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Notes and Comments

The Price for Driving While Intoxicated: Should it be Blood?

I. Introduction

Despite significant efforts at the state level aimed at eliminating the drunk driver¹ from state highways,² it is ironic that the evidence most likely to establish the driver's degree of intoxication, a blood alcohol content (BAC) test, still encounters admissibility obstacles. Controversy has long surrounded the issue of whether the state can compel a driver to submit to a blood test to establish the driver's BAC.³ The New York Court of Ap-

1. A driver is defined as "a person who operates or drives or is in actual physical control of a vehicle." N.Y. VEH. & TRAF. LAW § 113 (McKinney Supp. 1981). This discussion focuses upon a driver impaired by alcohol. The issue of a driver impaired by drugs, although analogous to drunk driving, is not developed.

2. See, e.g., N.Y. VEH. & TRAF. LAW §§ 1678-1678j (McKinney Supp. 1982). Referred to as STOP-DWI (Special Traffic Options Program for Driving While Intoxicated), the program's purpose is to "provide a plan for coordination of county, town, city and village efforts to reduce alcohol-related traffic injuries and fatalities." *Id.* at § 1678-c(1). A county which chooses to participate in the program is provided with the funds to support it. *Id.* at § 1678-a(1).

New York is one of several states employing roadblocks in an attempt to detect drunk drivers. Noted for their proliferation on holiday weekends, the roadblocks are set up by the police who indiscriminately stop drivers and look for signs of drinking. Recognized as warrantless searches, the roadblocks are receiving strong criticism for their intrusion upon a driver's interest in privacy. Defenders of the program stress the need for balancing an individual driver's interest in privacy with the state's interest in detecting a drunk driver. Flaherty, *As Roadblocks Proliferate, Questions of Legality Persist*, *The Nat'l L.J.*, July 25, 1983, at 3, col. 2.

3. See N.Y. STATE JOINT COMM. ON MOTOR VEHICLE PROBLEMS, CHEMICAL TESTS FOR INTOXICATION, 3 N.Y. DOC. NO. 25, 176th N.Y. LEG. 17 (1953). In drafting the first implied consent statute in the nation, thereby permitting the state to obtain blood tests from drivers to establish their blood alcohol content (BAC), the drafting commission recognized a potential conflict between the interests of the state and the drivers. The commission would have drafted the statute to permit obtaining the test over drivers' objections except for the state attorney general's opinion that drivers should not be subjected to blood tests they did not want. *Id.* at 17. See *infra* notes 14-15 and accompanying text.

peals' ruling in *People v. Moselle*⁴ attempted to quell this dispute by focusing upon the nature of the driver's consent to the BAC test. The court ruled that a BAC test obtained in the absence of a court order or a driver's actual consent was inadmissible in Penal Law proceedings.⁵ Consent to a BAC test as implied through operation of section 1194 of the Vehicle and Traffic Law (VTL)⁶ validated use of the test only in proceedings brought under the VTL.⁷ The ruling reinforced the policy favored in New York of not compelling a driver to submit to a blood test.⁸ The practical result was the exclusion of the BAC tests in the three cases, involving drunk drivers and deceased victims,⁹ consolidated in *Moselle*.

The New York legislature's reaction to *Moselle*'s result came one year later. The legislature revised the VTL, Penal Law and Criminal Procedure Law (CPL).¹⁰ By enacting the revisions, the legislature intended to eliminate a driver's ability to refuse a BAC test if another individual had been killed or suffered serious physical injury due to the driver's operation of a motor vehicle.¹¹ Thus, when specific statutory provisions are complied with, a driver's consent to a BAC test is unnecessary.

4. 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).

5. *Id.* at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

6. N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1982), amended by Compulsory Chemical Tests for Intoxication, ch. 481, § 1194(2), 1983 N.Y. Laws 882, 882-83 (effective on the ninetieth day following July 15, 1983). This statute is commonly referred to as the implied consent statute. References throughout this Note to the implied consent statute are, unless otherwise specified, to the version in effect prior to Oct. 15, 1983. This version is cited as N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1982).

The abbreviation VTL is used throughout this Note to designate the *New York Vehicle and Traffic Law*.

Moselle was decided under a version of the implied consent statute in effect prior to passage of the Compulsory Chemical Tests for Intoxication, ch. 481, § 1194(2), 1983 N.Y. Laws 882, 882-83.

7. *Moselle*, 57 N.Y.2d at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

8. See *supra* note 3.

9. *Moselle*, 57 N.Y.2d at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. The three cases consolidated in *Moselle* are: *People v. Moselle*, (Erie County Ct. Dec. 7, 1981); *People v. Daniel*, 84 A.D.2d 916, 446 N.Y.S.2d 658 (4th Dep't 1981); and *People v. Wolter*, 83 A.D.2d 187, 444 N.Y.S.2d 331 (4th Dep't 1981).

10. Compulsory Chemical Tests for Intoxication, ch. 481, § 1194(2), 1983 N.Y. Laws 882, 882-83.

11. *New York State Assembly Memorandum in Support of Legislation — Purpose or General Idea of Bill*, accompanying Bill No. 4178. This Bill was enacted as Compulsory Chemical Tests for Intoxication, ch. 481, § 1194(2), 1983 N.Y. Laws 882, 882-83.

Part II of this note explores the confusion in statutory and case law which spurred the New York Court of Appeals to consider *People v. Moselle*.¹² Part III presents the factual background of the three cases consolidated in *Moselle* and the court's decision. Part IV examines the deficiencies in the *Moselle* ruling and discusses alternative solutions. Part V concludes that VTL section 1194-a reflects a shift in emphasis from protecting the interests of a drunk driver to protecting those of an innocent victim.

II. Background

A. Blood Alcohol Content Testing Pursuant to a Driver's Actual or Implied Consent

A driver's actual consent to a BAC test yields evidence admissible in VTL and Penal Law proceedings.¹³ Absent a driver's actual consent, opinion has varied as to the admissibility of the test. In formulating the nation's first implied consent statute in 1953, the New York drafting commission noted two conflicting policies: its own view which favored compelling a driver to submit to a blood test despite the individual's wishes, versus the state attorney general's view that an individual should not be compelled to submit to a test.¹⁴ In deference to the attorney general's opinion, the commission included in the statute a means by which a driver could refuse a blood test.¹⁵

12. 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).

13. *Moselle*, 57 N.Y.2d at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293; accord *People v. Biester*, 24 A.D.2d 1021, 1022, 266 N.Y.S.2d 46, 48 (2d Dep't 1965) (Hopkins, J., dissenting) (had the only issue in a N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney Supp. 1982), see *infra* note 26, proceeding been the consent given by the defendant to a blood test, and the jury been provided evidence from which they could conclude that the defendant had consented to the test, then the blood test would have been ruled admissible); *People v. Flynn*, 73 Misc. 2d 178, 340 N.Y.S.2d 837 (Seneca County Ct. 1973) (a blood test from a defendant charged with second degree manslaughter was proper evidence for consideration by a grand jury for the defendant was found to have consented to the test).

