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Minnesota's Double-Barrelled Implied Consent Law

A 1983 update of "Analytical Study of the Legal and Operational Aspects of the Minnesota Law Entitled 'Chemical Test for Intoxication' DOT/HS-806-170. (Robert H. Reeder)

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16. Abstract

To ensure that a driver's license is revoked promptly when a test shows an alcohol concentration of 0.10 or more, regardless of court outcome or plea bargaining on the criminal charge, Minnesota adopted an administrative revocation law in 1976, adding to the conventional implied consent revocation for refusing to take the test. This law was unique to Minnesota until 1981 when two other jurisdictions passed similar laws. In 1982 three more, and in 1983 thirteen more states established similar prompt revocation on test result systems. The author describes the Minnesota law as amended in 1982 and discusses legal and constitutional issues. Effect on apprehension rates, swiftness of sanction, deterrence and perceived risk are analyzed. Author concludes that a two-track DWI control system employing both prompt administrative driver license sanctions on one track and conventional court action on a related but not directly connected parallel criminal track enhances deterrence through more certain, swift penalty, perceived by drivers as severe.

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FOREWORD

This report provides information about Minnesota's two-track system of acting to control and deter drunken driving. These two tracks consist of:

1. Administrative revocation of a driver's license either for refusing to take an alcohol test or for a test showing an alcohol concentration of 0.10 or more; and the

2. Parallel, but not directly connected track of arrest and prosecution on the criminal charge of drunk driving, with the conventional court imposed penalties of fine or jail.

Minnesota has had this system in place since 1976. An excellent analysis of the legal and operational aspects was provided in 1981 by Robert H. Reeder, General Counsel, The Traffic Institute, Northwestern University (and now also Executive Director, National Committee on Uniform Traffic Laws and Ordinances), under contract with the U.S. Department of Transportation, National Highway Traffic Safety Administration. ("Analytical Study of the Legal and Operational Aspects of the Minnesota Law Entitled

'Chemical Test for Intoxication' M.S.A. Sec. 169.123", 1981 U.S. DOT/HS-806-170.)

Significant changes in the 1976 law went into effect July 1, 1982. This report updates the Reeder study and provides information on the law's operation and effects in the twelve months following those changes.

The author of this report often refers to the Minnesota "Two-Track" system of drunk driving control, referring to the administrative and the criminal tracks. Joel Watne, of the Minnesota Attorney General's Department, calls the Implied Consent administrative part of the law a "double-barrelled" system because it acts both on refusal of the test and failing the test with 0.10 or higher alcohol concentration. This report is principally concerned with the administrative revocation under the Implied Consent Law, hence the title on the cover.

BACKGROUND AND INTRODUCTION

In 1976 the State of Minnesota put into place a unique two-track system of taking legal action against drunken drivers.

Until then, Minnesota proceeded in much the same way as other U.S. jurisdictions; that is, a driver accused of a violation commonly called "drunken driving" was arrested, charged, brought to trial, and, if found guilty, penalized by a fine or jail or both, along with a period of license revocation.

This conventional system included those legal features generally regarded as progressive and useful in enforcing drunken driving laws, e.g. implied consent, illegal per se and preliminary screening tests. This conventional criminal justice procedure is still in effect.

Even though in the years prior to 1976 the driving while intoxicated (DWI) arrest rate in Minnesota was respectable by national average standards, only about 80% of drivers

arrested were convicted on the original charge and therefore subject to license revocation for that reason. Plea negotiation resulted in conviction for offenses not involving license revocation and also carried with it the drawback of frequently concealing prior offenses.

State Senator Alec Olson, president of the Senate (a former U.S. Congressman and later Lieutenant Governor) found plea bargaining and its consequences in drunken driving cases not to his liking. In cooperation with Senator Jack Davies, chairman of the judiciary committee and a law professor, he introduced legislation which provided that a driver's license shall be revoked <u>either</u> for refusing to take a test, or for driving with an alcohol concentration of 0.10 or more as shown by the test. The Minnesota Legislature has historically been receptive to firm, progressive DWI control measures and in this atmosphere and with this strong leadership the law was passed and became effective in July, 1976.

This system of administrative driver license revocation for refusing <u>or</u> failing the test proceeds independently of the criminal charge of drunken driving. Indeed, there are a number of perfectly proper situations in which drivers' licenses are administratively revoked but a criminal charge is not brought. In 1982, for example, there were 36,024

alcohol-related driver license revocations and only 28,048 drunken driving charges are shown on the state arrest information system. For a number of unrelated reasons, this system under-reports DWI arrests. Section I of this report provides a detailed description of what happens under what is sometimes called the "Minnesota Two-Track System," and the "Minnesota Double-barrelled Implied Consent Law."

This report provides an operational update on the Minnesota law, which underwent significant amendments in 1982. The legal and constitutional issues involving the original law are discussed and analyzed by Reeder (1), Reese (2) and others. This report does provide the Minnesota Supreme Court decision unanimously upholding the 1982 statute in Heddan vs Dirkswager (Appendix A.) and some other legal information, but for a basic legal discussion of administrative revocation the reader is referred to Reeder and Reese.

SECTION I

SYSTEM DESCRIPTION, COSTS

This section provides a narrative description of how the administrative track of the Minnesota drunken driver control system operates.

Tables, figures, and references to appropriate sections of Minnesota law (provided in Appendix B) will help the reader understand the way this law works. In the first five years following enactment in 1976 the law providing non-judicial driver license revocation or suspension based on an alcohol test showing 0.10 or higher concentration was unique, although many states (those conforming to Section 6-205 and 6-206 of the Uniform Vehicle Code) have general authority to suspend administratively, and the District of Columbia has had administrative authority since 1925 to suspend the licenses of drivers who have shown a flagrant disregard for the safety of persons or property, which is interpreted to include drunk driving offenses.

In 1981 West Virginia enacted a somewhat similar law, followed by Delaware in 1982. Laws more nearly like Minnesota's were also adopted in 1982 by Iowa and Oklahoma.

In 1983 Alaska, Colorado, Indiana, Louisiana, Maine, Missouri, Mississippi, Nevada, North Carolina, North Dakota, Oregon, Utah and Washington enacted similar laws. Several other states are considering such laws. The recent popularity of this law is in large part related to the Federal Alcohol Incentive Grant program which includes as a criterion the prompt suspension of driver licenses.

A comparison of the essential elements of such laws in the 19 jurisdictions listed above, along with a model law, is available from the National Highway Traffic Safety Administration, NTS-20, Washington, D.C. 20590.

Factors to be considered in discussing Minnesota's administrative revocation law are:

1. Revocation under Minnesota Statutes Section 169.123 (see Appendix B) is a civil procedure that deals only with the driver license or the operating privilege. Revocation may take place regardless of the outcome of a criminal charge on the parallel track.

2. The circumstances under which a driver may be required to take a test are somewhat broader than being under arrest for driving under the influence (DWI), a violation of Section 169.121, or some other criminal charge including

the DWI statute (Appendix B.). The condition under which an officer may require a preliminary screening breath test is that the officer has "reason to believe" that a driver is violating the DWI statute (Section 169.121 subdivision 6). This is something less than "probable cause" and, in fact, the screening test itself often generates the probable cause. Refusing the screening test will trigger a test request under section 169.123, the Implied Consent statute, even though the circumstances do not support an arrest or criminal charge under section 169.121.

3. Even though the test is taken and shows 0.10 alcohol concentration or more, under some limited circumstances an arrest for DWI is not made or a charge placed under section 169.121. In certifying that a driver has refused or failed a test, a police officer states that "I had reasonable and probable grounds to believe that..." and NOT that an arrest was made.

The diagram, Figure 1., shows that <u>apprehensions</u> or "Peace Officer's Certificates" by which the officer notifies the Department of Public Safety (driver license authority) that a person has refused or failed the test, are not congruent with <u>arrests</u> or charges of DWI placed. In 1982 there were

33,323 Peace Officer's Certificates filed and 28,048 DWI charges reported. (28,048 understates total DWI or other alcohol-related arrests since the Criminal Justice Information System tabulates only the "most serious" arrest when more than one charge grows out of the same event. For example, a driver is stopped on suspicion of drunk driving and it turns out the car is stolen. The person is charged with both drunken driving and car theft, but because DWI is a misdemeanor and car theft is a felony, the single "arrest" is tabulated as "vehicle theft" and not as "DWI".)

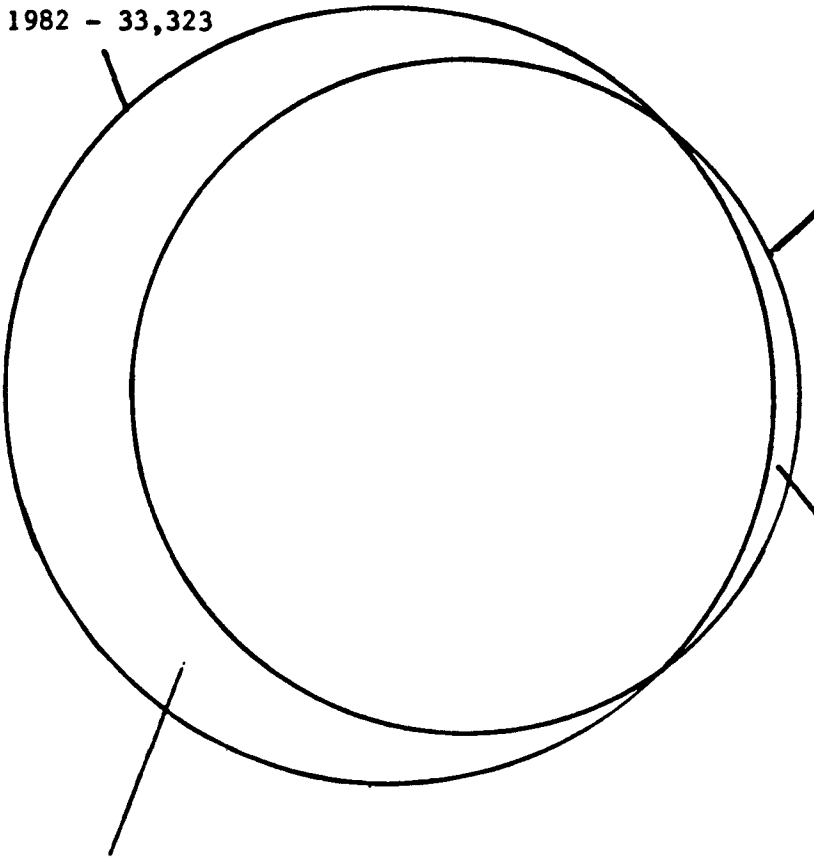
The following series of simplified examples is intended to show how administrative driver license revocation works in Minnesota. (See diagram, Figure 2.)

EXAMPLE A.

A police officer sees a car being driven in such a way that there is "reason to believe" or "articulable suspicion" of drunken driving. The officer stops the car, asks for the driver's license, questions the driver and decides, on the basis of the driving and the way the driver looks, acts and smells, that there are enough grounds for DWI arrest and testing. The officer may also make this decision on the results of a preliminary breath test or the driver's performance of conventional roadside sobriety tests. The officer decides to require a breath test and takes the driver

Figure 1.

"Peace Officer's Certificates" filed with DPS, Sec. 169.123
APPREHENSIONS (not necessarily with arrest)



ARRESTS resulting in criminal CHARGE of DWI Sec. 169.121

1982 - 28,048

(Understates total alcohol-related charges, e.g. "aggravated DWI", criminal negligence, other gross misdemeanor or felony charges.)

Arrests without a test request, or arrests when test result was below .10

Numbers unknown

Refused test but Sec. 169.121 charge not made, or failed test (.10 or more) but Sec. 169.121 charge not made.

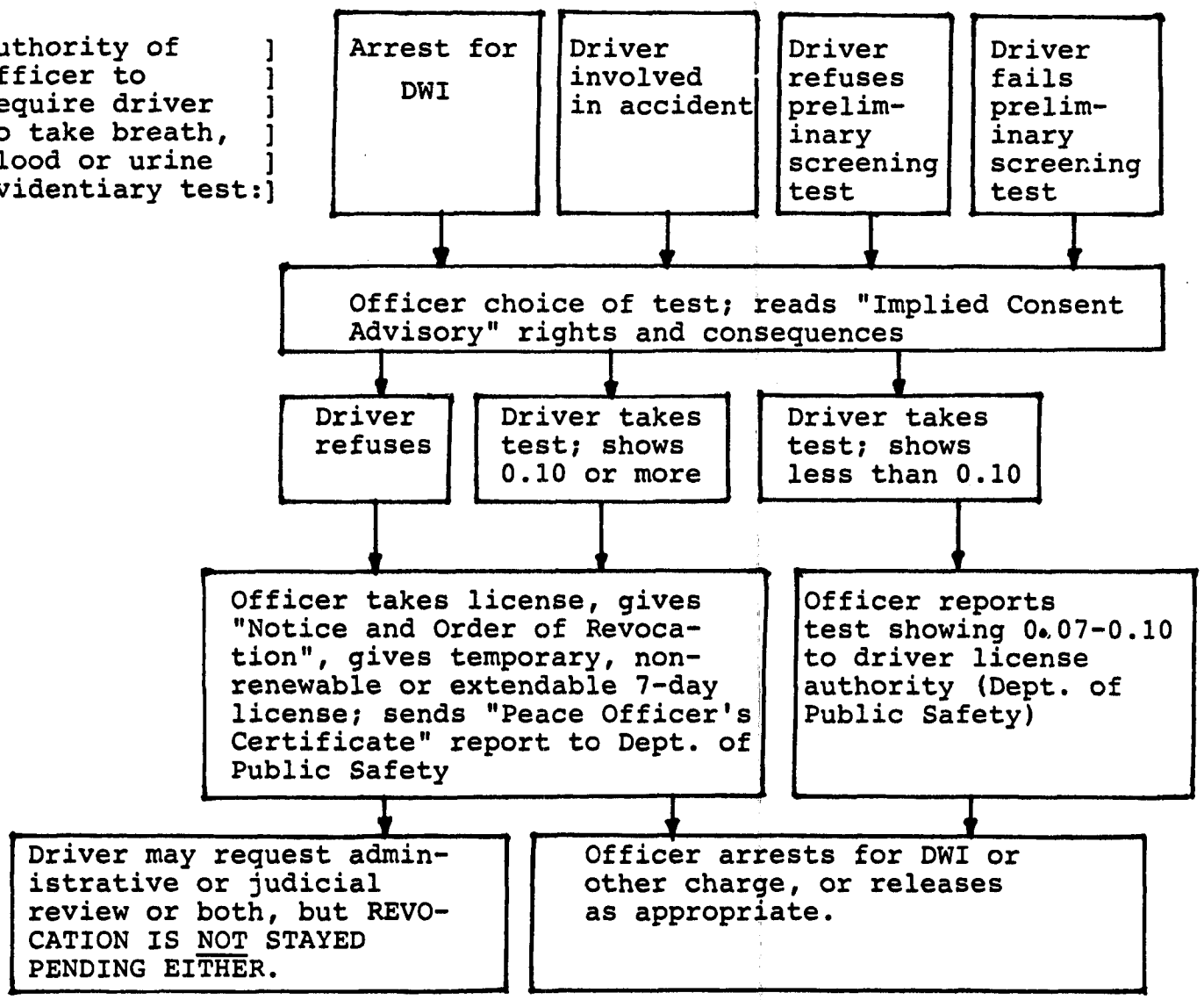
In early 1982 many of these were accident scene cases, where officer did not witness and probable cause may have been less than the best.

In some cases, police made "arrest" but prosecutor decision was to "charge" a lesser or greater offense.

Numbers unknown

Figure 2.

MINNESOTA: WHEN A DRIVER IS REQUIRED TO TAKE AN ALCOHOL TEST --



to the police station where the evidentiary test device is located. The test choice is the officer's; the one alternative is discussed in Example B.

The officer reads the "Implied Consent Advisory" (Figure 3.) and the offender agrees to take the test. The test result shows, for example, an alcohol concentration of 0.18, the average of tests resulting in 0.10 or more.

The officer keeps the plastic license certificate and sends it to the Department of Public Safety, along with a copy of the "Notice and Order of Revocation" which is given to the driver (Figure 4.)

This notice includes a temporary license good for only seven days. This ends the police officer's role in the administrative revocation track, unless the officer's testimony is required in a judicial review. It is worth noting here, however, that the license revocation is not stayed pending either an administrative or judicial review, and thus there is little incentive for frivolous or dilatory review demands. Under the circumstances described in this example, the driver is booked and held and the case proceeds on the criminal track as well.

EXAMPLE B.

Assume the same set of circumstances as in Example A. up to

Figure 3.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY
DRIVER AND VEHICLE SERVICES DIVISION
IMPLIED CONSENT SECTION
108 TRANSPORTATION BUILDING
ST. PAUL, MN 55155

IMPLIED CONSENT ADVISORY

(TO BE USED TO REQUEST THE TEST AND TO RECORD THE INDIVIDUAL'S RESPONSES.)

TIME STARTED: _____ LOCATION WHERE READ: _____

_____, I believe that you have been driving, operating or controlling a motor vehicle while under the influence of alcohol or a controlled substance.

I request that you submit to a test of your

(CHECK ONE)
_____ Breath
_____ Urine
_____ Blood or Breath/Urine

To determine the presence of alcohol or controlled substance.

If you refuse the test, your right to drive will be revoked for a minimum of six months.

If you take the test and the results indicate that you are under the influence of alcohol or a controlled substance, you will be subject to criminal penalties and your right to drive may be revoked for a minimum of ninety days.

If you take the test, you have the right to have additional tests made by a person of your choosing.

Before making your decision about testing, you have the right to consult with an attorney. This right cannot unreasonably delay the test. If you can't reach an attorney, you will have to decide on your own.

If you refuse to take the test, the refusal will be offered into evidence against you at trial.

If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test.

Do you understand what I've just explained? _____

Do you want to call an attorney? _____

Time telephone was available: _____ (Start) _____ (Stop)

Will you give the test? _____

(If blood is offered:)
Which test will you give? _____

(If driver refuses:)
What is your reason for refusing? _____

_____

_____

_____

TIME COMPLETED: _____

DATE: _____

_____
(Printed name of officer requesting test)

Figure 4.

PS31123-06

225006

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY
DRIVER & VEHICLE SERVICES DIVISION
SAINT PAUL 55155

*Date Issued _____
Enf. Agency _____
Ticket or Case # _____
DOB _____
Court _____

Name _____ (First / Middle / Last)

Address _____ D/L # _____

City _____ State _____ Zip _____

NOTICE AND ORDER OF REVOCATION

You are hereby notified that on the date shown above (*date issued) you were asked to submit to a chemical test to determine the alcohol concentration of your blood pursuant to M.S. 169.123, the Implied Consent Law.

☐ Because you refused to submit to testing, the Commissioner of Public Safety will revoke your Driver License and/or driving privileges for a minimum of six months.

☐ Because you submitted to a breath test which disclosed an alcohol concentration of 0.10 or more, the Commissioner of Public Safety will revoke your driver license and/or driving privileges for a minimum of 90 days. Results of breath test indicated _____ blood alcohol concentration.

☑ Your Driver License and/or privilege to drive in this state is hereby REVOKED. THIS IS YOUR OFFICIAL NOTICE OF REVOCATION. This revocation will take effect 7 days after the date shown above.

SURRENDER OF DRIVER LICENSE

By law, the officer is required to take all license certificates in your possession, and if you have a valid license, issue a temporary license effective only for 7 days.

☐ Yes ☐ No Driver License card surrendered and forwarded with this report.

TEMPORARY LICENSE

This entire notice is valid as a temporary license from the date shown above for 7 days. NOT VALID IF DETACHED. Temporary license valid only if record so indicates.

Licensee Height: _____ Weight: _____ Class: _____

Restriction: _____

☐ No temporary license issued because: _____

AFFIDAVIT OF LOST DRIVER LICENSE

I have lost or destroyed my license. I promise that if it is found I will immediately forward it to the Driver License Office, 108 Transportation Building, St. Paul, Mn. 55155. I fully realize that in making this affidavit, the license certificate is rendered null and void and may not be used for operating a motor vehicle.

_____
Date Signature of Licensee

Signed: _____
Signature of Peace Officer

_____
Telephone Number

WHITE COPY TO DRIVER

the point where the officer decides to arrest and take the driver in for the test. In this case, assume that the officer asks for a blood test. The officer might decide on a blood test if the arrest takes place close to a hospital and the nearest breath test is twenty miles away, or the offender requires medical attention, or the officer suspects drugs are involved. In this case, while the officer may ask for a blood test, the offender may refuse a direct blood test without having the license revoked for refusal unless an alternative breath or urine test is available and offered. (See Figure 3., "Implied Consent Advisory" and Appendix B, Section 169.123 subdivision 2.) In this example, if a blood test is refused, the officer could take the driver to a breath test station or require a urine test. The latter may be preferred if the officer had reason to believe drugs were involved. Minnesota law, Section 169.123 subdivision 2a, provides that when there are "grounds to believe there is impairment by a controlled substance which is not subject to testing by a blood or breath test, a urine test may be required even after a blood or breath test has been administered."

However, if this example assumes the offender submitted to a blood test, then notice of revocation is delayed until the result of the blood test is returned from the Bureau of

Criminal Apprehension Laboratory where the officer sent the blood sample. In the meantime the officer has booked the driver. The notice of revocation is also delayed when a urine test must await laboratory analysis.

