Assembly Hearing Slip

(Please print plainly)

Date: 3/17/99

Bill No. AB 160
Or
Subject

NINA EMERSON
(Name)

RESOURCE CTR ON IMPAIRED DRIVING
(Street Address or Route Number)

UW LAW SCHOOL
(City & Zip Code)

(Representing)

Speaking *in favor:*	☐
Speaking *against:*	☐
Registering *in favor:*	☐
Registering *against:*	☐
Speaking for *information only;* Neither for nor against:	☒

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 3-17-99

Bill No. AB 160
Or
Subject Blood Test of Drivers in Accidents

ORAL Comment
(Name)

411 S. CENTER AVE
(Street Address or Route Number)

Jefferson, WI 53549
(City & Zip Code)

(Representing)

Speaking *in favor:*	☐
Speaking *against:*	☐
Registering *in favor:*	☒
Registering *against:*	☐
Speaking for *information only;* Neither for nor against:	☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 03-17-99

Bill No. AB 160
Or
Subject

STEVEN C. WERNER
(Name)

340 Coyer
(Street Address or Route Number)

Madison, WI
(City & Zip Code)

WISCONSIN PROBATION & PAROLE ASSOC.
(Representing)

Speaking *in favor:*	☐
Speaking *against:*	☐
Registering *in favor:*	☒
Registering *against:*	☐
Speaking for *information only;* Neither for nor against:	☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 3/17/99

Bill No. AB160
Or
Subject

Rep Gielow

(Name)

(Street Address or Route Number)

(City & Zip Code)

(Representing)

Speaking *in favor:*	☒
Speaking *against:*	☐
Registering *in favor:*	☐
Registering *against:*	☐
Speaking for *information only;* Neither for nor against:	☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 3-17-99

Bill No. AB160
Or
Subject

JAN STEINBERGS

(Name)

2945 SOUTH ST

(Street Address or Route Number)

EAST TROY, WI 53120

(City & Zip Code)

WIS. TROOPERS' ASSOC.

(Representing)

Speaking *in favor:*	☒
Speaking *against:*	☐
Registering *in favor:*	☐
Registering *against:*	☐
Speaking for *information only;* Neither for nor against:	☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 3/17/99

Bill No. AB160
Or
Subject

Loralee Brumund

(Name)

(Street Address or Route Number)

(City & Zip Code)

State Patrol / DOT

(Representing)

Speaking *in favor:*	☐
Speaking *against:*	☐
Registering *in favor:*	☐
Registering *against:*	☐
Speaking for *information only;* Neither for nor against:	☒

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

GET GREEN SLIP FROM GRAVES

GOETSCH WANTS MINOR CHANGES TO AB 160.

- CHANGE TIME FRAME? (3 HR - 1 HR → "AS SOON AS PRACTICABLE, BUT NOT MORE THAN 3 HR.")
- REQUIRE ALL DRIVERS TO TAKE BLOOD TEST? → NO
- NO PENALTY FOR REFUSAL UNDER AB 160
- NARROW TO FATALITIES ONLY?

ROBERT G. GOETSCH

STATE REPRESENTATIVE
39TH ASSEMBLY DISTRICT

CHAIR: Criminal Justice and Corrections

April 8, 1999

Copy:
Rep. Stone, Chair
Highway Safety
Rm 306 N

Robert Cook
Executive Assistant to the Secretary
Department of Transportation
4802 Sheboygan Ave., Room 120-B
HAND-DELIVER

RE: Assembly Bill 160, relating to testing of blood alcohol content (BAC) in motor vehicle accidents involving a fatality or great bodily harm and providing a penalty.

Dear Robert,

I request that you authorize the appropriate person to prepare a corrected fiscal estimate for Assembly Bill 160. Loralee Brumund of the State Patrol prepared the original fiscal estimate, which contains several inadequacies set out below.

Assembly bill 160 requires BAC testing for all motor vehicle drivers or operators involved in an accident that results in death or great bodily harm. Under the bill, the department of transportation would pay for those tests. A copy of the bill is enclosed.

According to the bill:

> "great bodily harm" means "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."

In discussion with my office, Loralee stated the department cannot ascertain the incidence of "great bodily harm" resulting from accidents because injury data is not collected in such particularized detail that allows "great bodily harm" to be extrapolated from other types of injury within the broader category of data the department records. Specifically, the department currently records motor vehicle injury as "Type K, A, B or C" to correspond with varying injury severity, as assessed by the law enforcement officer who files an accident report. As described in the department's uniform traffic accident report form, a "Type A" injury is:

> "an injury, other than fatal, that prevents walking, driving or performing other activities that were performed before the crash."

In Loralee's fiscal estimate (*see* enclosure), however, she falsely assumes that "Type A injuries are equivalent to injuries causing great bodily harm." Because Loralee inexplicably equates the

COMMITTEE MEMBER: Ways and Means; Children and Families; Urban and Local Affairs
GOVERNOR'S COMMISSION: Law Enforcement and Crime; SPECIAL COMMITTEE: Child Custody, Support and Visitation

P.O. Box 8952, State Capitol • Madison, WI 53708-8952 • Office: (608) 266-2540 • Hotline: (800) 362-9472
Route 1, N6485 High Point Road, Juneau, WI 53059 • (414) 887-7413

narrowly-defined "great bodily harm" to the broader "Type A" injury, her fiscal estimate consequently analyzes a larger category of injuries than what is provided by Assembly Bill 160. Loralee's resulting calculations therefore grossly exaggerate the number of additional drivers who would be required to be tested for BAC upon their involvement in an accident that caused great bodily harm.

A more reasonable estimate of the additional drivers who would be required to take a BAC test under Assembly Bill 160 can be obtained by considering the department's 1996 data for convictions on citations issued for related motor vehicle violations:

Violation cited	**Number of 1996 convictions**
Causing great bodily harm by negligent operation of a vehicle	58
Causing bodily harm by negligent operation of a vehicle	30
Homicide by negligent operation of a vehicle	11
Causing injury by intoxicated use of a vehicle	421

If Loralee or whoever prepares a corrected fiscal estimate believes there is insufficient statistical correlation between the 1996 data and a reasonable forecast for the additional number of drivers who would be subject to BAC testing under Assembly Bill 160, I suggest that he or she find a suitable alternative to capriciously equating "great bodily harm" to "Type A" injuries in the re-estimates.

In Loralee's discussion with my office on April 5, 1999 she stated that great bodily harm may not "equate" to a Type A injury, but that the two are "similar" for purposes of her fiscal estimate. Her assertion is reflected in her memorandum of the same date (*see* enclosure). Because her calculations in the memo are based on the same mistaken assumption that the number of injuries causing "great bodily harm" is somehow linked to "Type A" injuries, her conclusions about the net fiscal impact of Assembly Bill 160 are as flawed as her original fiscal estimate.

Loralee acknowledged on April 5, 1999 that a law enforcement officer's duty under the bill to establish whether an accident resulted in "great bodily harm" (thereby requiring a BAC test) is distinguishable from a law enforcement agency's duty to report accident data under current law (i.e., *see* s. 346.70 (4), stats.) Nonetheless, Loralee's fiscal estimate and memorandum fail to consider that Assembly Bill 160's provision for "great bodily harm" seeks a different purpose - i.e., BAC testing, than the purpose intended by s. 346.70 (4) - i.e., evidence in administrative proceedings and statistical data compilation.

