

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

E I G H T Y - N I N T H L E G I S L A T U R E

Legislative Document

No. 950

S. P. 419

In Senate, February 15, 1939.

Referred to Committee on Judiciary and sent down for concurrence. 500 copies ordered printed.

ROYDEN V. BROWN, Secretary.

S T A T E O F M A I N E

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
THIRTY-NINE

To the Honorable Senate and House of Representatives of the
89th Legislature of Maine:

At the regular session of the 88th Legislature an order (S. P. 439) was passed calling for the appointment of a recess committee of 7 members, consisting of 2 on the part of the senate and 5 on the part of the house "to investigate the feasibility of the enactment into law of requirements for the adoption of blood test for persons charged with operating motor vehicles when intoxicated or under the influence of liquor or drugs."

Under the authority of the order, Senator Harvey A. Tompkins from Aroostook, Senator H. C. Marden from Kennebec, Mr. Howard S. Higgins from Ellsworth, Mr. Alverdo L. Douglass from Gorham, Mr. Carl F. Fellows from Augusta, Mr. Lyle M. Snow from Dover-Foxcroft, and Mr. Oayma J. Colby from South Paris, were appointed to that committee, which under the order was instructed to report "its findings and recommendations together with any bill or bills to any special session of the 88th Legislature or to the regular session of the 89th Legislature."

Upon organization, the committee elected Senator Harvey A. Tompkins as chairman and Senator H. C. Marden as secretary.

Several meetings have been held, communications have been directed to all known sources of information, and conference was held with Dr. Julius Gottlieb, pathologist at Central Maine General Hospital, Lewiston, who had recently completed research in this field for presentation to the State

Medical Association. From the information thus assembled, the most important printed authorities of which are cited in this report, your committee has prepared its report.

Such legislation calls first for the determination of acceptable standards by scientific means by which the quantity of liquor in the body that renders a person—any person regardless of his capacity for “holding liquor”—incompetent to drive can be measured and second the validity in law of such measurement. It follows that the consideration of this problem resolves itself into two issues :

1st. **Legal;** viz. that of constitutionality of any legislation attempting to make mandatory blood tests for the purpose of determining the quantity of liquor or drug in the body.

2nd. **Medical;** in the taking of test and the formulation and reliability of result.

Constitutionality. The question of constitutionality of legislation requiring such a test is of course raised by the 5th amendment to the constitution, which says: “No person shall be compelled in any criminal case to be a witness against himself;” which clause is commonly known as the “Self-Crimination Clause” of the constitution, and which provision has been raised many times in opposition to the admission of evidence against an accused which evidence in any sense has been obtained from the accused himself. While it is clear that under this constitutional privilege against self-crimination, an accused is not obliged to testify against himself, it seems clear that there is an increasing tendency toward restriction of this privilege to “testimonial compulsion” and the courts of English-speaking countries are becoming more liberal in admitting evidence furnished by the accused, such as photographs, body measurements, measurements of garments and shoes, taking of handwriting, sound of voice, and the taking and use of fingerprints. Not all courts are in agreement upon the extent to which such evidence may be obtained from the accused and be admissible against him, but the current tendency of the courts seems to agree largely with Wigmore, noted authority on the law of evidence, who says that “The component idea of the privilege (constitutional privilege) is not compulsion alone but testimonial compulsion The display of the accused’s body is not testimony about his body, but his body itself. Compulsion to come within the present principle must be by process of law or its equivalent for the purpose of obtaining testimony.”

Under this principle, it would seem clear that the result of tests made

upon body fluids from the accused, if the sample is obtained by consent of the accused,—or to farther, without opposition presented by the accused,—should be admissible against the accused in court; and the supreme court of at least one state (State of Arizona vs. Duguid, Oct. 1937) has so held on appeal. In the Duguid case, a sample of urine was obtained from the respondent upon which the tests for the presence of alcohol were made and the result offered in evidence. A trial court of Iowa in November, 1937, (State vs. Townsend, Des Moines, Ia.) citing the Arizona decision, allowed the admission of evidence of presence of alcohol obtained from a test of blood of the respondent. In both of the records cited, the accused was charged with driving an automobile while under the influence of intoxicating liquor and convictions resulted. The Arizona case is believed to have established a precedent in this field from a state court of last resort.

There has been a very substantial use of similarly obtained body fluid tests in trial courts within the last 2 years.

Your committee is informed through correspondence with persons connected officially with the International Bureau Against Alcoholism that Germany has since Sept. 1936 required a blood test of the drivers involved in all cases of traffic accidents; that in Norway the blood test is generally adopted although not compulsory; and the same in Sweden, with the test compulsory for professional drivers involved in an accident; and in Switzerland, the blood test is frequently used.