EXAMPLE C.

If the driver described in either of the above examples had simply refused to take any test, then the license is revoked for that refusal just as it is in most other states with an implied consent law. However, it should be noted that under Minnesota law the police officer gives notice of revocation, takes the plastic license certificate and issues a seven-day temporary license which is not renewable, and the revocation is not stayed pending review. See Figures 3. and 4.

To report the action taken in circumstances similar to those in the above examples, the police officer uses the "Implied Consent Law Peace Officer's Certificate" (Figure 5.) which is printed on the back of the "Implied Consent Advisory" (Figure 3.)

The driver who receives a "Notice and Order of Revocation" including the seven-day temporary license (Figure 4.) will find on the back of that form additional information describing the right to administrative or judicial reviews,

consequences of a guilty plea on the criminal charge (possible shorter period of revocation), and information about the reinstatement of the license. (Figure 6.)

In addition to amending Minnesota's administrative revocation law to shorten the term of the temporary license to seven days instead of thirty and to make the temporary license non-renewable pending review, the 1982 legislature also lengthened the period of revocation required upon conviction of a second or subsequent offense under Section 169.121.

Table 1. shows the periods of revocation associated with both conviction on a criminal charge and with administrative revocation under civil procedures.

IMPLIED CONSENT LAW
PEACE OFFICER'S CERTIFICATE

▶(PLEASE TYPE OR PRINT LEGIBLY, CROSS OUT REFERENCES TO INAPPLICABLE ITEMS.)

Name of Peace Officer	Name of Police Agency

I certify to the Commissioner of Public Safety, State of Minnesota, that I am a member of the above police agency and:

1. I am a "peace officer" within the meaning of Minnesota Statutes, Section 169.123, Subdivision 1.

2. On (Date) _____, I had reasonable and probable grounds to believe that the person named below had been driving, operating or in physical control of a motor vehicle within the State of Minnesota on _____ in the City or Township of _____ in _____ County, while under the influence of alcohol or a controlled substance, contrary to law.

Full Name	Date of Birth

Address	City, State, Zip

Driver License Number	State of Issue

3. Reason for initial contact:
☐ Vehicle stopped by officer because: _____.
☐ Accident ☐ Vehicle already stopped (describe): _____
☐ Other (describe): _____

4. Probable cause that person was driving, operating or in physical control.
☐ Saw person ☐ Person admitted ☐ Other: _____

5. Probable cause that person was under influence (in addition to other information)
☐ Odor of alcohol; ☐ bloodshot, watery eyes; ☐ slurred speech ☐ poor balance
☐ Other (describe): _____

6. Check at least one of the following:
☐ DWI arrest ☐ accident ☐ refused PBT (preliminary screening breath test);
☐ failed PBT with alcohol concentration of .10 or more

7. Other pertinent information _____

8. The person was requested to submit to a chemical test to determine (alcohol concentration) (or) (presence of a controlled substance), pursuant to the provisions of Minnesota Statutes, Section 169.123, and was read the implied consent Advisory on the other side of this form by: (Name and Agency) _____

9. The person: (X APPLICABLE BOX)
☐ Refused to provide a test sample to determine the presence of (alcohol) (or) (controlled substance).
☐ Provided a sample (blood) (breath) (urine) for analysis, which indicated an alcohol concentration of_____.

The sample was submitted for analysis to:

Name of Agency, Analyst or Breathalyzer Operator
Address of Agency or Analyst
City, State, Zip
Sample Identification Number (Blood or Urine Tests Only)

MEDICAL PERSONNEL CERTIFICATE

Pursuant to Minn. Stat. §634.15 (1982), I certify as follows: at the request of the undersigned peace officer, I withdrew a sample of blood from:

NAME: _____

AT: _____
(Location)

I am authorized and qualified to draw blood samples pursuant to Minn. Stat. §169.123, subd. 3 (1982).

I withdrew the sample of blood at _____ A.M./P.M., after preparing the site of withdrawal with a non-alcohol substance.

I used a sterile needle and container in withdrawing and receiving the blood sample.

I gave the blood sample to the undersigned peace officer.

DATE: _____ _____
Signature

_____
Printed Name

_____
Occupation (M.D., R.N., M.T., L.T., etc.)

_____
Signature of Peace Officer

SEND WITH COPY OF ALCOHOL INFLUENCE REPORT, ARREST OR ACCIDENT REPORT, BREATHALYZER CHECKLIST, LABORATORY REPORT TO:
Department of Public Safety
Driver and Vehicle Services Division
Implied Consent Section
108 Transportation Building
St. Paul, MN 55155

Attach Notice of Revocation (Form PS-31123-02) if issued.

Signature of Peace Officer
Printed Name of Peace Officer
Badge Number
Business Telephone Number
Date

PS-01802-05 (Rev. 7/83)

Figure 5.

Figure 6.

REQUEST FOR ADMINSTRATIVE REVIEW

The Commissioner of Public Safety will review your revocation only upon written request. The forms which are required to be completed to obtain this review are available from a Driver License Examining office, Clerk of District Court, or from the Driver and Vehicle Services Division office on the first floor of the Transportation Building in St. Paul. Request for Administrative Review forms are also available by mail. Send written request for the forms to: Chief Driver Evaluator, 108 Transportation Building, St. Paul, MN 55155. Telephone requests cannot be accepted.

PETITION FOR JUDICIAL REVIEW

You have the right to Petition for judicial review. Petitions must be filed in writing as outlined in M.S. 169.123, subd. 5C in the county in which the incident occurred. The hearing is limited to the issue specified in your Petition which may include:

a. Whether the Peace Officer had reasonable and probable grounds to believe that you were driving, operating, or in physical control of a motor vehicle while under the influence of alcohol or a controlled substance.

b. Whether you were lawfully placed under arrest for violation of Secton 169.121, or were involved in a motor vehicle accident or collision resulting in property damage, personal injury or death, or refused to take the screening test provided in Section 169.121, or took the screening test and failed.

c. Whether you were advised of your rights and responsibilities under the law.

d. Whether you refused the test, or whether you submitted a reliable test which showed an alcohol concentration of 0.10 or more.

GENERAL INFORMATION

If your license is revoked, you may not drive again in Minnesota under any condition, including using a driver license from another jurisdiction until you have complied with Minnesota's requirements and received a notice of reinstatement. Revocation of driving privileges under the Implied Consent Law is an administrative action which is independent and separate of the actions taken on the criminal charge of DWI.

IF YOU PLEAD GUILTY TO DWI

Because the revocation which follows a DWI conviction is often shorter than an implied consent revocation, the Commissioner may impose the lesser revocation period upon receipt of a certificate of conviction from the clerk of court, if this is your first alcohol related offense.

REINSTATEMENT INFORMATION

You may not drive in Minnesota until:

a. The expiration of the period of time designated on the front side of this notice or expiration of additional period of time as indicated in correspondence from Driver & Vehicle Services Division, and

b. You have successfully completed a re-examination, and paid the $100.00 reinstatement fee, and

c. You have complied with any other requirements of Driver & Vehicle Services, if you have had any previous alcohol related offenses and

d. Prior to reinstatement of your privilege to drive in the State of Minnesota, you must submit proof of an alcohol problem assessment. This is an assessment interview relative to your use of alcohol. If this assessment was done by the Court (termed a presentence investigation) you can submit a copy of that assessment to this office. If no assessment was done by the Court, you must schedule an assessment interview with our office.

   Assessment Scheduling (612) 296-2040
   Assessment Information (612) 296-8599

e. You have made application for and received a new license, and

f. Received a notice of reinstatement.

g. If you are not a resident of Minnesota, you will receive a notice of reinstatement only.

LIMITED LICENSE INFORMATION

If this is the first time your license has been withdrawn, you may be eligible for a limited license.

▶ Any additional information may be obtained by writing Driver Evaluation Section, Driver & Vehicle Services Division, Room 108 Transportation Building, St. Paul, Minnesota 55155 or by telephone at (612) 296-2025.

TABLE 1.

PERIODS OF DRIVER LICENSE REVOCATION

CONVICTION ON CRIMINAL CHARGE (169.121, subd. 4)

DWI, first conviction	30 days
DWI, second conviction in 5 years	90 days
DWI, third conviction in 5 years	1 yr (+171.04)*
DWI, fourth or subsequent conviction on record	2 yrs (+171.04)*

If the violation results in death or serious personal injury, a minimum of 90 days is added to the base periods above.

ADMINISTRATIVE REVOCATION (169.123 "Implied Consent")

Refusing test	6 months
Test shows 0.10 alcohol concentration or more	90 days

*Section 171.04 is a "denial" of all driving privileges as "inimical to public safety" until rehabilitation is established.

When the 1982 Legislature acted to strengthen the Minnesota administrative revocation law it was concerned to see that drivers who refused or failed a chemical test were quickly ruled off the road and were not able to delay that driver license revocation through a series of appeal or review procedures.

In recommending the 1982 amendments, Minnesota Attorney General Warren Spannaus advised the Legislature that if there were provisions fof prompt review which would afford due process, the revocation itself need not be stayed pending such a review. This opinion was based on a number of appellate court decisions, including the U.S. Supreme Court decision in Mackey v Montrym, which relied on balancing the public interest in promptly removing unsafe drivers from the road against the private interest in retaining the driving privilege. The availability of prompt post-revocation review is, however, an important part of assuring that administrative license revocation can withstand constitutional challenge.

To maintain this protection of the private interest in the driving privilege, Minnesota's 1982 amendments to Sec. 169.123 provided two kinds of review and made either or both available.

The Minnesota Supreme Court in unanimously upholding the 1982 law (Heddan vs Dirkswager, Appendix A) described the review process as follows:

"During the 1982 legislative session Minn. Stat. § 169.123 was amended in order to reduce the time lapse between an implied consent violation and the imposition of license revocation. The old law delayed all revocations for 30 days

from the notice of revocation. The new law provides just 7 days. Minn. Stat. § 169.123, subds. 5 and 5a (1982). The old law enabled additional delay by a request for judicial review. The new amendments provide that '[t]he filing of the petition shall not stay the revocation or denial.' Minn. Stat. § 169.123, subd. 5c (1982).

"While removing the opportunity for lengthy delay, the 1982 amendments simultaneously created a more efficient system for obtaining review of the revocation order. The amendments provided for two distinct avenues of review: administrative review by the Department of Public Safety, and judicial review in a county or municipal court.

"The administrative review mechanism is entirely new. The statute provides as follows:

> Administrative review. At any time during a period of revocation imposed under this section a person may request in writing a review of the order of revocation by the commissioner of public safety. Upon receiving a request the commissioner or his designee shall review the order, the evidence upon which the order was based, and any other material information brought to the attention of the commissioner, and determine whether sufficient cause exists to sustain the order. Within 15 days of receiving the request the commissioner shall report in writing the results of his review. The review provided in this subdivision is not subject to the contested case provisions of the administrative procedure act in sections 14.01 to 14.70.
>
> The availability of administrative review for an order of revocation shall have no effect upon the availability of judicial review under this section.

Minn. Stat. § 169.123, subd. 5b (1982). This provision contemplates an informal review procedure which is designed to remedy obvious errors. The procedure is speedy, promising a result within 15 days, and it accords a certain measure of due process to subjects of revocation orders.

"Drivers requesting administrative review are asked to fill out an administrative review form setting forth facts pertaining to why the revocation is not valid. Drivers are then asked to sign the form, have it notarized, and submit it to the commissioner. Each numbered paragraph of the form sets forth an element of the implied consent violation and solicits the driver's version of the facts pertaining to that element.

"Administrative reviews are conducted by civil service employees known as 'driver safety analysts.' All employees in this classification have past experience with the laws and rules governing license revocation. They have also undergone training in administrative review and in the legal principles in this area.

"In addition to the written request for review, drivers may appear in person for administrative review on any business day in St. Paul or at regularly scheduled times in locations throughout the state. Counsel may appear with the driver, although there are not provisions for subpoenaing or cross-examining witnesses.

"In conducting an administrative review, the review officer considers information provided by the driver and all relevant reports provided by law enforcement agencies. The review officer reports his findings to the driver within 15 days of request for review. The report includes findings on each element of the offense. Within 30 days following receipt of the notice and order of revocation a person may petition the court for judicial review. Minn. Stat. § 169.123, subd. 5c (1982). This may be done while prusuing administrative review.

"The judicial review provision, as amended in 1982, requires that a hearing be conducted 'at the earliest practicable date,' and in no event later than 60 days after the filing of a petition for judicial review. Minn. Stat. § 169.123, subd. 6 (1982). Judicial district administrators are directed to implement this requirement through efficient scheduling and the transfer of cases within their districts to expedite hearings. Court administrators in the 10 Minnesota judicial districts have established a scheduling system for implied consent cases whereby judicial review will normally be had from within 10 to 40 days following the filing of a petition." (End of quotation from Heddan vs Dirkswager.)

The form for requesting an administrative review is shown in Figure 7.

Figure 7. (front)

REQUEST FOR ADMINISTRATIVE REVIEW OF IMPLIED CONSENT REVOCATION

INTRODUCTION

If your driving privileges have been revoked under the Implied Consent Law (Minn. Stat. § 169.123), you are entitled to a review of the revocation by the Commissioner of Public Safety. The revocation of driving privileges is initiated by a Minnesota Peace Officer. The Commissioner generally has all of the reports from the peace officer. Completion of this form by you is the only means by which the Commissioner can be advised of your version of the facts of the incident. It is important that you complete each item on the form so that your request for administrative review can be fully considered.

Upon receipt of this completed form, the Commissioner or his designee will undertake a full review of the facts surrounding your revocation. Within fifteen (15) days after receipt, you will be notified of the results of the review in writing. Administrative review of the revocation cannot be undertaken unless you complete and sign this form. This review will not affect pending or future court actions. All of your rights to seek court review of the revocation are preserved whether or not you request administrative review.

IMPORTANT NOTICE

All information supplied on this form is public data which, under Minnesota law, may be given to any person upon request, and which may be used for any lawful purpose. You are advised that information given in this form may be used in any related court action involving your driver's license, including any criminal charges which may result from this incident.

Complete each item as follows:

I. A peace officer must be able to state a reason for stopping a motor vehicle.
In this case:

__I agree that I was stopped for a valid reason.

__I was not stopped for a valid reason because _____

_____

_____

_____

__I don't remember being stopped.

II. A peace officer must have reasonable and probable grounds to believe that a person was under the influence of alcohol or a controlled substance while driving, operating or controlling a motor vehicle before a request for an alcohol test can be made.
In this case:

__I agree that the peace officer reasonably believed that I was under the influence of alcohol or a controlled substance.

__I do not think that the peace officer reasonably believed that I was under the influence because _____

_____

_____

III. Before being requested to submit to an alcohol test, a driver is advised by the peace officer of certain rights and facts. Usually these rights are read from a printed form. These rights and facts include: 1) refusing the test will result in a six (6) months revocation of license; 2) failing the test will subject the driver to criminal penalties and a license revocation of ninety (90) days or more; 3) a driver has the right to a telephone call to an attorney to help decide what to do about testing, but this call cannot delay the test unreasonably; and 4) if the driver takes the test, he/she can also arrange for his/her own additional test.
In this case:

__The peace officer read the form and advised me of these rights and responsibilities.

__I don't recall whether or not I was given the required advice.

__The peace officer failed to advise me of the following: _____

_____

_____

_____

IV. Before being offered an alcohol test, a driver must have: 1) been lawfully arrested, 2) been involved in an accident involving property damage or personal injury, 3) failed a preliminary breath test, or 4) refused to take a preliminary breath test.

Figure 7. (back)

In this case:

__At least one of the four requirements listed above occurred.

__None of the four requirements listed above occurred. Explain. _____

_____

_____

_____

V. In some cases, it is reasonable to refuse to submit to an alcohol test.

In this case, and if you refused the test, the reason for refusing was _____

_____

_____

__Not applicable because I took the test.

VI. If an alcohol test was taken, it must be shown that the test was reliable and the results properly evaluated.

In this case:

__I agree that the test was reliable and properly evaluated.

__I don't know if the test was reliable and properly evaluated.

__The test was not reliable or not properly evaluated because: _____

_____

_____

__Not applicable because I did not take the test.

VII. In addition to the foregoing, I believe that the revocation of my driving privileges is improper because:

_____

_____

_____

_____

(Use additional sheets if necessary and attach any other documents you wish to be considered.)

DATE: _____ Signature: _____
(Driver MUST sign)

Printed Name _____

Driver License No. _____

Date of Birth: _____

Telephone: ( ) _____

Subscribed and sworn to before me this
_____ day of _____, 19___.

_____
NOTARY PUBLIC

A review of the propriety of the revocation of your driving privileges will be conducted based upon this completed form and all other records in possession of the Department of Public Safety relating to this incident. You will be notified by mail within fifteen (15) days after receipt of this form. At anytime, you may make an appointment to appear in person before a driver evaluator to discuss any driver license matter. In some cases, however, this could result in a delay in considering your case beyond the fifteen days within which a written review can be completed. You may call (612) 296-8599 to make an appointment.

MAIL (OR HAND DELIVER) FULLY COMPLETED FORM TO:

Chief Driver Evaluator
108 Transportation Building
St. Paul, MN 55155

The 1982 law was clearly successful in establishing prompt driver license revocation (7 days after refusal or test result), in elimination of purely dilatory appeals, and in providing due process through availability of both administrative and judicial review.

The 1982 Minnesota Legislature also acted to establish that the police officer decides which test shall be given, made several other improvements in the law and established repeat DWI offenses as gross misdemeanors.

While the 1983 Minnesota Legislature made no substantive changes in the administrative revocation law, it did act to make evidence of refusal of the test fully admissible in a trial of the criminal charge, following within days the U.S. Supreme Court decision in Neville v South Dakota. The 1983 Legislature also established a new felony offense of "Criminal Vehicular Operation", the elements of which are: being negligent ("ordinary" rather than "gross"), being in violation of Section 169.121 -- DWI, and killing or seriously injuring another person. There was also established a felony crime of failing to stop at the scene of an accident (hit-run) if death or serious injury is involved. Previously all hit-run offenses were misdemeanors. Although felony hit-run need not involve DWI the law was proposed and passed in the belief that it would be disincentive for a drinking driver to leave the scene of an accident.

CHRONOLOGY OF HIGHLIGHTS OF MINNESOTA DRUNKEN DRIVING LAWS

1911 "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor."

1925 Three months driver license "forfeit" upon conviction.

1927 "Under the influence of intoxicating liquor" terminology replaced "in an intoxicated condition." Offense made gross misdemeanor, imprisonment mandatory.

1937 Back to misdemeanor. (No need to offer jury trial under law at that time.)

1955 Chemical test (voluntary) presumption standards for results of tests of blood, breath, urine or saliva. Prima facie at 0.15.

1957 "Alcoholic beverage" replaced term "intoxicating liquor."

1961 Implied Consent: take test when arrested for DWI or lose driver license for six months.

1967 Prima facie reduced from 0.15 to 0.10.

1971 Preliminary screening breath test (PBT) authorized.

Illegal per se at 0.10.

Invoke implied consent without necessarily having person under arrest.

1976 Presentence alcohol problem assessment required.

"Aggravated DWI" gross misdemeanor. (DWI while license under revocation for previous alcohol related offense.)

Authorize administrative revocation of driver license for <u>either</u> refusing to take test or for testing 0.10 or more.

1978 Police officer acts as agent of Commissioner, giving notice of revocation and picking up plastic license certificate.

"Alcohol concentration" term (rather than "blood alcohol concentration") adopted and defined in statute by ratios to blood, breath and urine.

1980 Admit test results without in-person testimony of chemist.

1982 Police officer given the choice of test to be offered.

Second and subsequent offenses, gross misdemeanor.

Administrative revocation effective in 7 days. <u>Not</u> stayed pending review.

1983 Evidence of refusal admissible in trial.

Felony "criminal vehicular operation" if ordinary negligence, DWI resulting in death or injury.

COSTS OF AN ADMINISTRATIVE DRIVER LICENSE REVOCATION SYSTEM

Legislators and administrators considering an administrative revocation law are understandably concerned about possible costs of establishing and maintaining a system such as this report describes.

There should not be any significant increase in costs to the driver license agency when a state adopts administrative revocation based on test results if that state already operates a conventional driver record system which posts revocations or suspensions based on convictions or other court-ordered actions. In fact, if a state operates a conventional system under which a mailed notice of revocation is necessary, there can be substantial savings and efficiency if the police officer, acting as an agent of the driver license authority, gives notice of revocation and takes possession of the regular driver license at the time a test is refused or failed.

There <u>will</u> be additional costs if a law provides a <u>pre</u>-revocation hearing process because such a provision encourages

filing dilatory hearing requests.

If a state, relying on the U.S. Supreme Court decision in Mackey vs. Montrym and the Minnesota Supreme Court decision in Heddan vs. Dirkswager (Appendix A), provides for only a post-revocation hearing or review, with the revocation remaining in effect until there is a finding favorable to the appellant, then there will not be significant added costs.

