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# The Possibility of Using Chemical Tests to Determine Alcoholic Intoxication in State of Missouri

Walter J. Taylor Jr.

tunity for judicial reconciliation of theory was not seized in *Kelly v. Hoffman*,[50] which was decided upon the pleadings with indecisive language used. Further, the decision would not make failure to edit negligence as a matter of law, and as such was unsound. The basic failure to "bring home" to participants the grave dangers involved satisfies the causal relation, whether or not the defamation is outside the prepared script.

Where there is no script because of the informal nature of the program, the station must bear the risk of liability. The risks are foreseeable and it seems just that the station should undertake them.

The legislature has not sufficiently clarified the basis of liability in any jurisdiction. The soundest enactments are found in Florida and Washington where the statutes codify the *Summit Hotel* decision. In the absence of statute, it is submitted that the rules developed above will prove workable in determining liability under the common law concepts of defamatory publication.

WILLIAM R. HIRSCH*

## THE POSSIBILITY OF USING CHEMICAL TESTS TO DETERMINE ALCOHOLIC INTOXICATION IN THE STATE OF MISSOURI

Defendant, while driving on a public highway, is involved in an accident. As the police arrive they notice that defendant is having trouble in getting out from behind the steering wheel. After helping defendant from behind the wheel, and after talking to him for a few minutes, the officers decide that defendant is intoxicated and so place him under arrest.

Sometime later, defendant is brought to trial for violation of MO. REV. STAT. § 8401 (g) (Supp. 1945) which provides: "No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."[1]

50. Recently commented upon in 24 NOTRE DAME LAW, 123 (1949); 4 INTR. L. REV. (N. Y. U.) 94 (1949); 3 RUTGERS L. REV. 128 (1949); 97 U. OF PA. L. REV. 444 (1949); 3 MIAMI L. Q. 312 (1949).

* Member of the Missouri Bar; former member of the staff, WASH. U. L. Q.

1. State v. Raines, 333 Mo. 538, 62 S.W. 2d 727 (1933), states that intoxicated condition need not be defined. Any intoxication that in any manner impairs the ability of a person to operate an automobile is sufficient to sustain a conviction under this statute.

I

At present in Missouri, the determination of whether or not defendant is intoxicated is based on certain external factors such as: the driver nearly fell out of the automobile when the officer opened the door, the officer was unable to awaken him, there was a strong odor of liquor, there was evidence that he had vomited, he could not walk or stand without aid.[2] Other methods of determining whether or not a defendant is intoxicated are:

> . . . . testimony of witnesses who had observed the appearance and actions of the accused, testimony of police surgeons and private physicians based upon examination of the accused, and the finding of incriminating real evidence at the scene of the accident or arrest.[3]

Thus it can be seen that evidence as to the intoxicated condition of a defendant is based on an observation of the defendant's appearance and conduct at the time of the arrest.

Monroe in his article, "The Drinking Driver: Problems of Enforcement," points out six main disadvantages to this type of evidence.[4] To begin with, he says that due to the fact that there are many pathological conditions which produce symptoms similar to those produced by alcohol, it is relatively easy for the defense attorney to instill doubt in the minds of the jury by pointing out this fact to them and thus obtaining an acquittal for his client.

The second disadvantage is found in the difficulty of identifying intoxication from "external manifestations," as no two persons act alike while under the influence of intoxicating liquor. This fact is bound to cause uncertainty in the minds of witnesses so that their testimony cannot be relied upon.

Third among the disadvantages of the traditional methods of proving intoxication is their basic reliance upon the kind and quantity of liquor consumed. Evidence as to drinking alone cannot prove how much alcohol has influenced the individual. An accurate measure of the degree of intoxication of an individual can be obtained only by determining the amount of alcohol accumulated in the brain.

A fourth weakness is the difficulty of identifying the so-called

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2. *Ibid.*
3. Monroe, *The Drinking Driver: Problems of Enforcement*, 8 Q. J. OF STUDIES ON ALCOHOL, No. 3, p. 388 (Dec. 1947).
4. *Id.* at 389.

