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Daniel E. Johnson
Baker & Daniels

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BLOOD TEST RESULTS—THEIR ADMISSIBILITY TO SHOW A DECEDENT'S INTOXICATION

DANIEL E. JOHNSON†

The drinking driver constitutes a hazard on the highways.1 If he causes an accident he will be hard pressed to conceal the fact of such drinking. Witnesses may be produced who will testify respecting his appearance. He may be asked to submit to one of several tests which evaluate either his performance or his body fluids. If he refuses to submit an inference arises. But what if he dies in the very accident he caused? How, then, may his intoxication be established? Among the many techniques for proving intoxication, the significance of those loosely grouped as “chemical blood tests” looms far larger when the drinker is dead. Choosing Indiana as the jurisdiction, it is proposed to investigate the state of the law respecting the admissibility of chemical blood test results in a civil action on the issue of the deceased's intoxication.2 It is assumed that no consent is given to the testing, either by the deceased prior to his demise or by his personal representative thereafter. The extraction of blood under these circumstances and the admission into evidence of the test results suggest the possible violation of certain rights and privileges, both with respect to the living and the dead. Further, even granting the admissibility of such results per se, they are only admissible if preceded by a proper foundation. Curiously, the essentials of this necessary predicate appear far from certain. Finally, if admitted into evidence, what is to be made of the test results? Who may interpret them and what standards should be used? These general areas (admis-

† Member of the Indiana Bar, associated with the firm of Baker & Daniels, Indianapolis, Indiana.

1. Specific studies reveal that drinking drivers and the drinking pedestrians have been involved in 50% or more of the fatal accidents covered by the various studies. Further, the percentage appears to be increasing. 1961 ACCIDENT FACTS, annual statistical report of the National Safety Council. The following comment may serve to point up the incidence of inebriation: “In Maryland, the Department of Post Mortem Examiners analyzes the blood of drivers and pedestrians who die within 6 hours of a motor vehicle accident. Among these victims, nearly 3 out of 4 drivers, and 3 out of 5 pedestrians have been found with alcohol in their blood.” Alcohol Involvement in Traffic Accidents, in 1961 ACCIDENT FACTS.

2. Rare indeed are prosecutions of deceased defendants. Yet the matter of admissibility of chemical blood test results has, at least upon occasion, become relevant in a criminal action. See Commonwealth v. Capalbo, 308 Mass. 376, 32 N.E.2d 225 (1941). In Capalbo evidence based on blood taken from the victim belied the defendant's claim that he killed only in self defense.
sibility, predicate and interpretation) will be viewed in turn through the prism of Indiana Law.

1. THE GENERAL RULE RESPECTING ADMISSIBILITY

By the weight of authority in this county the results of chemical tests are admissible into evidence in civil actions on the issue of intoxication, assuming a proper predicate and subject to the rules respecting a proper taking. As stated in Wigmore, the condition of intoxication: "[M]ay be evidenced by chemical tests of the alcohol-content of a person's blood, urine, etc., provided the test is one evidenced to be accepted in medical science as indicative in the average person of inability to control his movements intelligently in the usual affairs of life." Of course, such evidence, although generally admissible, is not conclusive and may successfully be rebutted.

A smaller yet heartening number of decisions have dealt with the narrower issue of the admissibility of evidence derived from chemical tests based upon blood extracted from the veins of either a corpse or of a person since deceased. These decisions indicate that death does not alter the general rule of admissibility. In sum, the area of chemical blood

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3. The lore of chemical blood tests is rich in technical writings, carefully explaining the needs, methods and limitations of the various types of tests. See DONIGAN, CHEMICAL TESTS AND THE LAW (1957); Ladd & Gibson, The Medico-Legal Aspects of the Blood Test to Determine Intoxication, 24 IOWA L. REV. 191 (1939); Muehlberger, Medico-Legal Aspects of Alcohol Intoxication, 35 MICH. SBJ. 36 (1956).

4. Rivers v. Black, 259 Ala. 528, 68 So.2d 2 (1953); Nichols v. McCoy, 38 Cal. 2d 447, 240 P.2d 569 (1952); McKee v. People, 131 Colo. 492, 286 P.2d 618 (1955); Russell v. Pitts, 105 Ga. App. 147, 123 S.E.2d 708 (1961); Woolley v. Hafner's Wagon Wheel, Inc., 22 Ill. 2d 413, 176 N.E.2d 757 (1961), reversing 169 N.E.2d 119 (1960); Williams v. Hendrickson, 189 Kan. 673, 371 P.2d 188 (1962); Soard v. Rogers' Adm'r, 332 S.W.2d 525 (Ky. 1960); Robinson v. Life & Cas. Ins. Co., 255 N.C. 669, 122 S.E.2d 801 (1961) (dictum); Fossum v. Zurn, 78 S.D. 260, 100 N.W.2d 805 (1960); Bolie v. Fireman's & Policeman's Civil Serv. Comm'n, 330 S.W.2d 234 (Tex. 1959); Baird v. Cornelius, 107 N.W.2d 278 (Wis. 1961); City of Appleton v. Sauer, 271 Wis. 614, 74 N.W.2d 167 (1956); Schwartz v. Schneutiger, 269 Wis. 535, 69 N.W.2d 756 (1955); Commissioner's Prefatory Note to UNIFORM CHEMICAL TEST FOR INTOXICATION ACT, 9 Uniform Laws Annotated (Supp. 1962); DONIGAN, CHEMICAL TESTS AND THE LAW, ch. 2 (1957); MCCORMICK, EVIDENCE § 176, at 375 (1954); Annot., 127 A.L.R. 1513 (1940), supplemented in 159 A.L.R. 209 (1945). A substantial number of additional decisions clearly presuppose the admissibility of such evidence per se, and reject the specific evidence proffered in the particular case only because of an improper foundation. Such decisions are nonetheless instructive on the issue of admissibility. Section 11-902(b) of the Uniform Vehicle Code, promulgated by the National Committee on Uniform Traffic Laws and Ordinances (rev. 1956), now specifically provides that evidence respecting the amount of alcohol in a person's blood is admissible and entitled to the specified presumptions in civil as well as criminal proceedings.


