Implied Consent in New Mexico

John R. Leathers

Recommended Citation
Available at: http://digitalrepository.unm.edu/nrj/vol10/iss2/8
It is a harsh fact of life on American highways that each year thousands of innocent people are killed in accidents caused by intoxicated drivers.\(^1\) Property damage in the United States in 1967 caused by the intoxicated driver amounted to almost two billion dollars.\(^2\) In New Mexico over half of all fatal accidents involve alcohol.\(^3\) Finding an effective method of controlling the menace of the intoxicated driver is a perplexing problem.\(^4\) Despite stiff penalties for driving while intoxicated, the drunk driver has not as yet been effectively deterred. This is perhaps due to the fact that proof of intoxicated driving is difficult to obtain from the conflicting stories of those involved.\(^5\) Despite a Supreme Court holding that it is permissible to admit into evidence blood tests taken without the permission of the accused to prove intoxication,\(^6\) most states still rely on the traditional method of having the arresting officer and any witnesses present at the arrest give testimony about the physical state of the accused at the time of the alleged violation. Use of this method in New Mexico has resulted in convictions in less than half of the cases of arrests for driving while intoxicated.\(^7\) In an attempt to provide an effective means of deterring and removing the intoxicated driver from the highways, some states have enacted "implied consent" laws. In general terms, an implied consent law provides that drivers using the state highways are considered to have given their consent in advance to a test to determine the alcoholic content of their blood. Refusal to submit to the test when requested to do so results in loss of the driving privilege.

New Mexico has recently enacted an implied consent law.\(^8\) It is

---

1. For a good discussion of the problem, see R. Weiers, Licensed to Kill (1968).
2. Id.
3. Interview with Donald McElroy, Sergeant, New Mexico State Police, in Albuquerque, New Mexico, November 5, 1969.
5. Id.
7. Interview, supra note 3.

**A.** Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given his consent, subject to the provisions of the Implied Consent Act . . . to a chemical test of his breath or blood for the purpose of determining the alcoholic content of his blood, if arrested for any offense arising out of the acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of an intoxicating liquor.

B. The test shall be administered at the direction of a law enforcement officer.
somewhat different from those in other states. This Comment will contrast the New Mexico law with the laws of other states, revealing defects in the New Mexico statute so basic that they cripple it completely. This discussion also suggests amendments to rehabilitate the New Mexico statute to make it effective.

The New Mexico statute is in some ways similar to statutes enacted in New York, California, and Nebraska. A reading of the having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways while under the influence of intoxicating liquor.

(2.7) If a person is arrested ten (10) miles or more from a place where a blood test may be administered by a qualified person, the person arrested, in lieu of submitting to a chemical test of his blood, may agree to submit to a breathalyzer test or similar breath test administered by the arresting officer at the place of arrest for the purpose of determining the alcoholic content of his blood. If the results of the breath test indicate that the arrested person is intoxicated, the arrested person shall be required to submit to a chemical test of his blood as provided in the Implied Consent Act.

(2.10) The results of a chemical test performed pursuant to the Implied Consent Act may be introduced into evidence in any civil action against the person tested for any violation of section 64-22-2 N.M.S.A. 1953 or for violation of any municipal ordinance prohibiting persons from driving while under the influence of intoxicating liquor.

(2.11) A. If a person under arrest for driving while under the influence of intoxicating liquor refuses to submit to chemical testing, none shall be administered.

B. The arresting officer shall file a sworn report with the commissioner stating that he had reasonable grounds to believe the arrested person had been driving a motor vehicle on the public highways while under the influence of intoxicating liquor and that the person refused to submit to a chemical test after being advised that failure to submit could result in revocation of his privilege to drive.

(2.12) A. Upon receipt of the arresting officer's report, the commissioner shall commence a civil action in the magistrate court where the person resides, to revoke the arrested person's privilege to drive. The hearing in the magistrate court shall include the issues:

1. whether the law enforcement officers had reasonable grounds to believe the person had been driving a motor vehicle on the public highways while under the influence of intoxicating liquor;
2. whether the person was arrested for driving while intoxicated;
3. whether the person refused to submit to a chemical test after being advised that failure to submit could result in revocation of his privilege to drive.


I. Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition, or while his ability to operate such motor vehicle or motorcycle was impaired by the consumption of alcohol, and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test, refuses to submit to such chemical test, the test shall not be given but the commissioner shall revoke his license or permit to drive and non-resident operating privilege; provided, however, the commissioner shall grant such person an opportunity to be heard but a license, permit or non-resident operating privilege may, upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition, or while his ability to operate such motor
NATURAL RESOURCES JOURNAL

车辆或摩托车行驶时因饮酒导致死亡事件增加，这主要是由于驾驶员要么完全醉酒，要么醉酒程度使他们驾驶的能力受到严重影响。

2. 车辆或摩托车因饮酒而受到损害，应暂停而不予通知，直至确定任何听证会。


(a.) 任何驾驶车辆上高速公路的人，不得拒绝进行血液、呼吸或尿液的化学测试，以确定血液中的酒精含量。该测试应在执法官有理由怀疑该人驾驶车辆时进行。如果该人拒绝测试，将被暂停驾驶权6个月。

(b.) 如果任何司机拒绝服从执法官的请求进行化学测试，执法官应提交一份他有合理理由认为该人曾驾驶车辆时灌醉的陈述。如果收到该报告，交通部门应通知该人听证会日期，以决定该人的拒绝是否合理。如果拒绝不被接受，交通部门应撤销该人的驾驶执照。


(.03) 任何操作车辆或在车辆内的人，应在公共道路上行驶车辆时，应提供其同意测试血液、尿液或呼吸的协议，以确定血液中的酒精含量。测试应在执法官有证据怀疑该人驾驶车辆时进行。如果少酒，将被暂停驾驶权6个月。

(.08) 如果受审的人因没有进行测试而被指控，应向交通部门提交一份报告，说明该人有合理理由认为该人操作或控制车辆时灌醉。

(.09) 司机在收到听证会通知后，如未提出合理理由，应撤销其驾驶执照，为期一年。

Implied consent laws are designed to correct weaknesses of criminal sanctions against driving while intoxicated. The difficulty in convicting a person of driving while intoxicated is proving that the person actually was intoxicated. Satisfying this burden of proof by the testimony of the arresting officer or witnesses is more a matter of opinion than of fact. An objective standard is needed, against which the condition of the driver can be measured. The New Mexico law states that any person operating a motor vehicle on the public highways is deemed to have consented to an objective measure, but then fails to set a measure.\textsuperscript{13}

The method of measurement which the statute provides is a blood test or, in some circumstances, a test of the driver's breath.\textsuperscript{14} Without establishing a definite percentage of alcoholic content in the blood at which a person is deemed to be intoxicated, the determination of intoxication is made by the person interpreting the test. Under the new law the state remains where it was prior to the enactment of the law—with a standard that is a matter of opinion rather than fact.

The test called for in the New Mexico statute does not include the provision seen in other states for a choice by the driver of whether the test is to be made of his blood, breath, or urine. The only choice allowed under the New Mexico law is when a person is arrested ten miles or more from the place where a blood test can be administered, he may elect to take a breatholisor test at the place of arrest. While this lack of choice may be commendable as requiring the most reliable test,\textsuperscript{15} it does pose some problems.

The difficulty of not allowing any choice is that there are some people who could not take a blood test without physical danger. Hemophiliacs and heart patients being treated with anti-coagulants would be endangered by the drawing of blood even under the supervision of a doctor. Some choice should be allowed for these special cases.

The enforcement provisions of the New Mexico statute are quite different from those in other states. As is common, the statute provides for a sworn statement from the arresting officer to the Commissioner of Motor Vehicles concerning the refusal of the arrested driver to submit to the test provided for by the implied consent

New Mexico highway deaths total almost 500 per year. In an estimated 50%, alcohol is involved. Interview, supra note 3.

15. Interview, supra note 3.
law.\textsuperscript{16} It is at this point that the New Mexico statute departs from other state statutes and in so doing destroys the effectiveness of the act.

