CHEMICAL TEST LAW IN THE UNITED STATES
by
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IT WAS IN THE 1930's that a number of medical men and other scientists in this country became intensely interested in the problem of the drinking driver upon our highways and the use of chemical tests to determine alcoholic influence as one of the means of coping with it. They conducted hundreds of experiments to find out exactly what effects the ingestion of alcohol has upon the body and mental faculties. Some of these scientists also conducted research projects to develop and test various techniques of measuring blood-alcohol concentrations in human beings and to determine what effects measured levels of blood-alcohol have upon the individual. Most of these men were or became members of the American Medical Association's Committee on Medico-legal Problems and/or the National Safety Council's Committee on Tests for Intoxication.

As techniques and devices for determining and measuring blood-alcohol were further developed, refined, and simplified, a substantial number of law enforcement agencies began to establish chemical test programs in their communities in order to better combat the drinking-driver problem. As the use of chemical test evidence in criminal prosecutions and in civil damage suits increased, misinformation about and misunderstanding of the value, validity, and legality of this type of evidence were encountered, not only on the part of the public but also some judges and other supposedly learned men. This, of course, led to the voicing of that old American demand: "There ought to be a law."

Indiana in 1939 was the first state to enact chemical test legislation, providing that chemical test evidence is admissible in prosecutions for driving while under the influence of intoxicants and establishing 0.15% as the blood-alcohol level at which a motorist is presumed to be under the influence. Within the next three or four years, Maine, New York, and Oregon followed suit. About 1944 this type of legislation was recommended for adoption by all states by the National Committee on Uniform Traffic Laws and Ordinances through its inclusion in the Uniform Vehicle Code of a recommended statutory provision similar to the state statutes already enacted.

Accepted by Courts

By 1950 when the Traffic Institute of Northwestern University published its first treatise on the legal aspects of chemical tests to determine alcoholic influence, eight additional states had enacted chemical test legislation. It is interesting to note that at the time there had been only about 40 appellate court cases involving chemical test evidence. Although comparatively few in number, these appellate decisions, however, did indicate a start toward a good foundation of case law favoring the admissibility of this type of evidence, whether with or without the sanction of specific legislation on the subject.

That trend has continued. Our courts in this nation generally have welcomed this type of scientific evidence when properly prepared and presented. They have applied existing rules of evidence to questions of its admissibility and, where statutory law has been applicable, have interpreted it generally as the legislatures intended. Therefore, in addition to the chemical test legislation now in 40 of our 50 states, we have a substantial foundation of case law relating to the admissibility of chemical test evidence established by appellate court decisions in 48 states (exceptions are Hawaii and Wyoming) and the federal jurisdiction, the number of which is rapidly approaching the 550 mark. While the reversal rate in appellate decisions is averaging about 20%, none of these cases has been reversed because the courts do not consider chemical test evidence valid evidence. The vast majority of these reversals could be avoided if the chemical test evidence were to be properly prepared and

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then presented in the proper manner in the courtroom according to the now well-defined rules governing admissibility.

When model legislation in this country was in its formative stages in the late 1930's and early 1940's, our scientists had recommended the 0.15% presumptive level, which is still found in most of our state chemical test statutes today. While many thought from their experimentations and research on the subject that this was too high a figure, these experts realized that little was known generally by our people about chemical tests of this nature and that it would be a most difficult sales task to convince the public of the value of this new weapon with which to combat the drinking-driver problem. This also was true with respect to legislators, police administrators, prosecutors, judges, and other public officials, no matter what presumptive level eventually was to be recommended. Therefore, in their effort to be absolutely fair and in order to gain initial and official acceptance, our scientists recommended the most liberal figure of 0.15% as their wisest course in the initial stages.

It should be noted that the experimentation and research by medical men and other scientists in this country during those early days were conducted largely in the laboratory by psychophysical tests rather than by placement of the subjects behind the steering wheels of motor vehicles. However, in the intervening years, the research projects in this field more and more have included the human "guinea pigs" being actually placed behind the wheels of all types of motor vehicles. However, in the intervening years, the research projects in this field more and more have included the human "guinea pigs" being actually placed behind the wheels of all types of motor vehicles and driving on "obstacle courses" where their reactions to measured quantities of alcohol could be much better observed and recorded. As a result of these more modern and realistic experiments, the majority of our specialists in the field of chemical tests have come to the definite conclusion that none of us is fit to drive a motor vehicle when he has as much as 0.10% blood-alcohol and that the 0.15% presumptive level is far too liberal.