14. N.Y. STATE JOINT COMM. ON MOTOR VEHICLE PROBLEMS, CHEMICAL TESTS FOR INTOXICATION, 3 N.Y. Doc. No. 25, 176th N.Y. Leg. 17 (1953). See *supra* note 3.

15. The implied consent statute, as originally enacted, provided:

Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine or saliva for the purposes of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable

In 1966, the Supreme Court ruled in *Schmerber v. California*¹⁶ that an individual has no constitutional right to refuse a blood test for use in criminal driving while intoxicated (DWI) proceedings, provided there is probable cause to suspect the individual of DWI and the test itself is conducted in a reasonable manner.¹⁷ This ruling effectively eliminated not only the need to include in the implied consent statute a means by which a driver could refuse a test but also the need for the statute itself. Consent, according to the Supreme Court, was no longer an issue in blood testing. Despite *Schmerber*, New York chose to continue its policy of affording a driver the opportunity to refuse a blood

grounds to suspect such person of driving while under the influence of intoxicating liquor. If such person refuses to submit to such test the test shall not be given but the commissioner shall revoke his license or permit to drive and any nonresident operating privilege.

Ch. 854, § 71-a, 1953 N.Y. Laws 1167.

In *Schutt v. MacDuff*, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. Orange County 1954), this implied consent statute was challenged on the constitutional grounds of self-incrimination, unreasonable search and seizure, and violations of due process and equal protection. The court rejected each of these challenges except due process. The statute was ruled to violate due process because it failed to limit its application to cases where there had been a valid arrest prior to a driver being subjected to a blood test or where there had been a hearing prior to the revocation of a license. *Id.* at 54, 127 N.Y.S.2d at 128. The 1954 amendment to the implied consent statute included provisions for prior arrest and a hearing. Ch. 320, § 71-a(1), 1954 N.Y. Laws 406 (amending ch. 854, § 71-a(1), 1953 N.Y. Laws 1167).

16. 384 U.S. 757 (1966).

17. *Id.* *Schmerber* was under arrest for the criminal offense of DWI at the time the blood sample he had refused on advice of counsel was collected. The Supreme Court rejected each of *Schmerber's* constitutional challenges to the state's ability to compel an individual to submit to a blood test. In addressing *Schmerber's* fifth amendment claim, the Court classified a blood sample as "real or physical evidence." *Id.* at 764. Since the fifth amendment proscribed compelled communicative or testimonial evidence and a blood sample was neither, no self-incrimination existed. *Id.* at 760-65.

In dismissing *Schmerber's* fourth amendment arguments, the Court held that the bodily intrusion resulting from the collection of the blood sample was justifiable, reasonable and done in a proper manner. Furthermore, the Court ruled that a warrant was not necessary to obtain the blood since the exigent circumstance of a time lapse resulting in the destruction of evidence existed. *Id.* at 766-72.

Constitutional challenges under the sixth and fourteenth amendments were also rejected. *Schmerber* claimed that administration of the blood test over his refusal, on the advice of counsel, violated his "Sixth Amendment right to the assistance of counsel." *Id.* at 766. The Court rejected this claim by reasoning that since the defendant had no right to refuse the test, he gained no additional right by turning to his counsel for advice. *Id.* at 765-66. In rejecting *Schmerber's* fourteenth amendment due process claim, the Court noted that the blood test had been conducted "by a physician in a simple, medically acceptable manner in a hospital environment." *Id.* at 759.

test by preserving the implied consent statute.¹⁸ Although the statute underwent several revisions,¹⁹ this underlying policy survived unchanged until 1983.²⁰

18. The implied consent statute, as in effect until Oct. 15, 1983, provided in relevant part:

1. Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic or drug content of his blood provided that such test is administered at the direction of a police officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of section eleven hundred ninety-two and within two hours after such person has been placed under arrest for any such violation, or

(2) within two hours after a breath test, as provided in section eleven hundred ninety-three-a of this chapter, indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which he is a member.

2. If such person having been placed under arrest or after a breath test indicates the presence of alcohol in his system and having thereafter been requested to submit to such chemical test and having been informed that his license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test, whether or not he is found guilty of the charge for which he is arrested, refuses to submit to such chemical test, the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

N.Y. VEH. & TRAF. LAW § 1194(1)-(2) (McKinney Supp. 1982), *amended by* Compulsory Chemical Tests for Intoxication, ch. 481, § 1194(2), 1983 N.Y. Laws 882, 882-83. For a thorough analysis of the development of the implied consent statute through mid-1975, see King & Tipperman, *The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York*, 3 HOFSTRA L. REV 541 (1975).

As amended by Compulsory Chemical Tests for Intoxication, ch. 481, § 1194(2), 1983 N.Y. Laws 882, 882-83, VTL § 1194(2) provides in relevant part:

If such person having been placed under arrest or after a breath test indicates the presence of alcohol in his system and having thereafter been requested to submit to such chemical test and having been informed that his license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test, whether or not he is found guilty of the charge for which he is arrested, refuses to submit to such chemical test, *unless a court order has been granted pursuant to section eleven hundred ninety-four-a of this chapter*, the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

Id. (amending N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1982)) (emphasis added).

19. See N.Y. VEH. & TRAF. LAW § 1194 annot. (McKinney 1970 & Supp. 1982).

20. Compulsory Chemical Tests for Intoxication, ch. 481, § 1194-a, 1983 N.Y. Laws 882, 883-85, amends the implied consent statute by eliminating a driver's ability to refuse a blood test if a court order for the test is obtained in compliance with the pertinent

Under the version of the implied consent statute in effect until October 15, 1983, a driver who took advantage of the privilege of driving²¹ within the state was deemed to have consented to a blood test for use in VTL proceedings.²² To activate the state's right to conduct the blood test, the driver had to be either under arrest or subjected to a breath test indicating the presence of alcohol.²³ A driver's actual refusal was necessary to prevent the test from being conducted.²⁴ Actual consent, however, was not needed since consent was implied by the statute.²⁵

When cases involving the implied consent statute surfaced, the courts were presented with two procedural issues. First, in what proceedings could a blood test complying with the statute be used and second, what effect does noncompliance with the

statutory provisions. See *infra* notes 129-132 and accompanying text.

21. *Anderson v. MacDuff*, 208 Misc. 271, 273, 143 N.Y.S.2d 257, 258 (Sup. Ct. Montgomery County 1955); *Schutt v. MacDuff*, 205 Misc. 43, 47, 127 N.Y.S.2d 116, 121-22 (Sup. Ct. Orange County 1954).