"moderately" intoxicated person. The problem is caused by those who have had enough to impair their judgment, but not enough to affect their appearance markedly.

Fifth among the weaknesses is the difficulty of determining whether a person has reached that state of intoxication at which he succumbs to the influence of alcohol.[5]

Last of the prevailing weaknesses of the traditional methods are the many administrative and enforcement difficulties which result from dependence upon lay and expert testimony relative to external evidence of intoxication.

As a solution to this dilemma, it is suggested that Missouri turn to the use of chemical testing as a sound and equitable approach to the problem of the drinking driver. It is a well recognized fact that the problem of the drinking driver is becoming more acute every year. In a study made by the Safety Council of Greater St. Louis, it is shown that from January until July of 1949, there had been 149 intoxicated drivers involved in traffic accidents in St. Louis, compared with 83 for the corresponding period of the year previous, or an increase of approximately 80 per cent. The report further states that this figure represents reports of only approximately 30 per cent of the accidents involving intoxicated drivers, thus making the previous noted increase more alarming.[6]

Chemical tests as proof of intoxication consist of the determination of the concentration of alcohol in the brain by analyzing various body materials such as blood, urine, spinal fluid, saliva, and breath. As a result of the test, the amount of blood alcohol in the person's body at the time of the test is determined; this indicates the individual's condition at the time of the test.[7]

The amount of blood alcohol is generally expressed in percentage form and as a result certain chemical standards have been set up for the legal interpretation of the degree of intoxica-

5. See note 1 *supra*. A question for the jury in Missouri.

6. ANTOINE, A REPORT ON THE DRINKING DRIVER PROBLEM, SAFETY COUNCIL OF GREATER ST. LOUIS, 1 (Oct. 18, 1949). General recommendations for setting up a program of chemical testing in St. Louis.

Kansas City is using the Harger Drunkometer which is a device for determining the degree of intoxication of an individual by analyzing his breath. As a result of this program its traffic safety record has increased steadily.

7. CHEMICAL TESTS FOR INTOXICATION, TRAINING MANUAL NO. 1, INDIANA STATE POLICE. Shows mechanical aspects of making a drunkometer test.

tion of a particular defendant. These percentages are divided into three broad zones of alcohol concentration. They are:

1. Below 0.05 per cent alcohol in the blood: no influence by alcohol within the meaning of the law;
2. Between 0.05 and 0.15 per cent, a liberal, wide zone: alcohol influence usually is present, but courts of law are advised to consider the behavior of the individual and circumstances leading to the arrest in making their decision;
3. 0.15 per cent: definite evidence of "under the influence" measurable extent, lacks some of that clearness of intellect and control of himself that he would normally possess.

The zone below 0.05 per cent vindicates the non-drinking or temperate driver, the wide middle zone considers tolerance and idiosycrasy, and the highest zone indicates alcoholic influence regardless of unusual tolerance. . . .[8]

At the present time chemical tests and the interpretation of them are accurate and have been generally recognized by the medical profession as such.[9] As far as can be determined, only one case has question the scientific accuracy of this method and in that case the court said that in view of the fact that there was no testimony in the record of its [Harger Drunkometer] general acceptance by the medical profession as accurately establishing the alcoholic content of a subject's blood and thus the extent of his intoxication, the results of the test should not have been admitted into evidence by the trial court.[10] The fact to be noted in this case is that the court did not say that it could not be admitted into evidence when and if the proper foundation is laid as to its scientific accuracy.

## II

What is the possibility of using chemical tests as evidence of intoxication under the law of Missouri as it exists today? One argument that would undoubtedly be raised by the defendant's attorney is that such tests are a violation of the state constitution which provides that no person shall be compelled to be a witness against himself in any criminal case—self-incrimination. In the

8. "Report of American Medical Association Committee to Study Problems of Motor Vehicle Accidents," 119 J. AM. MED. ASS'N. 635 (June 20, 1942). Quoted in "CHEMICAL TESTS FOR INTOXICATION" 35, *supra* note 7.

