

**RECENT TRENDS IN BREATH AND BLOOD
TESTING IN INTOXICATION CASES**

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State Bar of Texas
31ST ANNUAL ADVANCED CRIMINAL LAW COURSE
July 18 – 21, 2005
Corpus Christi

CHAPTER 47

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TABLE OF CONTENTS

I.	BREATH TESTING EVIDENCE - <i>MATA/BAGHERI</i>	1
A.	Recent Holdings from the Court of Criminal Appeals	1
1.	<i>Stewart v. State</i> , 129 S.W.3d 93 (Tex. Crim. App. 2004)	1
2.	<i>State v. Mechler</i> , 153 S.W.3d 435 (Tex. Crim. App. 2005)	2
B.	Recent Decisions Construing <i>Mechler</i> and <i>Stewart</i> Directly	2
1.	Court of Appeals for the Second District, Fort Worth	2
2.	Court of Appeals for the Fourth District, San Antonio	2
3.	Court of Appeals for the Sixth District, Texarkana	2
4.	Court of Appeals for the Ninth District, Beaumont.....	2
C.	Recent Decisions Construing <i>Mata</i> Directly	2
1.	Court of Appeals for the Third District, Austin	2
2.	Court of Appeals for the Sixth District, Texarkana	3
3.	Court of Appeals for the Eighth District, El Paso.....	3
4.	Court of Appeals for the Fourteenth District, Houston	3
D.	Evidence of Retrograde Extrapolation is not necessary for the Admission of Breath Test Results.....	3
II.	NEW AND RECURRING BREATH TEST ISSUES.....	4
A.	Temperature.....	4
B.	Intoxilyzer Computer Source Code	7
III.	BLOOD TESTING.....	8
A.	Emergency Room Blood Testing and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).....	9
B.	Tex. Transp. Code Ann. § 724.011 (implied consent).....	10

RECENT TRENDS IN BREATH AND BLOOD TESTING IN INTOXICATION CASES

Introduction: Because the science of retrograde extrapolation of blood and breath test results is inexact, restrictions apply to admission of the evidence, the violation of which causes reversible error. However, breath test results are relevant and admissible concerning both definitions of intoxication without the necessity of engaging in retrograde extrapolation. New reliability issues regarding the intoxilyzer are discussed. Additionally, the Health Insurance Portability and Accountability Act (HIPAA) may provide a new right of privacy in a defendant's blood test results.

I. BREATH TESTING EVIDENCE - MATA/BAGHERI

Driving while intoxicated or driving under the influence criminal cases throughout the United States often present problems when the prosecution is required to prove a "per se" allegation that the defendant had a certain alcohol concentration level at the time of driving. It is a problem because the breath test result is obtained some time after the arrest. The lapse in time requires the prosecution to make a retrograde estimation of the alcohol concentration in the defendant at the earlier time. This effort necessitates the use of expert testimony, and it carries with it some inevitable problems resulting from lack of scientific reliability of the opinion due to the absence of essential physiological information about the defendant which only he can supply. Since the defendants are not usually very cooperative in supplying accurate information for their own prosecution, either the retrograde estimation may not be performed or the particular jurisdiction has developed a statutory scheme to avoid the problem altogether. 119 A.L.R. 5th 379 (2004), "Admissibility and Sufficiency of Extrapolation Evidence in DUI Prosecutions"

In Texas, the controlling cases were decided at *Mata v. State*, 46 S.W.3d 902, 917 (Tex. Crim. App. 2001) and *Bagheri v. State*, 119 S.W.3d 755, (Tex. Crim. App. 2003). *Mata* highlights the problems presented when experts attempt to estimate alcohol concentrations in individuals at earlier points in time, such as when the individual was driving, when he was placed under arrest, or at the time when he was involved in an accident causing serious injury or death. Problems arise when experts render opinions based upon a breath or blood test obtained some indefinite time after these events. In Texas the time of driving, of arrest or of the accident is the point in time during which the accused's status of intoxication

causes the event to become a crime under Chapter 49 of the Texas Code of Criminal Procedure. Because the information is usually from an expert who is providing scientific evidence to a jury, the testimony has a powerful persuasive effect upon the jury and can prejudice its consideration of other admissible evidence in the case. Therefore, an opinion involving retrograde extrapolation of breath or blood test results is not admissible without the presence of certain minimal facts about the individual being tested, such as: his gender, weight, age mental state, and drinking pattern; the amount and type of beverage he consumed; the time period of alcohol consumption; and the presence and type of food in his stomach during these relevant times. Without knowledge of these factors, the retrograde extrapolation opinion is scientifically unreliable, and it is error to admit the opinion. *Bagheri* addresses the problem of erroneously admitting this powerful type of evidence which can confuse juries and unfairly prejudice them concerning other evidence which has been admitted in the case. Thus, a reviewing court must conduct a harm analysis of this type of error and, after reviewing the record as a whole, determine whether the erroneous admission of the extrapolation evidence may have prejudiced the jury's consideration or substantially affected their deliberations.

Recent holdings from the Court of Criminal Appeals in *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004) and *State v. Mechler*, 153 S.W.3d 435 (Tex. Crim. App. 2005) have clarified the issue left open in *Mata* and *Bagheri* concerning the admissibility of unextrapolated breath test results. These cases hold that extrapolation is not necessary to make the test results relevant within the meaning of Rule 403 of the Texas Rules of Evidence. The test results show the presence of alcohol in the system of the defendant. Thus, the admission of those results is relevant to a jury determination of whether the individual was above .08 at the time of driving as well as whether any loss of his mental or physical faculties could be attributable to the ingestion of alcohol.