Minnesota did not experience significant added administrative expenses when the original 1976 law went into effect (even though another law, requiring alcohol problem assessments, was passed in that year and this also increased driver license office workload) and the employee complement has increased little since that time. In 1976, before the administrative revocation law, the complement of the Driver License Section, Driver and Vehicle Services Division of the Minnesota Department of Public Safety, was 20, of which 8 were driver safety analysts, who conduct driver license related interviews and who now perform administrative reviews when such reviews are requested. In 1983 the complement of the section was 34, of which 13 are driver safety analysts. An efficient administrative driver license revocation system does not involve much additional expense and may even be cost-saving if these caveats are observed:

1. Allow police officer the choice of tests. (Breath test results are immediate.)

2. The police officer gives notice of revocation and picks up the regular license certificate. (Saves mailing costs and denial of receipt.)

3. Hearings or reviews are post-revocation rather than pre-revocation and revocation is not stayed pending hearing or review. (Prevents dilatory appeals.)

SECTION II

COURT ROLE IN DRIVER LICENSE REVOCATION

In recent years Minnesota courts have been relieved of virtually all responsibility for imposing license revocations, authorizing limited licenses, or deciding the length of a revocation. Many judges have expressed pleasure at being relieved of these often troublesome duties. The courts do continue to have two basic responsibilities in driver license revocations. The first is the finding of guilt or innocence under the criminal charge. The statutes specify the period of revocation which the Department of Public Safety shall impose when notice of conviction is received from the court. The second is to give notice of revocation and to require surrender of the plastic license certificate if it is still in the driver's possession when coming to court on the criminal charge. This happens most frequently when a blood or urine test result has not been received by the Department of Public Safety before the driver is arraigned and pleads guilty.

There is a shorter period of revocation (30 days) associated with the first conviction on the criminal charge (Table 1.) The Department acts on the first basis for revocation received. It is sometimes possible for a person to plead guilty at arraignment and have the notice of that conviction received

and the driver license revoked on those grounds (conviction) before the basis for an administrative revocation (test result) comes in. Hence for some there is an incentive to plead guilty promptly.

Prior to 1982, when administrative revocations began to take place seven days after apprehension with no delays, many more driver licenses were revoked as a result of conviction (30 day revocation) than were revoked for failing the test (90 day revocation).

As Table 2. shows, in 1981 there were 19,009 conviction revocations as compared with 8,607 test-fail revocations. These ratios were reversed in 1982 when there were 9,400 conviction revocations and 18,168 test-fail revocations. This shift took place during the second half of the year after the new law went into effect July 1. During the six-month period (July through December) there were 2,633 conviction revocations and 12,933 test-fail revocations. In addition to the obvious fact that fewer drivers can plead guilty and have the conviction notice received within the non-extendable seven day period, another reason for the shift is that the 1982 law gave police officers the decision as to which test is offered. Their preference, of course, is for the breath test, the results of which are immediately available. With the administrative revocation taking place in seven days there is

considerably less likelihood of the 30-day conviction revocation instead of the 90-day test-fail revocation.

In the first four months of 1983 the trend continued, with 256 revocations based on the criminal conviction for DWI, while 8,190 revocations were based on test-fail and 3,463 were for refusal of the test. In May through December, 1983 all revocations were under the administrative law, for refusing or failing, and none were based on the criminal conviction. This is due, in part, to a provision that first or second offenders whose driving privileges are revoked under the Implied Consent statute as a result of the same incident will not face an additional DWI revocation if convicted. Table 3. shows driver license revocations taking place by month in 1982 and through July, 1983. The effect of the law providing prompt and certain revocation in seven days, which went into place on July 1, 1982 is clear.

There will, of course, continue to be a few revocations based on conviction. These will be cases in which there is a delay in the test result report, or in which no test was given or a DWI charge was placed when the test result was less than 0.10.

Under the old law, in effect until July 1, 1982, more than one-third of administrative revocations were appealed through the simple act of asking the Commissioner of Public Safety for a judicial review, whereupon the Department was required

TABLE 2.

DRUNKEN DRIVING IN MINNESOTA - 1976-1982

	1976	1977	1978	1979	1980	1981	1982
Drunken Driving Arrests	19,419	16,976	18,078	18,092	22,788	27,034	28,048
State Patrol Only	4,689	3,593	3,716	3,879	5,282	7,116	7,174
Alcohol-Related Driver License Revocations	14,251	17,741	24,357	24,966	30,481	32,043	36,024
For Conviction of DWI Charge	NA	NA	15,512	14,797	17,406	19,009	9,400
For Refusing Test	NA	NA	3,344	3,427	3,863	4,427	8,456
For Failing Test (.10 or higher)	NA	NA	5,501	6,742	9,212	8,607	18,168
Drivers Killed	478	476	576	523	519	437	321
Tested (died within 4 hours)	61%	58%	66%	63%	65%	66%	72%
Positive (had been drinking)	64%	60%	63%	58%	69%	62%	54%
Drunk (.10 or higher)	53%	54%	51%	45%	58%	52%	48%

to defend its action and pay all costs. Table 4. shows that in the last six months of the old law, such requests approached 40 per cent. It is clear that filing such appeals was almost always a dilatory tactic since the number of appellants who ultimately prevailed was about three percent*, but all who filed delayed their revocations by several months. It was the intent of the new law that this free appeal impediment to prompt revocation be removed. As Table 4. shows, during the first six months of the new law, July through December, 1982, requests for both judicial hearing and the new administrative review totalled 1,558, or 8.7 per cent of the 17,989 administrative revocations. In 1983 the hearing request rate fell to 7.5 per cent.

---

*Less than 1% of all administrative revocations, and many of these for reasons unrelated to refusing or failing the test, e.g. witnesses failing to appear as cases aged often more than a year.

TABLE 3.

ALCOHOL-RELATED DRIVER LICENSE REVOCATIONS, 1982 AND 1983, BY MONTH

	Apprehensions (P.O. Certif.)				Revocations				
					DWI Guilty		Administrat.		Total
	≥ .10	Refuse Test	Total	Refusal Rate %	Ref. Test	≥ .10	Ref. Test	≥ .10	
1982									
JAN	1,452	483	1,935	24.9	185	835	463	884	2,367
FEB	1,664	657	2,321	28.3	194	962	434	990	2,580
MAR	2,192	792	2,984	26.5	213	919	337	802	2,271
APR	2,086	745	2,831	26.3	154	913	429	817	2,313
MAY	1,844	756	2,600	29.1	183	1,207	436	935	2,761
JUN	2,032	871	2,903	30.0	143	859	501	807	2,310
TOT 6 mo.	11,270	4,304	15,574	27.6	1,072	5,695	2,600	5,235	14,602
Law Change									
JUL	2,162	872	3,034	28.7	154	803	1,016	2,289	4,262
AUG	2,006	796	2,802	28.5	80	654	894	2,346	3,974
SEP	1,991	958	2,949	32.5	52	311	1,003	2,536	3,902
OCT	1,954	947	2,901	32.6	58	166	1,020	1,404	2,648
NOV	2,002	813	2,815	28.9	63	155	856	2,085	3,159
DEC	2,164	1,084	3,248	33.4	42	95	1,067	2,273	3,477
TOT 6 mo.	12,279	5,470	17,749	30.0	449	2,104	5,056	12,933	21,422
TOT yr.	23,549	9,774	33,323	29.3	1,521	7,879	8,456	18,168	36,024*
1983									
JAN	2,045	882	2,927	30.1	29	58	830	1,973	2,890
FEB	1,940	838	2,778	30.1	33	76	739	1,874	2,722
MAR	2,411	990	3,401	28.8	11	40	1,000	2,393	3,444
APR	2,384	1,042	3,426	30.4	1	8	894	1,950	2,853
MAY	2,086	835	2,921	28.6	0	0	949	2,226	3,175
JUN	2,190	977	3,167	30.8	0	0	993	2,218	3,211
TOT 6 mo.	13,056	5,564	18,620	29.9	74	182	5,405	12,634	18,295
JUL	1,964	833	2,797	29.8	0	0	764	1,780	2,544
AUG	2,428	965	3,393	28.4	0	0	878	2,079	2,957
SEP	2,222	1,060	3,282	32.3	0	0	983	2,114	3,097
OCT	2,153	1,010	3,163	31.9	0	0	1,009	1,867	2,874
NOV	1,847	946	2,793	33.9	0	0	765	1,650	2,415
DEC	1,798	928	2,726	34.0	0	0	1,781	940	2,721
TOT 6 mo.	12,412	5,742	18,154	31.6	0	0	6,178	10,430	16,608
TOT yr.	25,468	11,306	36,774	30.7	74	182	11,583	23,064	34,903

* Includes approx. 3,000 case back-log under old law, cleaned up in 1982. Revocations in 1982 resulting from 1982 apprehensions: 33,000+.

TABLE 4.

REQUESTS FOR HEARING AFTER ADMINISTRATIVE REVOCATION, 1982-83, BY MONTH

	Judicial Review	Administrative Review	Total
1982			
JAN	838	Not applicable	838
FEB	901	"	901
MAR	1,105	"	1,105
APR	1,539	"	1,539
MAY	863	"	863
JUN	910	"	910
TOT 6 mo.	6,156		6,156
Law change			
JUL	619	14	633
AUG	139	62	201
SEP	129	70	199
OCT	111	66	177
NOV	91	51	142
DEC	134	72	206
TOT 6 mo.	1,223	335	1,558
TOT yr.	7,379	335 (July-December)	7,714
1983			
JAN	133	76	209
FEB	122	57	179
MAR	162	65	227
APR	180	57	237
MAY	162	62	224
JUN	222	84	306
TOT 6 mo.	981	401	1,382
JUL	112	75	187
AUG	138	55	193
SEP	135	58	193
OCT	180	59	239
NOV	174	51	225
DEC	157	43	200
TOT 6 mo.	896	341	1,237
TOT yr.	1,877	742	2,619

SECTION III

STUDY OF OPERATIONAL IMPACT, UPDATE

In the 1981 "Analytical Study of the Legal and Operational Aspects of the Minnesota Law Entitled 'Chemical Test for Intoxication' M.S.A. Sec. 169.123" (single copies available from National Highway Traffic Safety Administration, NTS-20, Washington, D.C. 20590), Reeder addressed a series of questions set out as a framework for the study. The questions addressed were:

1. Ascertain to what extent offenders charged with DUI are cited under Minnesota Section 169.123, as opposed to Minnesota Section 169.121, wherein an implied consent BAC test has been administered.

2. Determine, if possible, to what extent law enforcement officers are using the Subd. 4 provision by submitting to the Commissioner of Public Safety BAC test results of 0.10 or more.

3. Determine what use is being made by the Motor Vehicle Department of the BAC test results as authorized under Subd. 4. What, if any are the constitutional, legal and practical problems -- how well is it working.

4. Determine to what extent driver license revocation actions are taken pursuant to Subd. 4 (BAC test results of 0.10 per cent or higher) under the following situations:

   a) The DUI charge is nolle prossed
   b) The DUI case is continued
   c) The DUI charge is plea bargained down to a lesser offense
   d) The DUI case results in an acquittal.

5. Based on available data, determine the impact the enactment of Minnesota Section 169.123 (Subd. 4) has had on the number of implied consent refusals.

6. Determine the extent to which the Commissioner of Public Safety appears through prosecuting attorneys at driver license revocation hearings as provided for in Minnesota Section 169.123 (Subd. 6).

7. Determine, to the extent practical, the impact of the administrative licensing action on the adjudication

process (e.g., conviction rates, sanction involved.)

8. Determine, to the extent practical, the impact of the administrative licensing process on the rate of enforcement and support of police officers.

This report addresses the same questions and provides an update in light of significant modifications to the law in 1982 and the subsequent Minnesota Supreme Court decision upholding the new law.

In 1981, Reeder answered question 1. as follows:

The total number of "arrests" for DWI reported to the Minnesota Criminal Justice Information System in 1980 was 22,788. Also, in 1980 the number of "certificates" from law enforcement officers to the Department of Public Safety that a driver had either refused a chemical test or had submitted and the results were 0.10 alcohol concentration or more totalled 28,429. From the data available it is not possible to determine the number of chemical tests administered in the 22,788 arrests. Under Minnesota law the officer can arrest for DWI without administering any chemical tests.

It is possible for the officer to file a "certificate" of refusal or 0.10 or more with the Department of Public Safety

without filing any criminal charges for DWI. Also, there are cases where the driver submitted to the chemical test and the results were less than 0.10 alcohol concentration and thus no certificate would be sent to the Department of Public Safety yet criminal charges could have been filed. Hence there are several reasons for the number of arrests and number of revocations to differ.

In some of the interviews with Minnesota officials it was reported that the "administrative per se" or implied consent law was popular with law enforcement officers. The number of revocations over arrests appears to support this view.

1983 update and comment:

The comments by Reeder in 1981 in response to this question remain valid. The relationship between criminal charges ("arrests") and apprehensions ("Peace Officer Certificates"), upon which administrative revocations are based, remains the same (see Table 2. and Figure 1.). Discussion of this question is found earlier in this report in Section I, "System Description", page 5. The 1982 amendments to Sec. 169.123 did not affect the relationship, or lack of relationship, with Sec. 169.121.

In 1981, answering question 2, Reeder discussed in some detail the situation in which a prompt guilty plea on the criminal charge blocked the longer period of revocation under the implied consent law, making it appear that the administrative revocation was being used only about half the time even though reports were being filed on virtually all 0.10 or higher tests, but concluded with this statement:

"Interviews with Minnesota officials indicate that in their view officers are using this law most of the time. When the factors just discussed are taken into consideration, it would appear that the views of the officials interviewed are supported by the data."

1983 update and comment:

In 1982 the language of Sec. 169.123 subdivision 5a was amended from "a peace officer...may serve immediate notice" to "...shall serve immediate notice." Since that change the two Minnesota jurisdictions that did not regularly initiate revocation in all cases are now doing so.

The situation described by Reeder, in which entering a guilty plea at the first opportunity purged the implied consent offense and required the license

revocation under the criminal law, has changed since the 1982 amendment. The case law still stands, but the number of such cases is reduced by the fact that prompt revocation has already been imposed administratively before there is a chance for a guilty plea on the criminal charge. The ratio of licenses revoked for being found guilty of DWI (30 days), as contrasted with licenses revoked under administrative law, has declined steadily since May and June 1982, the last months of the old law, when there were 2,392 conviction revocations and 2,679 administrative revocations, until there were no conviction-based revocations in May and June of 1983 while there were 6,386 administrative revocations. After April, 1983 and continuing through December, 1983 virtually all alcohol-related driver license revocations have been imposed under the administrative section of the law (169.123) rather than the criminal section (169.121). See Table 3.

In answering question 3, Reeder noted the importance of having the police officer serve notice of revocation and physically take the license certificate. In the period covered by Reeder's study the problem of a growing backlog of cases asking for a court hearing was given special attention. He noted increased numbers of arrests being

made, a limited Attorney General's staff handling the cases, and a growing tendency to delay revocation by asking for a judicial hearing.

1983 update and comment:

The backlog reported by Reeder was eliminated by July, 1983 following the July 1982 amendment. The Minnesota Attorney General reports that there are virtually no cases still remaining from the backlog of hearings requested under the provisions of the old law.

Furthermore, both administrative review and judicial hearings required for cases coming under the new law are current, that is, are being held within the time required by the statute, 15 days from the date of filing for administrative review and 60 days from the date of filing for judicial review.

This situation is, of course, a product of the greatly reduced number of requests for hearings (see Table 4.) which, in turn is a product of removing the incentive for purely dilatory hearing requests since the license revocation remains in place until it is actually rescinded by administrative or judicial finding.

In responding to question 4, Reeder reported that "from the data available in Minnesota, it is very difficult to determine the precise impact the law has had on the four areas listed above. In fact, no data was found to determine exactly how many DWI cases were nolle prossed, continued, plea bargained or acquitted on a state wide basis.

"However, a general answer can be given by looking at the number of total alcohol-related revocations. The law became effective on July 1, 1976. If a comparison is made for 1975 (17,628 revocations) which would be DWI convictions and refusals and 1979 DWI convictions and refusals (18,224 revocations) the impact of revoking under the (administrative) law was not negative. It appears the DWI case load has continued to increase since the convictions resulting in revocations has increased. In 1980 there was a significant increase -- from 14,797 in 1979 to 17,406 in 1980. It can be concluded that the enactment of the (administrative) implied consent law did not decrease the DWI cases in court."

1983 update and comment:
There has been no change in the difficulty of determining on a statewide basis the number of DWI criminal cases falling into the categories on which information is requested. There is no central system to provide such

court disposition information for all state courts handling traffic cases. By the early part of 1984 the Department of Public Safety, to whom all traffic court convictions are reported, expects to be able to provide aggregated information. At present individual conviction notices received from individual courts are posted on individual driver records and it is not possible, for example, to say how many DWI convictions took place statewide in a given period.

Reeder's answer to question 5. concluded that enactment of the implied consent law which added revocations for having an alcohol concentration of 0.10 or more had no negative impact. Nor does it appear that this new law greatly increased refusals.

1983 update and comment:

A review of the proportion of refusals among drivers required to take a test shows slight increase in the refusal rate (27.6% in the first six months of 1982 under the old law vs 31.6% in July through December, 1983, the most recent six months under the new law). (See Table 3.) However, a 1983 amendment authorizing admission of evidence of test refusals in DWI cases,

effective August 1, 1983, may reduce the incentive to refuse testing, although this effect had not been felt by the end of 1983.

Reeder's answer to question 6 was that no agreements have been entered into with any local jurisdiction to represent the Department of Public Safety at any implied consent hearings, and that the importance of keeping the function in the Attorney General's Office is that it removes any pressure on the local prosecutor concerning the disposition of both the criminal charges and the implied consent revocation proceedings. Also, keeping it at the state level provides for uniform policies in handling the implied consent cases.

1983 update and comment:
The Department of Public Safety continues to be represented in implied consent case hearings by the Attorney General. With the caseload greatly reduced under the new law it is unlikely that there will be any change in the current practice. The authorization for agreements with local prosecutors was enacted as a possible efficiency or remedy for the growing (at that time) backlog of cases.

In responding to question 7, Reeder found that "it is very difficult to determine conviction rates, types of sanctions imposed, and related aspects in DWI cases in the court system. However, one measure that is available is the number of revocations for DWI convictions. These have increased -- 15,512 in 1978; 14,797 in 1979; 17,406 in 1980; and 7,861 in the first five months of 1981 (which if the level continues would be about 18,864 in 1981).

"Based on the number of revocations for convictions the enactment of the administrative per se implied consent law had no negative impact on criminal charges under the DWI statute.

"Since the two tracks are separate and the timing is not parallel, the officials interviewed in Minnesota reported they had not observed any impact on conviction rates, sanctions imposed, etc. If anything, tightening the net on drinking drivers has led to increased enforcement activity by law enforcement officers."

1983 update and comment:

The comments made here by Reeder in 1981 are still pertinent and are further supported by the data on revocations in 1982 and 1983 shown in Table 3. of this current report. In the absence of a statewide

court information system it is possible to report only that data available from separate (county) court systems. Studies under way in 1983 should be able to provide better information early in 1984.

In responding to question 8, Reeder provided information on the number of sworn police officers in Minnesota noting that it has remained relatively stable in the past few years -- going from 5,922 in 1977 to 6,107 in 1980 -- an increase of only 185 officers. Such a small increase cannot account for the increase in total number of revocations for alcohol related offenses which went from 17,741 to 30,481 in the same period of time.

Reeder went on to note that among the officials interviewed it was reported that the law was popular among law enforcement officers. As is true in many jurisdictions the officers express frustration at the courts and their handling of DWI cases. It appears they view the administrative track as providing a method of doing something about the drinking driver regardless of what happens to the criminal charges in court.

1983 update and comment:
Discussions with working police officers confirm what Reeder found. The 1982 prompt revocation law has

enhanced police satisfaction with the administrative revocation system. One important source of this approval is the 1978-enacted provision under which the police officer acts for the Department of Public Safety in giving notice of revocation and actually picking up the license at the time of the testing. The system gives police officers the knowledge that their work DOES have a result, despite any problems with prosecution or plea bargaining.

SECTION IV

DISCUSSION AND CONCLUSIONS

Most efforts to analyze effectiveness of various deterrents to drunken driving have focused on legal sanctions applied through the conventional criminal justice system, from arrest through trial and the penalties of fine, incarceration and driver license deprivation. Often the imposition of court-coerced education, treatment or rehabilitation for the condition of alcoholism or problem drinking must be considered along with the other more traditional sanctions. Ross (6) and others have examined DWI deterrence in the light of the three elements of classic deterrence through punishment theory, i.e., the certainty, severity and swiftness of punishment following the commission of an offense. Most analysts agree that from the point of view of deterrence, certainty of apprehension and the swiftness with which punishment follows, are more important than severity (presumably beyond some degree of unpleasant or undesirable consequence.)

In Minnesota the House of Representatives Research Department has completed one section of an evaluation of recent state DWI legislation, (4) and the authors of Part I: The Perceptions of Minnesota's Drivers, Alan Rodgers and James D. Cleary, examine the responses to survey questions in the light of deterrence theory and its corollary which emphasizes the importance of perception of risk as well as actual risk of apprehension. Rodgers and Cleary (4) point out that "perhaps due to the difficulty of operationalizing celerity, deterrence research studies more often focus on certainty and severity."