Accordingly, upon the requests of a number of national organizations interested in traffic safety, the presumptive standard recommended in the Uniform Vehicle Code was reduced in 1962 to the 0.10% figure and four states already have taken legislative cognizance of it. North Carolina, North Dakota, and Vermont have established this lower presumptive figure in their chemical test laws. New York has created a new lesser offense by a statute which in effect prohibits an adult from operating a motor vehicle when he has as much as 0.10% blood-alcohol and a driver under 21 years of age when he has as much as 0.05% blood-alcohol.

Motorist Refusals

However, as the use of chemical test evidence has become more and more prevalent throughout the United States, it has been found that an increasing number of motorists suspected or charged with driving while under the influence of intoxicants are refusing to submit to such tests, thus effectively depriving courts and juries of this highly probative type of evidence. National Safety Council reports show that the percentages of refusals in far too many communities range from 50% all the way to 92%.

This experience has been more pronounced, of course, in the cases of repeaters but is by no means limited to them. It is not unusual to hear this subject-matter discussed at receptions, cocktail parties, and other functions at which intoxicating beverages are served as a matter of course and occasionally to hear someone remark that his lawyer has advised him that if he is ever apprehended for driving while under the influence of intoxicants, he should refuse to submit to any type of chemical test.

In the early 1950's, many people in this country were advocating, and many still are, compulsory chemical test laws—every motorist suspected of driving while under the influence of intoxicants should be compelled to submit to a chemical test. To this, a number of persons in the traffic safety field have dissented, pointing out the possible legal problems in some jurisdictions, particularly those relating to the scope of the constitutional privilege against self-incrimination. Emphasis also was placed upon the fact that laws to be enforceable must be acceptable to the public. They ventured the opinion that there are too many people in this community who are not yet ready to accept the truism that the hazards created by the drinking driver are so aggravated as to warrant this extreme type of legislative action.

The suggestion of others was that every driver should be required to sign an agreement, as part of his application for a driver's license, to submit to a chemical test if and whenever he should be suspected of driving while under the influence of intoxicants. Many queried how this proposal would be effective in controlling the nonresident
motorist from another state or the resident driver who neither had a license nor ever applied for one, who therefore would not have been a party to such an agreement as part of a license application in the enacting state.

About this same time, an interim legislative committee in New York, studying the problems of traffic safety and traffic laws, found that even though that state had been among the first to enact a chemical test law, only a comparatively few law enforcement agencies had established chemical test programs. After the committee investigated the reasons for this, some real and some fancied, it was decided the state needed a stronger law to bolster the chemical test statute.

After considerable study and research, the committee and its counsel decided upon what is known as the "implied consent law." It provided in effect that as a condition of the privilege of driving a motor vehicle upon the highways of the state, every motorist was deemed to have given his consent to a chemical test of his blood, breath, or urine to determine blood-alcohol concentration if charged with driving while in an intoxicated condition; that if he was so charged and refused to submit to a test, no test was to be given, but his privilege to drive within the state was to be revoked because of his refusal to abide by this condition upon which the privilege is based.

The committee and its counsel considered their recommendation for such a statute to be based upon a sound legal foundation. The New York courts had held for many years, as had the courts of other states, that the use of the public highways, whether it be called a privilege, right, or freedom, was a matter which could be regulated and to which reasonable conditions could be attached by the state legislature.

Implied Consent Law

Furthermore, an implied consent type of law was not a new kind of law. Most states have the so-called "long-arm" law, patterned after the recommended provision in the Uniform Vehicle Code, which provides that, as a condition of his using the highways in the host state, a nonresident motorist is deemed to have impliedly appointed the motor vehicle administrator of the host state as his agent upon whom service of process may be made in case he is involved in an accident in the host state and is sued therein as a result. In 1927, the United States Supreme Court had upheld the validity and constitutionality of this type of implied consent law in a case arising in Massachusetts.

