

June 10, 1970 (OPINION)

Mr. John B. Hart

State's Attorney

Rolette County

RE: Motor Vehicles - Tests for Intoxication - Type of Test

This is in response to your letter of June 4, 1970, in which you state that in certain instances persons who are arrested while driving under the influence demand a blood test instead of a breathalyzer test. When this occurs the peace officer takes the person arrested to the Rolla Community Hospital where a technician (non-doctor) takes the blood sample. The Rolla Community Hospital then bills the County \$25.00 for taking such blood sample. You then call our attention to Section 39-20-13, which amongst other things, provides that the State Toxicologist pay \$5.00 for taking a blood sample. You also advise that the Commissioners object to paying \$25.00 for this service.

You then ask are there any standard fees or any basis for a determination of the reasonable value for taking a blood test as provided for by Section 39-20-01. If not, is the County liable to pay to the hospital for any blood test initiated by any peace officer.

The answers to the questions depend on a number of items. First, we are not aware of any authority or power whereby the County may delegate to a peace officer the authority to incur expenses to be paid for by the County. This alone would indicate that unless the County has by some measure or means authorized certain peace officers to incur expenses the County would not be obligated to pay same.

We are not aware of a standard fee for taking a blood specimen, but would assume each hospital, doctor, etc. would set its own fee. The \$5.00 fee mentioned in Section 39-20-13 applies only in instances where blood was taken from a dead person.

Section 39-20-01 has been construed by the North Dakota Supreme Court in *Timm v. State*, 110 N.W.2d. 359, 364, to mean that the tests to be given are at the determination of the arresting officer. The officer elects the type of test to be given and invariably this is dependent upon the equipment available to the peace officer or to the law enforcement officials in the community. This case concludes that under the provisions of Section 39-20-01 the arrested person or the subject does not have the right to select the type of test he will undergo. It would thus appear that if an arrested person or subject wanted a specific type of test which was not available to the law enforcement officials or which cannot be conducted by the peace officer or the law enforcement officials, that the subject or person arrested pay for such tests, provided the tests can be accomplished within a reasonable time so as to reflect the condition of the subject or arrested person as closely as possible with reference to

the time when he was operating a vehicle. Such person should be required to personally pay for a test so selected under the foregoing provisions.

It is, therefore, our opinion that a peace officer does not have authority to incur any expenses for the County such as fees for taking and making alcoholic blood tests, unless the County has first authorized such peace officers to do so or unless the County has negotiated with some medical institution for the payment of fees for certain services.

It is our further opinion that the arresting officer determines and selects the type of tests to which the arrested person will be subjected. The arresting officer should know what equipment is available and the capacity or capabilities of the immediate law enforcement office to conduct the tests and make the proper selection.

It is our further opinion that if an arrested person wishes to take a test which cannot be made or completed by the arresting officer or members of the law enforcement office in the immediate locality, such person would be required to pay for the costs incurred personally; provided, however, that the taking of the blood sample can be accomplished without delay so that the specimen will be as close to the time as possible reflecting the condition of the incident of driving while under the influence.

The State's Toxicologist's Office is available to the law enforcement officials, but in recognizing this we also are aware that he will merely make an examination and analysis of the blood but is in no position to take the blood sample in the first instance.

HELGI JOHANNESON

Attorney General