A. Recent Holdings from the Court of Criminal Appeals

1. *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004)

This was a DWI case in which the defendant appealed for the reason that it was erroneous to submit the case to the jury on both theories of intoxication after erroneously admitting the breath test. *Stewart* claimed that the test results were "irrelevant" without extrapolation of the results to the time of driving. In fact, there was *no extrapolation* attempted by the State's expert because he did not have sufficient information to make that attempt. The Court of

Criminal Appeals reversed the appellate court on the basis of the facts of that particular case.

2. State v. Mechler, 153 S.W.3d 435 (Tex. Crim. App. 2005)

The *Mechler* case appears to call for an individual assessment of relevance by the judge. That is, the Rule 403 factors are weighed and admissibility of the test results is determined on a case by case basis based upon a four-part test: whether (1) the intoxilyzer results are probative of intoxication under both the per se and impairment definitions of intoxication; (2) the results are not unfairly prejudicial because the evidence related directly to the charged offense; (3) a jury could be distracted away from the charged offense because of the required time to present the results, and (4) the proponent's need for the evidence. This last factor encompasses the issues of whether the proponent has other evidence establishing this fact and whether this fact is related to a disputed issue.

B. Recent Decisions Construing *Mechler* and *Stewart* Directly

1. Court of Appeals for the Second District, Fort Worth

Torres v. State, 109 S.W.3d 602 (Tex.App.-Fort Worth 2003) [extrapolation not required for introduction of blood test results exceeding legal limit, following *Mechler v. State*, *infra*.]

2. Court of Appeals for the Fourth District, San Antonio

Trillo v. State, 2005 Tex. App. LEXIS 2792 ___ S.W.3d ___ (Tex. App.-San Antonio April 13, 2005) (published)

The admission of the breath test results was reviewed using the abuse of discretion standard set out in *State v. Mechler*, *supra*. After evaluating all of the relevant factors, the court held that the trial court did not abuse its discretion in admitting the intoxilyzer test results based upon the four-part test set out in *Mechler*.

Surreddin v. State, 2005 Tex. App. LEXIS 2557, ___S.W.3d ___ (Tex. App.-San Antonio April 6, 2005)(published)

Rationale of *Stewart*, *supra*, (relevance) was applied to evidence of an open container which would have been admissible during the guilt/innocence phase of trial because it tended to make it more probable that Surreddin was intoxicated at the time he drove since the open container was evidence that he consumed

alcohol. Because the jury would have heard testimony regarding the open container even if the enhancement provision was not read, error, if any, in reading the allegation was harmless.

Martinez v. State, 155 S.W.3d 491 (Tex.App. San Antonio 2004)

Evidence of breath test results is both probative and admissible even in the absence of retrograde extrapolation testimony.

3. Court of Appeals for the Sixth District, Texarkana

Blumenstetter v. State, 135 S.W.3d 234 (Tex. App.-Texarkana 2004) Blumenstetter testified he did not remember the accident. There was no evidence he consumed any alcohol after the accident, and his blood-alcohol reading of .20 two hours after the accident is relevant evidence he was intoxicated at the time he drove, under either definition of intoxication, because it provided evidence he had consumed alcohol. The court cites *Stewart*, *supra*.

4. Court of Appeals for the Ninth District, Beaumont

Adams v. State, 156 S.W.3d 152 (Tex. App.-Beaumont 2004)

Since the breath test results tended to make it more probable that the defendant was intoxicated at the time she drove under either definition of intoxication because they provided evidence that she had consumed alcohol, the intoxilyzer result is probative on the element of intoxication. Citing *Stewart*, *supra* and *Mechler*, *supra*.

C. Recent Decisions Construing *Mata* Directly

1. Court of Appeals for the Third District, Austin

Douthitt v. State, 127 S.W.3d 327 (Tex. App. Austin 2004) This was an intoxication manslaughter case in which a type of retrograde extrapolation opinion was offered by the State's expert during a jury trial. The opinion was based upon a breath test administered over 4 ½ hours after the accident. The court of appeals held that the admission of the opinion was erroneous based upon the Court of Criminal Appeals holding in *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001). The court held that retrograde extrapolation evidence was relevant only to prove intoxication per se. However, the court followed *Bagheri v. State*, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003) in order to determine "whether the erroneously admitted testimony might have prejudiced the jury's consideration of the other evidence or

substantially affected the jury's deliberations." *Douthitt v. State*, 127 S.W.3d *supra* at p. 337. The court then applied "the analysis used in *Bagheri*," and concluded that the error did not require reversal. The court distinguished the case from *Bagheri*:

Although the prosecutor did remind the jurors of Ortiz's testimony during his arguments, he did not claim special expertise for Ortiz or suggest that this testimony was alone sufficient to convict. *Cf. Bagheri II*, 119 S.W.3d at 763. Given the strength of the State's case and the relative weakness of appellant's defensive theories, we can state with fair assurance that the erroneous admission of the retrograde extrapolation testimony had, at most, a slight effect on the jury. We therefore conclude that the error should be disregarded.