22. This is the basic premise of the implied consent statute. N.Y. VEH. & TRAF. LAW § 1194(1) (McKinney Supp. 1982).

23. *Id.* Absent an arrest, a breath test provides an objective basis for administering a blood test. It removes the necessity of relying upon the observations of an eye-witness or a police officer. If the result of a breath test indicates that alcohol has been consumed, the officer can request the driver to submit to a blood test provided the officer also informs the driver of the consequences of a refusal. If the driver refuses, the officer will suspend the driver's license, thus preventing the driver who is suspected of DWI from driving away from the scene. See *id.* at § 1194(2); 13 AKRON L. REV. 731 (1980).

The legal validity of the breath test was established in New York in *People v. Donaldson*, 36 A.D.2d 37, 319 N.Y.S.2d 172 (4th Dep't 1971). The scientific validity of the breath test, however, has been questioned recently. A manufacturer of a series of breath testing equipment has noted the possibility of radio transmissions interfering with the test units and causing false readings of the driver's degree of intoxication. These radio transmissions may emanate from such sources as radio and television stations and police installations. See *Smith & Wesson, Customer Advisory — Guidelines for Radio Frequency Interference Testing, All Breathalyzer® Models*, Sept. 10, 1982.

24. N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1982). See *supra* note 18. See *People v. Thomas*, 46 N.Y.2d 100, 108, 385 N.E.2d 584, 588, 412 N.Y.S.2d 845, 850 (1978). A driver must be afforded the opportunity to refuse the test. N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1982). "An examination of the legislative history [of the implied consent statute] reveals that the primary reason for allowing an individual to refuse to take a blood test was to avoid the unpleasant situation of forcibly taking blood from a recalcitrant donor." *People v. Paddock*, 29 N.Y.2d 504, 506, 272 N.E.2d 486, 487, 323 N.Y.S.2d 976, 977 (1971) (Jasen, J., concurring) (citing N.Y. STATE JOINT COMM. ON MOTOR VEHICLE PROBLEMS, CHEMICAL TESTS FOR INTOXICATION, 3 N.Y. Doc. No. 25, 176th N.Y. Leg. (1953)).

25. See *People v. Kelty*, 95 Misc. 2d 246, 247-48, 406 N.Y.S.2d 972, 973 (Dist. Ct. Nassau County 1978).

statute have on the admissibility of a blood test. Compliance with the provisions of the implied consent statute yielded a blood test admissible in VTL section 1192 proceedings.²⁶ Non-compliance with the provisions yielded a blood test inadmissible in VTL section 1192(2) proceedings.²⁷ The courts differed, however, as to the admissibility of a noncomplying blood test in proceedings brought under VTL section 1192(3).²⁸ Courts ruling the noncomplying blood test inadmissible reasoned that the implied consent statute provided the exclusive means, absent actual consent or a court order, by which a driver's blood test could be obtained.²⁹ Courts admitting the noncomplying blood test reasoned that nothing in the VTL precluded its use.³⁰

Courts also differed when determining the admissibility of a blood test obtained pursuant to the provisions of the VTL implied consent statute in proceedings brought under the Penal Law. In *People v. O'Donnell*,³¹ the court ruled a blood test complying with the implied consent statute inadmissible as to the Penal Law charge of criminal negligence. In *People v. Daniel*,³² however, the intermediate court ruled a complying blood test admissible under the Penal Law charge of criminally negligent

26. N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1982) provides in relevant part:

2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vehicle while he is in an intoxicated condition.

Id. at § 1192(2)-(3).

Section 1195(1) provides:

Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two, the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood pursuant to the provisions of section eleven hundred ninety-four of this Chapter.

Id.

27. See *People v. Blowers*, 79 Misc. 2d 462, 465, 360 N.Y.S.2d 369, 373 (Rensselaer County Ct. 1974).

28. N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney Supp. 1982). See *supra* note 26.

29. See *People v. Daniel*, 84 A.D.2d 916, 916, 446 N.Y.S.2d 658, 659 (4th Dep't 1981); *People v. Wolter*, 83 A.D.2d 187, 190, 444 N.Y.S.2d 331, 333 (4th Dep't 1981).

30. See *People v. Blowers*, 79 Misc. 2d at 465, 360 N.Y.S.2d at 373.

31. 30 A.D.2d 731, 291 N.Y.S.2d 233 (3d Dep't 1968).

32. 84 A.D.2d at 917, 446 N.Y.S.2d at 660.

homicide. According to the *Daniel* court, the language of VTL section 1195(1)³³ permitted this result.³⁴

In *People v. Blowers*,³⁵ a blood test obtained in contravention of the implied consent statute, although inadmissible in a VTL section 1192(2) proceeding, was admissible under VTL section 1192(3), and for charges of reckless driving, criminally negligent homicide and second degree manslaughter.³⁶

B. Blood Testing Pursuant to a Court Order

Two statutory provisions covering the issuance of a court order to obtain a blood test are the CPL discovery statute and search warrant statute.

1. The CPL Discovery Statute

The anticipated effect of Article 240 of the CPL,³⁷ which sets forth the means of discovering material from either a defendant or prosecutor by demand and upon motion, was to avoid surprise at trial.³⁸ The purpose of the discovery statute, CPL section 240.40,³⁹ which permits discovery by either party of ma-

33. N.Y. VEH. & TRAF. LAW § 1195(1) (McKinney Supp. 1982). See *supra* note 26.

34. *People v. Daniel*, 84 A.D.2d at 917, 446 N.Y.S.2d at 660.

35. 79 Misc. 2d 462, 360 N.Y.S.2d 369 (Rensselaer County Ct. 1974).

36. *Id.* at 463, 465-66, 360 N.Y.S.2d at 371, 373-74.

37. N.Y. CRIM. PROC. LAW §§ 240.10-90 (McKinney 1982).

38. In approving this Article, Governor Carey stated: "The enactment of these measures will have a significant impact on the criminal justice process. The element of surprise in criminal trials and its inherent unfairness, will be reduced." Governor's Memorandum on approving L.1979, ch. 412 and 413, 1979 N.Y. Laws 1801.

39. N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982), amended by Compulsory Chemical Tests for Intoxication, ch. 481, § 240.40, 1983 N.Y. Laws 882, 885 [hereinafter cited as N.Y. VEH. & TRAF. LAW § 240.40(2) (McKinney 1982)], provides in relevant part:

2. Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment, superior court information, prosecutor's information or information is pending; (a) must order discovery as to any property not disclosed upon a demand pursuant to section 240.30, if it finds that the defendant's refusal to disclose such material is not justified; and (b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to: . . . (v) Permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto

This subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may de-

terial upon motion and court order when "an indictment . . . or information is pending,"⁴⁰ was interpreted as being to correct the existing discovery process which was considered "haphazard and unregulated."⁴¹ A court order issued pursuant to the discovery statute was not intended "to limit, expand, or otherwise affect the issuance of a similar court order, as [might] be authorized by law, before the filing of an accusatory instrument."⁴²

One type of material discoverable through a court order is issued pursuant to the discovery statute is a defendant's blood sample.⁴³ This statute has been used by the prosecution to obtain a blood sample from a defendant for comparison purposes⁴⁴ and by the defendant to obtain the result of a blood test conducted previously.⁴⁵ In each of these situations, the criminal prosecutions had already been in progress.