In summary, I renew the request I made in my March 18, 1999 letter to Loralee (*see* enclosure), in which I requested a corrected fiscal estimate for Assembly Bill 160. If the department does not maintain data to enable a reasonable forecast of the bill's fiscal effect, please prepare a re-estimate that reflects that finding.

Thank you for your prompt attention to this matter.

Sincerely,

Robert G. Goetsch
State Representative
39th Assembly District

RGG/kdv

4 (four) enclosures

Cc: Assembly Committee on Highway Safety members:

- Rep. Stone (Chair)
- Rep. Townsend (Vice-Chair)
- Rep. Brandemuehl
- Rep. Ward
- Rep. Urban
- Rep. Hasenohrl
- Rep. Ryba
- Rep. Young

Loralee Brumund
Nina Emerson

DOT *INFORMATIONAL* TESTIMONY @ ASSEMBLY
HIGHWAY SAFETY COMMITTEE HEARING
Wednesday, March 17, 1999
Loralee Brumund / State Patrol

AB 160 / Rep. Goetsch
Requires testing for BAC levels of all drivers/operators of motor vehicles involved in a crash that results in a fatality or in great bodily harm at time of the crash, if the drivers/operators are not already tested for purposes of determining if they committed a violation involving intoxicated driving

- Loralee Brumund from the DOT / Division of State Patrol
- Speaking for *information* on AB 160
- Currently:

  In ss.346.71(2), if a driver, pedestrian at least 14 years old, or a bicyclist at least 14 years old, is killed in a crash either at the scene or within 6 hours of the time of the crash, his or her blood is tested to determine its alcohol content.

  Federal law, as stated in 49 CFR 382.303, commercial motor vehicle operators (CMV operators) must be tested, for alcohol and controlled substances as soon as practicable following a crash if:

  1) the crash involved a fatality, regardless of whether the operator was issued a citation for a moving traffic violation, or
  2) the operator was issued a citation under state or local law for a moving traffic violation arising from the crash when the crash involved:
     a) bodily injury requiring medical treatment away from the crash scene, or
     b) disabling damage to any motor vehicle requiring it removal from the crash scene by a tow truck or other motor vehicle.
  3) the motor carriers are required to provide the tests unless the law enforcement agency has already required the test under probable cause.

Wisconsin tests:

90% of all killed drivers (under ss.346.17(2))

64% of all drivers involved in crashes due to death, probable cause, or voluntary testing
(national average for testing of all drivers is 44%)

Additional mandated testing may not be necessary and may not significantly improve current statistics.

- AB 160 requires the identification of a crash that results in *great bodily harm*, which for practical purposes would be categorized at the crash scene by a law enforcement agency as a *Type A injury*, one of the categories of injury used for crash information as identified in the Division of Motor Vehicles (DMV) *Law Enforcement Officer's Instruction Manual for Completing the Wisconsin Motor Vehicle Accident Report Form (MV4000)* which includes: K (killed), A (incapacitating injury), B (non-incapacitating injury), C (possible injury), and D (no apparent injury).

  Definition of *great bodily harm* is found in ss.939.22(14) as "...bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury".

  Definition of *Type A injury* is "An injury, other than fatal that prevents walking, driving, or performing other activities that were performed before the crash".

- As stated in AB 160, the law enforcement officer at the scene would have to *know* that a person either *died* before he or she was removed from the scene or suffered *great bodily harm* as a result of the crash. Though this is a possible scenario at a crash scene it is possible that the law enforcement officer may arrive at the scene too late to know that there was a Type A injury who has been transported to a medical facility, and thus the injured person may not be tested for BAC level. EMS personnel at the crash scene do not have the authority to request BAC tests for injured persons.
- More importantly, the required testing of all drivers at a crash scene, as identified in AB 160, does not provide the law enforcement officer the reasoning of *probable cause* to require the BAC test, creating an opportunity for some court challenges.

- Persons *refusing to take the BAC test* under AB 160 but without probable cause, may be fined, but may not be forced to take the BAC test.
- Some court challenges may be made for those drivers required to take the BAC test under AB 160 but without probable cause which results in an illegal BAC level, and who are subsequently charged with OWI.
- The time an officer must take to ensure the BAC test of injured drivers taken to a medical facility takes that officer away from other law enforcement duties.
- Due to a possible duplication of blood test results from coroners/medical examiners and law enforcement officers at a crash scene, the DOT may be receiving duplicate test results from the same crash.
- The DOT's required payment for all of the BAC tests conducted under AB 160 would cost approximately $597,600 annually to pay for the test results themselves and the .6 FTE position required to record the test results onto DOT crash reports (see FE).
- As well, the additional tests conducted by laboratories throughout the state would create additional costs to those facilities.
- In summary, the issues that cause concern for the Department of Transportation focus on 1) the costs to the DOT to pay for the tests and the additional staff, 2) the need for the additional data collection in light of the data currently collected by DOT, and 3) the factor of probable cause that would not be a part of this required testing of all drivers.
- Thank you for your attention. I would be pleased to answer any questions at this time.

RESOURCE CENTER REPORT

Number 96-2
November 1996

University of Wisconsin Law School
Resource Center on Impaired Driving

MANDATORY BLOOD TESTING IN FATAL CRASHES

Nina J. Sines, Director
Doris Brosnan, Research Assistant

Facts

A two-car crash occurred in which the driver of one car was killed. Because of the seriousness of the crash with the resulting fatality and injuries, the officers responding at the scene had two concerns: first, to see that the injured received medical attention; and, second, to direct traffic away from the scene in order to prevent further crashes. The surviving driver, who apparently fell asleep at the wheel and caused the crash, was questioned briefly by two police officers. At that time, neither officer detected an odor of intoxicants on the driver's breath. The driver's speech was not slurred, and his eyes did not appear bloodshot. Although the driver was obviously very upset by what had just happened, he did not exhibit obvious signs of intoxication or impairment. The driver suffered moderate injuries and was taken to the hospital for medical attention.

At the hospital, medical personnel asked the driver to provide a blood sample. He was informed that this was standard procedure in a traffic crash with a resulting fatality. The driver signed the hospital consent form and submitted to the blood draw. The driver was not placed under arrest or issued a citation. At no time was the "Informing the Accused" form read to the driver. The blood test results indicated the driver had a blood alcohol concentration well above the legal limit.[1] The driver was then charged with operating while intoxicated with a prohibited alcohol concentration (OWI-PAC) in violation of Wis. Stat. § 346.63(1)(b).[2]

Issues and Discussion

This report will examine the above fact scenario in light of applicable statutes, case law, and policy considerations. Specifically, this report will address the following two issues: (1) whether a blood test should be admissible when a driver who has not been arrested for drunk driving, but has been involved in a serious crash requiring medical treatment, consents to a blood test; and (2) how to strike a balance between the medical needs of the injured driver while insuring the public need of prosecuting impaired drivers. Finally, this report will make a recommendation for how the case at hand could be handled in the future.

In motor vehicle crashes where the driver is killed, subsec. 346.71(2) requires a coroner or medical examiner to draw a blood sample within 12 hours of death. The blood sample results are forwarded to the Department of Health and Social Services for statistical purposes in tracking the number of alcohol related motor vehicle fatalities.[3] Further, in situations where a driver involved in a crash may need medical attention, subsec. 905.04(2)(f) exempts any blood test results from the physician-patient privilege.[4] These test results could be used as evidence in a subsequent prosecution for impaired driving.

