

⁸⁴ D.C. Docket No 03-00065-CR-FTM 29, p18 (2005)

Collier⁸⁵ also prescribes three preconditions imposed by the EPPA that are of importance when one administers and controls a polygraph test. They are as follow:

- (i) that the employee had access to whatever forms the subject of the investigation;
- (ii) there must be a reasonable suspicion that the employee was involved in the incident;
- (iii) economic loss or injury must have been suffered by the employer.

In the recent case of the *State of New Jersey v A.O*⁸⁶ the court dealt with the legal question of the admissibility of lie detector test results obtained from the defendant before the trial. In this case the defendant, a Nigerian citizen was accused of sexually molesting his girlfriend's daughter several times during 2001 in New Jersey. There was no physical evidence to support the claim, however the police felt that the accusation needed to be investigated more thoroughly. The police then questioned the accused several times during the night and he was asked "do you agree to taking the stipulated polygraph examination to determine if you are telling the truth?". The defendant agreed to undertake the polygraph test without consulting an attorney and after signing a stipulation that stated that he agreed to the following:

- (i) he agreed that the polygraph examiner was an expert;
- (ii) waived any objection to the admissibility of the experts testimony;
- (iii) waived the right to call his own expert to challenge the test; and
- (iv) agreed that the result of the polygraph test would be admissible at the trial.

The defendant subsequently failed the polygraph test where after the victim also withdrew her statement, despite this the police decided to go ahead and charge

⁸⁵ See footnote 9 supra.

⁸⁶ Supreme Court of New Jersey Docket nr 62, 096

the defendant on the basis of the failed polygraph test. The defendant was convicted and sentenced to 18 years imprisonment. The matter went on appeal to the Supreme Court of Appeal in New Jersey. The court found that the evidence based on polygraph testing was entered into without the defendant's counsel being present and was therefore inadmissible. The court was of the opinion that a defendant may impeach the credibility of a victim- witness about a false allegation made after the underlying allegations were made against the defendant. The issue remains that polygraph evidence is not reliable and therefore would prejudice the defendant to such a manner that the court in this matter said that the use of polygraph tests as evidence should be banned from all courts of law.

D. Australian and Canadian Approach to Polygraph Testing

The case of *Raymond George Murray*⁸⁷ was heard in Australia, in which the court rejected the use of polygraph evidence. That court stated the following on polygraph evidence:

- (i) "the veracity of the accused and the weight to be given to his evidence, and other witnesses called in the trial, was a matter for the jury;
- (ii) the polygraph expert sought to express an opinion as to ultimate facts in issue, which is peculiarly the province of the jury;
- (iii) the test purported to be expert evidence by the witness who was not qualified as an expert, he was merely an operator and assessor of a polygraph. The scientific premise upon which his assessment was based had not been proved in any court in Australia; and
- (iv) devoid of any proved or accepted scientific basis, the evidence of the operator is hearsay which is inadmissible"⁸⁸.

⁸⁷ 1982 7A Crim R48

⁸⁸ The court cited the Canadian case of *Phillion v R* 1978 ISCR 18.

It is doubtful whether Australia will ever allow polygraph tests to be admissible as the issue has yet to reach the High Court of Australia. Ben Clarke⁸⁹ amplifies this statement and said the following:

“It is doubtful that results from lie detector tests will ever be held admissible in Australian criminal courts. While proponents of polygraph evidence claim that test results are a definitive indication of the veracity of an accused's denial of guilt, such the results are hearsay and amount to a self-serving statement which is inadmissible at both common law, and pursuant to statutory rules of evidence. Further, there does not appear to be any general acceptance of the validity and reliability of polygraphs within the Australian scientific community”.

In Canada the polygraph is often used as a tool in investigations and is often used in pre employment screening. The courts however do not accept the use of polygraph evidence in court. This was confirmed in the case of *R v Beland*⁹⁰ when the Supreme Court of Canada said:

“The result of polygraph examination is not admissible as evidence. The polygraph has no place in the judicial process where it is employed as a tool to determine or test the credibility of a witness”.