tests appears to be a viable one with the doctrine (and its substantive requirements) evolving rapidly.  

2. The Indiana Rule Respecting Admissibility

No reported Indiana decision considers the question of the admissibility of chemical blood test results in a civil action involving the death of the person whose intoxication is in question, whether the taking was with or without consent. However, in the 1962 decision of Ravellette v. Smith, an appeal from a judgment for the defendant in a wrongful death action, this issue was raised in a case where consent was lacking. At the trial evidence based upon an analysis of blood extracted from the corpse indicated a percentage of alcohol that would have been sufficient to impair the judgment in a person of physical characteristics similar to those of the decedent. In response to appellant's contention that the evidence was inadmissible, the Court of Appeals remarked that: "As far as we can determine Indiana courts have not passed on the question of admissibility of blood tests where the blood was taken from a dead body without the consent of the next of kin." The court concluded that article I, section 11 of the Indiana Constitution (which proscribes unlawful search and seizure) was inapplicable, since this right was personal to the decedent, as was his "right of privacy." On this basis the court distinguished cases involving the taking of blood from unconscious persons. As to such right as Article I, section 11 (which affords security to one's person and effects) gave the plaintiff in her deceased husband's corpse, the court held that his body did not constitute an "effect" within the language of this provision. Finally, on the authority of Breithaupt v. Abram the blood test was held not to constitute an outrage.


7. The change is illustrated by 20 Am. Jur. Evidence § 876 (1939). Although chemical tests are ignored in the original text as a means of proving intoxication, the 1963 supplement appends over one page of text and authority, beginning at p. 164, to reflect the adoption in the various jurisdictions either by statute or by common law of rules permitting the admission into evidence of the results of tests made of various body fluids for the presence of alcohol.

8. 300 F.2d 854 (7th Cir. 1962).

9. Id. at 857.

or indignity to the decedent's body. Unfortunately, this decision falls far short of considering all eminent objections to such evidence. These objections will be considered hereafter.

Only one Indiana decision relating to the use of chemical blood test evidence in a civil action deserves mention. In Nuewelt v. Roush, the rejection of evidence based upon a chemical blood test was approved by the Indiana Appellate Court for lack of a proper foundation. But the opinion appears to assume the admissibility of such evidence, granting a proper foundation.

3. THE ANALOGOUS INDIANA RULE IN CRIMINAL PROSECUTIONS

Broadening the scope of the investigation to include actions of a criminal as well as civil nature and to include the Harger drunkometer, a bloodless chemical test, considerably more Indiana authority is available. Several cases have considered the admissibility, in a prosecution for any one of several crimes involving drunken driving, of evidence resulting from chemical tests administered to the defendant, both with and without his consent. Unfortunately, most of these cases did not involve blood tests; a distinction of potential significance. If the defendant consented to the testing he is held to have waived such of his objections as are grounded upon constitutional bases or questions of privilege; the results of the test are admissible, subject to a proper foundation. And his intoxication need not invalidate his consent. Of course, objections relating to the accuracy of the test and to the qualifications of the medical expert are preserved in spite of the waiver; it merely permits the test to be made. But if the defendant-donor did not consent, analogous

12. Alder v. State, 239 Ind. 68, 154 N.E.2d 716 (1958) (blood test evidence held barred by physician-patient privilege); All dredge v. State, 239 Ind. 256, 156 N.E.2d 888 (1959) (comment on refusal to take drunkometer test held proper against self-incrimination objection; dictum that blood test improper unless consented to); Willinnar v. State, 228 Ind. 248, 91 N.E.2d 178 (1950) (drunkometer test: waiver of objections); Stevens v. State, 240 Ind. 19, 158 N.E.2d 784 (1959) (same); Spitler v. State, 221 Ind. 107, 46 N.E.2d 591 (1943) (same); Ray v. State, 233 Ind. 495, 120 N.E.2d 176, re hearing denied, 121 N.E.2d 732 (1954) (drunkometer test; waiver of any objections by failure to brief; dictum praising the "science" of the Harger drunkometer); Wells v. State, 239 Ind. 415, 158 N.E.2d 256 (1959) (chemical blood test; consent to taking). See also 1940 IND. OPS. ATTY GEN. 211, opining the admissibility of Harger drunkometer results (the reasoning in this opinion would appear not to limit it to criminal prosecutions); 3 INDIANA LAW ENCYCLOPEDIA, Automobiles § 188, at 541 n.85.
13. See notes 23 and 33 infra and accompanying text.
authority suggests that any one or more of several constitutional limitations may be called into play.

4. **Substantive Objections to Admissibility**

Granting that evidence based upon the results of chemical blood tests is not per se inadmissible on the issue of intoxication, assuming a proper foundation, several objections frequently appear in the decisions which qualify the general rule of admissibility. These objections will be considered in an order which reflects the amount of concern they appear to have caused the judiciary.