9. The American Bar Association, American Medical Association, Federal Bureau of Investigation, International Association of Chiefs of Police, and National Safety Council have all adopted this view.

10. People v. Morse, 38 N.W.2d 322 (Mich. 1949). *Contra:* Kirschuring v. Farrar, 114 Colo. 421, 166 P.2d 154 (1946); Natwich v. Moyer *et ux.*, 117 Ore. 486, 163 P.2d 936 (1945).

majority of the states using chemical tests, where the defendant has voluntarily consented to take the test, the results thereof are admissible into evidence as proof of the defendant's intoxicated condition.[11]

It is submitted that the better rule would be the limiting of the principle of self-incrimination to testimonial utterances only. In commenting upon this question, Ladd and Gibson in their article, "Legal Medical Aspects of Blood Tests to Determine Intoxication,"[12] quote from the North Carolina case of *State v. Graham*, where the court says:

> Confessions which are not voluntary if they are not made, or in hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the cornfield.[13]

The article goes on to say:

> The privilege should not be extended to the body fluid cases any more than to the fingerprint cases or other objective manifestations which could not be altered as a result of their compulsory taking.

Missouri, however, does not so limit the doctrine of self-incrimination so it is necessary to study the decided cases dealing with the taking of physical examinations in order to determine whether or not the results of chemical tests to determine intoxication may be admitted into evidence as proof of the defendant's

11. State v. Morkrid, 286 N.W. 412 (Iowa 1939). ". . . In the record we are unable to discover evidence of either compulsion or entrapment. . . ." It appears that the test was taken by the defendant voluntarily as he expected to be shown not to be intoxicated. Spitler v. State, 221 Ind. 107, 46 N.E.2d 591 (1943). Defendant in voluntarily undergoing a drunkometer test waived his privilege of not testifying against himself. State v. Cash, 219 N.C. 818, 15 S.E.2d 277 (1941); State v. Haner, 231 Iowa 348, 1 N.W.2d 91 (1941). Example of proper instructions to jury: "Evidence has been introduced as to an analysis of blood that was taken from the defendant shortly after his arrest in this case. This analysis is not admissible unless this blood was obtained from the defendant voluntarily, and without coercion, and without any inducement or promise of immunity from prosecution. If you find that the defendant voluntarily permitted said blood to be analyzed, and that it was obtained without any inducement or promise of immunity from prosecution, then you will give this evidence respecting this analysis such weight as you think it is entitled to in determining the guilt or innocence of the defendant."

12. 29 VA. L. REV. 749, 761 (1943).

13. 74 N.C. 646, 647 (1876).

intoxication. No reported cases have been found in Missouri concerning the use of chemical evidence as proof of intoxication.

In *State v. Teltaton*[14] the defendant was being tried for murder. A doctor for the state testified that he had examined the head wounds of the defendant and gave his opinion as to how they had been made. The court held that there was evidence that the examination by the doctor was voluntarily consented to by the defendant and also that it was necessary to treat the wounds so thus this consent constituted a waiver by the defendant of his privilege not to be made to testify against himself in a criminal case.

*State v. Jones*[15] is a case where the defendant was being tried for robbery in the first degree. There was evidence that he voluntarily allowed the sheriff and also a doctor called by the sheriff to examine wounds in his leg; this was done for the purpose of identifying the defendant. The court again held that the defendant had waived his privilege as to self-incrimination.

Thus it can be seen from these two cases, that if there is evidence that the defendant voluntarily submits to a physical examination, Missouri holds that there is no violation of his privilege not to be made to testify against himself. Using the same reasoning as found in these cases it would seem that there would be no objection to the use of chemical tests as proof of intoxication provided that the defendant voluntarily agreed to the making of the tests.

The next question that arises is whether or not the accused can be compelled to take the tests. In a Texas case involving a defendant charged with murder without malice arising out of an automobile accident as a result of driving while under the influence of intoxicationg liquor, the court held that as there was evidence that the defendant was compelled to take the tests he was thus being made to testify as against himself.[16]

There are several Missouri cases which deal with the taking of a physical examination without the consent of the defendant.

