

**ADID Legal Factors Reference Sheet (July 5, 2023)**

**Historical case law citing to National Safety Council Committee on Tests for Intoxication (COI),  
subsequently Committee on Alcohol and Other Drugs (CAOD),  
subsequently Alcohol, Drugs and Impairment Division (ADID).**

*Boris Moczula, J.D.*

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All language below comprises verbatim excerpts from the court opinions.

## **U.S. SUPREME COURT**

### **Breithaupt v. Abram 352 U.S. 432 (1957)**

Still other States accept the practice of the use of chemical tests for intoxication though there does not appear to have been litigation on the problem. See the summary in a report of the Committee on Tests for Intoxication of the National Safety Council, 1955 Uses of Chemical Tests for Intoxication.

### **South Dakota v. Dole, Secretary of Transportation 483 U.S. 203 (1987)**

*[Note: this case does not involve the Committee/Division, but shows the National Safety Council actually participating in U.S. Supreme Court litigation on an alcohol issue. The NSC filed an amicus curiae brief in support of the federal government's authority to withhold funding from a state in which the drinking age was less than 21.]*

Briefs of amici curiae urging affirmance were filed for the Insurance Institute for Highway Safety et al. by Andrew R. Hricko, Michele McDowell Fields, and Ronald G. Precup; for the National Council on Alcoholism et al. by Charles R. Walker III; for the National Safety Council by Harry N. Rosenfield; and for United States Senator Frank R. Lautenberg et al. by Thomas F. Campion and Michael J. Faigen.

### **Birchfield v. North Dakota 136 S.Ct. 2160 (2016)**

The American Medical Association and the National Safety Council set up committees to study the problem and ultimately concluded that a driver with a BAC of 0.15% or higher could be presumed to be inebriated. Donigan 21-22. In 1939, Indiana enacted the first law that defined presumptive intoxication based on BAC levels, using the recommended 0.15% standard.

## **FEDERAL COURTS**

### **Kay v. United States 255 F.2d 476 (4th Cir. 1958) (Virginia federal court case)**

Nor does consideration by the jury of the statutory presumptions deprive the defendant of any protected right. The presumptions embody the standards determined, after extensive investigation, by the Committee on Tests for Intoxication of the National Safety Council.

## **STATE COURTS**

### **Lawrence v. City of Los Angeles 53 Cal.App.2d 6 (Cal. App. 1942) (California)**

[fn. \*] \*. It appears to be the consensus of the medical profession that when the blood alcohol concentrate of the driver of an automobile is 0.15% (by weight) such fact is conclusive evidence that the driver is under the influence of alcohol. (Committee on Tests for Intoxication of the National Safety Council, Chemical Tests for Intoxication (1938) p. 5; see also for an excellent discussion of the subject "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," by Professors Mason Ladd and Robert B. Gibson, The Iowa Law Review, January, 1939, Vol. XXIV, No. 2, p. 191, et seq.; and "Alcohol in Relation to Traffic Accidents," by Richard L. Holcomb, Vol. III, No. 12, The Journal of the American Medical Association, September 17, 1938, p. 1076.) The Committee on Tests for Intoxication in its 1940 report thus graphically illustrates the relationship between alcohol in the blood and the degree of intoxication.

### **McKay v. State 235 S.W.2d 173 (Tex. Ct. App. 1950) (Texas)**

It is further observed that the President's Highway Safety Conference, the American Medical Association's Committee on Street and Highway Accidents, the National Safety Council's Committee for Tests for Intoxication, and other national organizations have recommended the passage of laws by the states which will recognize the value of chemical analyses of the blood, urine, breath, or other bodily substances, and give rise to the presumption that if the test shows the accused to have .05 per cent or less by weight of alcohol that he is not under the influence of intoxicating liquor; that if he has in excess of that amount but less than .15 per cent, no presumption rests one way or the other; that where a test shows .15 per cent or more by weight of alcohol in his blood it shall be presumed that the defendant was under the influence of intoxicating liquor and that such evidence shall not be construed as limiting the introduction of other competent evidence bearing upon the question of his intoxication.