Douthitt v. State, supra at page 339

2. Court of Appeals for the Sixth District, Texarkana

Blumenstetter v. State, 135 S.W.3d 327, 2004 Tex. App. LEXIS 3074 (Tex. App.-Texarkana April 6, 2004, no pet. h.) This was an intoxication manslaughter case involving a blood test which was taken two hours after the accident. The results was .20. The State's expert gave an opinion that the defendant was intoxicated at the time of the accident based upon retrograde extrapolation. The court of appeals held that the counsel was ineffective in failing to object to the opinion because the opinion was unreliable under *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001) and it should not have been admitted. However, the issue came to the court in the form of ineffective assistance of counsel. Thus, the court of appeals held that its harm analysis could not be made under *Bagheri v. State*, 119 S.W.3d 755, 763-64 (Tex. Crim. App. 2003) but under the "more stringent" standard of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed.2d 674, 104 S.Ct. 2052 (1984). *Blumenstetter v. State*, 2004 Tex. App. LEXIS 3074, p. *35. Nevertheless, the harm analysis in *Bagheri* was "helpful" to the court's analysis, and the court of appeals to some extent followed the reasoning of the Court of Criminal Appeals in *Bagheri*. *Id.*, pp. *35-37. The court held that "defense counsel's failure to object did not prejudice Blumenstetter's defense because the result of the proceeding would not have been different." *Id.*, p. *40.

3. Court of Appeals for the Eighth District, El Paso
Lemos v. State, 130 S.W.3d 888 (Tex. App.-El Paso 2004) This was an intoxication manslaughter case involving a blood test which was obtained nearly

two hours after the fatal accident. The indictments contained only the per se allegation that Lemos had an alcohol concentration of .08 or more. Neither party offered evidence regarding retrograde extrapolation. Nevertheless, the trial court allowed the State to argue that Lemos's alcohol concentration fell from the time of the accident to the time of the test, but the trial court did not allow the defense to argue that his alcohol concentration rose to the tested level from the time of the accident. While the court does not construe *Bagheri* directly because *Bagheri* was not timely raised by the appellant, the court of appeals reverses on a *Bagheri*-type harm analysis.

4. Court of Appeals for the Fourteenth District, Houston

Owens v. State, 135 S.W.3d 302 2004 Tex.App. LEXIS 3536 (April 22, 2004) The court of appeals determined that the trial court abused its discretion in admitting testimony based upon retrograde extrapolation pursuant to the holding in *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001) The court held that it must, therefore, conduct a Rule 44.2(b) harm analysis pursuant to the holding in *Bagheri v. State*, 119 S.W.3d 755 (Tex. Crim. App. 2003) After a detailed review of the facts of the case, including the voir dire, evidence, and the arguments of counsel, the court held:

...we cannot say with fair assurance the jury was not influenced by the trial court's erroneous admission of the unreliable retrograde extrapolation evidence; therefore, we must reverse the judgment of the trial court and remand for a new trial.

Owens v. State, supra, pp. 311-12

D. Evidence of Retrograde Extrapolation is not necessary for the Admission of Breath Test Results

Prior to the ruling in *Stewart, supra*, several courts of appeals have held that retrograde extrapolation is not required for the admission of breath test results. *Garcia v. State*, 112 S.W.2d 839 (Tex.App.-Houston [14th Dist. 2003) *Torres v. State*, 109 S.W.3d 602, 2003 WL 21283663, at *3 (Tex. App.-Fort Worth 2003, no pet.); *Price v. State*, 59 S.W.3d 297, 300 (Tex. App.-Fort Worth 2001, pet. ref'd); *State v. Mechler*, 2003 Tex.App. LEXIS 8156 at *9 (Tex.App.-Houston [14th Dist.] September 23, 2003); *Carillo v. State*, 2003 Tex. App. LEXIS 3337, 2003 WL 1889943, at *7 (Tex. App.-El Paso 2003, no pet.) (not designated for publication). *Ball v. State*, 2002 Tex. App. LEXIS 6293, 2002 WL 1988250, at *3 (Tex. App.-Austin 2002, pet. ref'd) (not designated for publication).

This argument appears to have surfaced first in *Daricek v. State*, 875 S.W.2d 770, 773 (Tex.App.-Austin 1994):

We hold that the proof needed to show the "loss of faculties" offense and the "per se offense" are not mutually exclusive. Clearly, a test showing that blood had a 0.10 alcohol concentration is probative evidence of a loss of faculties. Conversely, evidence of his failure to pass field sobriety tests immediately after driving his vehicle tends to make it more probable that the failed blood or breath test taken an hour later accurately reflect the driver's condition at the time of the offense.

The holding has since been followed in several appellate districts. *Owen v. State*, 905 S.W.2d 434, 438 (Tex.App.-Waco (1995)); *Henderson v. State*, 29 S.W.3d 616, 622 (Tex.App.-Houston [First Dist.] (2000)); *O'Neal v. State*, 999 S.W.2d 826, 832 (Tex.App.-Tyler 1999); *Garcia v. State*, 112 S.W.3d 839 (Tex.App.-Houston [14th Dist.] 2003)

II. NEW AND RECURRING BREATH TEST ISSUES

A. Temperature

Probably one of the most important challenges to Intoxilyzer results at the time of testing involves temperature. In determining whether a particular breath test was performed correctly on the occasion in question, it has been made clear that temperature is an important factor in accurate use of the machine. As early as the Court of Criminal Appeals ruling in *Harrell v. State*, 725 S.W.2d 208, 211 (Tex. Crim. App. 1986) that court has acknowledged the dependence of the Intoxilyzer upon the temperature of the reference sample device.¹ In fact a challenge was made to a test on the basis of the temperature of the reference sample device which ultimately led to reversal of a conviction and a new trial.

