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THE SOUTH CAROLINA IMPLIED CONSENT LAW: THE "BREATHALYZER" AND THE BAR

JOEL EDWARD GOTTLIEB*

Attorneys who plan to represent clients on charges of driving under the influence should restudy their chemistry as well as their law. On February 2, 1970, fifty-seven "Breathalyzers" were placed in key locations throughout the state¹ and the Implied Consent Law,² passed some seven months earlier,³ became effective. Although an increase in convictions for driving under the influence of alcohol may result,⁴ the primary purpose of the new law is to deter potential "drunk drivers" and thereby reduce the number of traffic accidents and fatalities.

Although thought by many to be a general term describing all breath-testing devices, the "Breathalyzer" is the brand name for a specific machine. It has been chosen for use in South Carolina in preference to the many other devices available.⁵ The development of the "Breathalyzer", as well as the other machines, stemmed from an application of Henry's Law⁶ which made it possible to determine a ratio of the amount of alcohol in the aveolar (deep-lung) breath to the amount of alcohol in the blood.⁷ When a subject blows into a "Breathalyzer," a known amount of aveolar breath is trapped in a cylinder. A piston then forces the breath sample into a test ampoule containing a dichromate solution. The oxidation of any alcohol in the solution causes a color change in the test ampoule which is measured by compar-

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1. The machines have been located so that a person will seldom have to be taken more than twenty miles to a "Breathalyzer" station.
2. S. C. CODE ANN. § 46-344 (Supp. 1969).
3. The Implied Consent Law was passed June 19, 1969.
4. See generally Hunvald, *Whatever Happened to Implied Consent? A Sounding*, 33 Mo. L. REV. 323 (1968).
5. Some of the other breath-testing devices are:
(1) the drunkometer, (2) alcometer, (3) portable intoximeter, (4) photo-electric intoximeter, (5) DPC Intoximeter, (6) breath-tester, (7) Kitagawa-Wright Apparatus.
6. Henry's Law states:
[W]hen a volatile substance is dissolved in a liquid, a predictable amount of the volatile substance will escape into still air which is in intimate contact with the liquid. Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C.L. REV. 35, 56 (1966).
7. One millimeter of blood will contain the same amount of alcohol as 2,100 millimeters of breath.

ing it to a standard ampoule. A photovoltaic cell is mounted behind each ampoule and a light bulb on a moveable rack is located between them. As the color of the test ampoule fades, the light moves toward the standard ampoule. The machine then measures the distance the light has moved and calibrates it into a blood-alcohol percentage. This light must be balanced before the test is begun in order to achieve accurate results.

The "Breathalyzer" is simple to operate, making it possible for an operator to obtain accurate readings after a minimal amount of training. Its design is such that most operating errors will cause a lower reading in the defendant's favor.⁸

I. WHEN THE TEST IS ADMINISTERED

A person arrested for driving under the influence will still be charged with a violation of section 46-343 of the South Carolina Code. This section makes it illegal for a person to drive a vehicle anywhere within the state while under the influence of alcohol.⁹ The Implied Consent Law, section 46-344, is limited, however, in its application to offenses committed on the public highways. Furthermore, section 46-344 does not actually make driving under the influence an offense; it merely describes the procedures to be followed when the "Breathalyzer" is used.

A person who operates a motor vehicle upon a public highway of South Carolina, by implication, gives his consent¹⁰ to a chemical test of his breath¹¹ if he has been arrested for an offense arising out of acts allegedly committed while driving under the influence of intoxicating liquor. In other words, the arresting officer must have grounds for an arrest and must make the

8. See Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C.L. REV. 35, 64 (1966).

9. The section applies to driving under the influence of not only alcohol but also "narcotic drugs, barbiturates, paraldehydes, or drugs, herbs or any other substance of like character. . . ." S. C. CODE ANN. § 46-343 (1962). The Implied Consent Law, however, applies only to alcohol.