2. *The CPL Search Warrant Statute*

Article 690 of the CPL⁴⁶ provides another authority for the issuance of a court order for a blood test. This Article defines a search warrant as a court order authorizing a police officer to conduct a search of a "designated person, for the purpose of

rive from the constitution of this state or of the United States.

Id.

40. *Id.*

41. Memorandum of Office of Court Administration discussing the text of ch. 412 proposed § 240.40, 1979 N.Y. Laws 1889.

42. N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982). See *supra* note 39.

43. *Id.* at § 240.40(2)(b)(v). See *supra* note 39.

44. See *People v. Natoli*, 109 Misc. 2d 49, 442 N.Y.S.2d 681 (Sup. Ct. Kings County 1982) (defendant charged with grand larceny and criminal possession of stolen property was compelled pursuant to a court order issued under CPL § 240.40(2)(b)(v) to submit to a blood test for comparison purposes); *People v. Trocchio*, 107 Misc. 2d 610, 435 N.Y.S.2d 639 (Suffolk County Ct. 1980) (a court order issued pursuant to CPL § 240.40(2)(b)(v) compelled a defendant charged with two counts of sodomy to submit to saliva and blood tests to compare the defendant's samples to blood found on articles of clothing).

45. See *People v. Inness*, 69 Misc. 2d 429, 326 N.Y.S.2d 669 (Westchester County Ct. 1971) (defendant charged with VTL and Penal Law violations was entitled to obtain the result of his blood test from the prosecution); *People v. North*, 96 Misc. 2d 637, 409 N.Y.S.2d 482 (Amherst Town Ct. 1978) (defendant charged with driving while intoxicated was entitled to receive from the prosecution pursuant to CPL § 240.40(1) the result of a blood test conducted after his arrest).

46. N.Y. CRIM. PROC. LAW §§ 690.05-.55 (McKinney 1971 & Supp. 1982).

seizing designated property.”⁴⁷ Property is subject to seizure if it “tends to demonstrate that an offense was committed or that a particular person participated in the commission of an offense.”⁴⁸ A search warrant may be obtained by filing a written or oral application.⁴⁹

The New York Court of Appeals considered the applicability of a search warrant to the collection of a blood sample in *In re Abe A.*⁵⁰ The defendant, a suspect in a homicide investigation, had refused to submit to a blood test.⁵¹ Since the purpose of obtaining the defendant's blood sample was for comparison with blood found at the scene of the homicide, the court reasoned that the defendant's blood was property which might tend to demonstrate “‘that a particular person participated in the commission of an offense.’”⁵² Thus an Article 690 search warrant was a proper means of obtaining the suspect's blood sample.⁵³

47. *Id.* at § 690.05(2) (McKinney 1971 & Supp. 1982).

48. *Id.* at § 690.10(4) (McKinney 1971).

49. *Id.* at § 690.35(1) (McKinney Supp. 1982). “[A]n oral application may be communicated to a judge by telephone, radio or other means of electronic communication.” *Id.* at § 690.36(1) (McKinney Supp. 1982).

In support of the enactment of CPL § 690.36, it was noted:

This legislation simply changes the procedures, but not the substantive legal requirements, for obtaining a search warrant. Presently, the law requires that an application for a search warrant be in writing. Thus, a police officer seeking to obtain a warrant can expect to expend considerable time and energy attending to the details of preparing a written application and finding a judge to review it. Unfortunately, the police are often faced with situations where time is of the essence, i.e., cases where the evidence may be lost or destroyed if a search and seizure are not promptly effected.

Memorandum of Legislative Representative of City of New York in support of the passage of ch. 679, 1982 N.Y. Laws 2540.

Additional arguments advanced in support of this statute included furtherance of the goal of keeping the police out of courthouses and on the streets of the community and minimizing the instances in which warrantless searches and seizures could occur. *Id.*

50. 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982).

51. *Id.* at 292, 437 N.E.2d at 267, 452 N.Y.S.2d at 8.

52. *Id.* at 294, 437 N.E.2d at 268, 452 N.Y.S.2d at 9 (quoting N.Y. CRIM. PROC. LAW § 690.10(4) (McKinney 1971)).

53. *Id.* The court required, however, that certain “stringent standards” be met prior to issuance of the court order. The “stringent standard” test states:

[A] court order to obtain a blood sample of a suspect may issue provided the People establish (1) probable cause to believe the suspect has committed the crime, (2) a “clear indication” that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable. In addition, the issuing court

III. *People v. Moselle*A. *Factual Background*

The defendants in the three cases consolidated in *People v. Moselle*⁵⁴ were drivers, each involved in an accident in which either the driver or a passenger of the other vehicle was killed. In each case, some aspect of the VTL implied consent statute had not been complied with and a court order or the driver's consent for the test had not been obtained, leading the intermediate court to rule the defendant's BAC test inadmissible in VTL and Penal Law proceedings.

1. *People v. Moselle*⁵⁵

Moselle was a driver involved in an accident in which the driver of the other vehicle died.⁵⁶ The investigating police officer requested that Moselle submit to a blood test after detecting a strong odor of alcohol.⁵⁷ No evidence was presented at trial to show that Moselle had actually consented to the blood test or that he had been arrested or administered a breath test prior to having his blood drawn.⁵⁸ The blood test indicated a BAC of .17 of one per centum by weight.⁵⁹ Moselle was charged with violating VTL section 1192(2).⁶⁰

At trial, the jury was instructed that if they were to find that the police officer had acted upon reasonable grounds in ordering Moselle's blood test, then the test would be admissible evidence.⁶¹ The jury found the officer's action reasonable and

must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other.

Id. at 291, 437 N.E.2d at 266, 452 N.Y.S.2d at 7.

54. 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).

55. (Erie County Ct. Dec. 7, 1981).

56. *Moselle*, 57 N.Y.2d at 101, 102 n.1, 439 N.E.2d at 1236 & n.1, 454 N.Y.S.2d at 293 & n.1.

57. *Id.* at 102, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

58. *Id.*

59. *Id.*

60. *Id.* N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney Supp. 1982). *See supra* note 26.