Under Wisconsin's implied consent law, anyone who operates a motor vehicle on the state highways is considered to have consented to a chemical test of his or her blood, breath, or urine.[5] This consent is not optional and is typically invoked when a driver is placed under arrest for an impaired driving offense. However, in the event a driver is unconscious or is not capable of withdrawing the statutory consent, the driver is presumed to have consented to a chemical test.[6] The provisions under the implied consent law were created to facilitate law enforcement officers in obtaining evidence to prosecute drunk drivers. In this respect, the unconscious driver need not be placed under arrest prior to administering a chemical test, provided the officer has probable cause to believe the person was driving while impaired or intoxicated.[7]

Driver Consent

In *State v. Zielke*,[8] the Wisconsin Supreme Court held that under the implied consent law, a blood test result is admissible in a subsequent criminal prosecution if the evidence is constitutionally obtained. According to *Zielke*, chemical test evidence will be admissible provided: (1) it is seized pursuant to a valid search warrant; (2) it is incident to a lawful arrest; (3) it is taken under exigent circumstances supported by probable cause; *or* (4) it is taken with the **consent of the driver**.[9] Further, the court concluded that actual consent of the driver will provide sufficient grounds for officers to legally obtain a warrantless blood test, even if the "Informing the Accused" form is not read.[10]

The defendant in *Zielke* was charged with four counts of homicide by intoxicated use resulting from a crash where he was the driver. When officers arrived at the scene, Zielke appeared "confused, disoriented, and emotionally upset." In addition, he had slurred and "thick" speech. He did not perform any field sobriety tests because he was injured and needed medical attention. Zielke was then taken to the hospital and placed under arrest for operating while intoxicated, but he was never read the "Informing the Accused" form. However, when asked if he would consent to a blood test, he agreed. The court concluded that this evidence was constitutionally obtained and therefore admissible.[11] In *Zielke*, the police officers relied on probable cause, exigent circumstances, ***and*** the defendant's actual consent to legally obtain the blood test.[12]

Blood Test Evidence

Under *State v. Seibel*,[13] a blood test result is admissible if the officers have "reasonable suspicion" to believe that a drunk driving violation has occurred. In *Seibel*, the defendant was the driver in a fatal car crash and was arrested for homicide by negligent operation of a motor vehicle. The defendant gave his informed consent to a blood test at the hospital which revealed a prohibited alcohol concentration. The defendant later moved to suppress the blood test evidence on the charges of homicide by intoxicated use of a motor vehicle.[14]

The Wisconsin Supreme Court held that blood may be drawn as part of a search incident to a lawful arrest if the police "reasonably suspect" that the defendant's blood contains evidence of a crime. The *Seibel* court concluded that the police had the requisite "reasonable suspicion" to order a blood test, based on evidence that the defendant had been driving erratically, smelled of intoxicants at the scene, and was belligerent and out of contact with reality when approached by police at the hospital.[15]

Warrantless Blood Draw

In *State v. Bohling*,[16] the Wisconsin Supreme Court held that blood may be taken as part of a search incident to a lawful OWI arrest based upon reasonable suspicion. The *Bohling* court held that a

warrantless blood draw could be taken provided the following four requirements are met: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk driving related offense; (2) there is clear indication that the blood draw will produce evidence of intoxication; (3) the method used to take the blood sample is reasonable and performed in a reasonable manner; and (4) the arrestee presents no reasonable objection to the blood draw.[17] Relying on the United States Supreme Court's decision in *Schmerber v. California*,[18] the Court reasoned that because alcohol rapidly dissipates in a person's blood stream after drinking stops, there is sufficient exigency to justify a warrantless blood draw following a lawful arrest for a drunk driving related offense.[19]

In *Bohling*, an officer was dispatched to a motor vehicle crash involving Bohling's vehicle and another vehicle. Because Bohling smelled of intoxicants, had bloodshot eyes and poor balance, he was arrested for operating a motor vehicle while under the influence of intoxicants.[20] The defendant was then taken to the police station where he refused to take the breath test. Subsequently, he was taken to the hospital for a blood test pursuant to police department policy. Bohling refused to sign the hospital consent form but submitted to the blood draw. The court concluded that the blood test results were admissible as a warrantless search incident to a lawful arrest.

Application to Present Case

Applying *Zielke* to the present case, the driver's actual consent could provide the basis for the warrantless blood draw. However, unlike *Zielke* where the officers also relied on probable cause, the officers in the case at hand did not have probable cause to believe that the driver was intoxicated or impaired when they arrived at the scene. Although the driver here appeared upset, the driver in *Zielke* was notably "confused, disoriented and emotionally upset." In addition, the officers in *Zielke* noted the defendant's slurred and thick speech while the driver's speech in this case was not slurred. Finally, *Zielke* does not address whether a police department could legally institute a policy requiring mandatory blood testing in *all* crashes involving a fatality with or without the driver's consent.

Under *Seibel*, the police need only reasonable suspicion, not probable cause, in order to obtain a warrantless blood draw. This reasoning applies even if the driver has not been placed under arrest for a drunk driving related offense. In the present case, the fact that a crash occurred which resulted in a fatality could provide the reasonable suspicion that the surviving driver might be impaired. This could also be supported by the well documented correlation between blood alcohol levels and the increased risk of car crashes.[21] Further, the police in the case at hand could point to the fact that the driver fell asleep at the wheel and appeared emotionally upset at the crash site to form the requisite "reasonable suspicion" to justify the warrantless blood draw. However, unlike *Seibel*, the officers in this case did not detect an odor of intoxicants on the driver's breath and the driver did not act in a belligerent or hostile manner as did Seibel. Therefore, it could be argued that the officers in the instant case did not have any reason to believe that the driver's blood contained evidence of a drunk driving related offense.

Finally, the *Bohling* decision states that the rapid dissipation of alcohol in a person's blood stream can constitute exigent circumstances to justify a warrantless blood draw. Further, Wisconsin statutes require that a blood sample be taken "within three hours of the event to be proved" in order for the test results to be considered prima facie evidence of a drunk driving related violation.[22] Arguably, under these two

criteria, the blood test results in the present case could be admissible. However, the *Bohling* court also required that the person be lawfully arrested for a drunk driving related offense. Here, the driver was not placed under arrest for drunk driving prior to submitting to the blood test at the hospital. In fact, it was the medical personnel who requested the blood sample, not the police. Therefore, it might be difficult to meet the four requirements set out in *Bohling* to justify the admissibility of the blood test results in the present case.

If the rapid dissipation of alcohol in the bloodstream cannot by itself constitute a sufficient exigency to justify a warrantless blood draw without an arrest, additional circumstances may be presented to support the hospital blood draw. For example, (1) the officers were investigating a crash involving a fatality; (2) the driver had fallen asleep at the wheel; and (3) any alcohol, even if unknown to the officers at the scene, is rapidly dissipating from the driver's bloodstream. Given these factors, a court could conclude that sufficient exigent circumstances, when taking the officers' reasonable suspicion into account, justified the warrantless blood draw. In fact, a Wisconsin Court of Appeals followed this line of reasoning in *State v. Salmon*[23] (unpublished decision). In *Salmon*, the defendant hit and killed a bicyclist. The defendant was transported to the hospital where a blood test was taken pursuant to an agency policy regarding fatal crashes. Defendant Salmon was not under arrest or in custody at the time his blood was taken.[24] However, the court concluded that probable cause, the reasonableness of the blood test, and the exigent circumstances rendered the blood test admissible in Salmon's subsequent prosecution for homicide by intoxicated use of a vehicle.

