OPINION
47-182

February 6, 1947 (OPINION)

MOTOR VEHICLES

RE: Drunken Driving - Blood Tests

This will acknowledge the receipt of your letter under date of February 3, 1947, in which you say:

> Recently in Sargent County four persons came to their deaths due to an automobile collision where two automobiles collided. The drivers of the automobiles that were involved in the accident were placed in a hospital and were unconscious when placed in the hospital and remained in that condition for some time.
>
> The Sheriff of Sargent County requested the hospital authorities to take a blood sample from the person of the two drivers to determine the presence of alcohol in the blood. When this request was made the drivers were still unconscious; the hospital people did not know if they had the authority to make this test and it was not made.
>
> Under the conditions when the sheriff desires a sample of the blood be taken from drivers of motor vehicles involved in motor vehicle accidents and their permission cannot be had, may such blood sample be taken to determine the amount or percentage of alcohol in the blood."

The question as to whether or not a person is required to submit to a blood test for the purpose of determining whether or not he was under the influence of intoxicating liquor when involved in an automobile accident has apparently not been definitely decided. An annotation dealing with this question is found in 127 A.L.R. pages 1513-1520. In that annotation dealing with the admissibility of evidence obtained through analytical tests for alcohol in the system it is said:

> Although there is as yet a very limited amount of authority upon the questions, so that a positive general rule cannot now be formulated, it may be said that the following decisions clearly indicate that where the prosecution seeks to establish the intoxication of an accused in a criminal case, evidence as to the taking of a specimen of a bodily fluid of the accused, of the alcoholic content of such specimen as determined by analysis, and expert opinion evidence as to intoxication based on the presence of such alcohol in the accused's system, is admissible against the accused if he voluntarily furnished the specimen of his blood or urine or other bodily fluid, or submitted without objection to the taking of such specimen; provided, of course, that the identity of the specimen analyzed and the accuracy of the analysis are properly established.
>
> In the criminal cases now in the books, the accused's objection

to the introduction of such evidence has been that the test was made and the specimen of bodily fluid used therein was taken without his consent and against his wish, so that the admission of evidence as to intoxication, based upon the result of such test, violated his constitutional right not to be compelled to give testimony against himself.

In two of the cases where this objection was raised, the court determined that the accused had voluntarily submitted to the test and held that, inasmuch as the ground of objection was not sustained by the record, the admission of such evidence was proper. State v. Duguid (1937) 50 Ariz. 276, 72 P (2) 435; State v. Morkrid (1939) _____Iowa_____, 186 N.W. 412.

But in Booker v. Cincinnati (1936) 5 Ohio Ops. 433, 22 Ohio L Abs 286, the court, proceeding upon the assumption that the defendant was compelled to submit to such tests against his will, held that testimony of the doctor who examined the defendant, based at least in part upon such compulsory examination, was inadmissible since the examination had been made in violation of the constitutional right of the defendant no to be subjected to self-incrimination.* * *"

From the cases cited in the annotation in 127 W.L.R., I have reached the following conclusions:

1. That if a person, suspected of being intoxicated, or under the influence of intoxicating liquor, permits, without objection, the taking of a specimen of his blood or other bodily fluid, the analysis of such specimen is admissible in evidence against him - whether in a civil or criminal case.

2. That if a person, suspected of being intoxicated, or under the influence of intoxicating liquor, objects to the taking of a specimen of his blood, or other bodily fluid, the analysis thereof is inadmissible in evidence if objection is made. But evidence as to his refusal to permit the taking of a specimen of his blood, etc., would be admissible.

3. If a person is unconscious, and is suspected of being intoxicated, or under the influence of intoxicating liquor, I can see no reason why a specimen of his blood or even urine may not be taken. Such person, of course, is in no position to object or give assent. But, as far as I am aware, the taking of such specimen for analysis does no harm, that is to say, no bodily inconvenience or injury is caused thereby. The analysis of such specimen may be offered in evidence, but if objection is made, such evidence would, in the light of existing cases, be inadmissible as self-incriminatory under section 13 of our state constitution.

It is, therefore, my opinion that in the case mentioned in your letter, a nurse or doctor should have complied with the sheriff's request and should have taken samples of the blood of the drivers of

the motor vehicles involved in the accident, for as stated, I am not aware that taking from them sufficient blood specimens for analysis as to alcoholic content would have caused them any bodily harm or inconvenience. In the event that one or both of the drivers should have been prosecuted for a crime because the blood tests showed the presence of alcohol, objection to evidence based on the tests would have to be sustained and would be prejudicial if admitted. But if no objections were made, such evidence would, in my opinion, be admissible.

It is my belief that before long courts will conclude that persons involved in automobile accidents, and suspected of being under the influence of intoxicating liquor, may be required to submit to a blood test in the same way that persons now charged with commission of crime may be fingerprinted, their footprints taken, etc. Fingerprints and footprints are admissible in evidence, although obtained contrary to the objection of the accused. I can see no valid reason why specimens of bodily fluid should not be regarded in the same evidentiary category, since the taking of such specimens involves no pain and no bodily harm. Section 13 of our state constitution, in my opinion, was intended to relate to confessions and admissions.

NELS G. JOHNSON

Attorney General