BLOOD TESTS: A VAMPIRE IN THE LAW

"The time has come," the walrus said,
To talk of many things,
Of liquor, drugs and stomach pumps,
And 'legal blood' lettings!"
(Apologies to Lewis Carroll)

Recently there has emerged in the law of evidence a new upstart, the child of advancing modern science in the field of crime detection. Spurred on by the pleas of irate citizens alarmed at the rapid increase in automobile accidents resulting from the use or abuse of liquor and drugs, the authorities have offered the new practice of taking blood tests as a useful and practical remedy.

This innovation has had immediate repercussions upon the law of evidence. Not falling conveniently under any one branch thereof, blood tests were at first generally treated by judges as somewhat akin to confessions and statements made by an accused person. This was not a happy choice. Granted there was some similarity between them; but there were also many wide points of difference. The blood sample, like the confession, it was said, must have been given voluntarily in order to admit it into evidence. That was all right, but then the further question arose, namely; was it suggested by a person in authority? and if so was a proper warning given? The case of R. v. Ford (1948) 1D.L.R. 787 was decided on these grounds. Here the analogy was, by logical process carried a little too far. Confessions or statements have no conclusive effect against an accused person, nor are they entitled to any weight beyond that which the jury in their conscience assign to them. Wills, Circumstantial evidence, 7th ed. at p. 133 says;

> "Of the credit and effect due to a confessional statement the jury are the sole judges; they must consider the whole confession, together with all the other evidence of the case, and if it is inconsistent, impropable or incredible or is contradicted or discredited by other evidence, or is the emenation of a weak or excited state of mind, they may exercise their discretion in rejecting it, either wholly or in part...."

In this respect a confession or statement differs from a blood test.

Whether or not the blood was given voluntarily could hardly affect the weight that a jury might give to it. In R. v. McNamara (1951) O.R. 6, Schroeder J. says at p. 8;

> ".....in the case of a statement or declaration, it might very well be that the man had reached such a state of irresponsibility that one would not be inclined to regard his statement as free and voluntary or that one would attach so little weight to it that its value as evidence would be negligible. But how can that condition apply to the physical characteristics of the accused? Does it make the blood

> sample taken any less reliable as evidence? Does it in any way affect the quality of his blood except to give it an alcoholic content?"

This case was appealed. In the course of delivering the judgement of the Ontario Court of Appeal, affirming the judgement of the trial judge, Robertson C.J.O said (supra p. 11);

> "We do not think there is any analogy between the taking of a sample of blood without the consent of the accused and the taking of a statement not made by the accused voluntarily."

At the trial Schoeder J. said by way of dictum (and the Court of appeal agreed with him) (supra p. 9);

> ".....even if this specimen were taken without his consent and against his will, while such action would be an invasion of this man's private rights, and would in fact constitute a trespass to his person he would at most have a cause of action against the doctor sounding in tort. I am not prepared to hold that the sample or the analysis of it may not be offered in evidence for or against the accused."

This notion has now become crystallized under an amendment to s. 285 of the Crimnal Code assented to on June 30th, 1951. Now by s. 285 (4d) in cases of drunken driving or driving while one's ability to drive is impaired by alcohol or drugs "the result of a chemical analysis of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether the person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence."

By subsection (4e) "No person is required to give a sample of blood....for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings."

We can gather from the decision in the McNamara case and the above mentioned amendment to s. 285 of the Criminal Code that the rules governing the admissibility of blood tests can no longer be treated as analogous to the rules as to the admissibility of statements or confessions. We are happy that this part of the law has been cleared up but we are sorry that the protection which it gave to the accused is taken away. He must now seek refuge elsewhere. As Roy J. said in the earlier case of R. v. Frechette (1948) 93 C.C.C. 111 at 113;

> "I am of opinion that under no pretext whatever can the accused be forced to furnish evidence of his guilt." At the present stage of the economy of the criminal law, it can be said that the person of the accused is inviolable and that the right that each individual reserves as to his person cannot be taken away. This is a forbidden domain. We must be imbued with the principle that the accused if free. It behooves the representatives of authority to find the evidence to bring about the conviction of an accused when they believe him guilty, but he is not obliged to help them in this work by incriminating himself. A blood test constitutes an attack upon the human body and it is not within the power of a judge to order it if the law does not authorize it...."

Now the law does not authorize it by s. 285 (4d) of the Criminal Code. Blood samples are admissible whether or not they are given freely and voluntarily. We fail to see the protection that S.S. 4(e) gives to the accused. It is a small consolation to a man spending a term in prison that he has an action in tort against the person who took the evidence that put him there.

So it becomes apparent that inroads have been made upon the old doctrine that a man should not be forced to convict himself out of his own mouth. Now not only his bloodstream but the contents of his stomach may be used in evidence against him. His right of privacy is being slowly and systematically gnawed away.

The length to which this trend will develop is in the least a little frightening to all lovers of personal freedom. Envision if you will fifty years hence. We are repelled by the thought that, even on the flimiest of pretexts several large law enforcement officers, lying in wait, might pounce upon some citizen (already sagging under his load of taxes) and after subduing him bend over his prostrate body and extract the very life blood from his veins. Worse still, that a man might be forced literally to "cough up" evidence against himself by means of a stomach pump is a proposition so revolting that we dare not think of it. We wonder where it will all end. Witness the vouge of forcing a suspect to blow up a balloon so that its contents can be studied for traces of alcohol. We dare not use a strong shaving lotion or sit through a long double feature for fear that on driving home we may be involved in some minor traffic accident and the alcoholic aroma or sleepy appearance would be the cause of our being subjected to the most gruelling of tortures. We are terrified by the thought that some wily crown prosecutor could build an airtight case against us with our blood, breath and gastric juices. Perhaps it will become every prosecutor's dream to produce our dismembered body in court at our own trial as exhibit "A" for the prosecution. Alas that a man's stomach should be made to yield up its damning evidence; that his very veins should be tapped; that the privacy of his internal organs should be invaded; and that part of his very being should be forced to turn informer against the rest of him.

If we are no longer protected by the deep rooted principle that a man cannot be forced to criminate himself out of his own mouth can we not find protection elsewhere? Is there no haven within the "four corners" of our constitution? In view of the fact that less evidence is needed to convict a man of driving "while his ability is impaired" accordingly can we not arrest the trend in procuring that evidence when it so fragrantly violates our personal liberty?

We were very close to complete dispair when the Supreme Court of the United States in a very recent decision ruled in clear and unequivocal terms that it is "unconstitutional" to use the contents of a man's stomach in evidence against him. But this was little relief to Canadians, who look with envious eyes to their neighbours to the south as they dine heartily, assured by the pronouncement of their Supreme Court that they still have a constitutional right to retain and enjoy their partially-digested dinner.

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