The fact that many interested organizations in the United States have gone forward with the study of this problem, and from the reports of which little or no discussion of constitutionality is involved, argues that those organizations have as a practical matter not been faced with serious constitutional barriers.

It is to be noted of course that the use of evidence obtained from body fluid tests so far discussed has been confined to analysis of fluids obtained with the permission, or without any objection, on the accused.

Just as all courts have not agreed upon the admission of evidence so obtained, and just as the admission of evidence of this nature has been allowed only by arduous progress toward liberalism, so it is believed, any extension of the discretion of a trial court in the admission of such evidence be opposed bitterly by virtue of a stronger reason will opposition be expressed to any attempt at making the submission to body fluid tests mandatory; and it seems clear to the committee that, the courts of our country would be widely divided on the constitutionality of any law so providing, the admission of such evidence under such a statute,—or its inadmissibility,—being dependent upon the respective courts, interpretation of the accused's constitutional privilege from self-crimination.

The only states which have attempted to make blood tests mandatory for any purpose have been New York and Wisconsin,

New York (P. L. 1935, Chap. 196, Chap. 197, Chap. 198; Amended P. L. 1936, Chap. 440, Chap. 439, Chap. 604)

Wisconsin (P. L. 1935, Chap. 351)

which states have authorized the courts to order blood tests for aid in determination or, more accurately, exclusion of paternity in bastardy proceedings. While bastardy proceedings are sometimes treated as quasi-criminal proceedings, they are undoubtedly civil proceedings in substance, so that the question of constitutionality of such mandatory tests has not reached a court of last resort.

A measure was introduced to the New York assembly in 1937 authorizing any peace officer to require a blood and urine test of motor vehicle operators whom he believed to be intoxicated and after arrest. This measure failed of passage.

Your committee finds no legislation of this type in Canada, and it is believed that the only attempt at such in the United States was the introduction of the measure in New York above mentioned.

It is the opinion of your committee that while such legislation may be inevitable it will be accepted only after bitter opposition involving the question of constitutionality.

Medical: A surprising number of organizations and individuals have interested themselves in the medical aspect of tests for the determination of medico-legal intoxication. (See "References.")

While it was the duty of this committee to investigate the matter of blood tests, it is difficult to discuss the value of such a test without comparing it with other tests recently developed for determining the alcoholic content in the system of an individual. The most practical of the tests developed for determining the alcoholic content in a person's system are those applied to spinal fluid, blood, urine, saliva, and breath.

Spinal fluid. Inasmuch as the degree of intoxication of an individual depends upon the alcoholic content of the brain, the alcoholic content in the spinal fluid is probably the most accurate test scientifically because the alcohol content of the spinal fluid proximates very closely that of the brain. This test is dangerous because of the difficulty in drawing the sample, which is in itself a difficult operation requiring skill and always a competent physician. This practical difficulty plus danger of infection obviates consideration.

Blood. With relation to alcoholic content there has been established a close correlation between the blood and spinal fluid so that the test of blood

is considered scientifically accurate for the determination of alcoholic content in the spine and brain and the resultant effect. The test is accomplished with less difficulty, the sample of fluid being taken from the arm or lobe of the ear by puncture and in the amount of from two to five cubic centimeters. With 15 drops to a centimeter, the layman can appreciate in a general way the amount of blood to be drawn. The 5 c.c. amount is sufficient for at least two analyses, which might be advisable for purposes of comparison. This test has the disadvantages of the spinal fluid test to a lesser degree in that there is possible danger of infection in taking the sample although thousands of such tests are taken daily in our Maine hospitals.

While the authorities differ on the alcoholic content necessary to place the accused within the requirements of so called "drunken driving" statutes, the authorities generally agree that an alcoholic content in the blood amounting to 1/10th of 1% by weight reasonably determines that the subject is "some under the influence." Inasmuch as our Maine statute prohibits a driver "at all under the influence" from operating a motor vehicle upon our public ways, it is clear that the finding of this amount of alcohol in the blood of a Maine motor vehicle operator would scientifically place him as intoxicated within the meaning of the statute. 2/10ths of 1% indicates objective intoxication; 3/10ths of 1% indicates a condition of stagger; and 4 to 5/10ths of 1% indicates stupor.

Some experience would be necessary for a person taking the blood sample, and an officer could be trained to do it, but laboratory analysis would be necessary.