In their study the authors analyzed responses of Minnesota drivers to questions about the likelihood of apprehension, the likelihood of punishment and the severity of punishment under new laws and policies adopted in Minnesota in 1982. Not suprisingly, in light of very high news media attention to actual law and policy changes and to convincing declarations and demonstrations of increased apprehensions by law enforcement officials, 52% of respondents believed the chances of being caught for drunken driving had increased (35% "somewhat more", 17% "much more", with 46% "about the same"). When asked about the likelihood of punishment after being caught, 75% believed it is greater (43% "somewhat more", 32% "much more", and 23% "about the same"). A third

question about an increase in the severity of punishment brought responses very similar to the question about likelihood of punishment, with 77% believing that severity of punishment has increased (45% "somewhat more", 32% "much more", and 22% "about the same").

It should be noted that these perceptions of an increase in risk are correct and are based on reality in that following the law and policy changes there are demonstrable increases in rates of apprehension, in the likelihood of punishment and in the severity of punishment imposed.

The author of this update report on Minnesota's administrative driver license revocation law posits the following model (Figure 8) as a fair representation of the way the conventional sanctions are viewed as relating to each of three elements of classic deterrence theory. The model is not intended as anything except a general depiction of the way many DWI control practitioners, i.e., police, judges, legislators, traffic administrators, researchers and others concerned with reducing drunken driving, regard the deterrence aspects of DWI penalties. A more precise measurement of these attitudes would, to be sure, reflect actual practice in a particular jurisdiction.

Figure 8.

	SEVERITY	CERTAINTY	SWIFTNESS
JAIL	High	Low	Low
FINE	Moderate	Moderate	Moderate
ADMINISTRATIVE DRIVER LICENSE REVOCATION	Low	High	High

Perception of DWI sanctions by many control practitioners.

The Rodgers and Cleary analysis provides, in addition to the information described above, another finding which is particularly valuable to this report on administrative revocation. In the survey drivers were asked this question:

"As you know, drunken driving could result in various punishments or other possible consequences. What do you think would most discourage people from driving after they have had too much to drink? (IF NECESSARY: What do you think most deters people from drunken driving?)"

The most frequent response to this open-ended question was "license revocation." 28% of respondents said that revocation

of the driver's license would most discourage drunken driving. This response was volunteered nearly twice as often as the next most frequent answer, "jail", offered by 15%.

In the close-ended, self-referrent question the respondent was read a list of possible consequences of drunken driving and asked how important each would be in "discouraging you from driving if you happened to have too much to drink." When "injuring someone" and "having an accident", which had low mention in the open-ended question about what most discourages people from driving after drinking, are included in the choice array they were named as "very important" by 95% and 90% of persons in discouraging them from driving after drinking. "License revocation" was named as "very important" by 90% of respondents and "jail" by 88%.

This survey is the latest in a growing body of information which identifies the driver license revocation or suspension as an important sanction for application to DWI control. Voas (5) states that "Loss of license is one of the most feared consequences of conviction for drunk driving" and cites Hagen (7), and others. Voas concludes:

"Given the available data concerning license actions one can conclude the following:

(1) License actions have been shown to have a significant specific deterrent impact in terms of documented reductions in arrests and crashes for those apprehended drivers receiving such actions;

(2) Like jail sentences, license actions have strong general deterrence potential, although such potential has not yet been maximized or adequately measured;

(3) Also like jail sentences, license actions are often viewed as severe sanctions and thus their imposition can have a disruptive impact on the courts;

(4) Unlike jail sentences, license actions can be imposed administratively and at less cost than jail sentences;

(5) To be frequently imposed, and to avoid producing unacceptable court backlogs, license actions for first offenders may have to be of a moderate nature (e.g., 30-120 day sentences);

(6) Because of the demonstrated value of license suspension, courts should be cautious in trading off license retention for attendance at treatment programs which have not demonstrated significant traffic safety benefits;

(7) Where driving is essential to job retention, the North Carolina results suggest that licenses limited to vocationally required travel can be effective."

In light of clear evidence that drivers most fear losing the driver's license as a consequence of being caught driving drunk, revoking the license should be regarded as a "severe" penalty, whether it is imposed by a judge or by an administrative authority.

In fact, statutory license revocation or suspension often attached to conviction of DWI is one of the most significant reasons that so many arrested drivers and their attorneys put so much effort into plea-bargaining to another charge which does not carry with it loss of the driver license.

The Background and Introduction section of this report describes the role that plea-bargaining and avoidance of license revocation had in the 1976 adoption of Minnesota's pioneering administrative revocation law.

This author concludes that driver license revocation or suspension ought to be regarded as a "severe" penalty by DWI control authorities since drivers see such a penalty as the one most feared.

Obviously the word "severity" does not precisely equate with "to be feared" nor is any penalty of whatever kind "feared" if it is never imposed. Thus both "severity of penalty" and "fear of penalty" are linked to "certainty of penalty". Even "swiftness of penalty" is also linked to "severity" in the sense of unpleasantness of consequences. For example, even being sentenced to hang would not inspire much fear if, in 1984 the event is set for the year 2084, and the condemned person is free and licensed to drive until the fatal date.

The perception of risk, which is such an important part of general deterrence of drunken driving, should be considered in relation to all three elements of the penalty -- severity, certainty and swiftness -- rather than only to certainty of apprehension, as is sometimes the case.

The model in Figure 9 below is offered as depicting the driver's perception of DWI penalties as well as what ought to be the perception of officials.

Figure 9.

	SEVERITY	CERTAINTY	SWIFTNESS
JAIL	High	Low	Low
FINE	Moderate	Moderate	Moderate
ADMINISTRATIVE DRIVER LICENSE REVOCATION	High	High	High

Perception of DWI Sanctions by drivers.

Since withdrawing the driver's license can be done administratively, without pre-revocation hearing, there is no question but that it is the swiftest sanction that can be imposed.

There may be disagreement over the relative severity of, for instance, 90 days of license suspension compared with 48 hours of incarceration. (California's 1982 law seems to equate them, since upon a driver's first conviction there is what amounts to an opportunity to choose between them. It will be interesting to see which penalty is voted Most Friendly in the popularity contest. Since California has been a leader in objective evaluation of its traffic safety programs, we may expect to see these alternatives undergo analysis.) However, comparing a quick administrative license revocation with "jail" in general, which can only follow a court trial, is not particularly productive and is somewhat like arguing about whether oil paintings or photographs are "better". It should be noted that in Minnesota the two kinds of penalty are not mutually exclusive, and as we have noted, both rate high as devoutly to be feared.

This writer is simply arguing that license deprivation is a significantly "severe" penalty and has deterrence value for that attribute as well as its unquestioned high "certainty" and "swiftness".

The certainty of a penalty following apprehension is the quality usually associated with administrative license withdrawal upon a test refusal or a test showing a specific alcohol concentration. However, there is an additional "certainty" element deriving from an administrative license action, and that is an increased degree of certainty of apprehension itself. As both Reeder (1) and Watne(8) find in interviews with police officers, the knowledge that an apprehended driver who refuses or fails a test is virtually certain to incur the license revocation penalty, regardless of the outcome of the criminal case under the separate two-track system, provides officers with reinforcement for the feeling that their DWI enforcement action has meaning. Thus there is incentive to officers to take enforcement action even if prosecution and court practices in their jurisdictions might otherwise encourage a "why bother" attitude.

Joel Watne is Special Assistant Attorney General with responsibility for Minnesota Implied Consent cases. His paper, "Prehearing License Revocation of Drinking Drivers - The Minnesota Experience" is provided as Appendix C. It is a particularly lucid and valuable reference in a study of what he refers to as Minnesota's "Double-Barrelled Implied Consent Law."

In providing the information comparing traffic death rates and alcohol-related license revocation rates between 1967 and 1982 (Table 5. and Figure 10.), the author is well aware that correlation does not prove causation, but would rather believe that Minnesota's efficient system of administrative revocation of driver licenses was also an effective DWI control measure and had more to do with reduction of traffic deaths in that state than the condition of the nation's or the state's economy, as some have suggested.

Table 5.

MINNESOTA

TRAFFIC DEATHS AND ALCOHOL RELATED DRIVER LICENSE REVOCATIONS

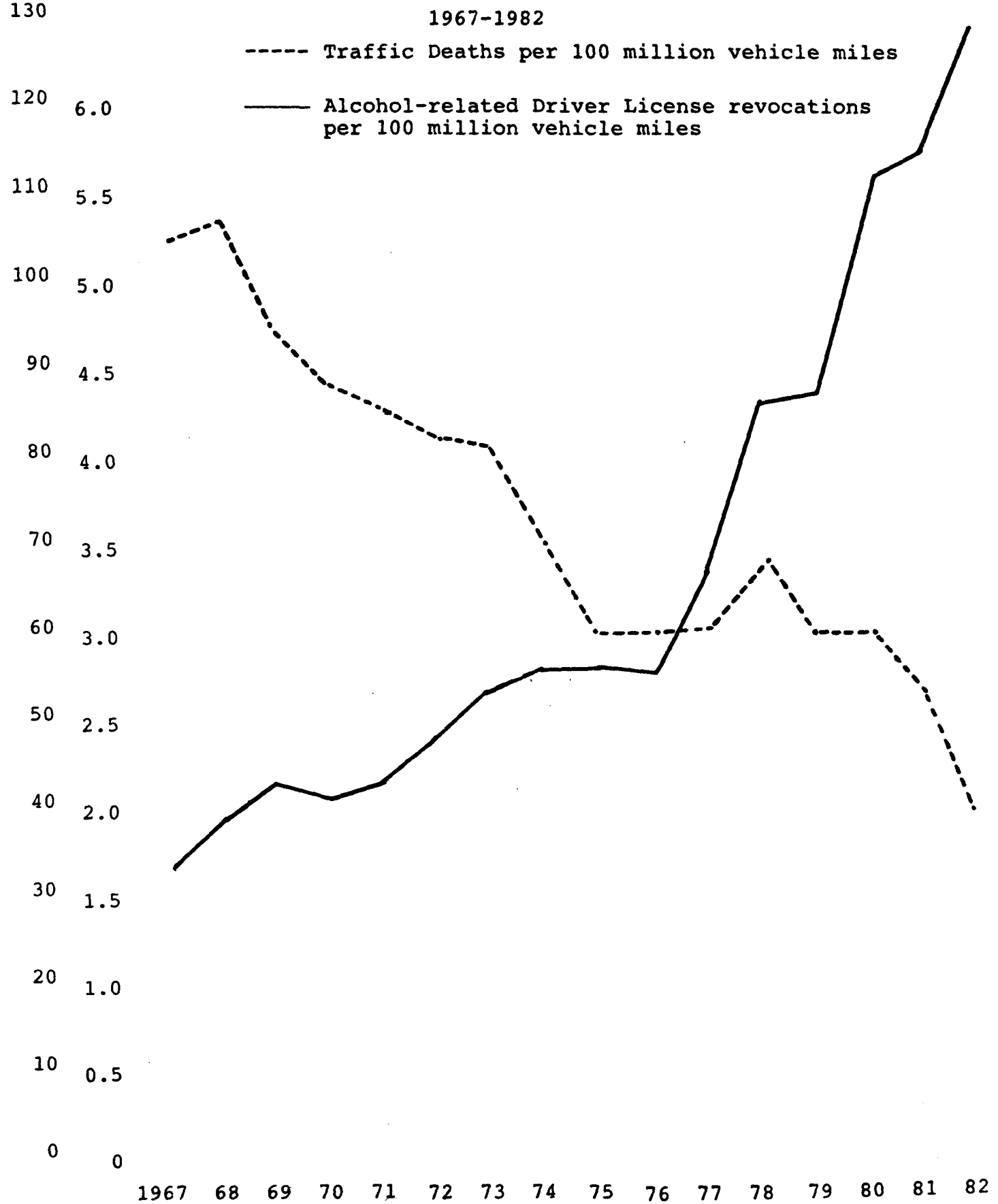
1967 - 1982

Year	100 million vehicle miles travelled	Traffic deaths	Rate	Alcohol related driver lic. revocations	Rate
1967	187	965	5.17	5,977	32
1968	199	1,060	5.33	7,431	37
1969	208	988	4.75	8,471	41
1970	224	987	4.41	8,634	39
1971	234	1,024	4.38	9,678	41
1972	249	1,031	4.14	11,303	45
1973	252	1,024	4.02	13,047	52
1974	246	852	3.47	13,325	54
1975	256	777	3.03	13,731	54
1976	270	809	3.00	14,251	53
1977	281	856	3.05	17,741	63
1978	288	980	3.40	24,357	85
1979	290	881	3.04	24,966	86
1980	285	863	3.03	30,481	107
1981	286	763	2.67	32,043	112
1982	294	581	1.98	36,024	126

Figure 10.

MINNESOTA

1967-1982



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APPENDIX A.

Ramsey County

Milo E. Heddan, et al.,

Appellants,

vs. CX-82-1645

Kenneth K. Dirkswager, et al.,

Respondents,

and

Milo E. Heddan,

Appellant,

vs. C3-83-198

John Sopsic, Commissioner of Public Safety,

Respondent.

Scott, J.
Concurring specially,
Yetka, J., Wahl, J.

Endorsed
Filed July 1, 1983
Wayne Tschimperle, Clerk
Minnesota Supreme Court

SYLLABUS

1. The prehearing license revocation provisions of Minn. Stat. § 169.123 (1982) do not violate due process of law as guaranteed by the United States and Minnesota Constitutions.

2. Minn. Stat. § 169.123 (1982) does not compel persons to incriminate themselves in violation of their Fifth Amendment privilege against self-incrimination.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

SCOTT, Justice.

This appeal is a consolidation of two lower court rulings. First, this is an appeal from the order for judgment of the Ramsey County District Court upholding the

constitutionality of the new prehearing license revocation proceedings under Minn. Stat. § 169.123 (1982). Second, also consolidated for review is an appeal from an order of a three-judge panel affirming an order of the municipal court in the case of Milo E. Heddan v. Commissioner of Public Safety which upheld Heddan's license revocation. Heddan sought discretionary review before this court and his appeal was consolidated with the appeal from the Ramsey County District Court. We affirm.

This declaratory judgment action challenges the constitutionality of Minnesota's prehearing license revocation statute on behalf of three parties: Paul W. Lundberg, Milo E. Heddan, and Craig S. Miller.

On July 9, 1982, Milo E. Heddan was stopped in Hennepin County and charged with DWI and having a blood alcohol concentration of .10 or more. He submitted to a Breathalyzer test, which revealed a blood alcohol content of .22. At that time he was given a notice and order of revocation of his driver's license. The notice and order also carried with it a temporary driver's permit valid for a seven-day period. On July 21, 1982, Heddan applied for and received a limited license from the Department of Public Safety. His limited license permitted him to drive from the hours of 8 a.m. through 6 p.m. six days per week, Monday through Saturday.

On July 21, 1982, Heddan also filed his request for judicial review and administrative review. On that date he appeared with counsel before a driver evaluator as part of his administrative review. Heddan submitted a petition generally denying each of the elements of the revocation, but asserted his privilege against self-incrimination and refused to give a statement or fill out and sign the form distributed by the Department of Public Safety for obtaining review. On July 27, 1982, the Commissioner of Public Safety sent notice to Heddan informing him that he found sufficient basis to sustain the revocation.

On August 16, 1982, Heddan had a judicial review hearing before a municipal court referee. Counsel for Heddan moved to dismiss the revocation order on grounds that the judicial review was to be heard by a court referee and that the proceedings violated his Fifth Amendment rights. The motion was denied. The revocation of Heddan's driving privileges was sustained at that time.

On July 3, 1982, Paul William Lundberg was stopped by Minneapolis police officers and subsequently charged with DWI and having a blood alcohol concentration of .10 or more. He submitted to a Breathalyzer test which revealed a .10 blood alcohol content. At that time he was given a notice and order of revocation of his driver's license. The notice and order also carried with it a temporary driver's permit valid for a seven-day period. Lundberg applied for and was issued a limited license on July 20, 1982. He filed his request for judicial and administrative review on July 26, 1982.

Lundberg appeared for administrative review before a driver evaluator on August 4, 1982. He submitted a petition generally denying each of the elements of the revocation, but asserted his privilege against self-incrimination and refused to give a statement or fill out and sign the form distributed by the Department of Public Safety for obtaining review. Lundberg was represented by counsel, who argued that a .10 reading was inherently defective. On or about August 15, 1982, the Commissioner of Public Safety sent Lundberg notice that he found sufficient basis to sustain the revocation.

On August 4, 1982, Lundberg reapplied for and received a limited license, as the one he had obtained earlier, on July 20, 1982, was for a 30-day period and was due to expire in August. He was, the same day, reissued a limited license which permitted him to drive between the hours of 7 a.m. and 5 p.m. Monday through Friday.

On August 19, 1982, a judicial review hearing was scheduled in the Lundberg case. At that time the state requested a continuance to September 30, 1982, as the arresting

officer and Breathalyzer test operator were unavailable. Over objection, the referee granted the continuance, but ordered the Department of Public Safety to reinstate Lundberg's full driving privileges effective August 19, 1982, pending the hearing. The judicial hearing was then rescheduled to September 30, 1982. After the hearing Lundberg's revocation was rescinded. The referee reasoned that the closeness of the reading, together with the failure of the police to follow the Bureau of Criminal Apprehension (BCA) recommended steps to avoid radio frequency interference, dictated in favor of the driver. He therefore held that the state failed to meet its burden of proof by a preponderance of the evidence that the test result was accurate and reliable.

On July 15, 1982, Craig Sheridan Miller was stopped by Minneapolis police and charged with DWI and having a blood alcohol concentration of .10 or more. He submitted to a Breathalyzer test, which revealed a blood alcohol content of .16. At that time he was given a notice and order of revocation of his driver's license. The notice and order carried with it a temporary driver's permit valid for a seven-day period. On July 26, 1982, Miller requested administrative and judicial review. He submitted a petition generally denying each of the elements of the revocation, but asserted his privilege against self-incrimination and refused to give a statement or fill out the form distributed by the Department of Public Safety for obtaining review. He also applied for a limited license. Miller was denied a limited license because he was not employed at that time. Present employment is a prerequisite for obtaining a limited license.

Miller appeared July 30, 1982, before a driver evaluator for administrative review and was represented by counsel. His counsel argued that the Minneapolis Police Department's failure to use the BCA 21-point checklist was a fatal defect in the revocation.

After Miller filed his request for administrative review the Department of Public

Safety attempted to obtain from the Minneapolis Police Department copies of the implied consent advisory, notice and order of revocation and temporary license. Although a police incident report was forwarded to the Department of Public Safety, these other documents were not. The documents were located by the Minneapolis Police Department on August 10, 1982, which was 15 days from the request for administrative review. However, they were not received by the Department until after the 15-day period had elapsed.

On August 13, 1982, Miller's driving privileges were reinstated as a result of the findings of the administrative review. The order of the Commissioner of Public Safety revoking Miller's driving privileges was overruled because the Department of Public Safety had not received from the Minneapolis Police Department information or reports sufficient to sustain the review within the 15-day required time period.

Overview of the Implied Consent Law

The question presented by this appeal is whether Minn. Stat. § 169.123 (1982), which mandates suspension of a driver's license because of a refusal to take a chemical test for alcohol concentration or failure of a chemical test by registering an alcohol concentration of .10 or more, is violative of due process or the privilege against self-incrimination.

The elements of an implied consent violation are clearly defined by the statute:

> Subd. 2. Implied consent; conditions; election as to type of test. (a) Any person who drives, operates or is in physical control of a motor vehicle within this state consents, subject to the provisions of this section and section 169.121, to a chemical test of his blood, breath, or urine for the purpose of determining the presence of alcohol or a controlled substance. The test shall be administered at the direction of a peace officer. The test may be required of a person when an officer has reasonable and probable grounds to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169.121 and one of the following conditions exist: (1) the person has been lawfully placed under arrest for violation of section 169.121, or an ordinance in conformity therewith; or (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death; or (3) the person has refused to take the screening test provided for by section 169.121, subdivision 6; or (4) the screening test was administered and recorded an alcohol concentration of 0.10 or more. No

action may be taken against the person for declining to take a direct blood test, if offered, unless an alternative test was offered.

Minn. Stat. § 169.123, subd. 2(a) (1982) (emphasis added).

The statute goes on to require that when requesting a test, the peace officer must notify the driver of the consequences of a decision to test or not test. Minn. Stat. § 169.123, subd. 2(b) (1982).

A final element in implied consent procedure is that a peace officer must afford the driver a reasonable opportunity to consult counsel before opting to test or not test. This requirement was established by this court in Prideaux v. State, Commissioner of Public Safety, 310 Minn. 405, 247 N.W.2d 385 (1976).

Administrative revocations under the implied consent law are 90 days for test failures and 6 months for test refusals. Minn. Stat. § 169.123, subd. 4 (1982). The law is designed to encourage the taking of tests and to remove suspected and certifiable drunken drivers from the road. Under the system in effect prior to July 1, 1982, a driver was given a 30-day temporary license with the notice of revocation. Minn. Stat. § 169.123, subd. 5a (1980). The driver then had the right to appeal the license revocation by requesting a judicial hearing. If the driver did appeal, he was issued a temporary license until a final determination on the revocation was made. Minn. Stat. § 169.123, subd. 5a (1980). If no appeal was requested, the revocation became effective at the end of the 30-day period.