10. The "consent" shall *not* be deemed to have been withdrawn if the defendant is unconscious or otherwise incapable of refusal, S. C. CODE ANN. § 46-344(c) (Supp. 1969). This section conforms with *Breithaupt v. Abram*, 352 U.S. 432 (1957) in which a conviction based on evidence acquired from a blood test which was administered to an unconscious person was upheld. The Court said that "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right. . . ." 352 U.S. at 435.

11. "Consent" is given only for one test and "[n]o person shall be required to submit to more than one test for any one offense for which he has been charged. . . ." S.C. CODE ANN. § 46-344(a) (Supp. 1969).

actual arrest before the test is administered.¹² The machine is not to be used for the purpose of furnishing the initial probable cause necessary to make a lawful arrest.

The law apparently does not make it mandatory that a breath test be administered in all arrests, although this point is debatable.¹³ It does establish, however, guidelines which must be followed if the officer who apprehended the defendant directs that the test be given. As a practical matter it would be difficult to obtain a conviction in a case in which a test might have been administered but was not.

The law specifically provides that the test shall not be administered by the arresting officer. This prohibition may present a question as to who is an "arresting officer" within the meaning of the act. The purpose of the restriction apparently is to reduce the chance of having a biased person operate the machine. The officer who actually made the arrest is in charge of the case and could, therefore, be more desirous of obtaining a higher reading. To what extent the courts will go in interpreting what constitutes an "arresting officer" remains to be seen.¹⁴

II. RIGHT TO AN ADDITIONAL TEST

The law provides that:

The person tested may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing conduct a test or tests in ad-

12. Section 46-344 (a) provides in part as follows:

(a) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood *if arrested* for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of intoxicating liquor. S. C. CODE ANN. § 46-344 (a) (Supp. 1969) (emphasis added).

13. The law requires that "[t]he test shall be administered at the direction of a law enforcement officer who has apprehended [the] person. . . ." S. C. CODE ANN. § 46-344(a) (Supp. 1969). Does this mean that the test shall be administered in each case or does it require the test only when the officer so directs? It is submitted that the test is discretionary with the officer. The Legislature realized that it would take almost a year after the passage of the Act to train operators and to implement the law. To argue that the Legislature intended that the test be mandatory would further dictate that the Legislature intended to do away with all "driving under the influence" cases until operators were certified and the machines in operation.

14. If two officers were on patrol together and one made the arrest while the other assisted, the court may consider both to have been "arresting officers." The question may also arise when several officers are in pursuit of the same individual.

dition to the test administered by the law enforcement officer. The failure or inability of the person tested to obtain an additional test shall not preclude the admission of evidence relating to the test taken at the direction of the law enforcement agency or officer.

The arresting officer or the person conducting the chemical test of the person apprehended shall promptly assist that person to contact a qualified person to conduct additional tests.¹⁵

This provision creates several questions¹⁶ that eventually will have to be answered by the courts. For example, how much assistance must be given toward contacting a qualified person? Does the statute contemplate merely a phone call or does it require that transportation to a medical facility be furnished? What effect will a substantial delay have on the credibility of an additional test?¹⁷ Assuming that adequate assistance is not furnished or that the officer actually refuses to allow the defendant to try to get an additional test, will the admissibility of the "Breathalyzer" results be affected or would the conduct of the officer merely affect the weight of such evidence? The statute does not give a clear answer, and it is difficult to predict whether the court would adopt an exclusionary rule. It is obvious, however, that the Legislature intended for the defendant to have the right to have an additional test administered and also to have the assistance of law enforcement personnel in obtaining such a test.¹⁸ In *State v. Ball*,¹⁹ the Supreme Court of Vermont said in discussing the refusal to an additional test:

If the careful structure of protection for the drinking driver erected by the legislature is to have any vitality, prosecutors ought not to be able to avoid its strictures