Urine. As in the case of blood, alcoholic content in urine is correlated to both blood and spinal fluid, so that to a lesser degree of accuracy this test is reliable. The practical problem of securing samples would not be particularly difficult and the analysis might be by an officer trained in chemical procedure.

Breath. This test technically known as "alveolar air process" is made by the taking of the breath of an accused, such as could be accomplished by the subject's inflating an ordinary toy balloon, which balloon may then be closed off, identified, and transported to laboratory for tests. In the event the accused should refuse to supply the sample, an apparatus has been devised which can take a sample by being placed near the mouth of the accused without actual contact. The apparatus, not only for the taking of the sample but for analysis of the sample, is simple and inexpensive and any officer, even without knowledge of chemistry, can be trained to make this test. While its simplicity challenges accuracy, authorities state that the test is reliable.

Your committee is satisfied that acceptable standards have been determined by scientific means by which the quantity of alcohol in a person's body rendering him incompetent to drive within the meaning of our motor vehicle law can be measured. However, this committee is charged with the investigation of the feasibility of blood tests, and it feels that such feasibility depends upon the possibility of other tests equally accurate, less difficult of accomplishment and infinitely more practicable. For this reason, slight comment on other tests has been made.

Drugs. Your committee is convinced that any attempt to determine presence of drugs in blood from an individual for the purpose of ascertaining competence of that person to operate a motor vehicle is, due to difficulty of analysis, and uncertainty of result, not feasible.

Conclusion. It is the conclusion of the committee unanimously, therefore, that, while the subjecting of accused persons to tests for the purpose of determining scientifically the presence or absence of alcohol (in turn determining whether or not that individual is under the influence of intoxicating liquor in violation of law) is highly desirable and eventually may be demanded by both the general public and law enforcement officers, constitutional questions attached to mandatory blood tests, together with practical medical questions, make the enactment of such legislation not feasible at this time.

In the light of highway traffic danger which is becoming more apparent to everyone daily and the consensus of authentic opinion that 60% or more highway accidents are traceable to the use of liquor at the wrong time and place, your committee feels very keenly that the time may be here for the enactment of some law requiring some scientific test for the accurate determination of the presence or absence of alcohol in the body of a person accused of driving a motor vehicle while under the influence of intoxicating liquor, and for that reason has commented upon other tests which have been developed for this purpose.

Respectfully submitted,

Harvey A. Tompkins

by H. C. M.

H. C. Marden

Howard S. Higgins

Alverdo L. Douglass

Lyle M. Snow

Oayma J. Colby

Carl F. Fellows

The undersigned members of your committee feel that worthwhile progress can be made by, and recommends, a law authorizing our courts to accept as evidence the results of scientifically analyzed body fluids legally obtained for the determination of the presence or absence of alcohol in cases of persons accused of driving a motor vehicle while under the influence of intoxicating liquor, which recommendation is expressed in a measure proposed herewith.

Respectfully submitted,

Harvey A. Tompkins

by H. C. M.

H. C. Marden

Lyle M. Snow

Oayma J. Colby

Carl F. Fellows

REFERENCE

Coroner's Research Report, Dr. S. R. Gerber, Coroner of Cuyahoga County, Cleveland, Ohio, 1936.

Urinalysis, *The Lancet*, March 20, 1937.

Paper before The Maine Medical Association, Julius Gottlieb, M. D., F. A. C. P., June, 1937.

Medical Legal Application of Chemical Tests for Alcohol, Herman M. Gunn, M. D., *American Association Journal*, June 19, 1937.

Blood Tests Statutes, *Journal of Criminal Law and Criminology*, July-August, 1937.

Alliance News, 1 Victoria Street, Westminster, London, England, January, 1938.

Tests for Driver Intoxication, Supplement to *Voice of the Board of Temperance*, Methodist Episcopal Church, February, 1938.

Statement by Anti-Salon League of America, Laura Lindley, Research Secretary, February 7, 1938.

Alcoholic Intoxication (Medicolegal Implication) Sydney Salesnick, M. D., *American Medical Association Journal*, March 12, 1938.

Convicting the Drinking Driver, Herman M. Gunn, M. D., *The Fraternal Order of Police Journal*, May, 1938.

Alcohol in Relation to Traffic Accidents, *American Medical Association Journal*, September 17, 1938.

Correspondence with International Bureau Against Alcoholism, Lusanne, Switzerland.

Handling the Drunken Driver, The Modern Method, Judge Harry H. Porter, Evanston, Illinois.

National Safety Council, Chicago, Illinois.

Lincoln Safety Council, Lincoln, Nebraska.

American Business Men's Research Foundation, 111 West Jackson Blvd., Chicago, Illinois.