This system resulted in approximately one request for judicial review out of every three implied consent violations reported. During 1981, of the approximately 33,000 implied consent violations reported, there were approximately 10,500 requests for judicial review. Out of these 10,500 requests for review, 326 drivers were able to avoid license revocation.

During the 1982 legislative session Minn. Stat. § 169.123 was amended in order to reduce the time lapse between an implied consent violation and the imposition of license revocation. The old law delayed all revocations for 30 days from the notice of revocation. The new law provides just 7 days. Minn. Stat. § 169.123, subds. 5 and 5a (1982). The old law enabled additional delay by a request for judicial review. The new amendments provide that "[t]he filing of the petition shall not stay the revocation or denial." Minn. Stat. § 169.123, subd. 5c (1982).

While removing the opportunity for lengthy delay, the 1982 amendments simultaneously created a more efficient system for obtaining review of the revocation order. The amendments provided for two distinct avenues of review: administrative review by the Department of Public Safety, and judicial review in a county or municipal court.

The administrative review mechanism is entirely new. The statute provides as follows:

> Administrative review. At any time during a period of revocation imposed under this section a person may request in writing a review of the order of revocation by the commissioner of public safety. Upon receiving a request the commissioner or his designee shall review the order, the evidence upon which the order was based, and any other material information brought to the attention of the commissioner, and determine whether sufficient cause exists to sustain the order. Within 15 days of receiving the request the commissioner shall report in writing the results of his review. The review provided in this subdivision is not subject to the contested case provisions of the administrative procedure act in sections 14.01 to 14.70.
>
> The availability of administrative review for an order of revocation shall have no effect upon the availability of judicial review under this section.

Minn. Stat. § 169.123, subd. 5b (1982). This provision contemplates an informal review procedure which is designed to remedy obvious errors. The procedure is speedy, promising a result within 15 days, and it accords a certain measure of due process to subjects of revocation orders.

Drivers requesting administrative review are asked to fill out an administrative review form setting forth facts pertaining to why the revocation is not valid. Drivers are then asked to sign the form, have it notarized, and submit it to the commissioner. Each numbered paragraph of the form sets forth an element of the implied consent violation and solicits the driver's version of the facts pertaining to that element.

Administrative reviews are conducted by civil service employees known as "driver safety analysts." All employees in this classification have past experience with the laws and rules governing license revocation. They have also undergone training in administrative review and in the legal principles in this area.

In addition to the written request for review, drivers may appear in person for administrative review on any business day in St. Paul or at regularly scheduled times in locations throughout the state. Counsel may appear with the driver, although there are no provisons for subpoenaing or cross-examining witnesses.

In conducting an administrative review, the review officer considers information provided by the driver and all relevant reports provided by law enforcement agencies. The review officer reports his findings to the driver within 15 days of request for review. The report includes findings on each element of the offense. Within 30 days following receipt of the notice and order of revocation a person may petition the court for judicial review. Minn. Stat. § 169.123, subd. 5c (1982). This may be done while pursuing administrative review.

The judicial review provision, as amended in 1982, requires that a hearing be conducted "at the earliest practicable date," and in no event later than 60 days after the filing of a petition for judicial review. Minn. Stat. § 169.123, subd. 6 (1982). Judicial district administrators are directed to implement this requirement through efficient scheduling and the transfer of cases within their districts to expedite hearings. Court

administrators in the 10 Minnesota judicial districts have established a scheduling system for implied consent cases whereby judicial review will normally be had from within 10 to 40 days following the filing of a petition.

Appellants raise the following issues on this appeal:

(1) Whether the prehearing license revocation provisions of Minn. Stat. § 169.123 (1982) violate due process of law as guaranteed by the United States and Minnesota Constitutions.

(2) Whether Minn. Stat. § 169.123 (1982) compels persons to incriminate themselves in violation of their Fifth Amendment privilege against self-incrimination.

1. Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments of the United States Constitution and Article I, Section 7, of the Minnesota Constitution.

A license to drive is an important property interest. Bell v. Burson, 402 U.S. 535, 539 (1971). The state does not dispute that appellants' licenses are property interests subject to due process protection; rather, it concludes that the existing procedures, as previously discussed, provide all the process that is constitutionally due before a driver can be deprived of his license.

The United States Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-558 (1974). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The resolution of the issue of whether the procedures provided under Minn. Stat. § 169.123 (1982) are constitutionally sufficient requires analysis of the governmental and private interests that are affected. In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the Supreme Court stated that identification of the specific dictates of procedural due process requires the consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The United States Supreme Court faced the due process question presented by a prehearing implied consent license revocation in Mackey v. Montrym, 443 U.S. 1 (1979). Montrym involved a class action challenge to the Massachusetts implied consent system. The Massachusetts system is similar to the new Minnesota system in most respects, but distinguishable in some.

The license revocation in Massachusetts, unlike Minnesota, is only for test refusals. The revocation is based upon a report from a peace officer to the state licensing agency, and takes immediate effect upon issuance.

The post-revocation review system in Massachusetts, like Minnesota, provides multiple levels of review. The first is an appearance before the Registrar of Motor Vehicles. Massachusetts Gen. Laws Ann. ch. 90, § 24(1)(g) (West 1975). This appearance is available immediately and a decision is apparently available within 2 to 10 days. 443 U.S. at 7-8, n.5. An appeal is provided to a more formal administrative body known as the Board of Appeal. The Massachusetts statute does not specify how soon this hearing must be held or when a decision must be rendered. Massachusetts Gen. Laws Ann., ch. 90, § 28 (West 1975).

The United States Supreme Court examined the Massachusetts implied consent system under the due process analysis used in Mathews v. Eldridge, supra. The Montrym court concluded "that the compelling interest in highway safety justifies the Commonwealth in making a summary suspension effective pending the outcome of the prompt postsuspension hearing available." 443 U.S. at 19. A comparison of the Minnesota and Massachusetts prehearing revocation systems employing the Eldridge factors shows that the Minnesota system is not significantly distinguishable from that of Massachusetts.

The three factors employed by the Montrym court were: (1) the nature and weight of the private interest affected by the official action challenged; (2) the likelihood of erroneous deprivation of the private interest involved as a consequence of the procedures used; and (3) the state interests served by the summary procedures used, as well as the administrative and fiscal burden that would result from substitute procedures sought. We will examine the Minnesota and Massachusetts implied consent systems using each of these factors.

A. The private interest

The private interest affected here is the same as in Montrym, the granted license to operate a motor vehicle, or more particularly, the driver's interest in continued possession and use of the license pending the outcome of a hearing. The court in Dixon v. Love, 431 U.S. 105 (1977), recognized this interest as a substantial one, particularly in light of the fact that the state will be unable to make a driver whole for any personal inconvenience and economic hardship suffered by reason of an erroneous suspension.

The Montrym court indicated that the actual weight given the private interest depends upon three factors: (1) the duration of the revocation; (2) the availability of hardship relief; and (3) the availability of prompt post-revocation review. 443 U.S. at 11-12.

The United States Supreme Court upheld prehearing revocations of driver's licenses in Montrym and the Illinois case of Dixon v. Love, supra. In Montrym the suspension was for a maximum period of 90 days. In Love the suspension could be for as long as one year (or more). The Minnesota revocation falls between those of Massachusetts and Illinois: 6 months for test refusals and 90 days for test failures. This factor does not distinguish this case from Montrym or Love, which upheld prehearing revocations.

The Minnesota implied consent system contains provisions for hardship relief unavailable under the Massachusetts statute. In Minnesota a driver automatically receives a 7-day temporary license at the time of revocation. Minn. Stat. § 169.123, subd. 5a (1982). In addition, the Minnesota statute provides for the issuing of limited licenses to drivers whose licenses have been revoked under certain conditions. A limited license is generally available immediately upon application by a first offender and during the second half of the revocation period for one whose license has been revoked twice within 5 years. The licenses are generally limited to use for employment or alcohol rehabilitation purposes. The availability of hardship relief in Minnesota and the lack thereof in Massachusetts are significant factors favoring the Minnesota system.

The final factor in weighing the affected private interest under the Montrym analysis is the availability of prompt post-revocation review. In Minnesota and Massachusetts post-revocation review is available in two forms. Informal administrative review is available immediately in both states. In each state it is conducted by an employee of the state licensing agency. A driver may be represented by counsel under both procedures, but in Massachusetts, unlike Minnesota, witnesses may testify and be cross-examined. In Massachusetts the decision is usually available in one or two days, but no later than 10 days after the hearing. In Minnesota, the decision is issued no later than 15 days after a written request for a review of the revocation. Minn. Stat. § 169.123, subd.

5b (1982).

A more formal and complete review is also available in both states. In Minnesota that review is conducted by a municipal or district court, Minn. Stat. § 169.123, subd. 6 (1982), while in Massachusetts it is conducted by an administrative board of appeal. In Massachusetts there is no statutory requirement on the timeliness of this hearing. The plaintiff in Montrym had a hearing scheduled before the Board of Appeal 29 days after revocation. In Minnesota Minn. Stat. § 169.123, subd. 6, requires that the hearing be conducted at "the earliest practicable date, and in any event no later than 60 days following the filing of the petition for review." The differences between the Massachusetts and Minnesota systems of post-revocation review do not appear to favor either system to any constitutionally significant degree.

This analysis of the three factors which the Montrym court considered significant in weighing the private interest leads us to the conclusion that, although the interest in a driver's license is a substantial one, the length of revocation, the availability of prompt post-revocation relief and, most importantly, the availability of hardship relief result in a private interest of no more weight than that in Montrym.

B. Risk of erroneous deprivation

The second factor considered in the Montrym analysis for a prehearing license revocation is the likelihood of an erroneous deprivation of the private interest involved. In describing this factor the Montrym court stated:

> And, although this aspect of the Eldridge test further requires an assessment of the relative reliability of the procedures used and the substitute procedures sought, the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations. Greenholtz v. Nebraska Penal Inmates, supra, at 7. Thus, even though our legal tradition regards the adversary process as the best

> means of ascertaining truth and minimizing the risk of error, the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." Dixon v. Love, supra, at 113. And, when prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

443 U.S. at 13 (emphasis added).

In both Minnesota and Massachusetts a driver's license is revoked in cases where a peace officer had probable cause to believe the person had been operating a motor vehicle while under the influence of alcohol and that person refused to submit to chemical testing. The Montrym court did not regard the risk of erroneous deprivation as significant in these cases, stating:

> [T]he risk of erroneous observation or deliberate misrepresentation of facts by the reporting officer in the ordinary case seems insubstantial.

443 U.S. at 14.

However, Minnesota also revokes the license of a driver who fails a chemical test, while Massachusetts does not. Appellants strongly assert that the risk of erroneous deprivation of a license to drive due to the "infinite possibilities for error" inherent in testing for blood alcohol concentration is the most significant difference in the Minnesota and Massachusetts systems. Appellants particularly challenge the reliability of Breathalyzer testing, which is the test given in most cases. Minn. Stat. § 169.123, subd. 2 (1982).

This court has previously considered the reliability of Breathalyzer testing. In State v. Quinn, 289 Minn. 184, 186, 182 N.W.2d 843, 845 (1971), we stated:

> It is generally held that the alcoholic content of the blood may be reliably determined by such a test, and testimony of the reading obtained upon a properly conducted test may be admitted without antecedent expert testimony that the reading is a trustworthy index of alcohol in the blood.

(Citations omitted.)

Three experts testified for the state as to the accuracy and reliability of the Breathalyzer test. Mr. Richard Prouty, Chief Forsenic Toxicologist, Office of Medical Examiner, State of Oklahoma, noted that:

> [T]he Breathalyzer and its various models are and have been internationally accepted and recognized as a reliable evidentiary device for determining blood alcohol content.

Mr. Lowell Van Berkom, BCA Laboratory Director, stated:

> [T]he use of the Breathalyzer Model 900 and 900A in accordance with this Breathalyzer operational checklist 21-step procedure provide a highly accurate and scientifically acceptable result of breath analysis for alcohol.

Mr. Phillip L. Neese, supervisor of the chemical testing unit for the Minneapolis Police Department, noted that "the Breathalyzer was an accurate instrument, but that the readings were slightly lower than blood tests." (Emphasis added.)

On September 10, 1982, Smith & Wesson Corporation, the manufacturer of the Breathalyzer Models 900 and 900A, which are the exclusive breath-testing apparatuses in Minnesota, issued an advisory to all of its customers concerning radio frequency interference (RFI). The advisory informed Smith & Wesson's customers that "continuing investigation now suggests this early series of breath testing instruments may be affected in an unpredictable manner by various frequencies and power levels." This advisory was a culmination of substantial testing by Smith & Wesson and an independent third party.

At trial Mr. Herb Belin, product manager of Smith & Wesson, testified that the Model 900 was not susceptible to RFI, and testing by the BCA confirmed this. Belin further testified that their investigation failed to show any problem "due to anything other than the contrived RF fields generated by our own equipment at our own demand." The BCA has field-tested all Breathalyzers in Minnesota for RFI. Each and every Breathalyzer presently in operation in Minnesota has been field-tested and certified not to

be affected by RFI in the location in which it is operating.

The trial court found that:

> Breath testing in Minnesota at certified locations in accordance with the BCA protocol, merits the highest confidence and remains a reliable and accurate means of measuring alcohol concentration.

The trial court's finding is not clearly erroneous. While the risk of erroneous deprivation is greater under the Minnesota statute than under Massachusetts law, it is not to such a degree as to alter the balance struck by the Supreme Court in Montrym.

C. The public interest served by prehearing revocation.

The third and final factor from Montrym for determining the constitutionality of prehearing implied consent revocations is the public interest at stake. The Montrym court considered two public interests: the public interest in keeping roads and highways safe, and the public interest in avoiding fiscal and administrative burdens which are disproportionate to the nature of the private interest being revoked and to the risk of erroneous revocation.

The public interest in preserving the safety of our roadways is of great importance. As the court in Montrym noted:

> We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs. [Citations omitted.]
>
> The Commonwealth's interest in public safety is substantially served in several ways by the summary suspension of those who refuse to take a breath-analysis test upon arrest. First, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways.

443 U.S. at 17-18.

Statistics linking drunken driving with the tragedy of death and injury on our nation's highways abound. Forst Lowry, the Safety Program Coordinator for the Minnesota Department of Public Safety, testified that in 1981 52% of the drivers killed in Minnesota had a blood alcohol concentration of .10 or more and 62% of drivers killed had some measurable alcohol concentration. It is estimated that in 1980 over 400 persons were killed in Minnesota because of drunken drivers and direct economic loss amounted to approximately $114 million.

The Montrym court determined that the summary and automatic character of the suspension sanction available under the Massachusetts statute is critical to deterring drunken drivers and making the state's highways safer. 443 U.S. at 18. The prehearing revocation system also helps to ease fiscal and administrative burdens, a second area of public interest. As the Montrym court stated:

> A presuspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breath-analysis test and demand a presuspension hearing as a dilatory tactic. Moreover, the incentive to delay arising from the availability of a presuspension hearing would generate a sharp increase in the number of hearings sought and therefore impose a substantial fiscal and administrative burden on the Commonwealth. Dixon v. Love, 431 U.S., at 114.

443 U.S. at 18. Attorney General Warren Spannaus testified at trial that his office had estimated for the legislature overall annual savings of approximately $320,000 under the new system of prehearing revocation.

As the statistics cited above point out, drunken drivers pose a severe threat to the health and safety of the citizens of Minnesota. The compelling interest in highway safety justifies the State of Minnesota in making a revocation effective pending the outcome of the prompt post-suspension hearing.

2. Appellants next contend that Minn. Stat. § 169.123 (1982) imposes a penalty on them for exercising their privilege against self-incrimination, and thereby violates the

Fifth Amendment to the United States Constitution and Article I, Section 7, of the Minnesota Constitution. The trial court determined that "the availablity of expeditious administrative and timely judicial review under the system devised by the Commissioner of Public Safety does not result in a violation of a plaintiff's Fifth Amendment privilege against self-incrimination."

In any DWI case, the defendant faces two types of penalties in two separate proceedings: (1) criminal penalties under Minn. Stat. § 169.121 and (2) civil license revocation under Minn. Stat. § 169.123. Under Minn. Stat. § 169.123 the driver's license is revoked prior to a hearing. The driver may then request administrative or judicial review of the revocation. The driver has a high incentive to request review immediately since his or her license has already been revoked. Meanwhile, if the driver pleads not guilty to the criminal charges, he will be seeking license revocation review while the criminal charges are pending. Statements made to the administrator in the administrative review or to the court in judicial review are not immunized by law, and thus may be used against the driver in the later criminal case. In fact, the form which a driver must submit in order to attain administrative review states that the information given in the form may be used in any related court action. Appellants contend that this puts the driver in an untenable position where he must choose between testifying during the license revocation hearing and risking the later use of the testimony in the criminal case, or refusing to testify and thus forgoing the right to fully litigate the license revocation.

There is no doubt that appellants have the right to assert their Fifth Amendment privilege against self-incrimination in either the administrative or judicial hearing if it can be "reasonably apprehend[ed]" that the statements could be used against them in a criminal prosecution. Murphy v. Waterfront Commission, 378 U.S. 52, 94 (1964). That is not the question before us, however. Appellants contend that the handicap which they

would be placed under if they assert the privilege is a constitutional violation. The question before this court is, therefore, whether the procedure under Minn. Stat. § 169.123 impermissably burdens appellants' exercise of their Fifth Amendment rights.

In South Dakota v. Neville, ___ U.S. ___ (1983), the United States Supreme Court recently held that the admission into evidence of a defendant's refusal to submit to a blood alcohol test does not offend his Fifth Amendment right against self-incrimination.[1] The court held that the refusal was not compelled and, therefore, not protected by the privilege against self-incrimination. In discussing the requirement that the defendant must be compelled to testify against himself in order to invoke his Fifth Amendment privilege, the Neville court stated:

> As we stated in Fisher v. United States, 425 U.S. 391, 397 (1976), "[T]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." This coercion requirement comes directly from the constitutional language directing that no person "shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5 (emphasis added). And as Professor Levy concluded in his history of the privilege, "[t]he element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incriminating interrogatories." W. Levy, Origins of the Fifth Amendment 328 (1968).
>
> Here, the state did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing. Of course, the fact the government gives a defendant or suspect a "choice" does not always resolve the compulsion inquiry. The classic Fifth Amendment violation—telling a defendant at trial to testify—does not, under an extreme view, compel the defendant to incriminate himself. He could submit to self accusation, or testify falsely (risking perjury) or decline to testify (risking contempt). But the Court has long recognized that the Fifth Amendment prevents the state from forcing the choice of this "cruel trilemma" on the defendant. See Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964). See also New Jersey v. Portash, 440 U.S. 450, 459 (1979) (telling a witness

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[1] It should be noted that after July 31, 1983, Minn. Stat. § 169.121, subd. 2(5), allows for the admission into evidence of a defendant's refusal to take a chemical test for determining the presence of alcohol or a controlled substance. Prior procedure is discussed in State v. Willis, 332 N.W.2d 180 (Minn. 1983).

> under a grant of legislative immunity to testify or face contempt sanctions is "the essence of coerced testimony."). Similarly, Schmerber cautioned that the Fifth Amendment may bar the use of testimony obtained when the proferred alternative was to submit to a test so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer "confession." Schmerber, 384 U.S., at 765, n. 9. Cf. Miranda v. Arizona, 384 U.S. 436, 458 (1966) (unless compulsion inherent in custodial surroundings is dispelled, no statement is truly a product of free choice).

___ U.S. at ___ (footnote omitted).

The court concluded that:

> We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. See, e.g., Crampton v. Ohio, decided with McGautha v. California, 402 U. S. 183, 213-217 (1971).

___ U. S. at ___. Although the appellants in the case at bar were faced with such a difficult choice, that choice does not rise to the level of compulsion necessary in order to constitute a Fifth Amendment violation.

Appellants' contention that Minn. Stat. § 169.123 violates their privilege against self-incrimination is primarily based upon their claim that a person seeking administrative review must complete and sign the form distributed by the Department of Public Safety entitled "Request for Administrative Review of Implied Consent Revocation." Completion of the form is not required by statute. See Minn. Stat. § 169.123, subd. 5b. The Department of Public Safety does not require that its form be completed in order to obtain administrative review. None of the parties to this action completed or signed the Department of Public Safety form and each had an administrative review of his license revocation. In fact, appellant Miller's driving privileges were reinstated as a result of his administrative review hearing. Furthermore, the state has the burden of proving each element of the implied consent violation in order to sustain the license revocation. This factor has been considered significant in determining whether a person is compelled to

testify. See United States v. U.S. Currency, 626 F.2d 11 (6th Cir.), cert. denied, 449 U.S. 993 (1980).

The record in this case is devoid of any evidence of appellants' being compelled to give incriminating evidence in order to obtain review of their license revocations. Appellants need merely request review and indicate a basis for reversal. They need provide no other information to have their challenge heard. The trial court was correct in its determination that Minn. Stat. § 169.123 does not compel persons to incriminate themselves in violation of their federal and state constitutional privilege against self-incrimination.

Finally, appellants have failed to satisfy 42 U.S.C. § 1983's threshold requirement that the plaintiff be deprived of a right "secured by the Constitution and laws," and therefore they have no cognizable claims under § 1983. Baker v. McCollan, 443 U.S. 137 (1979).

Affirmed.

YETKA, J. (concurring specially).