Accordingly, the New York legislature in 1953 followed the recommendation of its interim committee and enacted the implied consent law relating to chemical tests. Within a few months after this law became effective, the vast majority of law enforcement agencies in the state, including the New York City Police Department, established chemical test programs in their communities. Not too long afterwards, a motorist who had been arrested, tried, and acquitted on the charge of driving while in an intoxicated condition attacked the constitutionality of this law after the motor vehicle administrator had revoked his operator's license because of the motorist's refusal to submit to a chemical test at the time of his arrest. Upon appeal from the order, the lower court judge held that the law was not unconstitutional on two of the grounds advanced by defense counsel (violation of protection against self-incrimination and illegal search and seizure) but did hold it was unconstitutional on the ground it was a denial of due process for the statute not to provide (1) the request of the motorist to submit to a test and his refusal were to be effective only if made after his arrest and (2) the motorist was to be entitled to a hearing by the administrator before the order of revocation became final.

Without appealing from the order of the lower court judge, the state authorities immediately recommended to the New York legislature, which was then in session, that the implied consent law be amended to conform to the judge's opinion. This was accomplished within a matter of a few weeks: Since then, there has been no further successful attack upon the constitutionality of the New York implied consent law as amended.

Subsequently, in 1955, three other states enacted implied consent laws—Idaho, Kansas, and Utah. Within the next several years, a number of other states also enacted this type of law—Connecticut, Iowa, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, and Virginia.

In 1962 the implied consent type of law was included in the Uniform Vehicle Code by the National Committee on Uniform Traffic Laws and Ordinances at the recommendation of the National Safety Council, the American Medical Association, and other national organizations interested in traffic
safety and the prevention of traffic accidents.

While the supreme courts of several states have refused to pass upon the constitutionality of their implied consent laws because the question was not properly raised, several have met the issue squarely and hold such a law is valid and constitutional. They are the Supreme Courts of Idaho, Iowa, Kansas, Nebraska, Vermont, and Virginia.

In their decisions, these courts have recognized that the implied consent type of law is not to be construed as a "compulsory law." There is no compulsion upon the motorist to submit to a chemical test. He may submit to a test if he chooses, or he may refuse, in which case the law prescribes that no test shall be given.

It is to be noted also in these decisions that these courts adhere to the general rule in this country that the constitutional privilege against self-incrimination does not apply to obtaining physical evidence from a motorist, such as blood, breath, or urine for the purpose of chemical analyses. They limit the scope of the privilege to testimonial compulsion, protecting a person from being compelled to say things against himself through his own lips or by his writings.

**DISCUSSION**

Dr. Havard: Does this presumption apply to the time the test was taken or the time the offense was supposed to have been committed?

Mr. Donigan: At the time the test is taken.

Dr. Walls: Does the recommended level of one tenth of one per cent mean weight/weight or weight/volume?

Mr. Donigan: Weight.

Dr. Walls: In other words, one tenth of a gram per centigram of blood? Weight/weight?

Mr. Donigan: Yes, sir.

Question: Are breath tests used more than blood tests, and to what extent?

Mr. Donigan: I don't think anyone has ever taken a poll on that. From my experience I would say breath test is more common in the United States.

Mr. Andréasson: In comparison with Europe, the represented level at one per mil is very high. Has it been discussed here to lower it?

Mr. Donigan: In the United States?

Mr. Andréasson: Yes.

Mr. Donigan: Very little discussion because very few people in the United States are willing yet to accept the ten hundredths of one per cent level.

Question: Are copies of this paper available or being printed?

Mr. Donigan: I have none available. It will be available through the record of these proceedings.

Dr. Talbott: Do you know of any action against physicians who have taken samples of blood from an unconscious patient to determine whether alcohol is an influencing factor in the state of the patient as they see him and where this information was used against the patient subsequently?

Mr. Donigan: There are some Supreme Court decisions in several states where blood has been taken from an unconscious patient and has been admitted in evidence in the criminal prosecution later on.

Dr. Talbott: And no action taken against the physician?

Mr. Donigan: No case in the United States where action has ever been taken against the doctor or the person taking blood in the appellate courts. In answer to Dr. Havard's question as to when the presumption applied in the Uniform Vehicle Code, the recommended law is that at the time alleged, so it would apply at the time of the event.