### **Jones v. State 261 S.W.2d 161 (Tex. Ct. App. 1952) (Texas)**

Not as authority for this holding, but for the information of the Legislature, we quote from the Journal of the American Medical Association, Vol. 129, No. 9, on page 631, the following:

"Since 1937 the committee created by the House (House of Delegates of the American Medical Association) to study problems of motor vehicle accidents has studied carefully the relation of the action of alcohol to traffic accidents. In this study it has collaborated closely with the Committee on Tests for Intoxication of the National Safety Council. It has on several occasions recommended definite borderline limits for alcoholic influence in terms of amount of alcohol in the suspected drunken driver, and these limits have been approved by the House. In order to promote uniformity in state legislation in this field, the National Safety Council, through its

Committee on Tests for Intoxication and with the active collaboration of the Bureau, has formulated a draft of a uniform bill which embodies the borderline limits approved by the House \* \* \*. The draft, in form, is an amendment to section 54, act V, of the Uniform Vehicle Code, . . .

**Toms v. State 239 P.2d 812 (Okla. Ct. App. 1952) (Oklahoma)**

Oklahoma court quotes reference to Committee from 1942 California case:

"It appears to be the consensus of the medical profession that when the blood alcohol concentrate of the driver of an automobile is 0.15% (by weight) such fact is conclusive evidence that the driver is under the influence of alcohol. (Committee on Tests for Intoxication of the National Safety Council, Chemical Tests for Intoxication (1938)"

**People v. Ward 307 N.Y. 73 (N.Y. Ct. App. 1954) (New York)**

In 1941, the legislature amended subdivision 5 of section 70 of the Vehicle and Traffic Law permitting courts to "admit evidence of the amount of alcohol in the defendant's blood \* \* \* as shown by \* \* \* chemical analysis". A number of communities in this state subsequently provided for the use of these tests on persons suspected of driving while intoxicated. (See Interim Report of New York State Joint Legislative Committee on Motor Vehicle Problems, Chemical Tests for Intoxication, N. Y. Legis. Doc. 1953, No. 25, pp. 15-16; Report of Committee on Tests for Intoxication, National Safety Council [1952] Uses of Chemical Tests for Intoxication

**People v. Kovacik 205 Misc. 275 (N.Y. Ct. Special Sessions 1954) (New York)**

Experiments by Dr. Harger and many others including the National Safety Council have confirmed these findings. ("Evaluating Chemical Tests for Intoxication," 1953. A report of committee on tests for intoxication, National Safety Council.)

**Yarborough v. State, 268 S.W. 2d 154 (Tex. Ct. Crim. App. 1954) (Texas)**

Appellant was carried to the hospital in Amarillo, where a sample of his blood was taken with his written consent, and a test of such sample showed that it contained 2.2 milligrams of alcohol per c.c. of blood, which percentage, according to testimony of the expert witness and standards set by the American Medical Association and the National Safety Council, indicates intoxication.

**Commonwealth v. Mummert 183 Pa. Superior Ct. 638 (1957) (Pennsylvania)**

The generally accepted standards concerning the effect of alcohol within the body now utilized by courts in nearly all states are those of the National Safety Council, submitted by the 1940 Report of the Committee on tests for intoxication, Gray's Attorney's Text Book of Medicine, 3d Edition, Section 59.03. These standards based upon concentration of alcohol within the blood are the standards recommended by the manufacturer of the drunkometer.

**State v. Johnson 199 A.2d 809 (N.J. 1964) (New Jersey)**

The result of years of study and experimentation under the auspices of the National Safety Council Committee on Tests for Intoxication and the American Medical Association was the recommendation about 1938 of blood alcohol levels as an index of intoxication, of the use of chemical analysis of blood, urine, breath or other bodily substance to determine such content and of a scale of the effect of particular ranges of alcoholic concentration as shown by such tests. From a legal standpoint, the recommendation was implemented by Uniform Vehicle Code § 11-902(b) proposed by the National Committee on Uniform Traffic Laws and Ordinances, which was adopted in New Jersey almost verbatim in 1951 by N.J.S.A. 39:4-50.1, quoted in full at the beginning of this opinion. The recommended statute, or a substantial equivalent, is now in force in about 32 states and its theory is followed as a matter of common law in several others.

**State v. Miller 146 N.W.2d 159 (N.D. 1966) (North Dakota)**

The record shows that the Breathalyzer is approved by the National Safety Council. In a communication dated December 8, 1959, to Captain Edwin Anderson of the Fargo Police Department, Donald C. Lhotka, secretary of the Committee on Alcohol and Drugs, says:

"The National Safety Council, through its Committee on Alcohol and Drugs, formerly known as a Committee on Tests for Intoxication, does endorse the breath method of testing for blood alcohol concentrations. It is our opinion that tests made on the Alcometer, Breathalyzer, Drunkometer, and the Intoximeter, if conducted in the manner prescribed by the authors of these methods will give comparable and reliable results for estimating the concentration of alcohol in the blood."