14. 159 Mo. 354, 60 S.W.2d 743 (1900).
15. 153 Mo. 457, 55 S.W. 80 (1900).
16. Apodaca v. State, 146 S.W.2d 381 (Texas 1941). Defendant said that police made him give specimen of urine against his will, made him outstretch his arms and touch the tip of his nose, made him walk fast, walk slow, and turn quickly. "Compulsion is the keynote of the prohibition." Case criticized: Notes, 19 TEXAS L. REV. 463 (1941); 15 U. OF CIN. L. REV. 344 (1941); 26 WASH. & LEE L. REV. 122 (1941).

This is an important question in Missouri since, as has already been noted, Missouri does not limit the doctrine of self-incrimination to testimonial utterances only.

In *State v. Horton* the defendant was being tried for the crime of rape. He was compelled to submit to a physical examination to determine whether or not he was suffering from a venereal disease. The court said:

> When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more susbtantial than silence to justify an invasion of his constitutional right not to be made to furnish evidence against himself..[17]

And again, in *State v. Matsinger*,[18] the court said that the only consent on the part of the defendant was his failure to object when being informed that physicians were at the jail to examine him. It was found that the defendant was not apprised of his rights to resist the examination and thus submitted without consenting to the examination. The court stressed the fact that the defendant was in jail at the time.

The case of *State v. Newcombe*[19] also involves a physical examination for venereal disease. In this case the court said that the defendant had no option in the matter so the testimony was incompetent and inadmissible and violative of defendant's constitutional rights not to be compelled to testify against himself.

From these three cases it becomes apparent that under Missouri law, the compelling of a defendant to submit to a chemical test to determine his degree of intoxication without his consent would be held by the courts to be a violation of the constitutional provision that a defendant in a criminal prosecution shall not be compelled to be a witness against himself.

The next question that arises is, What constitutes consent? There are several cases that have been reported which give examples as to what has been considered proper consent in courts of states other than Missouri. It has been held that results of the tests are admissible where defendant thought he had to give a blood specimen and so consented to the taking of the specimen.[20] In another case where defendant submitted to the

17. State v. Horton, 247 Mo. 657, 663, 153 S.W. 1051, 1053 (1912).
18. 180 S.W. 856 (Mo. 1915).
19. 220 Mo. 54, 119 S.W. 405 (1909).
20. State v. Werling, 239 Iowa 1109, 13 N.W.2d 377 (1943).

taking of a specimen because the physician stated that it was his opinion that the defendant was intoxicated and he would so testify, but the test might prove that defendant was not intoxicated, the court held that there was neither duress nor illegal search and seizure and the results were admissible.[21] Where the defendant did not know why the specimen (urine) was taken the court held that the results of the specimen given without compulsion were admissible.[22]

It is extremely doubtful whether or not the courts of Missouri would have arrived at the same decision. On the basis of the decision in *State v. Matsinger*[23] it would seem that the defendant would have to be apprised of his right to refuse to submit to the test and would have to do something more than merely acquiesce to the demands of the police that he submit to a chemical test.

Assuming that the defendant has refused to permit the police to take a specimen from him for the purpose of performing a test as to his degree of intoxication, can this fact be commented upon by the state at time of trial? There are several decisions from other states on this point.[24] It is to be noted in these decisions allowing comment on the defendant's refusal to submit to a test that the constitution of the state permits such comments or that there are no express provisions in the constitution prohibiting self-incrimination.

The Missouri cases on the subject of comment all refer to the failure of the defendant to testify or to produce a document, chattel, etc. The case of *State v. Carey*[25] holds that it is not improper for the state to comment on the failure of the defendant

21. State v. Small, 233 Iowa 1280, 11 N.W.2d 377 (1943).

22. State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937) (self-incrimination is limited to testimonial utterances).