61. *Moselle*, 57 N.Y.2d at 102, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

convicted Moselle.⁶² On appeal, the Erie County Court reversed.⁶³

2. *People v. Daniel*⁶⁴

Daniel was a driver involved in an accident in which a passenger of one of the other vehicles died.⁶⁵ The investigating police officer requested that a nurse draw Daniel's blood after observing two empty bottles and one half-full cold bottle of beer in Daniel's van.⁶⁶ Actual consent was neither given by nor sought from Daniel for the test, which established his BAC as .22 of one per centum by weight.⁶⁷ Daniel was charged with criminally negligent homicide, a Penal Law offense, and violations of VTL sections 1192(2) and (3).⁶⁸

In a pretrial hearing, the suppression court granted Daniel's motion to suppress the blood test.⁶⁹ The intermediate court affirmed by ruling that the implied consent statute provided the exclusive means, absent actual consent or a court order, by which the police could obtain a blood test from a driver.⁷⁰ Non-compliance with the provisions of the implied consent statute negated use of the blood test.⁷¹ The intermediate court ruled further that had the blood test been collected in compliance with the provisions of the implied consent statute, it would have been admissible in the proceedings brought under the Penal Law.⁷²

62. *Id.*

63. *Id.*

64. 84 A.D.2d 916, 446 N.Y.S.2d 658 (4th Dep't 1981).

65. *Moselle*, 57 N.Y.2d at 102-03, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

66. *Id.* at 103, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

67. *Id.* The court of appeals noted that Daniel was unconscious and not under arrest when the blood test was initiated, and that he regained consciousness during the testing. *Id.* The intermediate court made no mention of this fact. *People v. Daniel*, 84 A.D.2d 916, 446 N.Y.S.2d 658 (4th Dep't 1981). See *infra* note 125.

68. *Moselle*, 57 N.Y.2d at 102-03, 439 N.E.2d at 1236-37, 454 N.Y.S.2d at 293-94. N.Y. VEH. & TRAF. LAW § 1192(2)-(3) (McKinney Supp. 1982). See *supra* note 26.

69. *Moselle*, 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.

70. *People v. Daniel*, 84 A.D.2d at 916, 446 N.Y.S.2d at 659. This is in contrast to the suppression court which had premised its ruling to suppress Daniel's blood test upon finding the extraction of his blood to be in violation of his constitutional rights. *Id.*

71. *Id.* at 917, 446 N.Y.S.2d at 660.

72. *Id.* The intermediate court interpreted N.Y. VEH. & TRAF. LAW § 1195(1) (McKinney Supp. 1982), see *supra* note 26, as the authority permitting use of a blood test

3. *People v. Wolter*⁷³

The driver Wolter, involved in an accident in which the driver of the other vehicle died, was under arrest when subjected to a blood test that he had refused.⁷⁴ The test indicated that Wolter's BAC was .23 of one per centum by weight.⁷⁵ Wolter was charged with several violations of the VTL and Penal Law.⁷⁶

At a pretrial suppression hearing, the court ruled Wolter's blood test inadmissible as to the VTL charges but admissible as to the Penal Law charges.⁷⁷ On appeal, however, the intermediate court ruled the test inadmissible as to all charges, reasoning that the implied consent statute provided the exclusive means by which the police could obtain a BAC test from a nonconsenting driver absent a court order.⁷⁸ Subjecting the driver to the test despite his refusal contravened the provisions of the implied consent statute, negating use of the test.⁷⁹

complying with the implied consent statute in any proceeding. Since the provisions of the implied consent statute had been violated by the police officer's failure to place Daniel under arrest or administer a breath test prior to conducting the blood test, the test was ruled inadmissible under the Penal Law as well as VTL charges. *Id.*

73. 83 A.D.2d 187, 444 N.Y.S.2d 331 (4th Dep't 1981).

74. *Moselle*, 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. The deputy investigating the accident had ordered the blood test after detecting the odor of alcohol about Wolter. *Id.*

75. *Id.*

76. The charges against Wolter included second degree assault, second degree manslaughter and the VTL offense of driving while intoxicated. *Id.* at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.

77. *People v. Wolter*, 83 A.D.2d 187, 188, 444 N.Y.S.2d 331, 332 (4th Dep't 1981).

78. *Id.* at 189-90, 444 N.Y.S.2d at 333. The intermediate court reasoned that although "a warrantless taking of blood from a person under arrest without his consent is undoubtedly constitutional . . . , it is not permissible to utilize the results of such a blood test in a trial where a statute plainly indicates it shall not be taken if the subject refuses to consent." *Id.* at 189, 444 N.Y.S.2d at 333. Obtaining Wolter's blood test despite his refusal contravened the provisions of the implied consent statute and rendered the test inadmissible in the VTL proceedings. *Id.* Citing *People v. Daniel*, 84 A.D.2d 916, 446 N.Y.S.2d 658 (4th Dep't 1981), as precedent, *see supra* note 72, the court further ruled the test inadmissible in the Penal Law proceedings. *People v. Wolter*, 83 A.D.2d at 189-90, 444 N.Y.S.2d at 333.

79. *People v. Wolter*, 83 A.D.2d at 189-90, 444 N.Y.S.2d at 333.

B. *The Decision of the Court of Appeals*

In *People v. Moselle*,⁸⁰ the New York Court of Appeals ruled that to be admissible in a VTL proceeding, a blood test must comply with the provisions of the implied consent statute in the absence of a driver's actual consent or a court order.⁸¹ Of the three cases consolidated in *Moselle*, this issue was only raised in regard to *Moselle* and *Wolter*. *Moselle* had not consented to the blood test and a court order had not issued.⁸² Thus the police officer's failure to either arrest him or administer a breath test violated the provisions of the implied consent statute and rendered the blood test inadmissible.⁸³ Administration of the blood test over *Wolter*'s refusal, again in violation of the implied consent statute, negated the use of the test in the VTL portion of the proceedings against him.⁸⁴

Contrary to the *Wolter* and *Daniel* intermediate courts,⁸⁵ the court of appeals stated that the VTL implied consent statute applied only to VTL proceedings.⁸⁶ In Penal Law proceedings, a blood test was admissible only if collected pursuant to a court order or an individual's actual consent.⁸⁷ Exigent circumstances, although perhaps excusing the failure to obtain a court order, did "not provide a source of authority to conduct discovery."⁸⁸

80. 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).

81. *Id.* at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

82. *Id.* at 102, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

83. *Id.* at 107, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.

84. *Id.*

85. *People v. Wolter*, 83 A.D.2d 187, 444 N.Y.S.2d 331 (4th Dep't 1981), *see supra* note 78 and accompanying text; *People v. Daniel*, 84 A.D.2d 916, 446 N.Y.S.2d 658 (4th Dep't 1981), *see supra* note 70 and accompanying text.

86. *Moselle*, 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.

87. *Id.* at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

88. *Id.* at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 296-97. An individual's body metabolizes alcohol over time, leading to destruction of the alcohol level in the blood. A blood test conducted after a significant time lapse would indicate a lower BAC level than if the test had been conducted at the scene or shortly after commission of a violation. For this reason the implied consent statute requires the blood test be conducted within two hours of the driver's arrest or breath test. N.Y. VEH. & TRAF. LAW § 1194(1)(2) (McKinney Supp. 1982). *See supra* note 18.