Policy Concerns

Since the officer's first priority at the scene of a serious traffic crash will be to promptly arrange for medical treatment of injured persons and to direct traffic away from the scene of the crash, the officer may not have an adequate opportunity to thoroughly evaluate a driver's sobriety before he or she is transported to the hospital for treatment. Under these circumstances, an officer is not in a position to request that a blood sample be taken incident to an arrest. Thus, the drunk and injured driver may be protected from subsequent prosecution for driving while intoxicated or impaired.[25]

Alternatively, a police department could implement an administrative policy requiring that blood samples be taken subsequent to all motor vehicle crashes involving a fatality. As stated earlier, subsection 346.71(2) requires coroners or medical examiners to draw the blood of any decedent in a car crash in which the decedent was the operator to test for his or her alcohol concentration. This law, while not on point in the present case for taking the blood of the surviving driver, does support the notion that any time there is a crash, the possibility that alcohol was involved is great enough to warrant a policy of automatically testing the surviving driver's blood for alcohol.[26] Therefore, a preestablished agency policy that requires all drivers in fatal vehicle crashes to supply a blood sample may circumvent the arrest and consent requirements.

For example, the National Committee on Uniform Traffic Laws and Ordinances developed a model statute for mandatory chemical testing. Specifically, Section 6-210 provides:

> . . . [W]hen the driver of a vehicle is involved in a crash resulting in death or serious personal injury of another person, and there is reason to believe that the driver is guilty of [driving under the influence of alcohol or

> drugs], the driver may be compelled by a police officer to submit to a test or tests of the driver's blood, breath or urine. . . .[27]

Twenty-eight states have established similar procedures which allow medical personnel to withdraw blood from a driver of a crash resulting in a fatality or serious bodily injury. These tests may be taken without the driver's consent, without a lawful arrest, and may be used as evidence of impairment to subsequently prosecute the driver. In cases where a driver has been injured in a crash and requires medical attention, this may be the only way of ascertaining the driver's alcohol concentration.

In addition, the Illinois Supreme Court recently held that a provision of the Illinois Vehicle Code making blood tests mandatory in serious crashes was constitutional, even absent reasonable suspicion of intoxication. Specifically, Section 11-501.6 states in part:

> Any person who drives . . . and has been involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent to a breath test or to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol or other drug content of such person's blood if arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code or similar provision of a local ordinance. . . .[28]

In *Fink v. Ryan*,[29] the court concluded that the statute fell within the state's "special needs" exception to the fourth amendment.[30] The court reasoned that (1) the state has an interest beyond that of law enforcement to determine whether drivers are chemically impaired for purposes of suspending drivers' licenses;[31] and (2) the regulation of automobiles reduces a driver's expectation of privacy to allow a minimally intrusive test.[32] While officers do not have to have reasonable suspicion or probable cause of intoxication, they do have to issue the driver who is being tested a citation for a moving violation.[33] Therefore, the chemical test must still be taken incident to an arrest.

In Wisconsin, 38% of all motor vehicle fatalities and 12% of all motor vehicle injures were alcohol related in 1995.[34] Given these facts, properly obtained blood test evidence could assist the state in prosecuting those drivers who were under the influence at the time of the crash. Information about an injured driver's specific blood alcohol content would also be helpful, if not necessary, in prescribing appropriate methods of treatment, including medication or anesthesia. Further, requiring blood tests incident to a fatality or injury is consistent with department policy that requires blood draws on *all* drunk driving offenses.[35] In this context, blood is taken incident to a lawful arrest, whether it is voluntary or involuntary. In the above proposed procedure, the occurrence of a motor vehicle crash with resulting injury or fatality could create the requisite exigent circumstances for taking a blood test without a lawful arrest.

Conclusion

Although the blood test in the present case was not taken incident to a lawful arrest for a drunk driving related violation, three reasons support the admissibility of the warrantless blood test results: (1) the driver consented which makes the bodily search constitutional;[36] (2) the police officers' "reasonable suspicion," when viewed in light of the exigent circumstances, rendered the blood draw legal;[37] and (3) the statutory requirement that blood be tested of decedents who were the drivers in fatal car crashes, supports a policy of mandatory blood testing for all drivers involved in fatal crashes.

In contrast, the following three reasons support the suppression of the blood test results in the present case: (1) under *Bohling*, a warrantless blood test is admissible only when the person is lawfully arrested for a drunk driving related violation;[38] (2) the police officers did not possess the requisite "reasonable suspicion" that a drunk driving related violation had taken place;[39] and (3) sufficient exigent circumstances did not exist to justify the warrantless blood draw because there was not enough evidence to indicate that the driver's blood contained evidence of a crime.[40]

In the alternative, legislation could eliminate the above issues by providing mandatory chemical testing incident to *all* motor vehicle crashes resulting in death or serious personal injury. Additionally, law enforcement agencies could establish an administrative policy requiring blood tests under preestablished circumstances, such as *all* motor vehicle crashes involving a fatality. Whatever approach is adopted, public policy dictates that the injured drunk driver who survives a fatal motor vehicle crash should not be shielded from prosecution by virtue of receiving medical attention.

Endnotes

1. Wis. Stat. § 340.01 (46m) defines "prohibited alcohol concentration" as either 0.10 percent and 0.10 grams or 0.08 percent and 0.08 grams, depending on whether the person has two or more prior offenses. See also Wis JI-Criminal 1186, Comment (1993).

2. Unless otherwise indicated, all references in this report to the Wisconsin Statutes are to the 1993-94 edition.

3. Subsec. 346.71(2) provides:
   > In cases of death involving a motor vehicle in which the decedent was the operator of a motor vehicle . . . the coroner or medical examiner of the county where the death occurred shall require that a blood specimen of at least 10 cc. be withdrawn from the body of the decedent within 12 hours after his or her death. . . . If the death involved a motor vehicle, the department [of health and social services] shall keep a record of all such examinations to be used for statistical purposes only. . . .

4. Subsec. 905.04(2)(f) provides:
   > There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or blood alcohol concentration.

5. Subsec. 343.305(2).

6. Subsec. 343.305(3)(b).

7. Thomas J. Hammer, "Implied Consent Law and Chemical Tests for Intoxication," *Traffic Law and Practice in Wisconsin* §§ 7.3-7.5 (State Bar of Wisconsin 1995). See also Nina J. Sines and John Ekman, "Informing the Accused Under the Implied Consent Law," *Resource Center Report*, No. 95-2, October 1995.

8. 137 Wis.2d 39, 403 N.W.2d 427 (1987).

9. *Id.* at 52, 403 N.W.2d at 441.

10. *Id.* at 52-53, 403 N.W.2d at 441, citing State v. Fillyaw, 104 Wis.2d 700, 716-18, 312 N.W.2d 795 (1981), and City of Bismark v. Hoffner, 379 N.W.2d 797, 799 (N.D. 1985).

11. *Zielke*, 137 Wis.2d at 42-44, 403 N.W.2d at 431-33.

12. *Id.* at 44, 403 N.W.2d at 436.

13. 163 Wis.2d 164, 471 N.W.2d 226 (1991).