(a) **Privilege Against Self-Incrimination.** Although earlier decisions were troubled by this privilege, it now appears to be generally accepted that the privilege, both state and federal, relates only to testimonial compulsion. As such it does not apply to blood tests or to the examination of other body fluids. This distinction has been accepted in Indiana. Further, when the donor is deceased at the time the evidence is proffered an additional consideration facilitates its admission. As sagely observed in Hartman v. Harder, "the claim of self-incrimination could not possibly apply here because the donor was dead and could not be prosecuted."

(b) **Unlawful Search and Seizure.** Article I, section 11, of the Indiana Constitution virtually copies the fourth amendment to the United States Constitution in affirming "the right of the people to be secure in their persons . . . and effects, against unreasonable search, or seizure." Since Mapp v. Ohio it appears that the federal exclusionary rule as ingrafted upon the fourth amendment is also contained in the fourteenth amendment, hence binding upon Indiana courts. However, Indiana had already adopted the exclusionary rule, at least respecting evidence secured in violation of article I, section 11, and, possibly, in violation of any constitutional safeguard. Apparently Indiana retains the common law rule concerning evidence which is seized illegally but in violation of no constitutional right.

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22. Ibid.
Since evidence is inadmissible if obtained pursuant to an illegal search and seizure it becomes appropriate to inquire as to whether a chemical blood test performed on a corpse may constitute an illegal search and seizure, assuming a lack of consent. It has been stated, with relation to blood extraction, that a lawful taking is predicated upon either such search as is incident to a lawful arrest or upon possession of a search warrant, hence implying that in other situations the taking might be in violation of this right. However, other discussions have regarded this right as protecting a person's home and possessions rather than his physical makeup.

The right to be secure in person and property is a right which is personal to the individual claiming it. Frequently the rule is asserted in this broad and unqualified form. Thus the beguiling answer to any assertion of constitutional violation by the successors in interest of a deceased donor is that his right perished with him. As stated in Ravellette v. Smith:

In the instant case, decedent was dead when the sample was taken. The law, frequently expressed, is that the rights guaranteed by the search and seizure provisions of state and federal Constitutions are personal rights. Decedent's right, being personal, could not survive his death and cannot validly be urged by plaintiff.

But what of the argument that a decedent's personal representative or heir succeeds to such a right? In Studabaker v. Faylor, a civil action involving a privileged communication rather than an unlawful search and seizure, the court recognized that the right to evoke the privilege is personal but proceeded to suggest that it might lie with the personal representative or with the heirs. Whatever the potential for objection here, it has not been successfully employed in decisions involving deceased donors.

There is one other factor. The plaintiff in Ravellette suggested that the taking of blood from her deceased husband's corpse violated not only

23. Foust & Davis, Medico-Legal Aspects of Blood Extraction, 52 J. of the Ind. S. Medical A. (1959). Perhaps the taking of blood from a corpse by or under the direction of public authority in situations where malfeasance is suspected is a proper exercise of the state's police power. For example, the coroner may order an autopsy for investigative purposes. See DONIGAN, CHEMICAL TESTS AND THE LAW 153 (1957).
26. 300 F.2d 854 (7th Cir. 1962).
27. Id. at 857. See also Hartman v. Harder, 322 S.W.2d 555 (Tex. 1959).
28. 52 Ind. App. 171, 98 N.E. 318 (1912).
the decedent's right under article I, section 11, to be secure in his person (which was disposed of as having perished with him), but also the right of his widow, the plaintiff, to be secure in her "effects," his corpse being one of her effects. This intriguing assertion was disallowed by the court.

In conclusion, despite the theoretical objections discussed herein, the decisions most closely in point do not indicate that any violation of the constitutional right to be secure in person and property occurs when results based on chemical tests of blood taken from a corpse without permission or a warrant are admitted into evidence.29

(c) Due Process. At least until Mapp v. Ohio, the federal due process clause was available as a crude limitation on such state action as, had it been done by federal officers, would have formed the basis for an exclusion of the evidence. But the limitation was an extreme one and applied only to conduct such as to shock the conscience.30 In Breithaupt v. Abram31 the United States Supreme Court held that the extraction of blood from an unconscious man for purposes of a chemical test to determine intoxication was not such conduct as "shocked the conscience."

However, the due process ("due course of law") provision found in article I, section 12, of the Indiana Constitution may impose a stricter standard. In Alldredge v. State,32 a prosecution for operating a motor vehicle while under the influence of intoxicating liquor, testimony respecting the refusal to submit to a drunkometer test was admitted over defendant's objection. But the Indiana Supreme Court, in dictum, cast some doubt upon Indiana's attitude towards such chemical blood tests as involve a physical invasion of the body for the extraction of blood. The court's language was as follows: "We hold that there was no error in the admission of the evidence of a refusal to take a drunkometer test where there is no evidence to show such a test would involve a physical invasion of the accused's body, which amounts to a violation of due process."33 Since the decision of the United States Supreme Court in Rochin v. California34 appeared to be regarded as significant by the Indiana Supreme Court, one may ponder whether Breithaupt was called to its attention. Nonetheless, Alldredge is its latest statement.