**Commonwealth v. Brooks 319 N.E.2d 901 (Mass. 1974) (Massachusetts)**

In 1939, the National Safety Council and the American Medical Association published reports concluding that particular blood alcohol levels should be considered as evidence presumptive of the presence or absence of the influence of alcohol on driving. The levels established were

.05 "percent" or less, which would create a presumption that the defendant was not under the influence, .05 "percent" to .15 "percent," which would create no presumption, and .15 "percent" and above, which would create a presumption that the defendant was under the influence. These reports are discussed, among other places, in Richardson, *Modern Scientific Evidence* (2d ed.) § 13.1 (1974), and Erwin, *supra*, § 14.02. The findings of the American Medical Association and National Safety Council committees were reflected by the Uniform Vehicle Code, § 11-902 (1952 version), which adopted the .05 and .15 "percent" cut-off figures for the purpose of establishing presumptions regarding the influence of alcohol.[4] This uniform act served as the pattern for legislation in a great many States, including Massachusetts. In fact, 1961 Senate Doc. No. 1589, one of the bills which culminated in St. 1961, c. 340, now G.L.c. 90, § 24 (1) (e), duplicated the provisions of § 11-902 of the uniform code.

**State v. Jones 316 So.2d 100 (La. 1975) (Louisiana)**

See also, the discussion appearing in R. Donigan, *Chemical Tests and the Law* at 60 (published by the Northwestern University Traffic Institute, 1966). The following language quoted from Donigan, *supra*, at 64 highlights one of the major deficiencies in the attempts of the state department of health to comply with La.R.S. 32:663:

"Upon the recommendation of the National Safety Council's Committee on Alcohol and Drugs and other national organizations, it is suggested in the Uniform Vehicle Code by the National Committee on Uniform Traffic Laws and Ordinances that there be legislation in each state requiring supervision at the state level of all chemical test programs. This would be in the nature of required approval of all test methods by an appropriate state agency, also approval by it of techniques to be employed in making such tests, and the checking by it of the qualifications of all persons who conduct such tests. \* \* \*"

**State v. Moon 436 A.2d 420 (Md. Ct. App. 1981) (Maryland)**

The standards contained in the original Maryland enactment and those which have remained in Maryland up until July 1 of this current year stemmed from the recommendations in 1938 of a joint committee of the National Safety Council and the American Medical Association. H. Campbell, *Courts and Prosecutors Are the Weak Link in Preventing Drunken Driving*, 46 A.B.A.J. 43, 44 (1960); R. Donigan, *Chemical Tests and the Law* 23 (2d ed. 1966); and H. Porter, *Value and Purpose of Chemical Tests*, *Chemical Tests for Intoxication Manual*, Committee on Medicolegal Problems, American Medical Association 2, 3 (1959). [6] Those recommendations found themselves embodied in the Uniform Vehicle Code. Campbell, *op. cit.*

**Aliff v. State 627 S.W.2d 166 (Tex. Ct. App. 1982) (Texas)**

In the case at bar the appellant totally failed to establish that at the time of trial the 1938 report by the Committee on Tests for Intoxication of the National Safety Council was recognized as authority on the amount of alcohol in the blood necessary to intoxicate a person. Therefore, the trial court did not err in not allowing the appellant to use the report in cross-examining the witness.

**State v. Gross 335 N.W.2d 509 (Minn. 1983) (Minnesota)**

The trial court relied, in part, upon a 1975 resolution by the Executive Board of the Committee on Alcohol and Drugs, National Safety Council, which stated that "a scientifically valid procedure is not known to be available for the reexamination of a Breathalyzer ampoule that has been used in the breath test \* \* \* in order to confirm the accuracy and reliability of the original breath analysis." Formal Statement of Committee on Alcohol and Drugs, National Safety Council, Chicago, Ill., Oct. 2, 1975, quoted in Finkle, Alcohol and Traffic Safety, 3 Am.J.Forensic Med. & Pathology 273, 273 (1982).

**People v. Schmidt 124 Misc.2d 102 (N.Y. Crim. Ct. 1984) (New York)**

In 1939, the National Safety Council Committee on tests for intoxication reported on the relationship between blood alcohol content and intoxication. The Committee established three "zones of influence" — (1) any person having up to .05% of alcohol in the blood was considered not to be under the influence of alcohol; (2) any person having .05% and less than .15% of alcohol in the blood was considered to be possibly under the influence of alcohol; (3) any person having .15% or more of alcohol in the blood was presumed to be under the influence of alcohol. The American Medical Association officially adopted this classification scheme. (1 105\*105 Erwin, Defense of Drunk Driving Cases [3d ed], § 14.02 [2], pp 14-6 - 14-7.)