If a court order were sought to obtain a driver's blood for BAC testing, the time required to obtain the court order would most likely exceed the rate of alcohol destruction by the body, unless the court order was sought by oral application. *See supra* note 49 and accompanying text. This "destruction of evidence" is recognized as an emergency situation and an exception to the warrant preference rule. *Schmerber v. California*, 384

After noting the absence of a common law right to obtain a blood test, the court inferred from the existence of the CPL discovery statute a legislative intent to make a court order or statutory provision the exclusive means for obtaining a blood test.⁸⁹ The court stated:

Any lingering doubt that this legislation was intended to blanket the subject (except as the Legislature itself might additionally provide) rather than merely to constitute a partial piece of special legislative regulation is dispelled when note is taken of the last sentence of subdivision 2: "This subdivision shall not be construed to limit, expand or otherwise affect the *issuance of a similar court order*, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may derive from the constitution of this state or of the United States." (Emphasis added.) No room is then left for the taking of samples of blood otherwise than pursuant to a court order issued under CPL 240.40 or a court order otherwise authorized by law (or in conformity with §1194). The negative inference is that the taking of blood in any other manner is foreclosed.⁹⁰

Since neither Daniel nor Wolter had consented to have his blood drawn, and a court order had issued in neither case, their tests were ruled inadmissible in the Penal Law proceedings.⁹¹

The dissent concurred with the majority's application of the implied consent statute to blood testing in VTL and Penal Law proceedings but disagreed with its interpretation of the CPL discovery statute.⁹² The dissent theorized that the discovery statute applied only to proceedings already in progress, not to a field investigation by a police officer.⁹³ Furthermore, the statute did not impliedly negate other means by which a blood test might be obtained.⁹⁴ The dissent concluded that neither a court order, implied or actual consent, nor an arrest was necessary to make a

U.S. 757, 770-71 (1966). The New York Court of Appeals recognized this "exigent circumstance" but further noted that authority for obtaining the blood must exist prior to excusing the need of a court order. *Moselle*, 57 N.Y.2d at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 296-97.

89. *Moselle*, 57 N.Y.2d at 109-10, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.

90. *Id.* at 110, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297 (footnotes omitted).

91. *Id.* at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.

92. *Id.* at 111, 439 N.E.2d at 1241, 454 N.Y.S.2d at 298 (Jasen, J., dissenting).

93. *Id.* at 111-12, 439 N.E.2d at 1241, 454 N.Y.S.2d at 298 (Jasen, J., dissenting).

94. *Id.*

blood test admissible.⁹⁵

IV. Analysis

Prior to *People v. Moselle*,⁹⁶ in the absence of actual consent or a court order, a blood test obtained in violation of the provisions of the VTL implied consent⁹⁷ statute was inadmissible in a VTL section 1192(2)⁹⁸ proceeding.⁹⁹ The *Moselle* ruling as to the defendant Moselle reaffirmed this.¹⁰⁰ The *Moselle* court quieted the conflict surrounding proceedings brought under VTL section 1192(3)¹⁰¹ by ruling that a noncomplying blood test was inadmissible in the VTL section 1192(3) charge against Wolter.¹⁰² The holding in *People v. Blowers*,¹⁰³ that a noncomplying blood test was admissible in VTL section 1192(3) proceedings, was effectively overruled.

Furthermore, *Moselle* settled the conflict concerning the application of the VTL implied consent statute to Penal Law proceedings.¹⁰⁴ According to the court, the implied consent statute provided no guidance or authority for obtaining or using a blood test in any proceeding other than a VTL prosecution.¹⁰⁵ The court failed, however, to explain why it disagreed with the *Daniel* intermediate court's¹⁰⁶ ruling that VTL section 1195(1)¹⁰⁷ authorized the use of a complying blood test in any proceeding

95. *Id.* at 113-14, 439 N.E.2d at 1242-43, 454 N.Y.S.2d at 299-300 (Jasen, J., dissenting).

96. 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).

97. N.Y. VEH. & TRAF. LAW § 1194(1)-(2) (McKinney Supp. 1982). *See supra* notes 6 & 18 and accompanying text.

98. *Id.* at § 1192(2). *See supra* note 26 and accompanying text.

99. *People v. Blowers*, 79 Misc. 2d 462, 465, 360 N.Y.S.2d 369, 373 (Rensselaer County Ct. 1974).

100. *Moselle*, 57 N.Y.2d at 107, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296. *See supra* text accompanying notes 80-83.

101. N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney Supp. 1982). *See supra* notes 26 & 28-30 and accompanying text.

102. *Moselle*, 57 N.Y.2d at 107, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296. *See supra* text accompanying note 84.

103. 79 Misc. 2d 462, 465, 360 N.Y.S.2d 369, 373 (Rensselaer County Ct. 1974). *See supra* text accompanying note 30.

104. *See supra* notes 31-36 and accompanying text.

105. *Moselle*, 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296. *See supra* notes 85-87 and accompanying text.

106. *People v. Daniel*, 84 A.D.2d 916, 917, 446 N.Y.S.2d 658, 660 (4th Dep't 1981).

107. N.Y. VEH. & TRAF. LAW § 1195(1) (McKinney Supp. 1982). *See supra* note 26.

"arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two."¹⁰⁸ Finally, the court required that a driver explicitly consent to a blood test or that a court order issue for a test in order for the test to be admissible in Penal Law proceedings.¹⁰⁹

The court had been presented with no authority recognizing the state's common law right to compel an individual to submit to a blood test.¹¹⁰ Absent such a common law right, the majority required another source of authority for obtaining the test. Besides the driver's actual or implied consent, the majority ruled that a court order issued pursuant to statutory authority would provide such authority.¹¹¹ The existence of the implied consent and discovery statutes was, from the majority's perspective, an indication of a legislative intent to limit an individual's right to be free from undesired blood testing.

According to the court, the existence of the CPL discovery statute¹¹² authorizing issuance of a court order to obtain a defendant's blood sample demonstrated the state's unwillingness to obtain an individual's blood in the absence of statutory authority.¹¹³ Existence of the CPL discovery statute did not exclude, however, a court order issued under another statutory authority.¹¹⁴ Thus a search warrant,¹¹⁵ a type of court order, would be a proper means for compelling a driver to submit to a test,¹¹⁶ with

108. *Id.* See *supra* text accompanying notes 32-34. The *Moselle* court merely stated: In our view, [VTL § 1195(1)] only authorizes the giving of chemical blood tests for prosecutions for violations of the Vehicle and Traffic Law; it has no application to charges brought under sections of the Penal Law, notwithstanding that the charged Penal Law violations arise out of the operation of a motor vehicle. To this extent we differ with the rationale on which the Appellate Division premised its determination in *Daniel*.

Moselle, 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.

109. *Moselle*, 57 N.Y.2d at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. See *supra* text accompanying note 91.

110. *Id.* at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.

