
Evidence - Admissibility of Drunkometer Tests

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Nearly all jurisdictions have held, in construing these statutes, that married women have been given the right to sue their husbands in property cases,¹² but only a few states have allowed wives to recover from their husbands for personal torts.¹³

No cases can be found in Illinois, except the Appellate Court decision in the *Welch* case, which decides whether or not the present Illinois Married Women's Act allows a wife to recover from her husband for personal tort injuries. A more recent Illinois Appellate Court case seems to take it for granted that a wife cannot sue her husband.¹⁴

Some vague inferences may be drawn from the language of the Supreme Court in the *Welch* case indicating that the justice writing the decision would favor allowing wives to sue their husbands for personal torts. However, it must be remembered that any reference to the Illinois Married Women's Act in this case is dicta and even these vague implications are not necessarily the opinion of the majority of the court.

It is, therefore, doubtful that the *Welch* case will be of any help to an attorney advocating that a wife, under the present Illinois Married Women's Act, has the right to sue her husband for personal injuries.

EVIDENCE—ADMISSIBILITY OF DRUNKOMETER TESTS

Defendant was convicted of driving an automobile while under the influence of intoxicating liquor. On appeal, it was held that the admission into evidence of the results of a drunkometer test was not error even though such tests have not received general scientific recognition. *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E. 2d 569 (1951).

In most communities, the only basis for a diagnosis of intoxication is the testimony of police officers and witnesses to an accident or traffic violation. Because the accuracy of such observations can be seriously challenged, certain scientific tests employing blood, breath or urine were developed.

The breath test makes use of a device known as the Harger Drunkometer. The person whose breath is to be tested voluntarily inflates a balloon. The breath thereby captured is released into a tube containing certain chemicals which change color as they absorb the alcohol from the air. The weights of the chemical before and after the test are compared, and by simple mathematical computation, the amount of alcohol in the

¹² 41 C.J.S., Husband and Wife § 396(b)(3) (1944); 27 Am. Jur., Husband and Wife §§ 599, 600 (1940).

¹³ 41 C.J.S., Husband and Wife § 396(b)(2) (1944); 27 Am. Jur., Husband and Wife §§ 591, 592, 593 (1940).

¹⁴ Tallios v. Tallios, 103 N.E. 2d 507 (Ill., 1952). This case held that a wife may sue her husband's employer for a tort committed by the husband while acting as an agent of the defendant.

blood is determined.¹ Once the amount of alcohol in the blood is computed, the extent of intoxication can be fairly accurately determined,² since blood and urine tests have received the general approval of the medical profession.³ Despite the fact that the amount of alcohol in the breath is in direct ratio to that in the blood, and that in a series of over a thousand tests the machine proved accurate and reliable, the breath test has not received general scientific approval.⁴

The *Bobczyk* decision represents the first time this question has been reviewed in Illinois. The defendant, voluntarily consenting to the test, was shown to have a .3 per cent concentration of alcohol in his blood which is the equivalent of ten ounces of one hundred proof whiskey. Science considers a person with a concentration of .15 per cent or more to be under the influence of alcohol. The results of the test, taken in connection with the testimony of several witnesses to the effect that his speech was incoherent and that he swayed as he walked, leave no doubt that the defendant was drunk. But just how much weight the court gave to the breath test itself is difficult to surmise.

Such evidence has generally been held admissible in Indiana,⁵ Texas,⁶ and New Jersey.⁷ Statutes in Indiana⁸ and New York⁹ expressly authorize such tests. The leading case denying the admission of such evidence is *People v. Morse*.¹⁰ The court in that case said that the accuracy of such a

¹ *State v. Hunter*, 4 N.J. Super. 531, 68 A. 2d 274 (1949); Harger, Lamb, and Hulpien, *A Rapid Chemical Test for Intoxication Employing Breath*, 110 A.M.A.J. 779 (1938).

² *Touchnon v. State*, 154 Fla. 547, 18 So. 2d 752 (1944); *State v. Duguid*, 50 Ariz. 276, 72 P. 2d 435 (1937); *Newman, Proof of Alcoholic Intoxication*, 34 Ky. L.J. 250 (1946).

³ *Legal—Medical Aspects of Blood Tests to Determine Intoxication*, 29 Va. L. Rev. 749 (1943).