29. Any discussion of illegal search and seizure assumes that the blood was taken by order of some governmental authority, e.g., a state or city policeman, rather than by a private person. In the latter situation, the constitutional right to be secure in person and property from unlawful search and seizure is simply not involved. 8 WIGMORE, EVIDENCE § 2184a, at 50 (McNaughton rev. 1961).
32. 239 Ind. 256, 156 N.E.2d 888 (1959).
33. Id. at 270, 156 N.E.2d at 894. (Emphasis added.)
34. 342 U.S. 165 (1952). See note 30 supra and accompanying text.
(d) Privileged Communication Between Physician and Patient. By statute a majority of jurisdictions recognize as privileged confidential communications between physician and patient arising out of that relationship. The scope of the privilege is rather narrowly drawn. In Indiana it apparently applies only to physicians,\(^5\) and may be waived.\(^6\) A further limitation on the privilege is reflected in certain decisions which restrict its scope by so defining the physician-patient relationship as to exclude situations in which blood was taken by a physician for reasons (such as testing for intoxication) not related to the patient’s treatment and for which the patient was not charged.\(^7\) If the blood was taken by a physician who did not (otherwise) treat the patient, the exclusion is more obvious and the privilege is inapplicable.

The physician-patient privilege receives scant treatment in those decisions which involve chemical tests of blood extracted from decedents. Apparently the capacity to invoke or waive the privilege as to communications which occurred during the lifetime of the patient is not lost on his death but passes to his personal representative.\(^8\) But as to the “communication” which occurred when blood was extracted from the corpse after death, different considerations obtain. Since a “communication” includes non-verbal information obtained from observation of the patient\(^9\) a blood test would appear to qualify. Yet it is generally accepted that the privilege does not apply to an autopsy,\(^10\) apparently on the theory that one cannot doctor a dead man. Presumably the same rationale, hence the same exception, would apply to the extraction of blood from a corpse; the difference, if any, appears only to be one of degree in the extent of the “taking.” Thus, at least in theory, blood extracted from a corpse for chemical testing would be an exception to the physician-patient privilege even if extracted by a physician.

To the recognized rule in the case of autopsies, the Indiana Appellate Court took exception in *Mathew v. Rex Health & Acc. Ins. Co.*\(^11\)

35. General Acc., Fire & Life Assur. Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936) (privilege not applicable to a nurse, the statutory term “physician” referring only to one possessing a degree of doctor of medicine). See also Block v. People, 125 Colo. 36, 240 P.2d 512, *cert. denied* 343 U.S. 978 (1951) (medical technician excluded).

36. Schlarb v. Henderson, 211 Ind. 1, 4 N.E.2d 205 (1936) (the patient’s calling two physicians as witnesses waived the privilege of confidentiality respecting a third who was not called by the patient).


39. 8 Wigmore, EVIDENCE § 2384 (McNaughton rev. 1961).

40. 8 Wigmore, EVIDENCE § 2382(4) (McNaughton rev. 1961); McCormick, EVIDENCE § 102 (1954); Annot. 58 A.L.R. 1134 (1929).

But the court appeared to regard as crucial the consideration that the physician who performed the autopsy and the physician who had treated the victim while alive were employed by the same hospital, hence that by the stratagem of bringing in a new physician the privilege could be circumvented. In dictum the court suggested that had the autopsy been performed by a physician who was not connected with prior treatment the results would not have been privileged. If the Indiana rule is any broader than this, it can scarcely be said to command general acceptance.

There is authority to support the proposition that the privilege does not apply to information which a physician obtains and places in a death certificate. But quite aside from the narrow scope of this exception, it is not recognized in Indiana.

Are there any Indiana decisions which consider this privilege in a situation where either the attending physician or one a stranger to the patient extracted blood thereafter used in a chemical blood test to determine intoxication? In Alder v. State, a prosecution for involuntary manslaughter, the attending physician extracted blood from the defendant for purposes of classification, hence of treatment, while the patient was unconscious. Some of the blood was thereafter tested chemically for alcohol. The testimony of the physician in identifying the blood was rejected by the Indiana Supreme Court by analogy to Chicago L.S. & S.B. Ry. v. Walas, where testimony of a physician respecting the drunken condition of a man he thereafter treated as a patient was held privileged. Note that the physician in Alder did actually treat the defendant, hence was his physician. But the Alder case is scant authority when considering a case in which the extraction was made from a corpse.

It remains to treat of the unusual wording of the Indiana privileged communication statute, which provides: "Who are incompetent. — The following persons shall not be competent witnesses: . . . Fourth. Physicians, as to matters communicated to them, as such by patients, in the course of their professional business, or advice given in such cases." The statute suggests not the creation of a privilege (which may be waived by nonexercise) but an absolute disqualification of the witness (which serves to bar any testimony within the defined areas). But as

42. Id. at 337, 157 N.E. at 46.
44. See McCormick, Evidence § 104 (1954); 8 Wigmore, Evidence § 2385(a) (McNaughton rev. 1961).
46. 239 Ind. 68, 154 N.E.2d 716 (1958).
47. 192 Ind. 369, 135 N.E. 150 (1952).
48. IND. ANN. STAT. § 2-1714 (Burns 1946).
observed by at least one writer, the statute characterizes in terms of competency not only the absolute disabilities of insanity and infancy but also communications between persons in four different relationships. The rules respecting these four classes are generally regarded as sounding in privilege, and the Indiana decisions actually treat the rule enunciated in subparagraph "Fourth" as a privilege rather than a matter of competency.