**Commonwealth v. Neal 464 N.E.2d 1356 (Mass 1984) (Massachusetts)**

(i) Retesting. In this Commonwealth a prerequisite to the admissibility of scientific evidence is a showing that the process used has attained general acceptance by the relevant scientific community. Commonwealth v. Fatalo, 346 Mass. 266, 269 (1963). "[A]t the present time, a scientifically valid procedure is not known to be available for the reexamination of a Breathalyzer ampule that has been used in [a] breath test ... in order to confirm the accuracy and reliability of the original breath analysis." National Safety Council, Formal Statement of Committee on Alcohol and Drugs (Oct. 2, 1975, reaff'd Oct. 21, 1981), published in 3 Am. J. of Forensic Med. & Pathology 273 (1982). Decisions of other jurisdictions indicate that ampule retesting has not, to date, achieved general scientific acceptance.

**Commonwealth v. Connolly 474 N.E. 2d 1106 (Mass. 1985) (Massachusetts)**

The legislative enactment of G. L. c. 90, Section 24 (1) (e), inserted by St. 1961, c. 340, supports our definition. That section originally provided, in part: "In any prosecution for a violation of paragraph (1) (a) of this section, evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor . . . . If such evidence is that such percentage was five one hundredths or less, there shall be a presumption that such defendant was not under the influence of intoxicating liquor; . . . and if such evidence is that such percentage was fifteen one hundredths or more, there shall be a presumption that such defendant was under the influence of intoxicating liquor." In 1972, the Legislature changed the word "fifteen" to "ten." St. 1972, c. 488, Section 1. The presumptions contained in Section 24 (1) (e) originated in 1939 reports published by the National Safety Council and the American Medical Association concerning the effect of alcohol on driving. See *Commonwealth v. Brooks*, 366 Mass. 423, 427 (1974). The legislative adoption of those presumptions, therefore, strengthens our conclusion that in G. L. c. 90, Section 24, the Legislature has focused on impaired drivers, not on "slightly happier" or "slightly depressed" drivers.

**Dahl v. State 707 S.W.2d 694 (Tex. Ct. App. 1986) (Texas)**

This language is almost the same as that used in 6701l-1 which defines "intoxicated" as having an alcohol concentration of .10 percent and then says that alcohol concentration is grams per 100 milliliters of blood or grams per 210 liters of breath; i.e., using both the percent and the number of grams in the same definition. The regulations note that the conversion factor is a "commonly used value recognized by the Committee on Alcohol & Other Drugs of the National Safety Council; that is, 210 liters of air at 34° C. contains approximately the same quantity as 100 cubic centimeters of pulmonary blood." *Id.* at 48,857 fn. 2.

**Commonwealth v. Karch 502 A.2d 1359 (Pa. Super. Ct. 1986) (Pennsylvania)**

This statute did not and still does not provide guidance regarding the measurement of "the amount of alcohol by weight", but some guidance is provided by the fact that the statute was derived from recommendations of committees of the National Safety Council and American Medical Association. Pa. House Leg.J., June 13, 1961, at 2266-67 (remarks of Rep. Fineman). Professor Harger, an original member of the committee that drafted the National Safety Council recommendations, later wrote that the measurement is "usually given as weight-volume and not weight-weight." *Medicolegal Aspects of Chemical Tests of Alcohol Intoxication*, 39 J.Crim.L. & Criminology 402 (1948).



**State v. Johnson 717 S.W.2d 298 (Tenn. App. 1986) (Tennessee)**

Dr. Stratton testified that the 2100:1 conversion ratio is dubious at best and is no longer considered an appropriate ratio. Yet, in another article filed as an exhibit, Dr. Dubowski and Dr. M.F. Mason recognized that the Committee on Tests for Intoxication of the National Safety Council has determined that the ratio has been determined by chemical tests and has been the value almost invariably used for many years.

**State v. Sensing 843 S.W.2d 412 (Tenn. 1992) (Tennessee)**

The conversion factor of 0.21 is a commonly used value recognized by the Committee on Alcohol and Other Drugs of the National Safety Council; that is 210 liters of deep lung air at 34° C contains approximately the same quantity (mass) of ethanol [alcohol] as 100cc of pulmonary blood. See R.N. Harger, R.B. Forney and R.S. Baker. "Estimates of the Level of Blood Alcohol from Analysis of Breath." Quarterly Journal of Studies on Alcohol. 1-18 (1956).