14. *Id.* at 169-70, 471 N.W.2d at 229.

15. *Id.* at 183, 471 N.W.2d at 235.

16. 173 Wis.2d 529, 494 N.W.2d 399 (1993).

17. *Id.* at 534, 494 N.W.2d at 404.

18. 384 U.S. 757 (1966).

19. *Bohling*, 173 Wis.2d at 539, 494 N.W.2d at 410.

20. *Id.* at 534, 494 N.W.2d at 405.

21. Numerous laboratory studies of the effects of alcohol and analysis of traffic accident data conclude that relatively low alcohol concentration levels significantly impair a person's ability to drive a motor vehicle. House Research Department, "The 0.08 Alcohol Concentration Limit," January 1994, at 10; H. Moskowitz, M.M. Burns, and A.F. Williams, "Skills Performance at Low Blood Alcohol Levels," *Journal of Studies on Alcohol*, Vol. 46, No. 6, 1985 at 482; P.C. Noordzij and R. Roszbach, *Alcohol, Drugs, and Traffic Safety*, T86, 10th International Conference on Alcohol, Drugs, and Traffic Safety, Amsterdam (1986).

22. Sec. 885.235.

23. No. 92-0972, 1992 Wisc. App. LEXIS 944 (Second Dist. Nov. 11, 1992) (per curiam). This is an unpublished limited precedent opinion and is subject to further editing.

24. *Salmon*, LEXIS 944 at *3.

25. See Colquitt, Fielding & Cronin, "Drunk Drivers and Medical and Social Injury," 317 *New Eng. J. Med.* 1262 (1987).

26. Subsection 346.71(2) clearly states that only the decedent's blood is to be tested and that test results will be used only for statistical purposes.

27. Uniform Vehicle Code and Model Traffic Ordinance, Sec. 6-210.

28. 625 Ill. Comp. Stat. Ann. 5/11 - 501.6(a) (West 1996).

29. 1996 Ill. LEXIS 108.

30. *Id.* at *14.

31. *Id.* at *8.

32. *Id.* at *14.

33. Sue Ellen Christian, "Crash breath tests legal, justices rule," *Chicago Tribune*, October 19, 1996, sec. 1, p. 5. See also "Illinois Approves Mandatory Chemical Testing of Drivers Involved in Serious Accidents," 60 CrL 1099, Oct. 30, 1996.

34. Bureau of Transportation Safety, Wisconsin Department of Transportation, *Wisconsin Alcohol Traffic Facts Book 1996 Edition.* (Forthcoming December 1996.)

35. For example, Jackson County has a policy under which officers are to take blood in all OWI cases in which there has been a chemical test refusal. Letter from James B. Sherman, Jackson County District Attorney to Chief Deputy Garth Rolbiecki, Police Chief Donald Gilberg, and Sergeant Darren Price (Jan. 24, 1995).

36. *State v. Zielke*, 137 Wis.2d at 44, 403 N.W.2d at 436.

37. Here, the police officers could point to the driver's falling asleep at the wheel, the severity of the crash, and the driver's emotional state at the scene of the crash in order to support their reasonable suspicion that the driver's blood contained evidence of a drunk driving related offense.

38. Even though probable cause might have existed to arrest the driver in the present case for criminal negligence, there was no evidence that the driver had violated Wisconsin's drunk driving statutes.

39. The police officers in the present case did not smell intoxicants on the driver's breath, nor did the emotional state of the driver present enough evidence to form a reasonable suspicion that the driver was intoxicated.

40. The rapid dissipation of blood alcohol is only a sufficient exigency if the driver is under lawful arrest for violation of a drunk driving statute.

RESOURCE CENTER REPORT

THIS REPORT REPLACES RESOURCE CENTER REPORT
No. 96-2, November, 1996

Number 97-1
August 1997

University of Wisconsin Law School
Resource Center on Impaired Driving

MANDATORY BLOOD TESTING IN MOTOR VEHICLE CRASHES

Nina J. Emerson, Director

The reason we are replacing Resource Center Report, No. 96-2 is because someone took the time to read it and bring to our attention some inconsistencies in the legal analysis.[1] While we apologize for any confusion this may have caused, this is exactly what we want our readers to do. We want to know how we're doing and how we can do a better job. In fact, the impetus for several Resource Center Reports was provided by those who use the Resource Center.[2] The Resource Center continues to invite your comments, inquiries, and suggestions.

In this report, we have added a fact scenario to the discussion of mandatory blood testing in motor vehicle crashes involving serious injury or death to (1) illustrate the different legal applications; (2) discuss possible statutory solutions; and (3) consider practical ramifications and policy concerns. Finally, the report concludes that whatever approach is adopted, it should be applied uniformly to insure the injured impaired driver does not escape prosecution and the injured unimpaired driver is exonerated from the suspicion that alcohol or drugs were involved.

Fact Scenario No. 1

A two-car crash occurred in which the driver of one car was killed. The surviving driver, who apparently caused the crash after falling asleep at the wheel, was questioned briefly by two officers. Neither officer detected signs of intoxication, *e.g.*, odor of intoxicants, slurred speech, or bloodshot eyes. The driver was taken to the hospital for medical attention where medical personnel requested a blood sample. The driver signed the hospital's consent form and submitted to a blood draw. The driver was not placed under arrest for operating while intoxicated (OWI) and was not read the Informing the Accused form. The blood test results indicated the driver had an alcohol concentration well above the legal limit.[3] The driver was then charged with operating with a prohibited alcohol concentration (OWI-PAC) in violation of Wis. Stat. § 346.63(1)(b).[4]

Discussion

In City of Muskego v. Godec,[5] the driver was involved in a serious one-car crash, requiring immediate medical attention. The officers arrived on the scene in time to have Godec taken to the hospital by the "Flight for Life" helicopter. The officers did not request that medical personnel obtain a breath, blood, or urine test for alcohol concentration. However, after the officers investigated the crash, they formed the basis for issuing an OWI citation. The officers also learned that the treating physician had ordered a blood test for diagnostic purposes, but Godec refused to release his medical records.[6]

The Wisconsin Supreme Court in Godec held that blood test results taken for diagnostic purposes could be used in a subsequent prosecution for an OWI offense. In reaching this decision, the court applied subsec. 905.04(4)(f) which exempts chemical tests for

intoxication from the physician-patient privilege.[7] In Godec, the blood test was taken prior to his arrest and was not taken pursuant to the direction of law enforcement.

Therefore, fact scenario No. 1 does not raise a search and seizure issue because blood tests taken solely at the direction of a doctor, in the absence of any governmental request, do not fall within the confines of the fourth amendment.

Fact Scenario No. 2

A two-car crash occurred in which the driver of one car was killed. The surviving driver had apparently fallen asleep at the wheel and caused the crash by crossing into the oncoming lane of traffic. The officers responding to the scene did not detect an odor of intoxicants on the driver's breath. Although the driver was obviously shaken, upset, and unsteady, he did not otherwise exhibit obvious signs of intoxication. The driver sustained moderate injuries and was taken by ambulance to the hospital for medical attention.

The officers investigating the crash site found empty beer cans suggesting one or both drivers had been drinking. When the officers went to the hospital, the paramedics indicated that the driver's breath had a slight odor of intoxicants. Although unable to request that the driver perform field sobriety tests, the officers placed the driver under arrest for OWI and read the Informing the "Accused form." The driver refused to comply with the officers' request. The officers then directed hospital personnel to take a blood sample. The driver complied and signed the hospital consent form.