Thus it appears that the rule is really a privilege and that, should it even be applicable to the mere extraction of blood from a corpse, and assuming a proper exercise of the privilege by the deceased's personal representative, it would be unlikely to bar any testimony except that of a physician who was involved in the subject's treatment prior to his demise.

(e) Right of Privacy. Both Ravellette v. Smith and Fretz v. Anderson suggested that such right of privacy as existed in a deceased donor died with him and could not be claimed by his estate or next of kin. Ravellette, of course, also considered the rights of the widow-administatrix in the corpse of the deceased husband yet recognized no actionable violation and held the resulting evidence to be admissible. Incidentally, the possibility that an actionable tort was committed by the unprivileged touching of the deceased was observed but apparently not favored by the Fretz court.

Certainly a right of privacy exists in Indiana. In Aetna Life Ins. Co. v. Burton, an insurer was held to have committed a tort against the widow of the insured by conducting an autopsy on the corpse in an effort to determine the cause of death and defeat her claim under the policy. Yet the right is a limited one which attempts a balancing of conflicting interests. Surely the mental suffering attributable to knowledge that a blood test was conducted on a corpse prior to embalming cannot be substantial. By way of analogy, it is apparently established that the plaintiff in a personal injury action can be compelled to submit to a physical examination. And if, as has been suggested by the Indiana Attorney General, an individual may be forced to submit to a blood test, why is it improper to take the same liberty with a corpse?

50. Id. at 264. See, e.g., the reference in Alder v. State, 239 Ind. 68, 154 N.E.2d 716 (1958), to the communicated matter as "privileged," and the express statement to this effect in Stayner v. Nye, 227 Ind. 231, 85 N.E.2d 496 (1949).
51. 300 F.2d 854 (7th Cir. 1962).
52. 5 U.2d 290; 300 P.2d 642 (1956).
53. 104 Ind. App. 576, 12 N.E.2d 360 (1938).
54. 25 C.J.S. Damages § 174 (1961); 9 INDIANA LAW ENCYCLOPEDIA, Damages § 164 (1958).
55. 1940 IND. OPIS. ATT'Y GEN. 211.
Occasionally references are found to a constitutional right of "personal security." This is an amalgam, its components being treated under headings such as "right of privacy" and "privilege against self-incrimination."

(f) Hearsay. In Hartman v. Harder, a civil action in which the admission into evidence of the results of a chemical blood test for intoxication was held to have been erroneous since the predicate was inadequate, the objection was also raised that the admission into evidence of a letter certifying as to the results of the test constituted hearsay. This objection was rather summarily dismissed by the court, suggesting that the letter might have been admissible under the Texas public records statute. Indiana has enacted neither the Uniform Business Records as Evidence Act, the Uniform Official Reports as Evidence Act, nor the Photographic Copies of Business and Public Records as Evidence Act, although it has enacted a statute permitting photographic copies of business (not public) records to be admissible in evidence as an original when the latter would have been. But this statute appears to provide no assistance in making business records admissible. Query as to whether the public records exception might not be available, assuming a duty, a public officer and record, and the employment of a customary routine.

Of course, the question of hearsay can only arise to the extent that the witness is unable to testify respecting the test and its results from personal knowledge. In the great majority of decisions it appears that no writing was used and that the witness or witnesses did so testify. Whatever the theoretical admissibility of a written report, the persuasive advantage of first hand knowledge appears almost to compel the use of testimony if at all possible.

(g) Dead Man's Statutes. The Indiana dead man's statute provides in part that:

In suits . . . in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment . . . may be made . . . for or against the estate . . . any person who is a necessary party to

57. 322 S.W.2d 555 (Tex. 1959).
58. In Natwick v. Moyer, 177 Ore. 486, 163 P.2d 936 (1945), the court stated, as dictum, that hospital records showing the results of the blood test would have been admissible as a "business record."
60. See Smith v. Mott, 100 So. 2d 173 (Fla. 1957).
the issue . . . whose interest is adverse to the estate, shall not be a competent witness as to such matters. . . ."'

Although the test about which testimony would be given certainly occurred after the decedent's death, this testimony is relevant only as it shows a condition (intoxication) which existed "during the lifetime of the decedent." Hence, this element of the statutory definition may not be relied upon as an exclusion. However, the statute requires that the witness be adverse in interest to the estate in order for the incompetency to obtain. In Lake Erie & W.R. Co. v. Charman, a wrongful death action (in which, by statute, the recovery is for the exclusive use of the named beneficiaries and not the estate), it was held that the defendant was not incompetent under the Indiana statute since his interest, although obviously adverse to that of the statutory beneficiaries, was not adverse to that of the estate. It is believed that the physician or technician who would testify as to a chemical blood test lacks the adverse interest presupposed by this statute.

5. THE NECESSARY PRECEDENT

Probably more rejections of evidence obtained from chemical blood tests have occurred because of what the court termed an inadequate predicate or foundation than have occurred as a result of all other objections combined. Accordingly, attention will now be directed to the essentials of the necessary predicate.