In *Atkinson v. State*, 871 S.W.2d 252 (Tex. App-Fort Worth 1994) the defendant requested the following instruction regarding the temperature of the reference sample device and the procedures used to test the defendant.

You are instructed that under our law in order to be considered valid, a chemical test must be performed according to the rules and regulations

governing such test by the Department of Public Safety concerning proper techniques and methodology.

Included in those regulations are:

- (1) continuous observation of the person tested for a minimum of fifteen (15) minutes prior to the actual test;
- (2) operating the reference sample device by blowing through it to see that the bubbling is reduced;
- (3) *checking the temperature to determine if it is 34 degrees plus or minus 2 degrees;*
- (4) keeping the breath tube housed inside the machine until the subject is required to give a sample.

If you have found beyond a reasonable doubt that each of these regulations were complied with you may consider such test and give it whatever weight that you choose.

If you do not so find or if you have a reasonable doubt as to whether these regulations were complied with you may not consider said test for any purpose and shall not refer to it further in your deliberations. [emphasis supplied]

The court of appeals agreed with the defendant and ordered a new trial. On petition for discretionary review, the case was remanded for a harm analysis in *Atkinson v. State*, 923 S.W.2d 21, 1996 Tex. Crim. App. LEXIS 56 (Tex. Crim. App. 1996), and it was later affirmed when the court of appeals found harm in the refusal of the instruction in *Atkinson v. State*, 934 S.W.2d 896, 1996 Tex. App. LEXIS 5162 (Tex. App. Fort Worth 1996)] The Fort Worth court believes that temperature matters, and that the jury should be instructed concerning it when the issue is properly raised.

The concept of temperature affecting the validity of a particular test has found its way into the jurisprudence in several cases. For example, in an unpublished opinion in *State v. Garza*, 2003 Tex. App. LEXIS 6001 (Tex. App.-San Antonio July 16, 2003) the court of appeals affirmed a suppression order entered by the trial court based in part upon the lack of proof of the temperature of the reference sample device. However, that court's understanding of the issue has varied from time to time.

In *Gamez v. State*, 2003 Tex. App. LEXIS 546 (Tex. App. – San Antonio January 22, 2003) the court of appeals acknowledged that the defendant's challenge to the breath test result was based upon *both* the temperature of the reference sample device and upon the temperature of the defendant. However, the court limited its ruling to the issue concerning the reference sample device. Its ruling was that even though the temperature was not measured or known at

¹ This factor was also of great importance for the accuracy of the Breathalyzer which was the predecessor of the Intoxilyzer. *Turpin v. State*, 606 S.W.2d 907, 914 (Tex. Crim. App. 1980) [the technical supervisor explained that to properly operate the machine, it must first be at the correct operating temperature.]

the time of the actual test the temperature results at other times made it close enough for government work:

On cross-examination, McDougall was asked, "You can't maintain a reference sample device at 34 degree centigrade or [at] a constant temperature. Do you agree or disagree with that?" McDougall disagreed, stating that the temperature can vary two-tenths of a degree in either direction. Thus, according to McDougall, the *known temperature* is 34 degrees centigrade plus or minus two tenths of a degree. Although the arresting officer did not record the actual temperature at the time that he administered the test to Gamez, McDougall testified that he routinely checks the temperature of the intoxilyzer and that the temperature always remains at 34 degrees centigrade plus or minus two tenths of a degree centigrade, its "known temperature." Furthermore, McDougall checked the intoxilyzer the day before and the day after the test was administered to Gamez. Both times, the intoxilyzer was at its known temperature. Given McDougall's testimony, we hold that the technique applied by the police department complied with section 19.3(c)(4) of the Texas Breath Alcohol Testing Regulations.

However the temperature of the *individual's breath* is a significant factor in the measurement of the amount of alcohol in his system. Since the advent of *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) it is imperative that the State be required to demonstrate that the technique of breath testing was correctly applied on the occasion in question. This law *supersedes* the old concept set out in *Slagle v State*, 570 S.W.2d 916, 919 (Tex. Crim. App. 1978) which held that once the Legislature has determined that a particular scientific test is admissible, it is unchallengeable:

Thus, the doubts of some scientists concerning the accuracy of the breathalyzer examinations conducted in the law enforcement environment are not sufficient to countervail the long line of case law holding that such scientific test results are admissible. Such evidence being admissible and the presumption acknowledged as valid, we cannot conclude that this legal presumption based upon evidence obtained by scientific method, which in turn is premised on scientific assumptions,

constitutes the type of evidentiary deficiency condemned by this Court...

Since the advent of the Court of Criminal Appeals ruling in *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004) many courts seem to believe that breath tests are now unassailable, and that the basic holding in *Slagle* is the current state of the law. However, none of the language in *Stewart* states that the holdings in *Mata v. State*, 122 S.W.3d 813 (Tex. Crim. App. 2003) [retrograde extrapolation of breath test results inadmissible without metabolism facts]; *Bagheri v. State*, 119 S.W.3d 755 (Tex. Crim. App. 2003) [the State has the burden of proof to connect the results in some way to the time of driving]; *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997)[the admissibility test for scientific evidence such as breath or blood tests applies to DWI cases] or *Kelly v. State, supra*, have been reversed or even criticized by the Court of Criminal Appeals. They are still the law. Therefore, the State still has the burden to demonstrate among other things that the scientific principles underlying the operation of the machine were correctly applied *on the occasion in question*, i.e., when the defendant gave his breath sample.