111. *Id.*

112. N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982). See *supra* notes 39-42 and accompanying text.

113. *Moselle*, 57 N.Y.2d at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.

114. *Id.* at 110, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.

115. N.Y. CRIM. PROC. LAW § 690.05(2) (McKinney 1970 & Supp. 1982). See *supra* text accompanying note 47.

116. *Moselle*, 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.

the driver identified as the "designated person,"¹¹⁷ and the driver's blood the "designated property"¹¹⁸ "tend[ing] to demonstrate that an offense [had been] committed,"¹¹⁹ the offense being a violation of the VTL or Penal Law. Such a court order could be sought by oral application.¹²⁰

The dissent disagreed with the majority's ruling in *Moselle* that the absence of actual consent or a court order negated use of a blood test in Penal Law prosecutions;¹²¹ no specific source of authority need exist for the test, for an individual had no constitutional right to refuse the test.¹²² Thus from the dissent's perspective, the existence of the implied consent and discovery statutes merely represented methods by which the state afforded an individual greater protection than that guaranteed by the Constitution.

The positions of the majority and dissent reflect the dichotomy initially recognized in New York toward the state's right to draw an individual's blood for testing.¹²³ Although the commission drafting the implied consent statute believed, as did the dissent, that an individual had no right to refuse a test, it incorporated into the 1953 statute the state attorney general's position that in the absence of actual or implied consent, a blood test should not be administered.¹²⁴ This was the *Moselle* court's position. The result was that an individual's interest in being free from forced bodily intrusion was valued above the state's interest in obtaining a blood test.

The dissent in *Moselle* foreshadowed the growing dissatisfaction with the judicial and legislative reluctance to force an individual to submit to a blood test. The dissent would have put no restrictions on the state's right to obtain the test. The dissent

117. N.Y. CRIM. PROC. LAW § 690.05(2) (McKinney 1971 & Supp. 1982). See *supra* text accompanying note 47.

118. *Id.*

119. *Id.* at § 690.10(4) (McKinney 1971). See *supra* text accompanying note 48.

120. *Id.* at § 690.35(1) (McKinney Supp. 1982). See *supra* note 49 and accompanying text.

121. *Moselle*, 57 N.Y.2d at 111, 439 N.E.2d at 1241, 454 N.Y.S.2d at 298 (Jasen, J., dissenting).

122. *Id.* at 112-14, 439 N.E.2d at 1242-43, 454 N.Y.S.2d at 299-300 (Jasen, J., dissenting).

123. See *supra* notes 3 & 14-15 and accompanying text.

124. *Id.*

maintained that not only was an arrest unnecessary,¹²⁵ a requirement under *Schmerber v. California*,¹²⁶ but a court order,¹²⁷ a

125. *Moselle*, 57 N.Y.2d at 114, 439 N.E.2d at 1243, 454 N.Y.S.2d at 299-300 (Jasen, J., dissenting). Daniel had argued that since he had not been under arrest when his blood was extracted, the blood test should be suppressed. The dissent stated that since an individual has no constitutional right to be arrested, a driver can not expect a police officer to guess when enough evidence has been gathered to establish probable cause to arrest the driver. *Id.* at 114, 439 N.E.2d at 1243, 454 N.Y.S.2d at 300 (Jasen, J., dissenting).

Although the court of appeals noted that Daniel had been unconscious when his blood test was initiated, *id.* at 103, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293, the court had not been presented with the issue of how unconsciousness affects an arrest. The prosecution in *Daniel* had conceded that the defendant Daniel had not been arrested prior to administration of the blood test; thus the court had no reason to discuss this issue. *People v. Daniel*, 84 A.D.2d at 916, 446 N.Y.S.2d at 659.

In *People v. Cantor*, 36 N.Y.2d 106, 111, 324 N.E.2d 872, 876, 365 N.Y.S.2d 509, 515 (1975), the court stated: "Whenever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action, that individual has been seized within the meaning of the Fourth Amendment." *Id.* In *People v. McGroder*, 81 Misc. 2d 1081, 1082-83, 367 N.Y.S.2d 714, 716 (Webster Town Ct. 1975), the court relied upon *Cantor* when it held that a blood test extracted from an unconscious driver complied with the arrest requirement of the implied consent statute, thus yielding a blood test admissible in a VTL proceeding. The court observed that the conduct of the driver and the police officer dictated that the driver's "liberty had been restrained," thus the unconscious driver was under arrest. *Id.* at 1083, 367 N.Y.S.2d at 716. *Accord* *People v. Curran*, 90 A.D.2d 661, 456 N.Y.S.2d 281 (3d Dep't 1982).

The *McGroder* court also addressed the issue of whether an unconscious driver can be deemed to have refused a blood test. The court noted that a driver's actual refusal is required to prevent the test from being conducted; actual consent to the test is not required by the implied consent statute. *Id.* at 1083, 367 N.Y.S.2d at 716-17. *See also* *People v. Kates*, 77 A.D.2d 417, 433 N.Y.S.2d 938 (4th Dep't 1980), *aff'd*, 53 N.Y.2d 591, 428 N.E.2d 852, 444 N.Y.S.2d 446 (1981).

New York has yet to decide the issue of the admissibility of a blood test taken from an unconscious driver who, upon regaining consciousness, refuses a test which has already been performed. *People v. McGroder*, 81 Misc. 2d at 1083, 367 N.Y.S.2d at 717.

126. 384 U.S. 757 (1966). *See supra* notes 16-17 and accompanying text.

127. *Moselle*, 57 N.Y.2d at 113, 439 N.E.2d at 1242, 454 N.Y.S.2d at 299 (Jasen, J., dissenting). The dissent reasoned that the CPL discovery statute for issuance of a court order to obtain a blood sample from a defendant had no application to a field investigation conducted by a police officer. *Id.* at 111, 439 N.E.2d at 1241, 454 N.Y.S.2d at 298 (Jasen, J., dissenting). Furthermore, the mere existence of this statute did not negate other means of obtaining a blood test from a driver. "There simply is no basis, either in the express language of the statute or its legislative history, for the majority's conclusion that CPL 240.40 pre-empts authorization for blood tests administered in the course of a criminal investigation to determine whether there has been a violation of the Penal Law." *Id.* at 112, 439 N.E.2d at 1242, 454 N.Y.S.2d at 299 (Jasen, J., dissenting). The dissent would have relied upon the exigent circumstance of a time lapse resulting in the destruction of evidence to "justif[y] the immediate, warrantless removal of the blood

requirement under *In re Abe A.*,¹²⁸ was unnecessary as well.

The legislature enacted VTL section 1194-a¹²⁹ in response to *Moselle's* result: the suppression of drivers' BAC tests in cases involving deceased or seriously injured victims.¹³⁰ The legislature adopted the dissent's view that a driver has no right to refuse a blood test but tempered it by limiting the test to situations where someone other than the driver was killed or suffered serious physical injury.¹³¹ The legislature also tailored the new statute to the framework defined by the majority by requiring

sample from the suspect's body." *Id.* at 113, 439 N.E.2d at 1242, 454 N.Y.S.2d at 299 (Jasen, J., dissenting). *But see supra* note 88 and accompanying text.