Discussion

In State v. Bohling,[8] a driver was involved in a two-car crash. When an officer arrived at the scene, he noted that Bohling smelled of intoxicants, had bloodshot eyes, and exhibited poor balance. The officer placed Bohling under arrest for OWI and took him to the police station where he refused to take the intoxilyzer test. Subsequently, Bohling was taken to the hospital for a blood test pursuant to police department policy. Although he refused to sign the hospital consent form, he complied with the blood test.[9]

In Bohling, the Wisconsin Supreme Court held that blood may be taken as a search incident to a lawful OWI arrest. The court concluded that blood test results taken without a search warrant will be admissible provided the following requirements are met:

(1) The blood is taken from a person legally arrested for a drunk driving offense to obtain evidence of intoxication. (2) There is a clear indication that the blood will produce evidence of intoxication. (3) The method used is performed in a reasonable manner. (4) The arrested person does not have an objection to the blood test.[10] Finally, the court reasoned that because alcohol quickly dissipates from a person's bloodstream, there is sufficient exigent circumstances to justify taking blood without a warrant.[11]

Application

Although the blood test in fact scenario No. 1 was not taken incident to a lawful arrest or pursuant to the implied consent law, it will likely be admissible for the following reasons: (1) It was taken for diagnostic purposes at the direction of a treating physician. (2) The test results are not confidential under the physician-patient privilege. (3) The officers' investigation of the crash site provided a sufficient basis to issue a drunk driving citation.[12]

Additionally, the blood test result will likely be admissible in fact scenario No. 2 because: (1) It was taken pursuant to a lawful arrest for drunk driving. (2) It was reasonable for the investigating officers to believe that, based on the totality of the circumstances, the driver's blood contained evidence of a crime which was rapidly dissipating.

(3) The blood test was performed by medical personnel in a reasonable manner.

In the alternative, a statute would eliminate the above issues of admissibility by providing mandatory chemical testing of all drivers who have been issued a citation for a nonequipment violation and have been involved in a motor vehicle crash resulting in death or serious personal injury. The possible statutory solutions are discussed below.

Universal Alcohol Testing

At one time, Wisconsin law authorized blood tests for "surviving drivers in accidents which result in death or 'great bodily harm' to anyone." Further, the test results were admissible in court.[13] Specifically, subsection 343.305(2)(am) provided:

> A law enforcement officer shall request any person who was the operator of a motor vehicle involved in an accident resulting in great bodily harm or death to any person to take a test as provided under par. (b) or (c) [breath, blood or urine] for the purpose specified in sub.(1) [to determine the presence or quantity of alcohol or controlled substances].[14]

This subsection became effective July 1, 1978, and generated some confusion concerning the legislative intent behind its application. Subsection (am) appeared to be an aberration from the implied consent law which required an officer to have either probable cause to believe the driver was operating while under the influence of an intoxicant or that the driver was already placed under arrest for OWI. On its face, subsection (am) required neither probable cause nor an arrest. One possible explanation was that the legislative intent construed the very fact of an accident resulting in great bodily harm or death as sufficient probable cause to justify taking a chemical test. However, this was considered to be one area of the new law that the legislature needed to clarify.

The question of a law enforcement officer's authority under subsection (am) was posed to then-senior staff attorney for the legislative council and then attorney general which yielded divergently different responses. Senior Staff Attorney Jim Fullin interpreted the legislative intent of (am) to take away an officer's discretion and mandate that tests be requested in all serious accident situations.[15] Attorney General Bronson LaFollette, on the other hand, stated unequivocally that a "law enforcement officer could not, in the absence of a validly issued citation, request that an operator of a motor vehicle involved in a crash when there is a fatality or a very serious injury submit to a test." In the alternative, the attorney general approved the following procedure for implementing subsection 343.305(2)(am):

> (1) If there is 'probable cause' to make an arrest, proceed with the arrest and implied consent procedure.
> (2) If there is no 'probable cause' present, request the operator(s) to submit to the test. If the operator(s) refuse, discontinue the procedure.[16]

A subsequent Attorney General Opinion reiterated this procedure in concluding that a driver could not be asked to take a test under subsection (2)(am) unless there was a lawful arrest.[17] Subsection (2)(am) was repealed in 1981.[18]

However, the dialogue concerning universal blood testing did not end with the repeal of subsection (2)(am). Two faculty members of the University of Wisconsin Law School suggested a different approach to the traditional probable cause rationale to justify taking blood tests of drivers involved in vehicle crashes. They reasoned that the unique circumstances surrounding a crash resulting in death or serious injury, when taken together with the high correlation between traffic

crashes and alcohol, were enough to satisfy the probable cause requirement, provided certain "neutral and objective" criteria were met.[19] It was argued that the legislative intent of subsection 343.305(2)(am) clearly provided for blood testing of all drivers involved in crashes resulting in death or serious injury. Further, the statute was considered to be in keeping with the public's interest of responding to the problem of the drinking driver.[20]

Illinois recently passed legislation that requires drivers involved in crashes resulting in serious personal injury or death and issued a citation for a nonequipment offense to undergo chemical testing for impairment by drugs or alcohol.[21] The statute was challenged as unconstitutional under the fourth amendment of the United States Constitution. However, the Illinois Supreme Court concluded that because the chemical test imposes only a minor intrusion on a driver who already has a diminished expectation of privacy while operating a vehicle[22] that the statute fit within the "special needs" exception to the fourth amendment.[23] The court reasoned that any subsequent prosecution is merely incidental to the primary purpose of the statute which is to protect the public from the hazards caused by intoxicated drivers.[24] Illinois is the second state to allow emergency room physicians to volunteer chemical test results to the police without fear of being sued by the injured driver.[25]

In response to concerns of the injured impaired driver, the National Committee on Uniform Traffic Laws and Ordinances developed a model statute for mandatory chemical testing which provides, in part:

> . . . [W]hen the driver of a vehicle is involved in a crash resulting in death or serious personal injury of another person, and there is reason to believe that the driver is guilty of [driving under the influence of alcohol or drugs], the driver may be compelled by a police officer to submit to a test or tests of the driver's blood, breath or urine. . . .[26]

A number of states have established similar procedures which allow medical personnel to withdraw blood from a driver of a crash resulting in a fatality or serious bodily injury. These tests may be taken without the driver's consent, without a lawful arrest, and may be used as evidence of impairment to subsequently prosecute the driver. In cases where a driver has been injured in a crash and requires medical attention, this may be the only way of ascertaining the driver's alcohol concentration.

Practical Considerations

Without the statutory authority to take blood tests of all drivers involved in motor vehicle crashes resulting in serious bodily injury or fatality, what are the practical logistics of obtaining hospital blood test results taken for diagnostic purposes? Further, to what extent will medical personnel voluntarily release the blood test results revealing a prohibited alcohol concentration to prosecutors or law enforcement officers? These are some of the practical considerations that must be addressed when confronted with the fact scenarios presented here.