**Hyle v. MVA 702 A.2d 760 (Md. Ct. App. 1997) (Maryland)**

Furthermore, the bill file contains the NATIONAL SAFETY COUNCIL, ALCOHOL AND THE IMPAIRED DRIVER—A MANUAL ON THE MEDICOLEGAL ASPECTS OF CHEMICAL TESTS FOR INTOXICATION WITH SUPPLEMENT ON BREATH/ALCOHOL TESTS 94-97 (Chicago 1976) (MANUAL). The MANUAL sets forth the many advantages to using the breath test, including: (1) While a blood test requires laboratory facilities and thus takes longer to complete, a breath test "is obtainable within a few minutes"; (2) A breath test "accurately reflects the actual pulmonary arterial blood-alcohol level at the time of the test"; (3) Breath test specimens avoid "evidentiary safeguard problems"; (4) Breath tests require less technical training to administer; (5) The facilities required to administer a breath test are minimal; and (6) Subjects usually have less objection to the collection of breath. MANUAL, at 94-95.

**State v. Brigham 694 So.2d 793 (Fla. Distr. Ct. App. 1997) (Florida)**

When the level of alcohol in breath is compared to the level of alcohol in blood, there are differences among people. Nevertheless, by the early 1950s, the National Safety Council determined that under Henry's Law, for legal purposes, it is reasonable to assume that the weight of the alcohol present in one milliliter of any person's blood is equivalent to the weight of alcohol present in 2100 milliliters of that person's breath at 34 degrees centigrade. Peter Gerstenzang, How to Handle the DWI Case, The Breathalyzer 1993, at 69, 77 (PLI Litig. & Admin. Practice Course Handbook Series No. H 4-5182, 1993).

**State v. Edison 9 S.W.3d 75 (Tenn. 1999) (Tennessee)**

The conversion factor of 0.21 is a commonly used value recognized by the Committee on Alcohol and Other Drugs of the National Safety Council; that is 210 liters of deep lung air at 34°C contains approximately the same quantity (mass) of ethanol [alcohol] as 100cc of pulmonary blood. See R.N. Harger, R.B. Forney and R.S. Baker. 'Estimates of the Level of Blood Alcohol from Analysis of Breath.' Quarterly Journal of Studies on Alcohol. 1-18 (1956)." Sensing, 843 S.W.2d at 415 n. 2.

**Green v. Dept. of Highway Safety 905 So.2d 922 (Fla. Distr. Ct. App. 2005) (Florida)**

"The 1:2100 ratio is also recognized by the Committee on Alcohol and Other Drugs of the National Safety Council as an accurate way to determine blood alcohol content." Id. Section 316.193(1)(b)-(c), Florida Statutes (2003), provides that a person is legally intoxicated if he has a blood alcohol level of .08 or more grams of alcohol per 100 milliliters of blood, or a breath alcohol level of .08 or more grams of alcohol per 210 liters of breath.

**State v. Chun 943 A.2d 114 (N.J. 2008) (New Jersey)**

Although New Jersey, prior to the introduction of Firmware version 3.11, in compliance with our decision in Romano and Downie, adhered to the 0.01 percent BAC tolerance standard, there is no general agreement among the states as to what standard is acceptable. Many states other than New Jersey utilize the 0.01 percent BAC tolerance standard as well, but the National Safety Council, for example, recommends a tolerance of no more than 0.02 between the highest and lowest readings.

**Collins v. Director of Revenue 399 S.W.3d 95 (Mo. Ct. App. 2013) (Missouri)**

The National Safety Council's Committee on Alcohol and Other Drugs has made recommendations for "Acceptable Practices for Evidential Breath Alcohol Testing." The Council set forth the following ten recommendations "necessary for establishing reliable evidential breath alcohol test performance"

**Commonwealth v. Camblin 86 N.E.3d 464 (Mass. 2017) (Massachusetts)**

According to the National Safety Council, an "interfering substance" is a "non-ethanol substance" able "to produce a significant response on any breath alcohol testing instrument." To qualify as an interfering substance, the substance must:

"1. Be a volatile organic compound capable of appearing in the breath of a living, conscious human being."

"2. Be present in sufficiently high concentration to be measured by the instrument after a 15 to 20 minute pretest observation period."

"3. Be able to produce a response on the instrument that is indistinguishable from ethanol."

National Safety Council, Committee on Alcohol and Other Drugs, Report on the Specificity of Breath Alcohol Analyzers (Feb. 22, 2010).

GENERAL NOTE: *Other cases may exist in internal state-specific databases of court dispositions, beyond those available in general legal databases. For example, five additional cases were found for Florida, but are not included herein.*