(a) Identity of the Blood Sample. It is hardly open to dispute that evidence derived from a blood test for alcoholic content is inadmissible until it is shown that the tested blood came from the person whose intoxication is in question. The difficulties latent in attempting to prove that the same blood which was extracted from the corpse was tested by (or under the supervision of) the medical expert are indicated by Nichols

61. IND. ANN. STAT. § 2-1715 (Burns 1946) (Emphasis added.)
62. See 97 C.J.S. Witnesses § 225, at 693 n.54 (1957).
63. 161 Ind. 95, 67 N.E. 923 (1903).
64. See 97 C.J.S. Witnesses § 145 (1957); 30 INDIANA LAW ENCYCLOPEDIA, Witnesses § 42 (1960).
65. For a general review of the problems see McCorMICK, EVIDENCE § 176 (1954) (numerous other authorities cited therein); 20 AM. JUR. EVIDENCE § 876 (Supp. 1962); 5A AM. JUR. AUTOMOBILES AND HIGHWAY TRAFFIC §§ 1347-50 (1956); Annot. 127 A.L.R. 1513 (1940), supplemented in 159 A.L.R. 209 (1945). For a more detailed discussion see Richardson, MODERN SCIENTIFIC EVIDENCE ch. 13 (1961). A model direct examination of the noted toxicologist, C. W. Muchberger, appears as an appendix to DONIGAN, CHEMICAL TESTS AND THE LAW 71-80 (1950). CHEMICAL TESTS AND THE LAW is a comprehensive treatment of the entire area of chemical blood tests, including great detail on the intricacies of the necessary predicate.
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v. McCoy, the appeal of a wrongful death action in which the issue of the decedent's intoxication loomed large. Evidence based upon an examination of blood extracted from the corpse by the embalmer was admitted over objection that the tested blood might not have been that of the decedent. After a detailed tracing of the blood vial from body to test tube the court held the resulting evidence inadmissible. This decision was subsequently reversed on the ground that the report of the county toxicologist was admissible under the Uniform Business Records as Evidence Act. Nonetheless, in order to satisfy the condition precedent of relevancy, the Supreme Court of California carefully detailed the various facts which tended to show that the blood received by the coroner's office and tested by the toxicologist really belonged to the decedent.

In Robinson v. Life & Cas. Ins. Co., an action on a life insurance policy which excluded benefits when death resulted from intoxication, the court quoted with approval from Benton v. Pellum, in the process of excluding evidence derived from a blood test for insufficient foundation:

[I]t is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. . . . As stated in Rodgers v. Commonwealth, 197 Va. 527, 90 S.E. 2d 257, 260: "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis."

The case of State v. Werling has been referred to as an example of the ideal proof: one or two witnesses whose testimony forges a chain of custody linking the extracted with the examined blood. The same care in tracing should be taken during the period the blood passes from hand to hand in the testing laboratory; it should not be regarded as sufficient merely to trace the blood to the laboratory.

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70. 232 S.C. 26, 100 S.E.2d 534, 537 (1957).
71. 255 N.C. at 674, 122 S.E.2d at 804.
72. 234 Iowa 1109, 13 N.W.2d 318 (1944).
74. For other decisions considering the identity of the blood sample see McGowan v. City of Los Angeles, 223 P.2d 862 (Cal. 1950) (action for personal injuries; issue of intoxication of deceased driver; blood extracted by embalmer and tested by county toxicologist; excluded because of doubts which funeral home procedure raised respecting identity); Woolley v. Hafner's Wagon Wheel, Inc., 22 Ill. 2d 413, 176 N.E.2d 757.
(b) **Integrity of the Blood Sample.** Granting that it was the decedent’s blood that was tested, it is also crucial to establish that no foreign matter was introduced into the blood prior to the test. It is proper to inquire as to whether the container in which the blood was placed was properly sealed immediately thereafter,\(^7^6\) whether, in the case of a deceased blood donor, extraneous matter had been injected into the corpse as an incident to the embalming process before the blood was extracted (apparently some embalming fluids contain alcohol),\(^7^6\) and whether the blood sample was in an unchanged condition when tested.\(^7^7\) In sum, proof of the integrity of the blood sample would include testimony showing a proper extraction, labeling, transportation and delivery of the sample, perhaps supplemented by the introduction of the container itself.

(c) **Relevancy in Point of Time.** The principle of relevancy is said to require that the sample or test not be remote in time from the condition sought to be discovered.\(^7^8\) But alcohol apparently is consumed at a known rate by the body, hence an expert may “work backwards” from the time his sample was taken for at least some period.\(^7^9\) And the addition of preservatives should allow some delay in testing a blood sample

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\(^{75}\) Kuroske v. Aetna Life Ins. Co., supra note 74; Newton v. City of Richmond, supra note 74.

\(^{76}\) Robinson v. Life & Cas. Ins. Co., supra note 74.

\(^{77}\) Woolley v. Hafner’s Wagon Wheel, Inc., supra note 74. The Woolley decision contains the implication that the standard of proof respecting matters such as the identity and integrity of the sample is lower in a civil than in a criminal action. It also absolves the civil plaintiff from much of the duty of justifying the ordinary routine of a laboratory and insuring the freedom of the test from error; if satisfactory to the doctors, the court observed, it should be satisfactory to the courts.


\(^{79}\) McCormick, Evidence § 176, at 376 n.12 (1954).
previously extracted. Nonetheless, what drinking driver would not stoutly maintain that most of the alcohol in his system was ingested as "one for the road" immediately before getting into the car and was not yet in the blood when the accident occurred, although admittedly so some time later when the test was administered?