Much of the cooperation on the part of medical personnel and emergency medical technicians (EMTs) will depend on the kind of working relationship they have with law enforcement officers. The primary concerns of an officer responding to a serious vehicle crash are: first, to promptly arrange for medical treatment of the injured; and second, to direct traffic away from the scene to insure it does not cause a hazard. Under these circumstances, an officer may not have an opportunity to adequately investigate the possibility of a surviving driver's impairment before he or she is taken to a hospital for treatment. Therefore, it is imperative that law enforcement officers and emergency room

personnel have good working relationships prior to a crash that requires blood testing. Most emergency medical staff and EMTs will cooperate with law enforcement officers, provided the officers' involvement is relatively unobtrusive and their requests can be accommodated by treating medical personnel.[27]

At least two jurisdictions in Wisconsin; namely, Milwaukee and Madison, have indicated that their police departments have not had any problems obtaining blood test results after a crash. If an officer contacts medical personnel at the hospital following a crash and requests the blood test results of a suspect, they will usually be furnished. Most hospitals in Milwaukee and Madison will cooperate by providing blood test results when an investigation reveals that alcohol may have been a contributing factor in a crash.

If the incident goes to trial, the city attorney or county prosecutor may want to issue a subpoena to obtain hospital blood test results.[28] However, some hospitals will release the results without a subpoena. In one case, it was the hospital that called the police department to report that a driver who sought medical attention after a one-vehicle crash had tested .39% alcohol concentration. Based on this information, the police were able to locate the driver and place her under arrest for OWI.[29]

Policy Concerns

If obtaining hospital blood test results is not a problem from a practical standpoint, why would there need to be a law requiring testing in all crashes involving serious bodily harm or fatality? A mandatory blood testing statute would treat all drivers involved in crashes the same, whether or not there is a suspicion of alcohol. This uniform treatment of drivers has three benefits: (1) It would quickly identify those cases where intoxication was not a factor in the crash; (2) it would quickly identify those cases where alcohol or drugs played a role in the crash; and (3) it would provide medical personnel the opportunity to intervene for the purpose of making appropriate treatment referrals. These points are discussed below.

First, a blood test can easily identify those cases where alcohol was not a factor in the crash. This information could quickly exonerate those surviving drivers who otherwise might be presumed to be intoxicated. For example, a man who caused a crash that resulted in three fatalities was originally jailed on three counts of homicide by intoxicated use of a motor vehicle. However, a blood test taken several hours after the crash revealed an alcohol concentration of .02%, well below the legal limit. Subsequently, the district attorney charged the man with three counts of homicide by negligent use of a motor vehicle.[30] Certainly a driver who knows he or she was not drinking prior to a crash would want the opportunity to be exonerated from the suspicion that intoxication played a role in the crash.

Second, thousands of injured impaired drivers in need of medical attention are able to avoid prosecution for drunk driving when treating physicians do not have the statutory authority to report chemical test results. And yet emergency room personnel have known for years that many people who are treated for injuries from car crashes are legally drunk.[31] However, without a policy or statute, emergency room personnel are faced with the dilemma of whether they should provide blood test results only when requested or if they should actively offer them even when not questioned. In many states, doctors are forced to remain silent because the physician-patient privilege treats blood test results as confidential. Thus, a recent study found that 70% of injured drivers hospitalized for treatment who had an alcohol concentration over .08% were

never prosecuted or convicted for drunk driving.[32] From the standpoint of the physicians and emergency room personnel who must treat the injured impaired driver, the message seems to be that if you drink, drive, and get injured, you probably won't get caught. In fact, you're more than likely to get away with it.[33]

Third, medical personnel should develop a policy requiring them to make appropriate referrals for alcohol rehabilitation. The high incidence of alcohol abuse in vehicle crashes requiring medical attention will provide an opportunity for medical personnel to intervene for the purpose of getting the patient to alcohol treatment.[34] Appropriate referrals and treatment of those with alcohol-related problems can help prevent a significant number of traffic crashes.[35]

Conclusion

There is a high correlation between the consumption of alcohol and the incidence of motor vehicle crashes.[36] Officers who respond to the scene of a serious crash have multiple responsibilities that often do not allow them to fully investigate the possibility of a surviving driver's impairment. Obtaining blood test results of the injured impaired driver can be handled in one of several ways; namely: (1) Blood may be taken at the direction of a treating physician and made available to investigating officers upon request. (2) Blood may be taken incident to a lawful arrest, without the driver's consent, due to exigent circumstances. (3) A mandatory blood testing statute could test all surviving drivers of vehicle crashes, whether or not there is a suspicion of impairment. Whatever approach is adopted, public policy dictates that the injured impaired driver should not be able to escape prosecution and the injured unimpaired driver should be exonerated from any suspicion of intoxication.

Endnotes

1. Letter from City of Appleton, Assistant City Attorney Scott E. Hansen to Nina J. Sines, Director, Resource Center on Impaired Driving (Jan. 20, 1997).

2. For example, Judge James Carlson suggested the Resource Center look at the history of the minimum drinking age discussed in "The Minimum Drinking Age and Alcohol Policy: An Historical Overview and Response to the Renewed Debate in Wisconsin," Resource Center Report, No. 96-1, April 1996. In addition, inquiries from both the prosecutor and the defense attorney in a drunk driving case provided the factual scenario discussed in "Informing the Accused Under the Implied Consent Law," Resource Center Report, No. 95-2, October 1995.

3. Wis. Stat. § 340.01 (46m) defines "prohibited alcohol concentration" as either 0.10 percent and 0.10 grams or 0.08 percent and 0.08 grams, depending on whether the person has two or more prior offenses. See also Wis JI-Criminal 1186, Comment (1993).

4. Unless otherwise indicated, all references in this report to the Wisconsin statutes are to the 1995-96 statutes.

5. 167 Wis.2d 536 (1992).

6. Id., at 540-41.

7. Subsec. 905.04(4)(f) provides:

> There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or blood alcohol concentration.

8. 173 Wis.2d 529 (1993).

9. See Id. at 534-35.

10. See Id. at 534.

11. See Id. at 539, citing Schmerber v. California, 384 U.S. 757, 770-71 (1966).

12. See State v. Smith, 929 P.2d 1191 (Wash. App. Div. 1 1997). The court relied on State v. Zielke, 137 Wis.2d 39 (1987), to conclude that blood taken for medical purposes was admissible given the legislative intent of the implied consent law. "Physician-Patient

Privilege Did Not Apply to Blood Sample or to any Reports of Sample's Alcohol Content; Public's Interest in Revelation of Facts Surrounding Alleged Drunk Driving Outweighed Benefits of Privilege," Drinking/Driving Law Letter, Vol. 16, No. 15, 272-74 (July 18, 1997).

13. Office of the Governor, Highway Safety Coordinator, State of Wisconsin, Wisconsin Arrests Drunk Drivers (leaflet) 1978.

14. Subsection 343.305, Wisconsin's Statutes on Operating a Motor Vehicle While Under The Influence, Legal Systems, Inc., 1978.

15. Wisconsin Legislative Council Staff Memorandum from Senior Staff Attorney Jim Fullin to Speaker Ed Jackamonis (Dec. 8, 1978.)

16. Governor's Office of Highway Safety, State of Wisconsin, Informational Bulletin #70, Jan. 15, 1979.

17. 68 Op. Att'y Gen. 314 (1978).

18. See Chapter 20, Laws of 1981, sec. 1568e. (codified as amended at Wis. Stat. § 343.305(2) (1981-82)).

19. The criteria would be based on the circumstances of the crash and knowledge about the correlation between vehicle crashes and alcohol use. See memorandum from Herman Goldstein and Chuck Susmilch to Dave Schultz, (July 21, 1981) (on file with author).