15. S. C. CODE ANN. § 46-344(a) (Supp. 1969).

16. See S.C. CODE ANN. § 46-344(g) (Supp. 1969). Questions involving doctor-patient privileges should not arise in South Carolina since there is no such recognized privilege. *Peagler v. Atlantic Coast Line R.R.*, 232 S.C. 274, 101 S.E.2d 821 (1958). In any event this section specifically requires that the person conducting the additional test furnish a copy of a report showing the time, type, and results of the test to the officer. For further discussion of the doctor-patient privilege, see also R. DONIGAN, *CHEMICAL TESTS AND THE LAW*, at 106-12 (2d ed. 1966).

17. The average rate of elimination of alcohol from the system is .015% per hour. The courts will probably allow interpretive testimony of an expert to show what the result of the additional test would have been had it been administered at the same time as the breath test. See *People v. Holmes*, 2 Mich. App. 283, 139 N.W.2d 771 (1966).

18. An interesting question that may soon arise is whether the defendant must be advised of his right to an additional test.

19. 123 Vt. 26, 179 A.2d 466 (1962).

while gaining the advantages of its presumptions. It cannot be supposed that the legislature deliberately enacted a statute intending it to be so easily circumvented.²⁰

III. SELF INCRIMINATION

Shortly after its famous *Miranda*²¹ decision, the United States Supreme Court heard the case of *Schmerber v. California*²² and upheld a driving under the influence conviction based on a blood test administered despite defendant's refusal, on the advice of counsel, to consent to the test. In that case the test was administered to the defendant without a search warrant while defendant was at a hospital receiving treatment for injuries. The trial court admitted the test results over defendant's objection that the test violated his fourteenth amendment right to due process,²³ his sixth amendment right to counsel,²⁴ his fourth amendment protection from unreasonable searches,²⁵ and his fifth amendment privileges against self-incrimination.

In disposing of petitioner's contention that his privilege against self-incrimination had been violated the Court said:

20. *Id.* at 29, 179 A.2d at 469.

21. *Miranda v. Arizona*, 384 U.S. 436 (1966).

22. 384 U.S. 757 (1966).

23. The Court relied on *Breithaupt v. Abram*, 352 U.S. 432 (1957) in disposing of the due process claim. In that case the Court concluded that a test administered in a proper manner is not "conduct that shocks the conscience" nor was it offensive to a "sense of justice" as described in *Rochin v. California*, 342 U.S. 165 (1952).

24. The Court, in rejecting defendant's right to counsel claim, said:

This conclusion [that the test was not communicative or testimonial] also answers petitioner's claim that in compelling him to submit to the test in view of the fact that his objection was made on the advice of counsel he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. *Schmerber v. California*, 384 U.S. 757, 765-66 (1966).

25. The Court acknowledged the fact that the blood test plainly constituted a "search and seizure" within the meaning of the Fourth Amendment. The question to be answered, therefore, was whether the "intrusion" was justifiable under the circumstances, and whether reasonable procedures were employed in taking the blood. In recognizing that the blood-alcohol percentage begins to diminish shortly after the drinking stops and that there was therefore no time to secure a warrant, the Court concluded that the chemical test was an appropriate incident to the arrest. The Court did, however, limit the scope of its holding by saying that because "the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Schmerber v. California*, 384 U.S. 757, 772 (1966).

[T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.²⁶

The fifth amendment does not require the exclusion of a defendant's body as evidence when it may be material²⁷ and "that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."²⁸

Regardless of the absence of fifth amendment protection concerning chemical tests, the Implied Consent Law provides that the defendant must be advised, prior to the test, that "he does not have to take the test but that his privilege to drive will be suspended or denied if he refuses" ²⁹ If defendant then refuses³⁰ to submit to the test his license will be suspended by the highway department for ninety days regardless of the outcome of the later trial.³¹ Section 46-344(e) does provide for an administrative appeal limited to the three following issues:

1. Whether the accused was placed under arrest;
2. Whether the accused had been informed of his right to refuse the test and the consequences of that refusal;
3. Whether he refused to submit to the test.³²

The ninety-day suspension is, in essence, for failure to cooperate and, therefore, is not a moving violation to which points

26. *Schmerber v. California*, 384 U.S. 757, 761 (1966).