Body and breath temperature have been known to have a direct effect upon the validity of breath testing.² In one case the defendant used an expert to attempt to demonstrate that fact to a jury, but the trial court would not allow it. While the court of Appeals acknowledged that such an attack upon the Intoxilyzer results was valid, it refused to reverse the case for specious reasons. *Railsback v. State*, 95 S.W.3d 473, 477 (Tex. App. – Houston [1st District] 2002) The defendant essentially was denied his day in court.

The Department of Public Safety's Breath Testing Regulations acknowledge the importance of temperature to the validity of its program:

§ 19.3 provides:

- (c) All breath testing techniques, in order to be approved shall meet but not be limited to the following:
 - (1) Continuous observation of the subject for a minimum period of time as set by the Scientific Director prior to collection of the breath specimen during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited,

² This fact is acknowledged to some extent by another court in *Dittman v. State*, 1997 Tex. App. LEXIS 2754 *6 (Tex. App. –Dallas 1997)

- eaten, smoked, or introduced any substances into the mouth.
- (2) The breath alcohol testing instrument and allied equipment must be operated by either a certified operator or Technical Supervisor and only certified personnel will have access to the instrument. This provision will not apply to operators inactivated in accordance with § 19.4(c)(2) of this title (relating to Operator Certification).
 - (3) The use of a system blank analysis in conjunction with the testing of each subject.
 - (4) The analysis of a reference sample, such as headspace gas from a mixture of water and a known weight of alcohol at a constant temperature, the results of which must agree with the reference sample predicted value within +/- 0.01g/210L, or such limits as set by the Scientific Director. This reference analysis shall immediately precede or immediately follow the analysis of the breath of the subject as determined by the Scientific Director.
 - (5) All analytical results shall be expressed in terminology established by state statute and reported to two decimal places without rounding off. (For example, a result of 0.237g/210L shall be reported as "0.23," or as stated by the Scientific Director.
 - (6) Maintenance of any specified records designated by the Scientific Director.
 - (7) Supervision of certified operators and testing techniques by a Technical Supervisor meeting the qualifications set forth in § 19.5 of this title (relating to Technical Supervisor).
 - (8) Designation that the instrumentation will be used only for testing subjects that are suspected of driving while intoxicated or in compliance with § 19.4 (b), (c), and (e) of this title...

The reference sample device is nothing more than a representation of the breath and lungs of the individual being tested, and its function is to assure that the machine is calibrated correctly to accept the individual's breath sample. "Breath testing methodology is based on the premise that at any given temperature, the ratio between the concentration of alcohol in the blood and that in the air from the lungs is constant." *Dahl v. State*, 707 S.W.2d 694, 695 (Tex. App.-Austin 1986) Thus, there is a fundamental assumption that the person being tested by the

Intoxilyzer has a breath/blood temperature which is the same as that calibrated by the reference sample device: 34 degrees Celsius.

In a significant research paper published in the *Journal of Forensic Sciences*, Vol. 34, No. 4, July 1989, pp. 836-841 the authors³ came to some rather interesting conclusions which can be demonstrated simply by reciting their abstract for the article:

Mild hyperthermia to the extent of a 2.5degree centigrade increase above normal body temperature was produced by immersion of ethanol-intoxicated subjects in a warm water bath. Hyperthermia did not influence the blood-alcohol decay curve (absorption and elimination) of the subjects. Hyperthermia did cause a significant *distortion* of the breath-alcohol decay curve, up to as much as a *23% increase above breath-alcohol concentration over blood-alcohol concentration for each degree centigrade increase in core body temperature.*

The forensic relevance of these results is that further support is given to previous recommendations that temperature monitoring be included in procedures for breath-alcohol analysis. This leads to the recommendation that mouth temperature be measured before breath sampling to screen for abnormal body temperature and to allow for potential use of a "temperature correction factor." This modification to existing analytical procedures would optimize the reliability of breath-ethanol analysis for prediction of blood-ethanol concentration. [emphasis supplied]

Fox and Hayward then conclude:

These results show clearly that mild hyperthermia in humans does not alter the standard decay curve of BAC, but does significantly distort the BrAC decay curve to an extent which would cause *serious inaccuracy for prediction of BAC.* [A copy of the study is attached]

When confronted with this information in the case of *Mireles v. Texas Dep't of Pub. Safety*, 9 S.W.3d 128, 1999 Tex. LEXIS 125, 43 Tex. Sup. Ct. J. 169 (Tex. 1999) the local technical supervisor acknowledged that if the overestimate is as great as that mentioned in the Fox/Hayward study then the Scientific Director of the Texas Department of Public Safety may have to

3 Glyn R. Fox, Ph. D and John S. Hayward, Ph. D

revise his position that the underlying scientific principles of the Intoxilyzer are correctly applied on the occasion in question without some accommodation for temperature of the individual's breath temperature. [Reporter's Record, pp. 69-71]

The Fox and Hayward study was performed upon healthy individuals whose body temperatures were raised by placing them in a warm bath. The argument frequently advanced by the State in opposition to the temperature problem is that the DWI arrestee is usually not feverish nor has he or she recently stepped out of a warm bath. These assumptions are both correct and irrelevant.