(d) Accuracy of the Test and the Testing. A person who has been qualified as an expert before the trier of fact should explain the nature of the test employed in some detail. He should be able to attest to the good mechanical condition of the necessary apparatus and state that the test was actually made, if not by him personally, by some one under his immediate supervision. If cross examination reveals that he is ignorant of the chemicals used in the test, or the exact manner in which the particular test was conducted, a risk is generated not only as to credibility but even as to admissibility. He should be able to vouch as an expert both for the accuracy of the test and for the particular results obtained in the instant case. One danger, where use is made of a genuine expert, is that the very magnitude of his experience prevents any recollection as to the details of a particular test. Resort may be attempted to present recollection refreshed or even to past recollection recorded.

(e) Significance of the Results. The witness should be able not simply to observe the results of the test but to explain their significance to the trier of fact. If the witness must rely upon a chart in order to reach his conclusions, they may be stricken, upon proper objection, as based upon hearsay. Thus it is necessary to differentiate between the expertise necessary to report the results of the test (which presupposes proof of skill in testing) and the expertise necessary to assess the effect of the tested percentage of alcohol in the subject's blood (which presupposes qualification as an expert respecting interpretation). The expert may explain the significance of the test results and offer his opinion as to whether that amount of alcohol would be "sufficient to impair judgment in a person with physical characteristics similar to the decedent's." The statutes of some states contain percentages, the function of which is to define the significance of certain alcohol readings under various chemical tests. But reliance upon this statute in a civil case may prove to be dangerous for reasons which will now be treated.

82. See Annot. 77 A.L.R.2d 971 (1961).
83. Ravellette v. Smith, 300 F.2d 854, 856 (7th Cir. 1962).
84. See IND. ANN. STAT. § 47-2003(2) (Burns 1952).
5. Availability of a Statutory Standard Respecting Intoxication

The enormous increase in the use of chemical tests for intoxication throughout the nation is reflected in the ever growing number of jurisdictions which, by statute, now permit the results of such tests to be admitted into evidence. Further, many states admit such evidence through judicial decision even in the absence of appropriate legislation. Nonetheless, the decisions indicate a reliance upon the statute extant in the particular jurisdiction in order to establish the effect of various concentrations of alcohol in the blood. Thus, the inability to use a statute is important not so much because of the possibility that the test results are thereby rendered inadmissible as because it is necessary to produce a medical expert who can testify as to the significance of these results. Conceding that use of a statute authorizing chemical blood test results is desirable in a civil action, is it available? Decisions in certain civil actions exclude reference to the particular state's alcoholic percentage statute on the basis that it was obviously intended to be applicable only to criminal prosecutions. Other decisions apply the statute in civil actions. Decisions from other jurisdictions are only instructive, however, if the exact language of the particular statute is examined.

Indiana's version of the above statute was originally enacted as a part of a comprehensive statute regulating highway traffic. The subdivision in which the chemical test for intoxication provision was found

85. In 8 Wigmore, Evidence § 2265, at 394, n.6 (McNaughton rev. 1961), it is stated that 33 jurisdictions have enacted statutes relating to the use of chemical tests to determine intoxication and to the admissibility of the results of such tests in evidence on that issue. But in Uses of Chemical Tests for Intoxication, a report of the Committee on Alcohol and Drugs of the National Safety Council (1962), it is stated that as of July 1, 1962, there were 36 states with chemical test laws. According to this report the only states lacking some such legislation at this time were Alabama, Alaska, California, Connecticut, Florida, Iowa, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Okahoma and Texas.

86. The decision of Breithaupt v. Abram 352 U.S. 432 (1957), at 436, n.3 observes that at that time (when only 23 states had statutes respecting chemical tests for intoxication) 47 states used such tests.

87. The validity of legislation creating a presumption of intoxication based upon blood tests is considered in Annot., 46 A.L.R.2d 1176 (1956). It is reported in 9 Uniform Laws Annotated 50 (Supp. 1962), that all present American legislation on this point employs the .05%-.15% percentage requirements.

88. See Russell v. Hammond, 200 Va. 600, 106 S.E.2d 626 (1959). Note the court's analysis of the statute's structure as indicative of its purpose and application. Admittedly, the Virginia statute analyzed in Russell is not similar to Indiana's Act and it is, by its terms, limited to criminal prosecutions. See also, Fossum v. Zurn, 78 S.D. 260, 100 N.W.2d 805 (1960) at page 811.

89. See Williams v. Hendrickson, 189 Kan. 673, 371 P.2d 188 (1962) (remarking that the language of the statute does not limit its application to criminal actions).


91. Ind. Laws 1939, ch. 48.
was concerned only with the definition of three crimes, one of which was "driving while under the influence of intoxicating liquor or narcotic drugs." Finally, the wording of the particular section containing the chemical test provisions gave further strength to the inference that the provision related only to criminal prosecution. Hence, an intent to limit the purview of the provision to certain criminal prosecutions seems apparent.

It is true that criminal standards are often engrafted upon the law of torts, providing standards of a sort upon which civil negligence may be predicated. Yet intoxication is not, per se, negligence but only a predisposing factor in its commission. Hence it would appear the doctrine that violation of a criminal statute is negligence per se simply has no application. The Indiana statute creates no offense but only a technique whereby the commission of certain offenses is gauged in terms of presumptions.