27. *Holt v. United States*, 218 U.S. 245 (1910).

28. *Schmerber v. California*, 384 U.S. 757, 764 (1966).

29. S.C. CODE ANN. § 46-344(a) (Supp. 1969).

30. A qualified refusal (i.e. refusal to take the test until the subject can talk to a doctor) will probably constitute a refusal. See Note, *The South Dakota Implied Consent Statute Reviewed*, 14 S.D.L. REV. 376 (1969).

31. The suspension is valid even though defendant is later acquitted. *But see Collins v. Hjetje*, 125 N.W.2d 453 (N.D. 1963), holding that suspension would be illegal if the defendant were acquitted, because the arrest would be illegal. This is most definitely a minority rule. One argument that might be raised in a situation where the defendant has pleaded guilty to a DUI charge is that the entire purpose of the test is to facilitate prosecution on this charge. Since the guilty plea renders the test unnecessary the requirement to take the test should be ruled inapplicable. See *Groff v. Rice*, 20 Ohio App. 2d 309, 253 N.E.2d 318 (1969).

32. Consent is not deemed to be withdrawn if the defendant is incapable of refusal. See note 10 *supra*. If intoxication is admitted or proven the defendant may, thereafter, be able to show that his condition rendered him incapable of refusal. *Groff v. Rice*, 20 Ohio App. 2d 309, 253 N.E.2d 318 (1969).

attach. If the defendant is acquitted of charges of driving under the influence of alcohol, a permanent record of the suspension will not be kept, and it will not come under the requirements of the Financial Responsibility Act.³³ The suspension should not, therefore, affect defendant's insurance rates.³⁴

If the defendant refuses the test and is subsequently convicted, the six-month suspension resulting from the conviction³⁵ will be added on to the ninety-day suspension resulting in a total suspension of nine months. At first glance it might appear that the best advice an attorney could give a client would be to refuse the test and only receive a three month suspension.³⁶ The theory of this approach would, of course, be that conviction would be unlikely without the chemical test as evidence. However evidence of defendant's refusal to submit to the test, which if used properly may compensate for the lack of the chemical test evidence, was held to be admissible in the case of *State v. Smith*.³⁷ In that case the South Carolina Supreme Court said:

[A]ppellant's constitutional rights were not violated by admitting testimony of his failure to submit to a chemical test designed to measure the alcoholic content of his blood. Since the testimony was admissible, it was proper for the attorney for the respondent to comment to the jury upon the appellant's refusal to submit to the chemical test of his blood."³⁸

The rationale of the court was that chemical tests were of the nature of physical evidence and not utterances which would bring it within the coverage of self-incrimination protections. Since the test was not self-incriminating, neither would be the refusal.

Whether the *Smith* case will withstand constitutional assaults is questionable. It is true that the chemical test affords physical evidence and not evidence of a communicative or testimonial nature. Thus, the test itself is not self-incriminating in the con-

33. S. C. CODE ANN. § 46-735 *et seq.* (Supp. 1969).

34. S. C. CODE ANN. § 46-344(h) (Supp. 1969). The subject who is not convicted shall not be required to file proof of insurance.

35. S.C. CODE ANN. § 46-348 (Supp. 1969). This section provides that there shall be a six-month suspension for a first offense, a one-year suspension for a second offense, and a two-year suspension for a third.

36. This suspension involves no fine nor should it substantially affect one's insurability. Also there is no "second offense" of refusing to submit to the test. Each refusal carries a ninety-day suspension.

37. 230 S.C. 164, 94 S.E.2d 886 (1956).