All of the technical supervisors in Texas were trained at a course given for them at the Center for Studies of Law in Action at Indiana University in Bloomington, Indiana. Included in their course materials is a copy of a research article by Kurt M. Dubowski concerning breath temperatures. In his study he discovered that the breath temperatures for *healthy persons* ranged from 32.41 degrees centigrade to 36.32 degrees centigrade, creating an average or mean temperature of 34 degrees centigrade. Therefore, all technical supervisors are taught that a healthy individual can have a breath temperature 2.32 degrees centigrade above the temperature which the Intoxilyzer calibrated. *This is precisely the amount of distortion cautioned about in the Fox and Hayward Study!* It is also the amount of error which the local technical supervisor acknowledged may cause the Scientific Director to change his opinion concerning whether the underlying scientific principles of the Intoxilyzer are applied correctly on the occasion in question.

Technical supervisors frequently complain that Dr. Dubowski's research may not be credible and that they disagree with it. However, he is in charge of the course which trains them, and Texas continues to send its technical supervisors to his school for training and certification.

This problem was recently addressed in a motion to suppress in a Bexar County case. Through the local technical supervisor the following factual data was developed at trial. A breath test of .10 can be overstated by 23% when the breath temperature of the individual is not known. (The officers are not trained to take the temperature of the individuals being tested.) Thus, a person being tested at .10 may actually be .073 less or .077 *at the time of testing*. The State has the burden to demonstrate by clear and convincing evidence that the principles underlying the testing procedures were applied correctly on the occasion in question. This science creates serious doubt that the Intoxilyzer results are either clear or convincing without some accounting for temperature.

CONCLUSION

This temperature problem has never been confronted directly by the courts of this state. It is a significant issue concerning the accuracy of breath testing. The problem could be remedied by some fairly simple procedures. However, the courts do not wish to deal directly with the problem, and they choose, so far, to demure on procedural grounds. The scientific director has no interest in correcting the problem. Finally, the trial courts believe that all of these issues are moot since the advent of *Stewart*. However, it is very important to note that neither *Stewart* nor *Mechler* held that breath tests are automatically admissible. When properly presented with an issue of harm under the standard set out in *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1991) a breath test may not be admissible. The court held that the evidence at issue in *Montgomery* was improperly admitted because the evidence was not necessary to prove specific intent or to support the testimony of the complainants. It appears that breath test evidence is to be evaluated on a case by case basis.

B. Intoxilyzer Computer Source Code

The Intoxilyzer operates automatically, and the input from the key board operated by the officer, the reference sample provided by the device attached to the machine, and the breath samples taken from the defendant are coordinated by the machine to provide a printed result. The printed result incorporates all of these steps in the process of the taking of a specimen. The machine is alerted to certain problems associated with the procedures and the samples to determine if the procedures are followed and the samples are correctly collected and within various tolerances based upon time, temperature alcohol concentration increase or decrease, and pressure. It also checks for ambient air interferants, such as cleaning fluids, and radio frequency interference. If any problems arise the machine will either print out an error code or make no printout at all. All of these procedures and checks are driven by software within the machine. The source code for this software is at issue in determining whether the machine is operating correctly on the occasion in question because the manufacturer has changed the software and some of the parts of the machine since it was original certified and placed in service. Thus, the current intoxilyzer is not the same machine that was previously certified. This issue has been addressed sporadically in Texas.

Torres v. State, 109 S.W.3d 602, 606 (Tex. App.-Fort Worth 2003)

Contrary to Appellant's characterization of the computer program as a "witness," the program which ran the gas chromatograph machine was not a person and could not be called to testify. See TEX. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules.") (emphasis added); cf. *Stevenson v. State*, 920 S.W.2d 342, 343 (Tex. App.--Dallas 1996, no pet.) ("The intoxilyzer instrument is a computer, not a person. By definition, therefore, the intoxilyzer is not a declarant."). We hold that Appellant's right to confront and cross-examine witnesses against him was not violated because the State could not have called the computer program as a witness.

However it is important to compare the holding in *May v. State*, 784 S.W.2d 494 (Tex. App.--Dallas 1990, pet. ref'd), where the trial court had allowed the State to introduce testimonial evidence of an intoxilyzer readout to prove May's insobriety. The appellate court determined that testimony of an operator repeating information observed on a computer readout constituted inadmissible hearsay. *Id.* at 497.

In *Ly v. State*, 908 S.W.2d 598, 600 (Tex. App.-Houston [1st District] 1995) the Court of Appeals distinguished the holding in *May* "because [in *Ly*'s case] the printout itself was introduced into evidence.

Sylvester v. State, 2001 Tex. App. LEXIS 79 (Tex. App.-Texarkana January 5, 2001) (unpublished)

The Technical Supervisor responded, as she had on direct, that the central program that controlled the intoxilyzer was protected by trade secret and she therefore had no opportunity or right to learn the details of the program.

Ridgle v. State, 1996 Tex. App. LEXIS 3372 (Tex. App.- Dallas July 23, 1996) (unpublished)

Ridgle argued that the trial court erred in admitting the results of an intoxilyzer breath test because the witness for the State could not testify about the results of the test without relying on hearsay. He argued that the technical supervisor, who testified about the intoxilyzer results, had no first hand knowledge of the computer program the machine uses in its internal processing. Hearsay, by definition, is a statement made by a declarant. TEX. R. CRIM. EVID. 801(d). A declarant is defined as a person. TEX. R. CRIM. EVID. 801(b). The intoxilyzer is not a declarant. Therefore, its results cannot constitute hearsay. *Stevenson v. State*, 920 S.W.2d 342, 343 (Tex. App.--Dallas 1996, no pet.).