While I concur in the result, I find it unnecessary to decide that the information requested in the pre-administrative review form is not violative of the privilege against self-incrimination. The form is not authorized by statute and I would hold that the information requested, if given, is not usable in a criminal proceeding. Such a holding would make the administrative hearing more meaningful and open because the driver would be more likely to tell his complete story, thus resulting in fewer court-contested cases.

WAHL, J. (concurring specially).

I join the concurrence of Justice Yetka.

APPENDIX B.

MINNESOTA DRUNK DRIVING LAWS, 1982

Subd. 52. **Wrecker.** "Wrecker" means a motor vehicle having a gross vehicle weight of 8,000 pounds or more, equipped with a crane and winch and further equipped to control the movement of the towed vehicle.

Subd. 53. **Bug deflector.** "Bug deflector" means a non-illuminated, transparent device attached to the hood of a motor vehicle so as to deflect the air stream.

Subd. 54. **Controlled access highway.** "Controlled access highway" means, in this chapter, every highway, street, or roadway in respect to which the right of access of the owners or occupants of abutting lands and other persons has been acquired and to which the owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only and in such manner as may be determined by the public authority having jurisdiction over such highway, street or roadway.

Subd. 55. **Implement of husbandry.** "Implement of husbandry" means every vehicle designed and adapted exclusively for agricultural, horticultural, or livestock-raising operations or for lifting or carrying an implement of husbandry and in either case not subject to registration if used upon the highways.

Subd. 56. **Stand or standing.** "Stand or standing" means the halting of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in receiving or discharging passengers.

Subd. 57. **Stop.** "Stop" means complete cessation from movement.

Subd. 58. **Stopping.** "Stopping" means any halting even momentarily of a vehicle, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic control sign or signal.

Subd. 59. **Urban district.** "Urban district" means the territory contiguous to and including any street which is built up with structures devoted to business, industry, or dwelling houses situated at intervals of less than 100 feet for a distance of a quarter of a mile or more.

Subd. 60. **Service vehicle.** "Service vehicle" means a motor vehicle owned and operated by a person, firm or corporation engaged in a business which includes the repairing or servicing of vehicles. The term also includes snow removal and road maintenance equipment not operated by or under contract to the state or a governmental subdivision.

Why Minnesota uses the term "alcohol concentration" instead of "blood alcohol concentration" in connection with tests of drivers. Law defines in terms of blood, breath or urine.

Subd. 61. **Alcohol concentration.** "Alcohol concentration" means
(a) the number of grams of alcohol per 100 milliliters of blood, or
(b) the number of grams of alcohol per 210 liters of breath, or
(c) the number of grams of alcohol per 67 milliliters of urine.

Subd. 62. **Bicycle lanes and ways.** The terms "bicycle lane" and "bicycle way" shall have the meanings ascribed to them in section 160.263.

History: *1937 c 464 s 1; Ex1937 c 38 s 1; 1939 c 430 s 1; 1947 c 204 s 1; 1947 c 428 s 1-4; 1949 c 90 s 1; 1949 c 247 s 1; 1951 c 114 s 1; 1951 c 331 s 1; 1953 c 289 s 1; 1953 c 303 s 1; 1955 c 536 s 1; 1959 c 521 s 1; 1961 c 42 s 1; 1963 c 357 s 1; 1971 c 164 s 1,2; 1973 c 127 s 1; 1974 c 379 s 1; 1975 c 29 s 2; 1976 c 104 s 1; 1976 c 166 s 7; 1977 c 214 s 6,7; 1978 c 494 s 1; 1978 c 613 s 4; 1978 c 727 s 1; 1978 c 739 s 1-5; 1981 c 321 s 2; 1982 c 468 s 1,2 (2720-151)*

169.02 SCOPE.

Subdivision 1. The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways, and upon highways, streets, private roads, and roadways situated on property owned, leased, or occupied by the regents of the University of Minnesota, or the University of Minnesota, except:

or witnesses, shall, within ten days after the date of such accident, forward a written report of such accident to the commissioner of public safety.

Subd. 9. **Accident report forms.** The department of public safety shall prepare, and upon request supply to police departments, coroners, sheriffs, garages and other suitable agencies or individuals, forms for accident reports required hereunder, appropriate with respect to the persons required to make such reports and the purposes to be served. The written reports to be made by persons involved in accidents and by investigating officers shall call for sufficiently detailed information to disclose with reference to a traffic accident the causes, conditions then existing, and the persons and vehicles involved.

Subd. 10. **Use of form required.** Every accident report required to be made in writing shall be made on the appropriate form approved by the department of public safety and contain all of the information required therein unless not available.

Subd. 11. **Coroner to report death.** Every coroner or other official performing like functions shall report in writing to the department of public safety the death of any person within his jurisdiction as the result of an accident involving a motor vehicle and the circumstances of the accident. The report shall be made within 15 days after the death.

BAC of drivers or adult pedestrians killed

In the case of drivers killed in motor vehicle accidents and of the death of pedestrians 16 years of age or older, who die within four hours after accident, the coroner or other official performing like functions shall examine the body and shall make tests as are necessary to determine the presence and percentage concentration of alcohol, and drugs if feasible, in the blood of the victim. This information shall be included in each report submitted pursuant to the provisions of this subdivision and shall be tabulated on a monthly basis by the department of public safety. This information may be used only for statistical purposes which do not reveal the identity of the deceased.

Subd. 12. **Garages to report.** The person in charge of any garage or repair shop to which is brought any motor vehicle which shows evidence of having been struck by any bullet shall immediately report to the local police or sheriff and to the commissioner of public safety within 24 hours after such motor vehicle is received, giving the engine number, registration number and the name and address of the owner or operator of such vehicle.

Subd. 13. **Accident reports confidential.** All written reports and supplemental reports required under this section to be provided to the department of public safety shall be without prejudice to the individual so reporting and shall be for the confidential use of the department of public safety and other appropriate state, federal, county and municipal governmental agencies for accident analysis purposes, except that the department of public safety or any law enforcement department of any municipality or county in this state shall, upon written request of any person involved in an accident or upon written request of the representative of his or her estate, surviving spouse, or one or more surviving next of kin, or a trustee appointed pursuant to section 573.02, disclose to the requester, his or her legal counsel or a representative of his or her insurer any information contained therein except the parties' version of the accident as set out in the written report filed by the parties or may disclose identity of a person involved in an accident when the identity is not otherwise known or when the person denies presence at the accident. No report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department of public safety shall furnish upon the demand of any person who has, or claims to have, made a report, or, upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department of public safety solely to prove a compliance or a failure to comply with the requirements that the report be made

to the department of public safety. Disclosing any information contained in any accident report, except as provided herein, is unlawful and a misdemeanor.

Nothing herein shall be construed to prevent any person who has made a report pursuant to this chapter from providing information to any persons involved in an accident or their representatives or from testifying in any trial, civil or criminal, arising out of an accident, as to facts within the person's knowledge. It is intended by this subdivision to render privileged the reports required but it is not intended to prohibit proof of the facts to which the reports relate. Legally qualified newspaper publications and licensed radio and television stations shall upon request to a law enforcement agency be given an oral statement covering only the time and place of the accident, the names and addresses of the parties involved, and a general statement as to how the accident happened without attempting to fix liability upon anyone, but said legally qualified newspaper publications and licensed radio and television stations shall not be given access to the hereinbefore mentioned confidential reports, nor shall any such statements or information so orally given be used as evidence in any court proceeding, but shall merely be used for the purpose of a proper publication or broadcast of the news.

When these reports are released for accident analysis purposes the identity of any involved person shall not be revealed. Data contained in these reports shall only be used for accident analysis purposes, except as otherwise provided by this subdivision. Accident reports and data contained therein which may be in the possession or control of departments or agencies other than the department of public safety shall not be discoverable under any provision of law or rule of court.

The department may charge authorized persons a $5 fee for a copy of an accident report.

Subd. 14. **Penalty.** Except as provided in subdivision 3, clause (b), any person failing to comply with any of the requirements of this section, under the circumstances specified, shall be guilty of a misdemeanor.

History: *1937 c 464 s 18-23; 1939 c 430 s 2,3; 1941 c 439; 1943 c 548 s 1; 1945 c 207 s 1; 1947 c 114 s 1; 1947 c 428 s 7-10; 1959 c 679 s 1; 1963 c 280 s 1; 1963 c 634 s 1; 1965 c 815 s 1; Ex1967 c 3 s 1; 1971 c 491 s 5-11; Ex1971 c 27 s 3-5; 1974 c 22 s 1-4; 1974 c 343 s 1; 1977 c 53 s 1; 1978 c 461 s 1,2; 1978 c 679 s 1; 1980 c 498 s 2,3; 1981 c 37 s 2; 1981 c 357 s 60; 1982 c 545 s 22; 1982 c 617 s 6 (2720-168, 2720-169, 2720-170, 2720-171, 2720-172, 2720-173)*

169.10 STATISTICAL INFORMATION.

The department of public safety shall tabulate and may analyze all accident reports and shall publish annually or at more frequent intervals statistical information based thereon as to the number and circumstances of traffic accidents.

History: *1937 c 464 s 24; 1971 c 491 s 12 (2720-174)*

169.11 CRIMINAL NEGLIGENCE.

The commissioner of public safety shall revoke the driver's license of any person convicted of the crime of criminal negligence in the operation of a vehicle resulting in the death of a human being.

History: *1937 c 464 s 25; 1963 c 753 art 2 s 1; 1969 c 1129 art 1 s 15,18; 1981 c 363 s 26 (2720-175)*

169.12 [Repealed, 1957 c 297 s 2]

Basic DWI law (MS 169.121) begins here.

169.121 MOTOR VEHICLE DRIVERS UNDER INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCE.

Subdivision 1. **Crime.** It is a misdemeanor for any person to drive, operate or be in physical control of any motor vehicle within this state:

(a) When the person is under the influence of alcohol;

(b) When the person is under the influence of a controlled substance;

(c) When the person is under the influence of a combination of any two or more of the elements named in clauses (a) and (b); or

(d) When the person's alcohol concentration is 0.10 or more.

Illegal per se to drive with alcohol concentration of .10 or more.

The provisions of this subdivision apply, but are not limited in application, to any person who drives, operates, or is in physical control of any motor vehicle in the manner prohibited by this subdivision upon the ice of any lake, stream, or river, including but not limited to the ice of any boundary water.

When an accident has occurred, a peace officer may lawfully arrest a person for violation of this section without a warrant upon probable cause, without regard to whether the violation was committed in the officer's presence.

Subd. 2. **Evidence.** Upon the trial of any prosecution arising out of acts alleged to have been committed by any person arrested for driving, operating, or being in physical control of a motor vehicle in violation of subdivision 1, the court may admit evidence of the amount of alcohol or a controlled substance in the person's blood, breath, or urine as shown by a medical or chemical analysis thereof, if the test is taken voluntarily or pursuant to section 169.123.

For the purposes of this subdivision:

(a) evidence that there was at the time an alcohol concentration of 0.05 or less is prima facie evidence that the person was not under the influence of alcohol;

Relevant evidence between .05 and .10.

(b) evidence that there was at the time an alcohol concentration of more than 0.05 and less than 0.10 is relevant evidence in indicating whether or not the person was under the influence of alcohol.

Evidence of no test is admissible.

Evidence of the absence of tests is admissible in a prosecution under this section without any comment and with a jury instruction, where applicable, that there shall be no speculation as to the reason for the absence and that no inference is to be drawn from the absence.

Test within two hours shows alcohol concentration at time of violation.

For purposes of this section and section 169.123, the result of an evidentiary test administered within two hours of the alleged violation is deemed to be the alcohol concentration at the time of the violation.

The foregoing provisions do not limit the introduction of any other competent evidence bearing upon the question whether or not the person was under the influence of alcohol or a controlled substance, including tests obtained more than two hours after the alleged violation.

Subd. 3. **Criminal penalties.** A person who violates this section or an ordinance in conformity therewith is guilty of a misdemeanor.

(Misdemeanor = up to $500 fine or up to 90 days jail or both.

Gross misdemeanor = up to $1,000 fine or up to one year jail or both.)

The following persons are guilty of a gross misdemeanor:

(a) A person who violates this section or an ordinance in conformity therewith within five years of a prior conviction under this section or an ordinance in conformity therewith; and

(b) A person who violates this section or an ordinance in conformity therewith within ten years of two or more prior convictions under this section or an ordinance in conformity therewith.

The attorney in the jurisdiction in which the violation occurred who is responsible for prosecution of misdemeanor violations of this section shall also be responsible for prosecution of gross misdemeanor violations of this section.

Subd. 4. **Penalties.** A person convicted of violating this section shall have his driver's license or operating privileges revoked by the commissioner of public safety as follows:

(a) First offense: not less than 30 days;

Driver license revocations are by Commissioner of Public Safety and are meshed with administrative revocations under MS 169.123 for either refusing or failing test with .10 or more. See below.

(b) Second offense in less than five years: not less than 90 days and until the court has certified that treatment or rehabilitation has been successfully completed where prescribed in accordance with section 169.126;

(c) Third offense in less than five years: not less than one year, together with denial under section 171.04, clause (8), until rehabilitation is established in accordance with standards established by the commissioner;

(d) Fourth or subsequent offense on the record: not less than two years, together with denial under section 171.04, clause (8), until rehabilitation is established in accordance with standards established by the commissioner.

Whenever department records show that the violation involved personal injury or death to any person, not less than 90 additional days shall be added to the base periods provided above.

Any person whose license has been revoked pursuant to section 169.123 as the result of the same incident is not subject to the mandatory revocation provisions of clause (a) or (b).

Court may not stay driver license revocation; must report other stays to the Commissioner of Public Safety (driver license authority).

Subd. 5. The court may stay imposition or execution of any sentence authorized by subdivision 3 or 4, except the revocation of the driver's license, on the condition that the convicted person submit to treatment by a public or private institution or a facility providing rehabilitation for chemical dependency licensed by the department of public welfare. A stay of imposition or execution shall be in the manner provided in section 609.135. The court shall report to the commissioner of public safety any stay of imposition or execution of sentence granted under the provisions of this section.

Grounds to require preliminary breath test (PBT).

Use of PBT; further tests.

Subd. 6. **Preliminary screening test.** When a peace officer has reason to believe from the manner in which a person is driving, operating, controlling, or acting upon departure from a motor vehicle, or has driven, operated, or controlled a motor vehicle, that the driver may be violating or has violated subdivision 1, he may require the driver to provide a sample of his breath for a preliminary screening test using a device approved by the commissioner of public safety for this purpose. The results of this preliminary screening test shall be used for the purpose of deciding whether an arrest should be made and whether to require the chemical tests authorized in section 169.123, but shall not be used in any court action except to prove that a chemical test was properly required of a person pursuant to section 169.123, subdivision 2. Following the screening test additional tests may be required of the driver pursuant to the provisions of section 169.123.

The driver who refuses to furnish a sample of his breath is subject to the provisions of section 169.123 unless, in compliance with section 169.123, he submits to a blood, breath or urine test to determine the presence of alcohol or a controlled substance.

Court to notify of revocation and take license (if police officer has not already done so under MS 169.123; see below.)

Subd. 7. On behalf of the commissioner of public safety a court shall serve notice of revocation on a person convicted of a violation of this section. The court shall take the license or permit of the driver, if any, or obtain a sworn affidavit stating that the license or permit cannot be produced, and send it to the commissioner with a record of the conviction and issue a temporary license effective only for the period during which an appeal from the conviction may be taken. No person who is without driving privileges at the time shall be issued a temporary license and any temporary license issued shall bear the same restrictions and limitations as the driver's license or permit for which it is exchanged.

The commissioner shall issue additional temporary licenses until the final determination of whether there shall be a revocation under this section.

Test result of .07 or more to be reported and recorded on driver record. If two such within two years, alcohol problem assessment (APA) may be required.

Subd. 8. **Alcohol assessment.** When the evidentiary test shows an alcohol concentration of 0.07 or more, that result shall be reported to the commissioner of public safety. The commissioner shall record that fact on the driver's record.

When the driver's record shows a second or subsequent report of an alcohol concentration of 0.07 or more within two years of a recorded report, the commissioner may require that the driver have an alcohol problem assessment meeting the commissioner's requirements. The assessment shall be at the driver's expense. In no event shall the commissioner deny the license of a person who refuses to take the assessment or to undertake treatment, if treatment is indicated by the assessment, for longer than 90 days. If an assessment is made pursuant to this section, the commissioner may waive the assessment required by section 169.126.

Allows more flexibility in what is done with arrested person's car. Need not baby-sit car while waiting for tow truck. Can speed up arrest process.

Subd. 9. **Immunity from liability.** (a) The state or political subdivision by which a peace officer making an arrest for violation of this section is employed shall have immunity from any liability, civil or criminal, for the care or custody of the motor vehicle being driven by, operated by, or in the physical control of the person arrested if the peace officer acts in good faith and exercises due care.

(b) For purposes of this subdivision, "political subdivision" means a county, statutory or home rule charter city, or town.

History: *1957 c 297 s 1; 1961 c 454 s 9; 1967 c 283 s 1; 1967 c 569 s 1; 1969 c 744 s 1; 1971 c 244 s 1; 1971 c 893 s 1,2; Ex1971 c 27 s 6; 1973 c 421 s 1; 1973 c 494 s 8; 1975 c 370 s 1; 1976 c 298 s 2; 1976 c 341 s 1; 1978 c 727 s 2; 1981 c 9 s 1; 1982 c 423 s 2-8*

169.122 OPEN BOTTLE LAW; PENALTY.

Illegal to drink in car or have open container.

Subdivision 1. No person shall drink or consume intoxicating liquors or nonintoxicating malt liquors in any motor vehicle when such vehicle is upon a public highway.

Subd. 2. No person shall have in his possession on his person while in a private motor vehicle upon a public highway, any bottle or receptacle containing intoxicating liquor or nonintoxicating malt liquor which has been opened, or the seal broken, or the contents of which have been partially removed.

Subd. 3. It shall be unlawful for the owner of any private motor vehicle or the driver, if the owner be not then present in the motor vehicle, to keep or allow to be kept in a motor vehicle when such vehicle is upon the public highway any bottle or receptacle containing intoxicating liquors or nonintoxicating malt liquors which has been opened, or the seal broken, or the contents of which have been partially removed except when such bottle or receptacle shall be kept in the trunk of the motor vehicle when such vehicle is equipped with a trunk, or kept in some other area of the vehicle not normally occupied by the driver or passengers, if the motor vehicle is not equipped with a trunk. A utility compartment or glove compartment shall be deemed to be within the area occupied by the driver and passengers.

Subd. 4. Whoever violates the provisions of subdivisions 1 to 3 is guilty of a misdemeanor.

History: *1959 c 255 s 1-4*

169.123 CHEMICAL TESTS FOR INTOXICATION.

This section used to be called the "Implied Consent Law" but it has more than that in it now. It is the basis for Minnesota's prompt administrative revocation for either refusing the test or failing it with .10 or more.

Subdivision 1. **Peace officer defined.** For purposes of this section and section 169.121, the term peace officer means a state patrol officer, university of Minnesota peace officer, a constable as defined in section 367.40, subdivision 3, or police officer of any municipality, including towns having powers under section 368.01, or county.

Subd. 2. **Implied consent; conditions; election as to type of test.** (a) Any person who drives, operates, or is in physical control of a motor vehicle within this state consents, subject to the provisions of this section and section 169.121, to a chemical test of his blood, breath, or urine for the purpose of determining the

Grounds for requiring test, including being involved in an accident.

presence of alcohol or a controlled substance. The test shall be administered at the direction of a peace officer. The test may be required of a person when an officer has reasonable and probable grounds to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169.121 and one of the following conditions exist: (1) the person has been lawfully placed under arrest for violation of section 169.121, or an ordinance in conformity therewith; or (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death; or (3) the person has refused to take the screening test provided for by section 169.121, subdivision 6; or (4) the screening test was administered and recorded an alcohol concentration of 0.10 or more. No action may be taken against the person for declining to take a direct blood test, if offered, unless an alternative test was offered.

Officer choice of test but direct blood test may be refused and alternative breath or urine test must be offered.

(b) At the time a chemical test specimen is requested, the person shall be informed:

At time of test, person must be informed:

(1) that if testing is refused, the person's right to drive will be revoked for a period of six months; and

(2) that if a test is taken and the results indicate that the person is under the influence of alcohol or a controlled substance, the person will be subject to criminal penalties and the person's right to drive may be revoked for a period of 90 days; and

(3) that the person has a right to consult with an attorney but that this right is limited to the extent that it cannot unreasonably delay administration of the test or the person will be deemed to have refused the test; and

(4) that after submitting to testing, the person has the right to have additional tests made by a person of his own choosing.

Additional urine test (drugs) may be required.

Subd. 2a. **Requirement of urine test.** Notwithstanding subdivision 2, if there are reasonable and probable grounds to believe there is impairment by a controlled substance which is not subject to testing by a blood or breath test, a urine test may be required even after a blood or breath test has been administered.