38. *Id.* at 173, 94 S.E.2d at 890.

stitutional sense,³⁹ but this, at least arguably, does not hold true in the case of a refusal. The refusal requires either a statement or conduct which is of a communicative nature and is indicative of the state of mind of the defendant. Use of the defendant's refusal to infer guilt could be interpreted as a violation of his right against self-incrimination. In fact, the United States Supreme Court in *Schmerber* seemed to suggest that a refusal to submit to such tests might be constitutionally protected.⁴⁰

IV. RIGHT TO COUNSEL

Since chemical test results are not self-incriminating, it should follow that the *Miranda* warnings, to the extent that they are geared to protecting one's privilege against self-incrimination, would not be a necessary prerequisite to the administration of the breathalyzer test. But what about the defendant's right to counsel, which is also included in the *Miranda* warning? The question has not yet arisen in South Carolina, nor has it been answered by the United States Supreme Court.⁴¹ The court decisions of other states vary, but most hold that defendant does

39. Evidence must be of a testimonial or communicative nature to fall within the scope of the constitutional protection against self-incrimination. See *Schmerber v. California*, 384 U.S. 757 (1966).

40. The Court in *Schmerber* said:

This conclusion would not necessarily govern had the State tried to show that the accused incriminated himself when he was told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case.

Petitioners have raised a similar issue in this case, in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. California*, 380 U.S. 609. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances; see *Miranda v. Arizona*, *ante*, at p. 30, p. 37. Since trial here was conducted after our decision in *Malloy v. Hogan*, *supra*, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements. 384 U.S. at 765, n. 9 (1966).

41. See note 8, *supra*.

not have an absolute right to counsel before deciding whether to submit to a chemical test.⁴² The test does not violate the constitutional rights of the defendant and although refusal results in automatic suspension, this suspension is pursuant to an administrative action to which *Miranda* does not apply.⁴³

A New York case⁴⁴ that considered the question of whether consulting with counsel would cause a delay in the test said:

Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But to be sure, there can be no recognition of an absolute right to refuse the test, until a lawyer reaches the scene. If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel.⁴⁵

If this view, which seems to be reasonable, were adopted by the South Carolina courts, the accused's rights would be protected to a reasonable extent without weakening the effectiveness of the Implied Consent Law.⁴⁶

V. THE TEST IN EVIDENCE

The alcohol-blood presumptive levels of intoxication set out in the Implied Consent Law are lower than those previously adhered to in South Carolina.⁴⁷ If a reading is five one hundredths

42. *Blow v. Commissioner*, 164 N.W.2d 351 (S.D. 1969); *Sharp v. Commonwealth*, 414 S.W.2d 902 (Ky. 1967); *State v. Trotter*, 4 Conn. Civ. 185, 230 A.2d 618 (1967); *State v. Oleson*, 180 Neb. 546, 143 N.W.2d 917 (1966); *State v. Plourde*, 3 Conn. Civ. 465, 217 A.2d 423 (1965); *City of Toledo v. Diez*, 3 Ohio St. 2d 30, 209 N.E.2d 127 (1965), *cert. denied* 382 U.S. 956 (1965); *Stensland v. Smith*, 79 S.D. 651, 116 N.W.2d 653 (1962). See Note, *The South Dakota Implied Consent Statute Reviewed*, 14 S.D.L. REV. 376 (1969). See also *Parker v. State*, 397 S.W. 2d 853 (Tex. 1965) (where no tests involved, defendant not entitled to acquittal on ground that he had been denied right to counsel for four hours). But see *City of Tacoma v. Heafer*, 67 Wash. 2d 733, 409 P.2d 867 (1966) (failure to allow defendant an opportunity to call his lawyer until four hours after the arrest held violation of defendant's constitutional rights to counsel and due process even though defendant refused to submit to chemical test).

43. *Gouschalf v. Sueppel*, 258 Ia. 1173, 140 N.W.2d 866 (1966).