Florida Suppresses Test

The published holdings of the courts of appeals of Texas are contradictory on this issue, and it appears that it is ripe for discussion. In fact, the courts in Florida have begun to address the question of discovery of the computer source code in the Intoxilyzer by the defense as a significant one. It has been reported in the Orlando Sentinel that judges of Seminole County have thrown out hundreds of breath alcohol tests in DWI cases because the state would not disclose how the machines work. The State would not disclose the source code because the manufacturer will not provide it to the State. The judges in Seminole County believe that if the defendant asks for a key piece of information about how the intoxilyzer works – its software source code – and the state cannot provide it, the breath test should be rejected. Judge Donald Marblestone is quoted as saying "Florida cannot contract away the statutory rights of its citizens."

Defense lawyers say that the reason the source code is necessary is that the intoxilyzer was approved by Florida's Department of Law Enforcement (similar to Texas Department of Public Safety) in 1993. Since that time the manufacturer has changed the software and some of the parts of the machine. Thus, it is not the same machine that was previously certified.

III. BLOOD TESTING

Tex. Transp. Code Ann. § 724.011 is the so-called "implied consent" statute in Texas. It requires:

- (a) If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place, or a watercraft, while intoxicated, or an offense under Section 106.041, Alcoholic Beverage Code, the person is deemed to have consented, subject to this chapter, to submit to the taking of one or more specimens of the person's breath or blood for analysis to determine the alcohol concentration or the presence in the person's body of a controlled substance, drug, dangerous drug, or other substance.
- (b) A person arrested for an offense described by Subsection (a) may consent to submit to the taking of any other type of specimen to determine the person's alcohol concentration.

In addition to the "legal" blood draw which is created by this statute, hospital emergency rooms typically draw blood to test it for purposes of medical treatment of the patient admitted after an accident. Prosecutors

will use either or both of these types of blood tests in prosecutions in intoxication cases. Both of these types of blood tests have been challenged in various ways which will be discussed below.

A. Emergency Room Blood Testing and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Challenges have been made to the admission of hospital and emergency room blood testing evidence on the basis of an unreasonable search and seizure or a violation of the doctor-patient privilege. However, the Court of Criminal Appeals decided in *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997) that Evidence Rule 509 defeats the physician-patient privilege in criminal litigation and that

While implied consent statutes generally have some safeguards that may indicate deference to Fourth Amendment concerns, those statutes also permit intrusions that are significantly greater than present here. Such safeguards appear to us to be a recognition that an expectation of privacy in bodily integrity (withdrawing the blood) still exists even though society does not recognize as reasonable an expectation of privacy in the results of a test. But, in the case of blood test results obtained by subpoena, where the tests were conducted by medical personnel solely for medical purposes, the person's interest in bodily integrity is not presented.

State v. Hardy, 963 S.W.2d, p. 527.

In 1996 Congress passed Pub. L. No. 104-191, 110 Stat. 1936 (1996) known as the Health Insurance Portability and Accountability Act of 1996. On December 20, 2002, President Clinton signed Executive Order No. 13181. This Executive Order established a clear Federal policy that:

. . . law enforcement may not use protected health information concerning an individual that is discovered during the course of health oversight activities for unrelated civil, administrative, or criminal investigations . . . except when the balance of relevant factors weighs clearly in favor of use . . .

In order to provide greater protections to patient's privacy, the Department . . . is issuing final regulations . . . under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)...

Stricter rules apply under HIPAA regulations, however, when law enforcement officials seek protected health information in order to investigate criminal activity outside of the health oversight realm.

Executive Order No. 13181, sec. 1, Policy (emphasis added).

The HIPAA law makes it unlawful for a health care provider to disseminate protected health care information. In some situations, it is a crime for a person to knowingly use, obtain or disclose individually identifiable health information. 42 U.S.C. §1320 d-6. Some HIPAA violations may result in civil penalties. 42 U.S.C. 1320 sec. d-5. Most large hospitals and their personnel are "covered entities" and may not disclose "protected health information." 45 C.F.R. 160.103. Protected health information is defined as any information, whether oral or recorded in any form that:

1. Is created and received by a health care provider...and
2. Relates to the past, present, or future physical or mental condition of an individual; the provision of health care to an individual. . .

45 C.F.R. 160.103.

The Act establishes several exceptions to the non-disclosure rule. The first exception, of course, would be the written consent by a patient. 65 C.F.R. 164.504. Various other exceptions apply where the situation involves: disclosure for treatment and billing purposes; to family members; for public health purposes; the reporting of certain types of wounds to law enforcement (gunshots); child abuse and neglect; FDA regulatory activity; domestic violence; health oversight activities; pursuant to a lawful judicial or administrative proceeding, and, a law enforcement request. See, 45 C.F.R. 164.512

The definitions of what may constitute an authorized "law enforcement request" are fairly clear. A covered entity may disclose information for "identifying or locating a suspect, fugitive, material witness or missing person." 45 C.F.R. 164.512 (f)(2). However, the information which is released is limited to biographical information, blood type, type of injury, date and time of treatment, date and time of death and distinguishing physical characteristics such as height and weight. 45 C.F.R. 512 (f)(2). "Information related to ... samples or analysis of bodily fluids or tissue" is not literally authorized under the law enforcement request exception. 45 C.F.R. 164.512 (f)(2)(ii).