20. See Id.

21. The Illinois Vehicle Code provides, in part:

> Any person who drives . . . and has been involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent to a breath test or to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol or other drug content of such person's blood if arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code or similar provision of a local ordinance. . . .

625 Ill. Comp. Stat. Ann. 5/11-501.6(a) (West 1997).

22. One has a lesser expectation of privacy in a motor vehicle, in part because its function is transportation and it seldom serves as one's residence. Because of this, and the fact that vehicular travel is, of necessity, highly regulated, individuals traveling in vehicles must expect that the state, in enforcing its regulations, will intrude to some extent on their privacy. "Search and Seizure," 65 LW 2653, 4/15/97, citing United States v. Stanfield; 109 F.3d 976, 982 (4th Cir. 1997).

23. Fink v. Ryan, 673 N.E.2d 281, 286-87 (Ill. 1996).

24. Id. at 285.

25. Oregon is the other state. Cindy Schreuder, "Law eased on drunken-driving tests," Chicago Tribune, Jan. 27, 1997. Oregon's implied consent law provides, in part:

> Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent . . . to a chemical test of the person's breath, **or of the person's blood if the person is receiving medical care in a health care facility immediately after a motor vehicle accident**, for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants . . . (emphasis provided). OR. Rev. Stat. Ann. § 813.10(1) (Supp. 1996).

26. Uniform Vehicle Code and Model Traffic Ordinance, Sec. 6-210.

27. Dan Mayer, "Emergency Room Medical Personnel and Impaired Drivers: Working with Law Enforcement to Help Stop Repeat Offenders," Impaired Driving Update, Vol. 1, No. 2, 21-22, January/February 1997.

28. Telephone interview with Lieutenant John Michalak,

Milwaukee Police Department (Jan. 31, 1997).

29. Telephone interview with Lieutenant Pat Malloy, Madison Police Department (Jan. 30, 1997).

30. See "Driver in fatal crash jailed," Wis. St. J., Feb. 8, 1993; Cary Segall, "Intoxication doubted in fatal crash," Wis. St. J., Feb. 9, 1993; and Joe Beck, "DA to charge driver in deaths of three," Wis. St. J., Feb. 10, 1993.

31. See Cindy Schreuder, supra note 25.

32. Rob Lillis, "Injured Drunk Drivers: Closing Gaps in Law Enforcement," Impaired Driving Update, Vol. 1, No. 5, July/August, 1997. See also, M. Colquitt, P. Fielding, P. & J. Cronan, "Drunk Driving and Medical and Social Injury," 317 New Eng. J. Med., 1262 (1987).

33. Due to the high rate of alcohol abuse in vehicular trauma, hospital admission may provide an opportunity to intervene in the treatment of alcohol-related problems. Appropriate treatment could prevent a significant number of traffic injuries and death. M. Mancino, M. Cunningham, P. Davidson, and R. Rulton, "Identification of the Motor Vehicle Accident Victim Who Abuses Alcohol: An Opportunity to Reduce Trauma," J. Stud. Alcohol, 57: 652-58 (1996).

34. Dan Mayer, supra note 27 at 22. See also, Kevin V. Johnson, "A medical loophole for drunken drivers," USA Today, April 1, 1997.

35. See M. Mancino, M. Cunningham, P. Davidson, and R. Rulton, supra note 33.

36. In Wisconsin in 1995, over one-third of driver fatalities and a substantial number of passengers and pedestrians killed in vehicle crashes tested with alcohol concentrations above .10%. Wisconsin Dep't of Transp., Wisconsin Alcohol Traffic Facts Book, 1996 ed.

The Resource Center invites your comments, inquiries, and suggestions. Call **toll free 1 (800) 862-1048** or **in Madison 265-3411.**

Resource Center on Impaired Driving
University of Wisconsin Law School
975 Bascom Mall, Room 2348
Madison, WI 53706-1399

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Testimony of

Nina J. Emerson, Director
University of Wisconsin Law School
Resource Center on Impaired Driving

1999 Assembly Bill 160

Highway Safety Committee
North Hearing Room
Wednesday, March 17, 1999, 9:30 A.M.

Thank you, Chairperson Stone and members of the Highway Safety Committee for the opportunity to testify on AB 160. My name is Nina Emerson, and I am the director of the Resource Center on Impaired Driving at the University of Wisconsin Law School. My testimony today is for information purposes only. The resource center does not take a formal position on AB 160, but as author of *Resource Center Report*, No. 97-1, entitled "Mandatory Blood Testing in Motor Vehicle Crashes," I would like to offer the following comments.

At the outset, I want to apologize for any confusion generated by the initial *Resource Center Report*, No. 96-2, I co-authored entitled, "Mandatory Blood Testing in Fatal Crashes," which I understand may have been relied upon in part by Representative Goetsch in proposing AB 160. That report contained some inconsistent statements that were later clarified in the replacement report No. 97-1 referred to above. I have attached copies of both reports for your reference and have underlined the language in report No. 96-2 that is admittedly problematic. With that disclosure made, I would like to proceed with a discussion of AB 160 as summarized below:

First, there are compelling public policy reasons to require some form of blood testing of surviving drivers in crashes involving serious injury or fatality. Second, both the model form and enacted legislation from other states require in conjunction with the testing either issuance of a nonequipment traffic citation or a probable cause standard that alcohol or drugs were involved. Third, do we need legislation as broad based as AB 160?

First, the public policy concerns are twofold: 1) Injured drunk drivers should not be protected from subsequent prosecution because they need medical attention; and 2) Blood test results may exonerate the driver with a medical condition that mimics impairment; for example, a diabetic insulin reaction. Indeed, the state's compelling interest to protect the motoring public from the dangers imposed by impaired drivers will typically outweigh the minimal intrusion imposed by a blood test taken of the driver.

Second, other statutes and model legislation impose conditions in addition to the existence of a crash. For example, Illinois passed legislation in 1997 that requires drivers involved in crashes resulting in serious personal injury or death *and* issued a citation for a nonequipment offense to undergo chemical testing for impairment by drugs or alcohol. Maine's statute requires "probable cause to believe that a death has occurred or will occur as a result of the accident." *State v. Roche,* 681 A.2d 472 (Me. 1996)(citing 29 M.R.S.A. sec. 1312(11)(D) 1993). Finally, the National Committee on Uniform Traffic Law and Ordinances crafted a model statute for mandatory chemical testing that requires "reason to believe that the driver is guilty of [driving under the influence of alcohol or drugs.]"

Third, as with any proposed legislation I think the question should be asked whether we really *need* the statute. In Wisconsin, blood test results taken for medical purposes are statutorily exempt from the physician-patient privilege. This means that both law enforcement officers and prosecutors already have access to hospital blood test results. In contrast, a study conducted in states that treated blood test results as confidential revealed that 70% of injured drivers who were hospitalized and who had an alcohol concentration over .08% were never prosecuted for drunk driving. However, both the Milwaukee and Madison police departments indicated they had no problems obtaining blood test results from area hospitals *after* a crash. In fact, most emergency medical staff and EMTs will be willing to cooperate with law enforcement incident to a crash investigation.

In conclusion, I invite you to consider AB 160 in light of the observations I have shared with you today. Further, I urge you to look at similar enacted legislation and that proposed by the National Committee on Uniform Traffic Laws and Ordinances. Finally, I thank you for your time. I will be happy to answer any questions you may have.