44. *People v. Gurnsey*, 22 N.Y.2d 224, 292 N.Y.S.2d 416, 239 N.E.2d 351 (1968).

45. *Id.* at 229, 292 N.Y.S.2d at 419, 239 N.E.2d at 353.

46. If the accused had an absolute right to counsel before the test could be administered, delay by the attorney in getting to the testing site would work in the accused's favor.

47. An individual was previously presumed to be under the influence when his blood contained fifteen one-hundredths (0.15%) of one percent of alcohol.

(.05%) of one percent or less, the defendant is conclusively presumed not to be under the influence of alcohol.⁴⁸ A reading of .06% through .09% puts the defendant in the "gray area". No presumption results, but he may be charged.⁴⁹ If the readings show .10% or higher a presumption that the defendant was under the influence will follow. This presumption is rebuttable.⁵⁰

The "Breathalyzer" is capable of giving accurate results when the test is administered properly.⁵¹ The courts will probably take notice of its accuracy since use of the machine has been sanctioned by the Legislature, and defense attorneys will have a difficult time trying to prove that the breathalyzer does not accurately determine the alcoholic content of the blood.⁵² Most will probably accept that fact and focus on the question of whether the test was properly administered by a competent operator. An effective cross-examination of an operator⁵³ who has not done his homework or who in fact did not administer the test properly may create enough doubt so that the jury will not give it full weight. It may in some cases render the results inadmissible.

The prosecution probably will be required to lay some foundation before the results will be allowed into evidence. There is yet no rule in South Carolina, but it is logical to assume that

48. The presumption applies only to alcohol. Since the breathalyzer does not indicate the presence or lack of presence of narcotics, etc., a subject could, conceivably, be legally charged under section 46-343 (which covers drugs as well as alcohol) for "driving under the influence" even though the test results indicated a presence less than 0.5% of alcohol in defendant's blood. S.C. CODE ANN. § 46-343 (Supp. 1969).

49. A conviction at this level seems unlikely unless the prosecution has a great deal of additional evidence.

50. The test results are indicative of the subject's condition at the time of the test. As a general rule, the time lapse between the arrest and the test has little effect on the results. If there is a long period of time, possibly one hour between the arrest and the test, the blood-alcohol level of the defendant will usually decrease and, therefore, a lower reading in the defendant's favor would result. This, however, would not hold true in all cases. Pure alcohol enters the system at an average of one to two ounces per forty to seventy minutes. If defendant could show that he had taken a couple of "stiff" drinks shortly before the arrest and that the time between the arrest and the test was long enough, he may be able to argue that he was still in the "gray area" (0.06-0.09) at the time of the arrest and that his blood-alcohol level increased during the time between the arrest and the test. The law, of course, requires that his blood-alcohol level be 0.10% at the time of the violation for the presumption to attach.

51. See R. DONIGAN, CHEMICAL TESTS AND THE LAW, at 56 (2d ed. 1966).

52. No case has been found in any state which has held or indicated that the "Breathalyzer" is not capable of rendering accurate readings.

53. See Taylor, *Determining the Competence of a Breathalyzer Operator*, 9 CAN. B. J. 299 (1966).

standards similar to those set forth in a Washington case, *State v. Baker*,⁵⁴ will be required. In *Baker* the court said that:

[F]our basic requirements must be shown by the state before the results of such tests may be admitted in evidence, to wit:

- (1) That the machine was properly checked and in proper working order at the time of conducting the test;
- (2) that the chemicals employed were of the correct kind and compounded in the proper proportions;
- (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test;
- (4) that the test be given by a qualified operator and in the proper manner.⁵⁵

Compliance with the first two standards can be demonstrated in several ways. The State Law Enforcement Division (hereafter referred to as SLED) will be periodically checking the machines, and the chemicals will be spot checked by SLED chemists.⁵⁶ These agents could testify as to the results of their maintenance checks, and the courts may eventually presume that the machines have been properly maintained.