Subd. 3. **Manner of making test; additional tests.** Only a physician, medical technician, physician's trained mobile intensive care paramedic, registered nurse, medical technologist or laboratory assistant acting at the request of a peace officer may withdraw blood for the purpose of determining the presence of alcohol or controlled substance. This limitation does not apply to the taking of a breath or urine specimen. The person tested has the right to have a person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test specimen on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state. The failure or inability to obtain an additional test or tests by a person shall not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer. The physician, medical technician, physician's trained mobile intensive care paramedic, medical technologist, laboratory assistant or registered nurse drawing blood at the request of a peace officer for the purpose of determining alcohol concentration shall in no manner be liable in any civil or criminal action except for negligence in drawing the blood. The person administering a test at the request and direction of a peace officer shall be fully trained in the administration of the tests pursuant to standards promulgated by rule by the commissioner of public safety.

Subd. 4. **Refusal, consent to permit test; revocation of license.** If a person refuses to permit chemical testing, none shall be given, but the peace officer shall report the refusal to the commissioner of public safety and the authority having responsibility for prosecution of misdemeanor offenses for the jurisdiction in

Refusal: Officer takes license, acts as agent for Commissioner in giving notice of revocation; reports to Commissioner and prosecutor.

which the acts occurred. If a person submits to chemical testing and the test results indicate an alcohol concentration of 0.10 or more, the results of the test shall be reported to the commissioner of public safety and to the authority having responsibility for prosecution of misdemeanor offenses for the jurisdiction in which the acts occurred.

Test results in .10 or more: Officer takes license, acts as agent for Commissioner in giving notice of revocation; reports to Commissioner and prosecutor. (Same as for refusal.)

Upon certification by the peace officer that there existed reasonable and probable grounds to believe the person had been driving, operating, or in physical control of a motor vehicle while under the influence of alcohol or a controlled substance and that the person refused to submit to chemical testing, the commissioner of public safety shall revoke the person's license or permit to drive, or his nonresident operating privilege, for a period of six months. Upon certification by the peace officer that there existed reasonable and probable grounds to believe the person had been driving, operating or in physical control of a motor vehicle while under the influence of alcohol or a controlled substance and that the person submitted to chemical testing and the test results indicate an alcohol concentration of 0.10 or more, the commissioner of public safety shall revoke the person's license or permit to drive, or his nonresident operating privilege, for a period of 90 days.

Upon certification from officer, Commissioner revokes for six months for refusing; 90 days for failing.

If the person is a resident without a license or permit to operate a motor vehicle in this state, the commissioner of public safety shall deny to the person the issuance of a license or permit for the same period after the date of the alleged violation as provided herein for revocation, subject to review as hereinafter provided.

Subd. 5. **Notice of revocation or determination to deny; request for hearing.** A revocation under subdivision 4 becomes effective at the time the commissioner of public safety or a peace officer acting on his behalf notifies the person of the intention to revoke and of revocation. The notice shall advise the person of the right to obtain administrative and judicial review as provided in this section. If mailed, the notice and order of revocation is deemed received three days after mailing to the last known address of the person.

As described above, officer acts as agent for Commissioner serving notice of revocation and takes license. Officer issues temporary license good for only 7 days.

Subd. 5a. **Peace officer agent for notice of revocation.** On behalf of the commissioner of public safety a peace officer offering a chemical test or directing the administration of a chemical test shall serve immediate notice of intention to revoke and of revocation on a person who refuses to permit chemical testing or on a person who submits to a chemical test the results of which indicate an alcohol concentration of 0.10 or more. The officer shall take the license or permit of the driver, if any, and issue a temporary license effective only for 7 days. The peace officer shall send the person's driver's license to the commissioner of public safety along with the certificate required by subdivision 4.

Person may request an administrative review.

Subd. 5b. **Administrative review.** At any time during a period of revocation imposed under this section a person may request in writing a review of the order of revocation by the commissioner of public safety. Upon receiving a request the commissioner or his designee shall review the order, the evidence upon which the order was based, and any other material information brought to the attention of the commissioner, and determine whether sufficient cause exists to sustain the order. Within 15 days of receiving the request the commissioner shall report in writing the results of his review. The review provided in this subdivision is not subject to the contested case provisions of the administrative procedure act in sections 14.01 to 14.70.

The availability of administrative review for an order of revocation shall have no effect upon the availability of judicial review under this section.

Person may also petition for judicial review.

Subd. 5c. **Petition for judicial review.** Within 30 days following receipt of a notice and order of revocation pursuant to this section, a person may petition the court for review. The petition shall be filed with the clerk of county or municipal court in the county where the alleged offense occurred, together with proof of

service of a copy on the commissioner of public safety, and accompanied by the standard filing fee for civil actions. No responsive pleading shall be required of the commissioner of public safety, and no court fees shall be charged for his appearance in the matter.

The petition shall be captioned in the name of the person making the petition as petitioner and the commissioner of public safety as respondent. The petition shall state with specificity the grounds upon which the petitioner seeks rescission of the order of revocation or denial.

Filing of petition does not stay the revocation.

The filing of the petition shall not stay the revocation or denial. The reviewing court may order a stay of the balance of the revocation if the hearing has not been conducted within 60 days after filing of the petition upon terms the court deems proper. Judicial reviews shall be conducted according to the rules of civil procedure.

Subd. 6. **Hearing.** A hearing under this section shall be before a municipal or county judge, in any county in the judicial district where the alleged offense occurred. The hearing shall be to the court and may be conducted at the same time and in the same manner as hearings upon pre-trial motions in the criminal prosecution under section 169.121, if any. The hearing shall be recorded. The commissioner of public safety may appear through his own attorney or, by agreement with the jurisdiction involved, through the prosecuting authority for that jurisdiction.

Requirements for hearing, when held, procedures to expedite.

The hearing shall be held at the earliest practicable date, and in any event no later than 60 days following the filing of the petition for review. The judicial district administrator shall establish procedures to ensure efficient compliance with the provisions of this subdivision. To accomplish this, the administrator may, whenever possible, consolidate and transfer review hearings among the county courts within the judicial district.

Scope of hearing.

The scope of the hearing shall be limited to the issues of:

(1) whether the peace officer had reasonable and probable grounds to believe the person was driving, operating, or in physical control of a motor vehicle while under the influence of alcohol or a controlled substance, and whether the person was lawfully placed under arrest for violation of section 169.121, or the person was involved in a motor vehicle accident or collision resulting in property damage, personal injury or death, or the person refused to take a screening test provided for by section 169.121, subdivision 6, or the screening test was administered and recorded an alcohol concentration of 0.10 or more; and

(2) whether at the time of the request for the test the peace officer informed the person of his rights and the consequences of taking or refusing the test as required by subdivision 2; and

(3) either (a) whether the person refused to permit the test, or (b) whether a test was taken and the test results indicated an alcohol concentration of 0.10 or more at the time of testing, and whether the testing method used was valid and reliable, and whether the test results were accurately evaluated.

It shall be an affirmative defense for the petitioner to prove that, at the time of the refusal, his refusal to permit the test was based upon reasonable grounds.

Certified or otherwise authenticated copies of laboratory or medical personnel reports, records, documents, licenses and certificates shall be admissible as substantive evidence.

The court shall order either that the revocation be rescinded or sustained and forward the order to the commissioner of public safety. The court shall file its order within 14 days following the hearing. If the revocation is sustained, the court shall also forward the person's driver's license or permit to the commissioner of public safety for his further action if the license or permit is not already in the commissioner's possession.

Subd. 7. **Review by district court.** Any party aggrieved by the decision of the reviewing court may appeal the decision to the district court as provided in sections 484.63 and 487.39.

Subd. 8. **Notice of action to other states.** When it has been finally determined that a nonresident's privilege to operate a motor vehicle in this state has been revoked or denied, the commissioner of public safety shall give information in writing of the action taken to the official in charge of traffic control or public safety of the state of the person's residence and of any state in which he has a license.

Limited license.

Subd. 9. **Limited license.** In any case in which a license has been revoked under this section, the commissioner may issue a limited license to the driver. The commissioner in issuing a limited license may impose the conditions and limitations which in his judgment are necessary to the interests of the public safety and welfare, including re-examination of the driver's qualifications, attendance at a driver improvement clinic, or attendance at counseling sessions. The license may be limited to the operation of particular vehicles and to particular classes and time of operation. The limited license issued by the commissioner shall clearly indicate the limitations imposed and the driver operating under a limited license shall have the license in his possession at all times when operating as a driver. In determining whether to issue a limited license, the commissioner shall consider the number and the seriousness of prior convictions and the entire driving record of the driver.

Subd. 10. **Termination of revocation period.** If the commissioner receives notice of the driver's attendance at a driver improvement clinic, attendance at counseling sessions, or participation in treatment for an alcohol problem the commissioner may, 30 days prior to the time the revocation period would otherwise expire, terminate the revocation period. The commissioner shall not terminate the revocation period under this subdivision for a driver who has had a license revoked under section 169.121 or this section for another incident during the preceding three year period.

History: *1961 c 454 s 1-8; 1967 c 284 s 1-6; 1969 c 620 s 1; 1969 c 742 s 1; 1969 c 1129 art 1 s 18; 1971 c 893 s 3; Ex1971 c 36 s 1; 1973 c 35 s 36; 1973 c 123 art 5 s 7; 1973 c 555 s 1; 1974 c 406 s 35-38; 1977 c 82 s 2; 1978 c 727 s 3; 1980 c 395 s 1; 1980 c 483 s 1; 1981 c 37 s 2; 1982 c 423 s 9; 1982 c 424 s 130*

169.1231 DRIVING WHILE UNDER THE INFLUENCE; DETOXIFICATION.

THIS SECTION DOES NOT TAKE EFFECT UNTIL JULY 1, 1983. The current (Jan.-May, 1983) session of the Legislature is considering significant changes or repeal.

Subdivision 1. **Grounds for taking driver to detoxification center or alcohol drug rehabilitation center.** Whenever a peace officer administers a preliminary screening test to a person and the test results indicate a blood alcohol content of .10 or more, the peace officer shall either take the person to a detoxification center or alcohol drug rehabilitation center established pursuant to section 254A.08 or arrange for another authorized person to do so. A peace officer shall also take, or arrange for another authorized person to take to a detoxification center or alcohol drug rehabilitation center established pursuant to section 254A.08, any person who refuses to take a preliminary screening test if the officer has reasonable and probable grounds to believe that the person was driving, operating, or in physical control of a motor vehicle in violation of section 169.121 or an ordinance in conformity therewith, and the person reasonably appears to the officer to be too intoxicated to resume driving safely.

Subd. 2. **Detoxification center or alcohol drug rehabilitation center; release procedure.** The detoxification center or alcohol drug rehabilitation center to which a person is transported pursuant to subdivision 1 shall hold the person until he is completely sober, unless another responsible person appears and requests that the intoxicated person be released for the purpose of taking him home or to a

medical facility. The person requesting release of the intoxicated person shall assure that the intoxicated person does not drive until completely sober; an intentional violation of this assurance is a misdemeanor.

Subd. 3. **Intoxicated person to pay costs.** A person taken to a detoxification center or alcohol drug rehabilitation center pursuant to this section shall pay the detoxification center or alcohol drug rehabilitation center for the cost of his stay, transportation, treatment, and other expenses in the detoxification center or alcohol drug rehabilitation center, if he does not meet the standards of indigency necessary to qualify for the services of the public defender and does not have health insurance coverage which would pay for this cost.

History: *1982 c 423 s 10*

NOTE: This section is effective July 1, 1983. See Laws 1982, Chapter 423, Section 15.

169.124 ALCOHOL SAFETY PROGRAM.

Subdivision 1. The county board of every county having a population of more than 10,000 shall and the county board of every county having a population of less than 10,000 may establish an alcohol safety program designed to provide alcohol problem assessment and evaluation of persons convicted of one of the offenses enumerated in section 169.126, subdivision 1.

Alcohol Problem Assessment (APA), who may conduct.

Subd. 2. The alcohol problem assessment shall be conducted under the direction of the court and by such persons or agencies as the court deems qualified to provide the alcohol problem assessment and assessment report as described in section 169.126. The alcohol problem assessment may be conducted by court services probation officers having the required knowledge and skills in the assessment of alcohol problems, by alcoholism counselors, by persons conducting court sponsored driver improvement clinics if in the judgment of the court such persons have the required knowledge and skills in the assessment of alcohol problems, by appropriate staff members of public or private alcohol treatment programs and agencies or mental health clinics, by court approved volunteer workers such as members of Alcoholics Anonymous, or by such other qualified persons as the court may direct. The commissioner of public safety shall provide the courts with information and assistance in establishing alcohol problem assessment programs suited to the needs of the area served by each court. The commissioner shall consult with the alcohol and other drug abuse section in the department of public welfare and with local community mental health boards in providing such information and assistance to the courts. The commissioner of public safety shall promulgate rules and standards, consistent with this subdivision, for reimbursement under the provisions of subdivision 3. The promulgation of such rules and standards shall not be subject to chapter 14.

State reimburse partial cost.

Subd. 3. The cost of alcohol problem assessment outlined in this section shall be borne by the county. Upon application by the county to the commissioner of public safety, the commissioner shall reimburse the county up to 50 percent of the cost of each alcohol problem assessment not to exceed $25 in each case. Payments shall be made annually and prorated if insufficient funds are appropriated.

History: *1976 c 298 s 1; 1978 c 727 s 4; 1982 c 424 s 130*

169.125 COUNTY COOPERATION.

County boards may enter into an agreement to establish a regional alcohol problem assessment alcohol safety program. County boards may contract with other counties and agencies for alcohol problem assessment services.

History: *1976 c 298 s 3; 1978 c 727 s 5*

APA conducted if person is convicted of DWI or another charge arising out of the DWI arrest

What APA report shall contain

169.126 ALCOHOL PROBLEM ASSESSMENT.

Subdivision 1. An alcohol problem assessment shall be conducted in counties of more than 10,000 population and an assessment report submitted to the court by the county agency administering the alcohol safety counseling program when:

(a) The defendant is convicted of an offense described in section 169.121; or

(b) The defendant is arrested for committing an offense described in section 169.121, is not convicted therefor, but is convicted of another offense arising out of the circumstances surrounding such arrest.

Subd. 2. The assessment report shall contain an evaluation of the convicted defendant concerning his prior traffic record, characteristics and history of alcohol problems, and amenability to rehabilitation through the alcohol safety program. The assessment report shall include a recommendation as to a treatment or rehabilitation program for the defendant. The assessment report shall be classified as private data on individuals as defined in section 13.02, subdivision 12.

Subd. 3. The assessment report required by this section shall be prepared by a person knowledgeable in diagnosis of chemical dependency.

Subd. 4. The court shall give due consideration to the agency's assessment report.

Subd. 5. Whenever a person is convicted of a second or subsequent offense described in subdivision 1 and the court is either provided with an appropriate treatment or rehabilitation recommendation from sources other than the alcohol problem assessment provided for in this section, or has sufficient knowledge both of the person's need for treatment and an appropriate treatment or rehabilitation plan, and the court finds that requiring an alcohol problem assessment would not substantially aid the court in sentencing, such an alcohol problem assessment need not be conducted.

Subd. 6. This section shall not apply to persons who are not residents of the state of Minnesota at the time of the offense and at the time of the alcohol problem assessment.

History: *1976 c 298 s 4; 1978 c 727 s 6; 1981 c 311 s 39; 1982 c 545 s 24*

Conditions for reinstatement of a revoked license (not automatic upon completion of time period.)

169.1261 REINSTATEMENT OF DRIVING PRIVILEGES; NOTICE.

Upon expiration of any period of revocation under section 169.121 or 169.123, the commissioner of public safety shall notify the person of the terms upon which his driving privileges can be reinstated, which terms are: (1) successful completion of a driving test and proof of compliance with any terms of alcohol treatment or counseling previously prescribed, if any; and (2) any other requirements imposed by the commissioner and applicable to that particular case. The commissioner shall also notify the person that if driving is resumed without reinstatement of driving privileges, the person will be subject to criminal penalties.

History: *1978 c 727 s 7*

169.127 [Repealed, 1978 c 727 s 11]

169.128 RULES OF THE COMMISSIONER OF PUBLIC SAFETY.

The commissioner of public safety may promulgate rules to carry out the provisions of sections 169.121 and 169.123. The rules may include forms for notice of intention to revoke, which shall describe clearly the right to a hearing, the procedure for requesting a hearing, and the consequences of failure to request a hearing; forms for revocation and notice of reinstatement of driving privileges as provided in section 169.1261; and forms for temporary licenses.

Rules promulgated pursuant to this section are exempt from the administrative procedure act but, to the extent authorized by law to adopt rules, the commissioner may use the provisions of section 14.38, subdivisions 5 to 9.

History: *1978 c 727 s 8; 1981 c 253 s 26; 1982 c 424 s 130*

169.129 AGGRAVATED VIOLATIONS; PENALTY.

"Aggravated DWI" = driving drunk while license is revoked as a result of a previous alcohol related offense; a gross misdemeanor.

Any person who drives, operates, or is in physical control of a motor vehicle, the operation of which requires a driver's license, within this state in violation of section 169.121 or an ordinance in conformity therewith before his driver's license or driver's privilege has been reinstated following its cancellation, suspension or revocation (1) because he drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol or a controlled substance or while he had an alcohol concentration of 0.10 or more or (2) because he refused to take a test which determines the presence of alcohol or a controlled substance when requested to do so by a proper authority, is guilty of a gross misdemeanor. Jurisdiction over prosecutions under this section is in the district court.

History: *1978 c 727 s 9*

169.13 RECKLESS OR CARELESS DRIVING.

Subdivision 1. **Reckless driving.** Any person who drives any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving and such reckless driving is a misdemeanor.

Subd. 2. **Careless driving.** Any person who shall operate or halt any vehicle upon any street or highway carelessly or heedlessly in disregard of the rights or the safety of others, is guilty of a misdemeanor.

Subd. 3. **Application.** The provisions of this section apply, but are not limited in application, to any person who drives any vehicle in the manner prohibited by this section upon the ice of any lake, stream, or river, including but not limited to the ice of any boundary water.

History: *1937 c 464 s 27; 1939 c 430 s 5; 1947 c 428 s 11; 1967 c 569 s 2; Ex1971 c 27 s 7 (2720-177)*

169.131 [Repealed, 1976 c 103 s 1]

169.132 [Repealed, 1977 c 347 s 29]

169.14 SPEED RESTRICTIONS.

Subdivision 1. **Basic rule.** No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so restricted as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

Subd. 2. **Speed limits.** Where no special hazard exists the following speeds shall be lawful, but any speeds in excess of such limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful; except that the speed limit within any municipality shall be a maximum limit and any speed in excess thereof shall be unlawful:

(1) 30 miles per hour in an urban district;

(2) 65 miles per hour in other locations during the daytime;

(3) 55 miles per hour in such other locations during the nighttime.

APPENDIX C.

PREHEARING LICENSE REVOCATION OF DRINKING DRIVERS - THE MINNESOTA EXPERIENCE

Minnesota's Implied Consent statute, Minn. Stat. § 169.123, was first enacted in 1961.[1/] As with most statutes of this type, it provided that the operation of motor vehicles implied consent to testing to determine blood alcohol content where there was probable cause to believe that the suspect had committed a DWI violation; gave the driver the option (but not the "right") to refuse to submit to testing;[2/] and provided for a six-month revocation of driving privileges for those who refused to submit to testing.

Any driver could have a pre-revocation hearing by simply sending a letter requesting a hearing to the Commissioner of Public Safety within twenty days after receipt of the notice of proposed revocation.[3/] The statute provided a two-tiered judicial review: an evidentiary hearing before a municipal or county court

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1/ New York adopted the first such statute in 1953, and Illinois became the 50th state to adopt an implied consent statute in 1973.

2/ There are early cases from California, Arizona and other states indicating that such provisions do not confer a "right to refuse", but merely acquiesce in refusals rather than risk the violence that might accompany efforts to obtain blood tests by force from uncooperative drivers. While the result - no test - is the same under either theory, there does not seem to be any sound reason why such a "right" should be conceded unless the legislation is drafted in a manner which refers to it as "right". A refusal to recognize a "right" to refuse avoids philosophical problems with respect to imposing sanctions for exercising a "right", and should make it easier to overcome the "there-but-for-the-grace-of God-go I" syndrome in enforcing the sanctions provided in the statute.

3/ This was increased to thirty days in 1978.

judge, and, if the driver wished, a de novo trial on appeal to the district court, with a jury.[4/] There were no administrative hearings.

All litigation on implied consent cases is handled for the Commissioner by the Attorney General. This has the distinct advantage of having a unified prosecution policy in effect in all 87 counties of the state, and avoids having both DWI and Implied Consent cases dismissed as parts of plea bargains under the threat of facing lengthy trials in both proceedings.

In 1971, the legislature had amended the statutes to provide for a ".10% BAC per se" violation, the use of preliminary screening tests, and allowed use of the implied consent statute without arrests. One of the ASAP programs, in Hennepin County (Minneapolis and suburbs), resulted in a significant increase in arrests with which the courts were not adequately equipped to deal. This increased the pressure for plea bargaining to the point where about half of all DWI charges in the county were routinely reduced, usually to "Careless Driving", even where the driver had a long history of prior arrests.[5/]

4/ The unwieldy system is reportedly the result of a compromise between a governor who insisted on having an implied consent law without jury trials, and a state senator who insisted that jury trials be available at some point. The compromise satisfied nobody except perhaps attorneys for drinking drivers. County and Municipal Court judges often felt that they were doing nothing but presiding over depositions in which the driver found out the strengths of the Commissioner's case, then appealed and presented his defenses as a surprise before a jury. District Court judges felt that such minor matters were a complete waste of their time and beneath their considerable dignity.