23. State v. Horton, 247 Mo. 657, 153 S.W. 1051 (1912). In the Halloway v. State, 175 S.W.2d 258 (Texas 1943), the question arose as to whether or not the defendant could consent to the taking of a urine specimen if he was intoxicated. The defendant contended that if he was intoxicated when he agreed to give the urine specimen it was not a voluntary act; if it was a voluntary act and he could consent to the taking of the specimen, then he was not in fact intoxicated. The court held, that although the defendant was found to have 0.24% alcohol in his urine the defendant did not claim in his own testimony that he was so drunk that he did not know that he consented to give such specimen or that it was not voluntarily given. Thus the defendant was held to be intoxicated enough to sustain a conviction, but not enough to effect his consent.

24. State v. Benson, 230 Iowa 1168, 300 N.W. 275 (1945); State v. Gatton, 60 Ohio App. 122, 20 N.E.2d 265 (1938); State v. Nutt, 65 N.E.2d 675 (Ohio 1946).

25. 311 Mo. 461, 228 S.W. 719 (1925).

to make a statement or explanation when arrested. It would seem that on this basis, as Missouri makes no distinction as between testimonial utterances and the taking of physical examinations as pertaining to the doctrine of waiver, that it can be argued that it might be proper for the state to comment on the failure of the defendant to submit to the taking of a specimen for a chemical test at the time of his arrest.

## III

Although it is believed that the law of Missouri will permit chemical testing to be introduced into evidence as proof of intoxication, it is recommended that a statute be passed making chemical testing the law of the land.[26] Under the terms of the statute it would be compulsory for the defendant to submit to the taking of a chemical test in order to determine his degree of intoxication. The advantages of such a statute, as pointed out by Monroe, are:

> Where test results are interpreted by law, the need for employment of expert witnesses is reduced accordingly. The one becomes substituted for the other. . . .
> . . . . Interpretive legislation assists in shifting the problem of proof away from the determination of how many drinks and what kind of drinks the accused had, to the simple evidentiary fact of how much alcohol per volume was present in the blood and what that signifies in terms of intoxication influence. . . .
> [The test] . . . . substitutes certainty for guesswork, scientific determination in place of superficial opinion evidence. . . .[27]

An example of such legislation is found in Section 54, Act V, Uniform Vehicle Code which, while setting up the three general zones that the percentage of alcohol is divided into, also provides for the introduction of any other competent evidence bearing on the subject.[28]

Mamet, in his excellent article, "Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication," points out two grounds upon which the constitutionality of such a

26. States having such a statute include: Indiana, Maine, Nebraska, New Hampshire, New York, North Dakota, Oregon, South Dakota, and Washington.

27. Monroe, *The Drinking Driver: Problems of Enforcement*, 8 Q. J. OF STUDIES ON ALCOHOL, No. 3, p. 388, 400 (Dec. 1947).

28. Committee on Uniform Traffic Laws, National Conference on Street and Highway Safety (12 Oct. 1944).

statute might rest while still recognizing the issue of self-incrimination.[29] He points out that the use of the highway is a privilege; the legislature can exclude an automobile therefrom. The legislature can prohibit the use of the highways to anyone who is not willing to submit to a chemical test. The other method is through the use of the police power of a state to regulate the highways for the protection and safety of the public as a whole. This is based on the assumption that the use of the highway is a right and not a privilege, but this right is not entirely unrestrictive and the interests of the individual balance as against the interests of the public as a whole and it is thus within the purview of the police power to effectuate a balance as between these interests. The latter theory does not involve the doctrine of waiver as is found in the former theory.

## IV

At the time of this writing it has been announced that the St. Louis Police are going to start giving the breath test as of January 1, 1950. This is a step in the right direction. The test is being used at present in Kansas City and Richmond Heights, Missouri, but as yet there are no court decisions based on its use. In view of the alarming increase in drinking drivers who are involved in accidents the state as a whole should have a testing program.

It is felt that the courts of the state will be sympathetic towards the use of such evidence and it is believed that it can be used, subject to such limitations as have been pointed out, under existing law. When te results of such a program are brought to the attention of the state legislature, then it should pass a statute, as has been done in other states, providing for the use of chemical tests as proof of intoxication.

WALTER J. TAYLOR, JR.

29. Mamet, *Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication*, 40 ILL. L. REV. 245 (1945).