Although there are several Indiana criminal prosecutions in which this statute was employed, no appellate decisions have been found utiliz-

92. Ind. Laws 1939, ch. 48, art. V.
93. Ind. Laws 1939, ch. 48, art. V, § 54(2). Section 52 defined the three offenses to be covered by art. V; § 53 purported to establish provisions regulating "proceedings" under § 52; § 54 also was entitled "Provisions For Proceedings Under Subsections (a) and (b) of Section 52." Within § 54, § (2) contained the chemical test provisions; §§ (1), (3), & (4) clearly related only to criminal prosecutions.
94. Suspicion that § 54 was intended only to support criminal prosecutions for violations of § 52 appears confirmed by reference to the terms employed in this section itself, quite aside from its context and title. The section begins by presupposing an indictment or information as the pleading initiating the action. The three categories of alcohol content, after being defined in terms of percentages (under .05, .05 to .15, over .15) are assigned a significance (1) "within the meaning of the statutory definitions of the offenses," (2) "within the meaning of this act," and (3) "within the meaning of the statutory definitions of the offenses," respectively. Two of the three references appear to countenance use of these standards only respecting the "offenses" defined in § 52. Does the third reference, being simply to "this act," suggest that the test may be used as a standard by which to gauge intoxication when considering any violation of ch. 48? This chapter does create a substantial number of statutory regulations respecting such matters as speed, passing, turning, etc., but they do not appear to be couched in terms of "offenses." Also, § 160 states that violation of any provision of the act is a misdemeanor unless otherwise stated to be a felony. Apparently, then, the one reference to "act" in § 54(2) really means "article." Further, §§ (3) and (4) of § 54, repealed in 1955, clearly countenanced only criminal prosecutions. If the legislative intent in amending this section so as to delete subsections (3) and (4) was to evince the availability in civil as well as criminal actions of the statutory standard for gauging intoxication, this intent was rather carefully masked. In sum, the internal evidence, although scarcely conclusive, does not appear to countenance its use in civil proceedings.
95. A careful discussion of this general subject under Indiana law may be found in Note, 35 Ind. L.J. 45 (1959).
ing the statute in a civil action. In *Spitler v. State*, a significant Indiana decision, the state supreme court referred to this statute, observing that by it “the general assembly undertook to authorize the use of evidence of this character in a prosecution of this kind. . . .” *Spitler*, of course, involved a criminal prosecution. Was a distinction intended between a “prosecution” and other actions; between proceedings “of this kind” and civil proceedings? In *Kuroske v. Aetna Life Ins. Co.*, a civil action, the Wisconsin Supreme Court considered it relevant to observe that Indiana had a statute defining the effect of chemical blood test evidence. The observation would have been irrelevant had the Wisconsin court considered the Indiana statute to be limited to criminal prosecutions. In any event, the civil litigant who, by phrasing his instructions to the jury in terms of the statutory percentages established under the Indiana statute, elects to clothe his opponent in the mantel of one “driving under the influence of intoxicating liquor,” should proceed with caution. In *Mattingly v. Eisenberg*, the Arizona Supreme Court considered it to be reversible error for the trial court to instruct the jury that the statutory percentages of alcohol in the blood were applicable as standards and created a presumption in the case. Since the statute was applicable only to criminal prosecutions, the instruction constituted an unwarranted comment on the evidence.

The question of the applicability of a chemical test statute for intoxication in civil as well as criminal cases could readily be resolved by the legislature. In five states statutes now expressly so provide. It would seem an appropriate area for legislation since the present statute’s applicability is questionable at best. Further, it would seem appropriate as legislation; if the tests are sufficiently accurate to warrant admission of the results in a criminal action, a fortiori as to their admissibility in a civil action where questions need only be resolved by a preponderance of the evidence rather than beyond all reasonable doubt.

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97. 221 Ind. 107, 46 N.E.2d 591 (1953).
98. Id. at 108-09, 46 N.E.2d 592.
99. 234 Wis. 394, 231 N.W. 384 (1940).
101. DEL. CODE ANN. tit. 11, § 3507 (Supp. 1962); ILL. ANN. STAT. ch. 95½, § 144 (Smith-Hurd 1958); N.Y. VEHICLE & TRAFFIC § 11194 (only if arrested); N.D. CENT. CODE ANN. § 39-20-07 (Supp. 1961); WIS. STAT. ANN. § 325.235 (1958). Section 11-902(b) of the Uniform Vehicle Code, promulgated by the National Committee on Uniform Traffic Laws, as amended in 1962, permits the results of such tests to be introduced in civil as well as criminal cases. The 1956 version referred in terms only to criminal prosecutions.
102. The ready availability of competent testing media and the admissibility of the results stand as a safeguard to all unjustly accused of driving while under the influence of intoxicants, whether the forum be civil or criminal, since the test will show sobriety as well as its opposite.
As previously mentioned, the statute should not be regarded as essential to the admissibility of the test results, although a more exacting burden would be placed upon the medical witness if there were no applicable statute. He must then (1) explain the test, (2) interpret its results, and (3) vouch for the accuracy and effect of such test upon its subject.

6. Desirable Legislation

Present uncertainty in three areas of chemical blood test evidence could be resolved by statute. The desirability of a statute applicable to civil as well as criminal proceedings has already been observed. The myriad pitfalls of the necessary predicate could in large measure be avoided by specifying an acceptable yet feasible procedure for extracting the blood, safeguarding its identity and condition, testing its contents, reporting the results and interpreting these results. Administrative convenience would appear to justify the admissibility of the test report when duly certified as an official record as against the objection of hearsay. Finally, the obstructionist's plaint that rights were infringed by an unprivileged taking could, at least as to all but constitutional objections, be silenced by the adoption of an implied consent statute. Such a statute would make consent to a chemical test for intoxication upon request by the proper authorities a condition precedent to the licensed operation of a motor vehicle on the public roadways.