The New Mexico statute makes the revocation of the driver's license of the arrested driver who refused to submit to a reasonable request to take a chemical test a judicial rather than an administrative proceeding. The commissioner must file a civil action in magistrate court in order to have the driver's license revoked.\textsuperscript{17} The burden of initiating the judicial action is on the state rather than on the offending driver. This defeats the manner in which the implied consent statute should interact with the driving while intoxicated criminal statutes.

The implied consent laws in other states operate to put the intoxicated driver in an inescapable position. When stopped by an officer for reasonable cause, the driver may either take a test which will prove his intoxication and result in loss of the driving privilege or he may refuse the test and with equal certainty lose his privilege. In those states loss of the driving privilege is automatic and mandatory, and this is the very procedure which makes the law function as it should.\textsuperscript{18} Even in Nebraska, where loss is not automatic, it is almost as sure because the proceeding is administrative rather than judicial.\textsuperscript{19} The New Mexico implied consent law is completely reversed from what it should be because of the way its enforcement provision works. In other states, the burden is on the driver to commence a civil action to get his driver's license back; the burden in New Mexico is on the state to commence a civil action to have the driver's license revoked.\textsuperscript{20} In other states an intoxicated driver is faced with certain loss of his license when he is stopped when driving while intoxicated; in New Mexico no certainty exists.

It can be seen that the New Mexico implied consent statute has three weaknesses. It does not provide an objective measure of intoxication, it does not provide for a choice of tests when choice may be needed, and it erroneously puts the burden of action on the state rather than on the driver.

The lack of an objective standard of intoxication has been noted as a defect. To correct this, Section 64-22-2.10 should have the following provision added to it:

\begin{itemize}
\item[\textsuperscript{17}] \textit{Id.} § 64-22-2.12, quoted \textit{supra} note 8.
\item[\textsuperscript{18}] N.Y. Veh. & Traf. Law, quoted \textit{supra} note 9; Cal. Vehicle Code, quoted \textit{supra} note 10.
\item[\textsuperscript{19}] Neb. Rev. Stat., quoted \textit{supra} note 11.
\end{itemize}
Should the results of the test administered reveal a blood alcohol content of .15% or greater, the arrested person shall be deemed to be intoxicated.

This standard (.15%) seems the fairest standard. Although some authorities feel that intoxication may take place at a lower level of alcoholic content, all agree that when the content reaches .15%, the person is intoxicated.\(^{21}\) Since the implied consent law is a relatively drastic step to deal with a serious problem, it would seem best to adopt a standard which is conclusive.

As previously noted, there will be some instances in which a blood test will not be practical. The blood test should be retained as the preferred test since it is the most dependable test, but alternatives should be available. To effect this, Section 64-22-2.7 should have the following provision added to it.

The above provisions notwithstanding, should the arrested person inform the arresting officer that he is unable to submit to the blood test for medical reasons, the arresting officer shall allow the arrested person to take a breatholisor or urine test in lieu of the blood test to determine the alcoholic content of his blood.

The last modification needed is to shift the burden of action from the state to the intoxicated driver. To accomplish this, the first paragraph of Section 64-22-2.12 should be amended to read as follows:

A. Upon receipt of the arresting officer’s report, the commissioner shall summarily revoke the driver’s license of the arrested person for a period of one year. Such revocation shall be subject to appeal at the option of the driver and the appeal shall be heard in magistrate’s court as a trial de novo on the following issues:

This will give New Mexico an effective enforcement provision similar to that of other states. The enforcement provision is the basis for success or failure. “An operator of a motor vehicle may lose his license if he drives while intoxicated and he permits a test of his blood or if he refuses the test.”\(^{22}\) This was what a court had to say about the way in which the New York statute worked. In California, “The statute . . . requires suspension of the driving privilege not for driving while intoxicated, but for refusing to submit to a chem-

---

21. Weiers, supra note 1, at 95.
ical test for intoxication after arrest.\textsuperscript{128} The New Mexico statute, to be effective, must put the arrested driver in just this position. An intoxicated person, if stopped by a police officer, will certainly lose his license whether he takes the test or not.

These three modifications will give New Mexico an effective law. Until these changes are made and funds provided by the legislature for the statute's implementation, the implied consent law in New Mexico is non-functional.

\textbf{JOHN R. LEATHERS}