⁴ *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E. 2d 569 (1951).

⁵ *Spitler v. State*, 221 Ind. 107, 46 N.E. 2d 591 (1943).

⁶ *McKay v. State*, 235 S.W. 2d 173 (Tex. Crim., 1950); *Guenther v. State*, 153 Tex. Crim. Rep. 519, 221 S.W. 2d 780 (1949).

⁷ *State v. Hunter*, 4 N.J. Super. 531, 68 A. 2d 274 (1949).

⁸ "If it is alleged in the indictment or affidavit, or upon the trial, that the defendant was under the influence of intoxicating liquor when he committed reckless homicide, or that he was under the influence of intoxicating liquor when he drove a vehicle, the court may admit evidence of the amount of alcohol in the defendant's blood at the time alleged, as shown by a chemical analysis of his breath, urine, or other bodily substance." Ind. Stat. Ann. (Burns, 1933) c. 47, § 2003.

⁹ "Upon the trial of any action or proceeding arising out of the acts alleged to have been committed by any person arrested for operating a motor vehicle or motor cycle while in an intoxicated condition, the court may admit evidence of the amount of alcohol in the defendant's blood taken within two hours of the time of the arrest, as shown by a medical or chemical analysis of his breath, blood, urine or saliva." Thompson's Laws of N.Y., Cumulative Supp. (1942), Vehicle and Traffic Law § 70-5.

¹⁰ 325 Mich. 270, 38 N.W. 2d 322 (1949).

device cannot be determined by a jury, especially where there is conflicting testimony as to its reliability and no allegation of its general scientific recognition. But constant improvement in the apparatus itself has reduced the margin of error greatly so that the results seem amply accurate for practical use.

The use of these tests raises many serious legal questions. Where such a test has been forced on the defendant, some courts have held such compulsion to be a violation of the privilege against self-incrimination.¹¹ Yet, there are holdings by other courts that the privilege applies only to oral testimony.¹² This seems to be the preferable view and, no doubt, the privilege is waived where the party voluntarily consents to it.¹³ But, if the test discloses a certain degree of intoxication, the party may conceivably be incapable of consent.

Another problem involved is the possibility that a compulsory test may be deemed an unlawful search and seizure.¹⁴ However, the court in *State v. Alexander*¹⁵ held that the defendant's rights against unreasonable search and seizure and self-incrimination were not violated by taking a specimen of his blood. The definition of an unreasonable search and seizure, as adopted by the court in *Graham v. State*,¹⁶ is "an examination or inspection without authority of law of one's person or premises with a view to the discovery of stolen contraband or illicit property or some evidence of guilt." One's breath certainly cannot be deemed illicit property or contraband. Even if such a test should be deemed an unlawful search and seizure, the results may be admitted in a jurisdiction holding illegally obtained evidence admissible.¹⁷

The breath test then has reached a stage of development and reliability where it may serve a most useful purpose in discovering the truth in cases in which intoxication is an issue. With constant improvements in the apparatus itself and the resulting reduction in the margin of error, the trend would seem to be toward more extensive use of the device. Certainly such evidence will be a great aid to courts and juries in deciding cases which come before them.

¹¹ *Apodaca v. State*, 140 Tex. Crim. Rep. 593, 146 S.W. 2d 381 (1940); *Booker v. Cincinnati*, 1 Ohio Supp. 152 (1936).

¹² *Holt v. U.S.*, 218 U.S. 245 (1910); *State v. Cram*, 176 Ore. 577, 160 P. 2d 283 (1945).

¹³ *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752 (1944); *State v. Small*, 233 Iowa 1280, 11 N.W. 2d 377 (1943).

¹⁴ *U.S. v. Willis*, 85 F. Supp. 745 (S.D. Calif., 1949). The use of a stomach pump was held to be an unreasonable search. See also *Rochin v. People of Cal.*, 72 S. Ct. 205 (1952).

¹⁵ 7 N.J. 585, 83 A. 2d 441 (S. Ct., 1951).

¹⁶ 31 Okla. Crim. Rep. 125, 237 Pac. 462 (1925).

¹⁷ *State v. Tonn*, 195 Iowa 94, 191 N.W. 530 (1923).