5/ With about 50 prosecuting jurisdictions in the county, the vigor with which DWI cases were prosecuted varied considerably,

(Footnote Continued)

In 1976, one legislator, State Senator Alec Olson, a former congressman and later lieutenant governor, became outraged over the extent to which plea bargaining was nullifying the DWI statute, allowing repeat offenders to avoid official identification as such, and avoiding tne loss of driving privileges. He proposed that licenses be revoked where drivers did submit to testing which disclosed a blood alcohol content of .10% or more. The suggestion won quick approval, and was enacted as Minn. Stat. § 169.127 (1976).6/

Under this statute, where a test was taken under the implied consent statute and produced a reading of .10% or more BAC, the license would be revoked for 90 days. The time was set deliberately at half the revocation time required for a refusal in order to give drivers an incentive to submit to testing. An effort was made to have the hearings made purely administrative, with review by the courts on the record, but a last-minute compromise threw the cases back into the judicial system, where they were

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(Footnote Continued)

as did the skill with which it was done. Some municipalities contracted with private law firms to provide prosecutorial services, and it was not uncommon for the law firms to use that business to provide trial experience to their newest members.

6/ After some initial disbelief that anyone would suggest such an outlandish idea, the reaction came to be "why didn't anyone think of this sooner?" The idea of administratively revoking licenses where an officer believes that a person was intoxicated but refused testing was well-established. It is even more logical to revoke licenses where a test has confirmed the officer's belief.

handled in the same way as cases involving refusals, with the exception that the two-tier trial procedure and jury trials were eliminated. Instead, there was a court trial, with appeals on the record to the district court.

In 1978, the legislature again turned its attention to the DWI problem, and made several significant changes. One was to eliminate the "blood alcohol content" concept, and to replace it with "alcohol concentration."[7/] This eliminates arguments that blood tests are more reliable because they are "direct" tests of "blood alcohol content" rather than "indirect" tests: the breath and urine tests are now "direct" tests of the "alcohol concentration" of the substance tested.

In 1978, Minn. Stat. § 169.127, the "implied consent test revocation" statute, was repealed and its substance merged into Minn. Stat. § 169.123, so that all revocations, whether resulting from refusals or tests, were made under the implied consent statute. At the same time, the hearing procedure was reformed to eliminate jury trials and trial de novo on appeal to district court. All hearings were still to a court, but all appeals would be on the record only.

7/ Minn. Stat. § 169.01, Subd. 61 (1982) states: "Alcohol concentration" means (a) the number of grams of alcohol per 100 milliliters of blood, or (b) the number of grams of alcohol per 210 liters of breath, or (c) the number of grams of alcohol per 67 milliliters of urine."

The most significant change enacted in 1978 was the introduction of a procedure in which police officers act as agents of the Commissioner to serve immediate notice of proposed revocations. The statute authorized officers to seize the licenses of drivers who refused testing or who tested .10 alcohol concentration or more, and to issue them a form which served as (a) a notice of the proposed revocation, (b) a self-executing order of revocation if no request for hearing was filed within thirty days, and (c) a temporary license during that thirty-day period if the person held a valid license.8/ The original intent of this legislation was to reduce the frequency with which drivers were avoiding conviction for driving after revocation by merely denying that they had received the notice of revocation.

The 1976 provision for revoking licenses of those who tested .10% BAC or more had significantly increased the workload of the attorney general's office. Between 1973 and 1976, three attorneys were assigned to handle the entire caseload, which grew from about 250 pending cases in 1972 to over 600 pending cases in 1975, and reduced to about 460 in 1976 before the new statute took effect. The new statute involved the office with potentially all DWI cases instead of the 15%-20% who were refusing tests, and the backlog of pending cases reached 2000 by 1978. The number of

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8/ As a practical matter, the form could not normally be used in blood and urine test cases because of the delay before test results could be obtained. In those cases, the test result was (and still is) reported to the Commissioner, and notice of the proposed revocation is sent by mail.

attorneys assigned to the implied consent cases grew to seven "premanent" assignments, supplemented on an ad hoc basis by other staff members with implied consent experience.

The 1978 amendments caused a substantial increase in the caseload. By January 1, 1982, it had risen to 4800 pending cases. Meanwhile, budgetary problems had reduced the complement of attorneys assigned fulltime to implied consent cases to four, supplemented by new staff members, each of whom would serve 90 days with the division to get trial experience. This caused some decrease in the "batting average" as inexperienced attorneys lost cases which could have been won, and also tended to increase the number of cases in which it was necessary to make an actual court appearance.9/

One reason for this increase was a positive one: the increase in arrests. Being able to seize the license from the driver and issue him the notice of proposed revocation gave officers a sense that their work would have some clear result. Even if their prosecutor was prone to reduce or dismiss charges, the driver would face the revocation, and would immediately lose the convenience of carrying a license with his picture on it. It is probably the only additional form to which police officers have not voiced objection. On the contrary, between the enactment of the statute and its

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9/ Some attorneys made it a practice to wait until they got to court to see if they would be up against an experienced lawyer or a "rookie". If it was an experienced attorney, and if the officers showed up, they would waive the right to a hearing.

effective date, officers were calling up impatiently demanding to know when they could get those forms so that they could start seizing licenses from drivers.10/

Even though drivers could still postpone the revocation indefinitely with a hearing request, the loss of the plastic license had an immediate impact: it was not very satisfying to be unable to produce the plastic license when asked for identification when cashing checks. It might be impossible to rent a car. And the paper temporary license, if produced when stopped by another officer, could help resolve doubts against the driver and improve his chances of being arrested for another DWI offense instead of being let go with a warning.

Even though about 85% of hearing requests were later withdrawn prior to a hearing, it was necessary for the Commissioner's Attorney General's staffs to devote thousands of hours of time processing literally thousands of files each year. Through 1981, while resources dwindled, the caseload continued to rise at a rate of about 100 cases a month, as about 900 cases were closed out and replaced by a thousand new ones.

It became apparent that the greatest economy could be achieved by eliminating the vast array of cases that existed solely because hearing requests were filed to postpone revocations while

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10/ One officer told me that, in his view, the only improvement on that procedure would be to adopt a procedure under which the officer is issued an apple basket for the back seat of his squad car and drivers would be instructed to throw the license into the basket.

the defense tried to sort out the options. The simplest way to do this would be to borrow the pre-hearing revocation procedure used by Massachusetts and upheld by the United States Supreme Court in Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979).

Several other events then happened to come together to facilitate the statutory change. Both the Attorney General and the incumbent Governor, who were expected to be opponents in the 1982 gubernatorial race, wanted to do something decisive to attack the problem of the drinking driver. MADD got organized in Minnesota, as a part of the nation-wide tide of outrage. And Danny Roman Kramarczyk provided a horrible example to dramatize the need for action: while awaiting trial on two DWI (and two implied consent) cases, he killed two ladies, aged 89 and 85, who were helping each other home from church just before Christmas, while driving with an alcohol concentration in excess of .10.11/

By agreement between staffers for the Governor and Attorney General, the Governor proposed changes in the DWI statute itself, while the Attorney General proposed changes in the implied consent statute. Both proposals were largely draften by the Attorney Generals' staff. News media hoping to find controversy in the proposals were disappointed when the Governor and Attorney General had nothing but praise for each other's proposed bills. The local leadership of MADD had not yet committed itself to any other

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11/ The other two cases involved hitting a schoolbus which was unloading children, and an unsuccessful attempt to elude pursuing Minneapolis police officers.

program, and strongly supported both the Governor's DWI proposals and the Attorney General's implied consent bill. These two bills were combined into a single bill in the senate, and, with some additional proposals, emerged with a unanimous vote.

The chief DWI amendment was one which made a second offense within five years, or the third within ten years, a gross misdemeanor.12/ Longer revocations for repeated violations were also written into the statute, largely codifying administrative policies already in effect.

The primary change in the implied consent statute was the substitution of prehearing revocations for prerevocation hearings. Under the new statute, the officer seizes the license, as before, and serves notice of the impending revocation, as before. However, the revocation takes effect seven days later, instead of thirty days later, and cannot be delayed by seeking a hearing.13/

12/ Minnesota has not been a state with severe criminal penalties. The initial statute, in 1911, made the offense a misdemeanor. In 1927, all DWI's were made gross misdemeanors with mandatory jail time. To avoid jury trials, which were not needed on misdemeanors at that time, and to increase the likelihood of conviction, the offense was reclassified as a misdemeanor in 1937. The level of offense remained the same for subsequent offenses, although a minimum of ten days in jail was required for second offenses until 1978, when it was repealed because it was avoided or ignored so much that it was a joke in many counties. Until August 1983, the maximum penalty for misdemeanors was $500 and 90 days in jail; and for gross misdemeanors, $1,000 and a year in jail. The maximum fines have now been raised to $700 and $3000, respectively.

13/ The legislature was asked to have the revocation effective ten days later, and individual legislators wanted it effective immediately. The seven day compromise allows the driver time in which to undertake the steps needed to qualify for a limited license for work purposes. However, there is a practical

(Footnote Continued)

Because of budgetary limitations, no request was made to take all implied consent hearings out of the judicial system and have them made administrative. However, to satisfy the speedy review considered necessary to due process for a valid pre-hearing revocation system, a "two track" system for review has been set up.

"Administrative review" is provided under Minn. Stat. § 169.123, Subd. 5b (1982). This consists largely of having a Driver Safety Analyst review the police reports and whatever the driver has submitted. Since few drivers actually do have any legitimate defense, and almost none of them provide a real alternative account of the incident for consideration, few drivers prevail at this stage.[14/] Administrative review is available at any time the revocation is still in effect. It is available whether or not the driver seeks judicial review.

(Footnote Continued)

reason why it would be preferable to have a ten-day period: it allows more time for the officer's report to get mailed to the Commissioner and to have the revocation entered on the computer several days after it takes effect, increasing somewhat the credibility of the revocation order: if the driver is stopped by another officer, a license check may show him "valid" when he already knows he is under revocation.

14/ The majority of requests for administrative review seem to be purely boilerplate forms submitted by attorneys, and consist of nothing but an assertion that not a single element of a proper implied consent case exists. While they denounce the administrative review as a farce, they do not take it seriously enough to attempt to have it be anything else.

Judicial review is obtained under Minn. Stat. § 169.123, Subd. 5c (1982). The driver is required to file the petition for review with the court, paying the filing fees for ordinary civil actions. The petition must state "with specificity" the grounds on which the revocation is contested. The petition must be filed within thirty days after receipt of the notice and order of revocation form.15/

Another important change in the 1982 implied consent law was elimination of a case law requirement that blood tests be offered in all cases. The officer decides what test will be offered, and the driver either submits or faces the six-month revocation for refusing. The exception is that if the officer chooses the blood test, a driver may refuse that without facing revocation unless the officer then offers another test. In general, most drivers are offered the breath test only.16/

15/ This shifts the expense and work of filing cases from the Commissioner to the driver, saving tax dollars. The increased cost to the driver reduces somewhat the number of petitioners for judicial review: $38 in fees is more substantial than a 20 cent stamp. However, most petitions are boilerplate forms which allege that no element of an implied consent case exists.

16/ The only instruments used in Minnesota for evidentiary breath tests are the Model 900 and Model 900A Breathalyzers. They are about to be replaced with newer equipment using funds finally appropriated by the legislature in the wake of the RFI controversy. Requests have been made for newer equipment for years, but have always been the victims of budget cuts. One of the 1983 revenue measures raised the reinstatement fee charged after DWI and implied consent revocations from $30 to $100, part of which was earmarked to pay for the new instruments. It is anticipated that the first instrument will be in place by Thanksgiving, with all 185 Breathalyzers in the state to be replaced in about a year.

The 1982 implied consent procedures were immediately challenged as allegedly violating due process. The Minnesota Supreme Court rejected all attacks and found the statute constitutional in Heddan v. Dirkswager, 336 N.W.2d 54 (Minn. 1983).

In 1983, the Legislature paid additional attention to the drinking driver. Minnesota was one of the states in which, by court decision, evidence of refusals could not be admitted into evidence in DWI trials. Within hours of the United States Supreme Court's decision in South Dakota v. Neville, ___ U.S. ___, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983), the first of several bills was introduced to amend the statutes to provide for admission of such evidence. In State v. Willis, 332 N.W.2d 180 (Minn. 1983), in which the 1982 language authorizing juries to be informed that no test was involved or necessary was upheld, the Chief Justice and two other justices indicated that they felt it was time to overrule the prior decision, even though the precise issue was not before them, on the strength of Neville. The statute was amended effective August 1, 1983. It has not faced the immediate challenge which followed the 1982 amendments, possibly because would-be appellants can read the concurring opinions in Willis and discern the handwriting on the wall.

Minnesota's statutes relating to violations resulting in death were also strengthened. For years, Minnesota has had a "criminal negligence" law, making it a felony to operate a motor vehicle in a grossly negligent manner resulting in death. While alcohol involvement was not an element of the offense, it was a rare case that did not involve an inebriated driver.

There were drivers who escaped conviction because they could not be shown to have acted in a "grossly negligent" manner. There are also cases in which victims are severely injured but do not die which were not covered.

Once again, one highly-publicized horrible example helped to galvanize public opinion, resulting in amendments to both the "criminal negligence" and "hit and run" laws. "Criminal negligence" has been renamed "criminal vehicular operation", and makes it a felony to kill or seriously injure a person either as a result of gross negligence or a DWI violation. "Hit and run" offenses involving injury and death have also been made felonies.

The horrible example in 1983 was Craig Swanson, a high school swimming coach from Elk River, Minnesota, who struck and killed two young girls, one of them a swimmer on his team, and left the scene of the accident. Because he was not apprehended until several days later, no alcohol concentration test result was avaiable. He denied any alcohol involvement, although he had been involved in a half dozen or more DWI charges over the years in Kentucky, Wisconsin and Minnesota. He also professed to having swerved to avoid another vehicle, to having never seen the girls, and to having believed that he had hit a deer. His case was pending during the legislative session.17/

17/ The jury found him "not guilty" on the criminal negligence charge, but found him guilty of "leaving the scene of an accident", a misdemeanor. He has appealed that conviction, even though his attorney argued to the jury that he was guilty of that offense, but not of criminal negligence. The school board demanded his resignation, which he resisted, despite rather

(Footnote Continued)

The various amendments over the years have given Minnesota a DWI law which covers every square inch of the state, and applies to all "driving", "operating", and "physical control". The elimination of the qualifyfng adjective in "actual physical control" has been held to disclose a legislative intent to have the statute cover "the broadest possible range of conduct" and to be given "the broadest possible effect." State, Department of Public Safety v. Juncewski, 308 N.W.2d 316, 319 (Minn. 1981). The implied consent law likewise applies to every square inch of the state, and is not limited in its application to "streets and highways". As a result, while the statute is clearly not the most severe or draconian in the land, it is probably as comprehensive in its scope as any, and probably remains second to none in the likelihood that the apprehension of a DWI violator will result in the loss of driving privileges.

Together with increased training of police officers and some official encouragement, this has encouraged officers on the street to step up their efforts to arrest drunk drivers. In 1982, for example, a Blaine, Minnesota, officer arrested over 300 drunk drivers; while the State Patrol's leader had 272, an increase over his 1981 output, when he and two of his partners each arrested over 200 drunk drivers.

(Footnote Continued)

strong community feeling. A compromise was reached in which he resigned in return for a payment of a sum of money less than would be expended in litigation if he were discharged.

There have also been some well-publicized arrests of public figures, including legislators, county officials, television personalities, etc., which have helped to bring about an increasing perception that the law will be applied to any driver, regardless of status.18/

There have been a variety of private efforts to increase public awareness of the DWI problem, as well as to deal with the broader problem of the abuse of alcohol and other drugs in society. In Grand Rapids, Minnesota, for example, there has been a program to revive the old Burma Shave signs with jingles dealing with the DWI problem. Another program produced posters advertising the DWI law to be hung on gas pumps and in windows of service stations. Public service messages were produced for television which included the Governor, a judge, a doctor and head of MADD. Newspapers and broadcast media have shown a greater interest in the subject.

In Hennepin County, the bench adopted a policy of requiring a minimum of two days in jail for all persons convicted of DWI or any offense reduced from DWI. The Ramsey County (St. Paul and suburbs) bench decided to attack the problem by scheduling DWI trials within thirty days. Anoka County (northern suburbs) adopted two days' incarceration in a concentrated DWI education program which Ramsey County is now adopting.19/

18/ There does remain, of course, the practical problem that in certain municipalities, there are unwritten rules prohibiting the arrest of home town people, etc., although some progress seems to be made as more new officers, with more training, go to work.

19/ As a result of retirments and replacements on the Hennepin County bench, the "two day rule" is no longer followed by all

(Footnote Continued)

There has been a general increase in public awareness. Anecdotes abound about people paying attention to their own use to avoid placing themselves in violation of the statute, arranging for one member of a party to avoid drinking so they can have a sober driver, etc. One driver had over fifty sets of keys made for his car. When he feels he has had too much, he throws away the set of keys, takes a cab home, and returns with one of his spare keys when sober.

As with every other publicized crackdown on the drinking driver, there has been an associated decline in traffic fatalities. Minnesota had 763 reported traffic deaths in 1981, for the lowest total in about twenty years. In 1982, this was reduced to 581, a figure lower than that achieved within any of the last thirty years. While this drop is approximately 30%, it is possible that the "rebound effect" observed in all other situations has already set in: in May 1982, fatalities were running about 45% behind the 1981 rate.

Attached are a pair of charts provided by Forst Lowery of the Minnesota Department of Public Safety, a member of the Presidential Commission on Drunk Driving, comparing figures of traffic deaths with the number of alcohol-related license revocations per 100 million vehicle miles from 1967 through 1982 in

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(Footnote Continued)

judges. Ramsey County found that setting cases for trial in thirty days did not result in as many quick pleas of guilty as anticipated, requiring the rescheduling of cases which could not be tried on the date set because older cases had priority.

Minnesota. As those charts indicate, an increase in alcohol-related driver license revocations has coincided with a decrease in traffic deaths.

For the Attorney General's Office, the procedural changes were a lifesaer. Because a revocation cannot be delayed by a hearing request, the number of new cases per month has dropped from a thousand to between 100 and 150. The backlog of 4800 pending cases on January 1, 1982 was reduced to less than 800 on January 1, 1983. By August 1, 1983, the caseload was down to 605, and dropped to 576 on September 1, 1983.

Where do we go from here? We know that no statute, no matter how comprehensive, can provide a perfect solution to the problem. At present, there is a task force at work trying to come up with the perfect statute. At the same time, another task force is trying to come up with long-range programs to prevent DWI violations by changing public attitudes towards the use of alcohol and its use in combination with motor vehicles.

There are some who call for increasing the severity of penalties. While more severe sanctions are certainly legally permissible, the present feeling seems to be that the objective should be a statute which is severe enough to have some sort of deterrent effect, while not making it so severe that police officers refuse to arrest, prosecutors refuse to prosecute, juries refuse to convict and judges refuse to sentence because of their perception that the punishment set forth in the statute is out of proportion to the perceived seriousness of the offense: when burglars get

probation, some people find jailing drunk drivers rather hard to swallow.

There are some specific areas in which the statute can be improved to make its application more certain without making it more severe. For example, the misdemeanor presence rule can be completely abrogated. Such a change, and others which eliminate "technical defenses", speed up the processing of DWI suspects, reduce required paperwork, etc., can make it easier for officers to do their work and encourage them to arrest more drunk drivers.

As in the past, we in Minnesota will try to benefit from the experience of other jurisdictions in improving our own programs, while sharing our experiences with other interested jurisdictions.

For those who feel that we take the problem too seriously and have laws or proposals that are too harsh, there are three decisions from the courts of other states which may be quoted in response.

For example, an Indiana motorist convicted of one "reckless driving" and two DWI violations within ten years was banned from driving for ten years under that state's habitual offender statute. In rejecting his appeal, the court stated:

> The state cannot wait until the mangled and lifeless body of a child lies silently by the roadside before it attempts to remove a reckless or drunken driver from its list of licensed drivers. The potential for the destruction of life and property is too great to permit irresponsible people, who have demonstrated a disregard for the safety of themselves and others, to drive on public thoroughfares. If Owens wants to prove that he is a safe and

> responsible driver, he will have that opportunity after ten years have elapsed.

Owens v. State ex rel. Van Natta, 382 N.E.2d 1312, 1317 (Ind.App.1978).

As to the severity of criminal penalties, one can suggest a review of State v. Beavers, 382 So.2d 943 (La. 1980), in which the Louisiana Supreme Court held that a penalty of ten years' imprisonment at hard labor is not cruel, excessive or unusual punishment for a person convicted of DWI four times within five years.

More recently, the Nebraska Supreme Court reviewed the 20-month to five-year sentence of a driver with a long record of alcohol-related offenses convicted of DWI as a "third offender", declared his excessive sentence claim to be fatuous, and observed: "A sentencing judge is required to have only an open mind, not an empty one." State v. Christensen, 331 N.W.2d 793 (Neb. 1983).

The last sentence, of course, applies not only to judges, but also to all others involved in the entire system, from the police officer on the street to the driver license administrator dealing with administrative sanctions.

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