The HIPAA law further authorizes the disclosure of protected health information to law enforcement concerning persons who are victims of crimes, or when it relates to a crime committed on the premises. 45 C.F.R. 512(f) (3) and (5). Finally, the law permits disclosures for reporting crime in emergencies when such a disclosure appears necessary to alert law enforcement to:

- (A) The commission and nature of a crime;
- (B) The location of such crime or of the victim(s) of such a crime; and
- (C) The identity, description, location of the perpetrator of such crime.

45 C.F.R. 512 (f)(6). It is a crime for a person to knowingly use or obtain uniquely identifiable health information. 42 U.S.C. §1320 d-6.

Texas Cases

In *Tapp v. State*, 108 S.W.3d 459 (Tex. App.-Houston [14th Dist.] 2003) the court of appeals recognized the Act and its privacy provisions but refused to apply it in the case because the question was “premature.”

On February 13, 2001, the Secretary promulgated final regulations that restrict and define the ability of covered entities, *i.e.* health plans, health care clearinghouses, and health care providers, ... to divulge patient medical records. However, the initial compliance date for covered entities to comply with these privacy standards was April 14, 2003. 45 C.F.R. § 164.534 (2002). Thus, a hospital, defined as a health care provider, ... was only required to comply with the regulations after April 14, 2003. In that regard, any action taken during the regulations' pre-enforcement stage cannot constitute a violation of the regulations as compliance is not required or enforceable. *See Ass'n of Am. Physicians & Surgeons, Inc. v. United States Dep't of Human Health & Servs.*, 224 F. Supp. 2d 1115, 1123-24 (S.D. Tex. 2002) ... Additionally, any alleged preemption argument raised at the regulations' pre-enforcement stage is premature. *See id.* (notes omitted)

Tapp v. State, 108 S.W.3d, *supra*, pp. 462-63. This ruling was followed in *Yocom v. State*, 2004 Tex. App. LEXIS 3195 (April 8, 2004)(unpublished)

However, in an unpublished opinion the First Court of Appeals recognized the Act as a new right of

privacy in medical records. *Harmon v. State*, ___ S.W.3d ___, 2003 LEXIS 6172 (Tex. App.-Houston [First District] July 17, 2003); *compare, Hicks v. State*, 2003 Tex. App. LEXIS 9280 (Tex.App.-Houston [First District] October 30, 2003)[no reasonable expectation of privacy in blood test results taken for medical treatment, defendant did not have standing to assert an unreasonable search or seizure]. This new statutory right of privacy which the Act imposes is “trumped” only by a criminal investigation pursuant to a grand jury subpoena. While this right may be overcome by a properly issued grand jury subpoena, *Id.* *There has been no finding that this right to privacy may be overcome by a regular subpoena issued by a district or county court.*

B. Tex. Transp. Code Ann. § 724.011 (implied consent)

Arrest required for voluntary blood draw. Under the implied consent statute, Tex. Transp. Code Ann. § 724.011 (Vernon Supp. 2002), consent is not implied absent an arrest. Accordingly, the withdrawal of consent statute requires an arrest in order to be applicable. Therefore, the withdrawal of consent statute, Tex. Transp. Code Ann. § 724.014, does not permit the State to draw a blood specimen from an unsuspecting, unconscious motorist to gain probable cause to arrest. A motorist who is rendered dead, unconscious, or otherwise incapable of refusal, absent arrest remains subject to general search and seizure protections that require probable cause. The purpose of the statute is to supplement protections afforded under the state and federal constitutions. Construing the statute to require arrest to be applicable is in accordance with that purpose. *Knisley v. State*, 81 S.W.3d 478 (Tex.App.- Dallas 2002)

If blood is nevertheless drawn without probable cause by police officers in violation of these statutes, a grand jury subpoena to produce the blood in court will not cure the lack of probable cause since a subpoena does not require a finding of probable cause. Therefore use of a grand jury subpoena for this purpose may constitute an improper use of the grand jury. *See, Boyle v State*, 820 S.W.2d 122 (Tex. Crim.App. 1989) Of course, the blood must be drawn by someone who is authorized by statute to draw the blood. Trans. Code §724.017(c) Failure by the arresting authority to abide by this statute constitutes grounds for suppression of the blood test. *Laird v. State*, 38 S.W.3d 707, 712 (Tex.App.-Austin 2000, pet. Ref'd.)

Search warrant moots the implied consent statute. Once a finding of probable cause is made, however, the purpose of the implied consent statute is rendered moot:

The implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood in the absence of a search warrant. It gives officers an additional weapon in their investigative arsenal, enabling them to draw blood in certain limited circumstances even without a search warrant. But once a valid search warrant is obtained by presenting facts establishing probable cause to a neutral and detached magistrate, consent, implied or explicit, becomes moot.

Beeman v. State, 86 S.W.3d 613 , 616 (Tex. Crim. App. 2002) Likewise, a person's voluntary consent to blood testing when he is not under arrest moots the protections of the statute. Under these circumstances all statutory or constitutional principles probably are waived. *Combest v. State*, 981 S.W.2d 958 (Tex. App. – Austin 1998)(appeal after remand)