Also, the machine operator may conduct a simulator test with a known solution immediately before or after testing the defendant.⁵⁷ If the machine readings equal the amount of alcohol in the known solution, there is a clear indication that the machine is working properly and that the correct chemicals have been used.⁵⁸

The third standard requires that the defendant be observed for fifteen minutes prior to the test, during which time he is

54. 56 Wash. 2d 846, 355 P.2d 806 (1960). See also R. DONIGAN, CHEMICAL TESTS AND THE LAW, at 56 (2d Ed. 1966), Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C.L. REV. 35, 83 (1966).

55. *State v. Baker*, 56 Wash. 2d 846, 852, 355 P.2d 806, 809 (1960).

56. It would be impossible to check each ampoule because such a procedure would require each ampoule to be broken, thus rendering it unusable. The rule will probably be that spot checking is sufficient to allow a presumption that the proper chemicals were in the ampoules.

57. All persons who have been certified by SLED have been instructed to conduct a simulator test in all cases. Defense counsel should ascertain before trial whether such test had been conducted.

58. The simulator test should be enough to comply with the first two standards set forth in *Baker*, *supra*. Yet the court there, although making no mention of such a test, seems to require more, *i.e.* a statement by SLED of periodic checks. At least the point is arguable and worthwhile for defense counsel to raise.

allowed nothing to eat or drink. Compliance with this requirement insures that any alcohol that could possibly be concentrated in the defendant's mouth would be completely dissipated before the test is administered.⁵⁹ Also, the defendant's mouth should be checked for anything that may have absorbed some alcohol thus keeping it concentrated in the mouth.⁶⁰

To meet the fourth standard SLED has developed a checklist for the operator's use. If followed closely, the chance of human error is reduced to a minimum. This standard requires that the test be given by a qualified person.⁶¹ As a bare minimum, the operator must have been trained and certified by SLED. The defense may always challenge the qualifications of the operator on cross-examination.⁶²

VI. CONCLUSION

Whether the Implied Consent Law will fully accomplish its intended purpose is a question that cannot be answered at this time. A great deal will depend upon the answers the courts give to the many questions left unanswered in this article. For example, if *State v. Smith* were overruled, and "refusals" were not admissible, the possibility of obtaining a conviction in a refusal case would be slight. As a result, most persons would probably refuse the test and take the ninety-day suspension. With the lessened risk of conviction the anticipated deterrent effect of the new law probably would be reduced.

If the courts were to go beyond the guidelines established in the *Baker* case, and increase the amount of groundwork that must be laid prior to admitting the test results, prosecution by highway patrolmen may become impractical. Requirements

59. The author has participated in several experiments in this area. In one instance he placed several drops of 100 proof bourbon on his tongue and immediately blew into the machine. The result indicated 0.14% even though no alcohol was in the bloodstream. Between 10 to 15 minutes later a second test was administered and the reading was zero.

A similar experiment was then conducted except one and one-half ounces of liquor was gargled. The initial reading was higher, about 0.30%, but it returned to zero within fifteen minutes. The same result, except with a lower initial reading, occurred when mouthwash was used instead of liquor.

60. For example: If the subject had a couple of drinks while chewing on a cigar, the wet end of the cigar may absorb some of the alcohol. If he put the cigar in his mouth and chewed on it just before blowing into the machine, some of the alcohol from the cigar may have stayed in his mouth, thus causing a higher reading.

61. See R. DONIGAN, *CHEMICAL TESTS AND THE LAW*, at 88-105 (2d ed. 1966).

62. See note 18 *supra*.

that are too stringent in the area of rendering assistance in obtaining an additional test may have a similar effect.

In spite of these and other possible loopholes the Implied Consent Law, if administered properly by law enforcement personnel, will at least make people think twice before taking the wheel after drinking. "Drunk drivers" will still be on the road but hopefully in fewer numbers.