E. Summary

It is in light of the above, I submit that I would support a suggestion that we establish a statutory body that will determine which tests are valid, reliable and who's responsibility will include the review of the process of polygraph testing. The Americans have the American Polygraph Association as well as the *Employee Polygraph Protection Act*⁹¹ (EPPA) and is also referred to by the Ministry of Justice in England. Furthermore, a code of good practice should be

⁸⁹ Clark B, “Trial by ordeal, Polygraph testing in Australia”. March 2007, Notre Dame University of Australia School of Law, Volume 7 Nr 1, p1.

⁹⁰ 1987 2 S.C.R. 398

⁹¹ Act 102, Stat 649, Public Law 100-347, June 27 1998

drawn up by all acknowledged role players in a NEDLAC⁹² or an equivalent and should conform to the rules established in EPPA⁹³.

⁹² National Economic Development and Labour Council

⁹³ See par C. 2 *The Employee Polygraph Protection Act*.

CHAPTER 5

CONCLUSION AND FINAL REMARKS

It is important to note that at the outset of this dissertation my goal was to prove that the polygraph machine and test are both reliable and accurate. However, the more articles, opinions, commentaries and scientific reviews I read the more I became doubtful of the machine and test and will not allow myself to be polygraphed. A lot of sympathy must go to the employers who want to subject employees to polygraph tests as they are trying to eliminate fraud, theft and syndicated crime in the workplace. Be that as it may, it is also important to note that employers may use the polygraph test as a “sword or shield” against the employee, without truly understanding the mechanics of a polygraph machine, the importance of the polygraphist and the implications of the polygraph test.

Polygraph testing will not disappear in the South African workplace and all indications are that it will be used more frequently and that the polygraph industry will be and is a highly lucrative one.

As stated earlier, I agree with the important views of Christianson⁹⁴ that we urgently need procedural guidelines in which employees or groups of employees may be tested. She raises a couple of interesting questions in her article which the guidelines must cover, such as:

- (i) who should be permitted to do the testing and what qualifications should they have;
- (ii) can employees only be tested for specific instances or is pre employment testing permitted; and
- (iii) what should be disclosed in the test and to whom.

⁹⁴ “Polygraph Testing in the South African Workplaces: “Shield and Sword” in the Dishonesty Detection Versus Compromising Privacy Debate” (2000) 21 ILJ 16.

A point that I want to address is the qualification level of the polygraphist and the minimum level of qualification needed. In my opinion this person must at least have a degree in psychology or a degree in medicine to understand the human body and how the human body functions when it is placed in a stressful situation. A law degree might be a further consideration as the polygraphist must understand the legal implications of his conduct, process and questions that he will ask.

Christianson makes two further valuable contributions to the field of polygraph testing and the remedy of procedural compliance that is needed for a person to conduct or to be subjected to a polygraph test. I do agree with Christianson⁹⁵ that the time to act is now and especially when you consider that scientific research has shown that 50% of polygraph tests have a false positive rate and this means that many employees have been and will be falsely accused and dismissed on the basis of failing a polygraph test⁹⁶. This is really concerning and will probably only hit home once you are subjected to a polygraph test.

In conclusion, as a bare minimum we need rules for the conducting of polygraph tests, clear guidelines on who may conduct the test and their minimum level of qualification. We need to be pro active and implement a system or a set of rules such as *The Polygraph Rules 2009*⁹⁷ as a starting point.

“For the Lord is good; His mercy is everlasting; and His truth endured to all generations”. Psalm 100:5

⁹⁵ See footnote 89 supra

⁹⁶ Colin Tredoux and Susan Pooley: “Polygraph Based Testing of Deception and Truthfulness: And Evaluation and commentary” (2001) 22 ILJ 819.

⁹⁷ Statutory Instruments, No. 619, The Polygraph Rules 2009

CHAPTER 6

ANNEXURES

“I have no greater joy than this, to hear that My children are living their lives in the truth”. 3 John 1:4

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