128. 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982). *See supra* notes 50-53 and accompanying text.

129. Compulsory Chemical Tests for Intoxication, ch. 481, § 1194-a, 1983 N.Y. Laws 882, 883-84 (effective Oct. 15, 1983) (new provision) [hereinafter cited as VTL § 1194-a], provides in part:

1. Notwithstanding the provisions of section eleven hundred ninety-four of this chapter, no person who operates a motor vehicle in this state may refuse to submit to a chemical test of his breath, blood, urine or saliva for the purpose of determining the alcoholic or drug content of his blood when a court order for such chemical test has been issued in accordance with the provisions of this section.

2. Upon refusal by any person to submit to a chemical test as described above the test shall not be given unless, a police officer or a district attorney, as defined in subdivision thirty-two of section 1.20 of the criminal procedure law, requests and obtains a court order to compel a person to submit to a chemical test to determine the alcoholic or drug content of his blood upon a finding of reasonable cause to believe that:

(a) such person was the operator of a motor vehicle and in the course of such operation a person other than the operator was killed or suffered serious physical injury as defined in section 10.00 of the penal law; and

(b) (1) either such person operated the vehicle in violation of any subdivision of section eleven hundred ninety-two of this chapter, or

(2) a breath test administered by a police officer in accordance with section eleven hundred ninety-three-a of this chapter indicates that alcohol has been consumed by such person; and

(c) such person has been placed under lawful arrest; and

(d) such person has refused to submit to a chemical test requested in accordance with the provisions of subdivision two of section eleven hundred ninety-four of this chapter or is unable to give his consent to such a test.

VTL § 1194-a(1)-(2).

130. *See New York State Assembly Memorandum in Support of Legislation — Purpose or General Idea of Bill*, accompanying Bill No. 4178, enacted as Compulsory Chemical Tests for Intoxication, ch. 481, 1983 N.Y. Laws 882.

131. VTL § 1194-a(2)(a). Serious physical injury is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. PENAL LAW § 10.00(10) (McKinney 1975).

the issuance of a court order to obtain the test.¹³²

A driver's refusal of a BAC test authorized by the implied consent statute triggers VTL section 1194-a.¹³³ Under this section, a police officer or district attorney may request a court order to obtain an individual's BAC test, and this court order may issue "upon a finding of reasonable cause to believe"¹³⁴ each of the following:

- the individual was a driver,
- someone other than this individual was killed or suffered serious physical injury,
- either the individual violated VTL section 1192¹³⁵ or the individual's breath test indicated consumption of alcohol,
- the individual was under lawful arrest, and
- either the individual refused the test authorized by the implied consent statute or the individual was unable to refuse the test.¹³⁶

"Reasonable cause" exists if from the totality of the circumstances it appears that the individual violated VTL section 1192.¹³⁷

A VTL section 1194-a court order may be issued only by specifically designated justices or judges.¹³⁸ This restriction is an

132. VTL § 1194-a(1). *See supra* note 129.

133. *Id.* at § 1194-a(2). *See supra* note 129.

134. *Id.*

135. N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1982). *See supra* note 26 for relevant provisions of the statute.

136. VTL § 1194-a(2)(a)-(d). *See supra* note 129.

137. VTL § 1194-a(2) provides:

For the purposes of this section "reasonable cause" shall be determined by viewing the totality of circumstances surrounding the incident which, when taken together, indicate that the operator was driving in violation of section eleven hundred ninety-two of this chapter. Such circumstances may include, but are not limited to: evidence that the operator was operating a motor vehicle in violation of any provision of this article or any other moving violation at the time of the incident; any visible indication of alcohol or drug consumption or impairment by the operator; the existence of an open container containing an alcoholic beverage in or around the vehicle driven by the operator; any other evidence surrounding the circumstances of the incident which indicate that the operator had been operating a motor vehicle while impaired by the consumption of alcohol or drugs or intoxicated at the time of the incident.

Id. N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1982). *See supra* note 26 for relevant provisions of the statute.

138. VTL § 1194-a(3)(a) provides:

An application for a court order to compel submission to a chemical test may be made to any supreme court justice, county court judge or district court judge in

attempt to guarantee that only officials with sufficient appreciation of the intrusion resulting from compelling an individual to submit to a blood test are able to grant the court order.¹³⁹ The application for the court order can be communicated to the justice or judge "by telephone, radio or other means of electronic communication, or in person."¹⁴⁰ The statute even mandates that the chief administrator of the courts establish a schedule whereby a justice or judge is always available to consider the oral application.¹⁴¹ The legislature appropriately addressed the necessity of quick action to prevent the loss of evidence.¹⁴²

Although providing the state with a means of obtaining a driver's blood test after a refusal, VTL section 1194-a necessitates compliance with several procedural mandates.¹⁴³ These

the judicial district in which the incident occurred, or if the incident occurred in the city of New York before any supreme court justice or judge of the criminal court of the city of New York. Such application may be communicated by telephone, radio or other means of electronic communication, or in person.

Id.

139. Telephone interview with Christopher A. Cernik, Esq., Program & Comm. Staff, N.Y. State Assembly (July 19, 1983).

140. VTL § 1194-a(3). *See supra* note 138. Compare this with N.Y. CRIM. PROC. LAW § 690.36(1) (McKinney Supp. 1982) which provides a similar provision for oral applications. *See supra* note 49.

141. VTL § 1194-a(3)(f) provides: "The chief administrator of the courts shall establish a schedule to provide that a sufficient number of judges or justices will be available in each judicial district to hear oral applications for court orders as permitted by this section." *Id.*

142. *Accord supra* note 88.

143. VTL § 1194-a(2)(a)-(d). *See supra* notes 129, 133-34, 136-37 and accompanying text. In fact, "[i]t may be argued that simpler procedures should be available. However, the bill represents a substantial advance in the present law and will facilitate the effective prosecution of intoxicated or impaired drivers under the Penal Law where there is serious physical injury or death."

Governor's Memorandum issued upon approval of Compulsory Chemical Tests for Intoxication, ch. 481, 1983 N.Y. Laws A-577.

According to the Memorandum of Legislative Representative of City of New York in support of the passage of Compulsory Chemical Tests for Intoxication, ch. 481, 1983 N.Y. Laws A-551, -552, the reasons for supporting the Law are:

Blood Alcohol Concentration (BAC) data derived from such samples would make it easier to assign culpability in traffic accidents that result in death or serious physical injury, and facilitate effective prosecution of such cases.

Furthermore, it would enable accurate reporting on the incidence of the involvement of alcohol with motor vehicle fatalities and serious injuries.

It is widely believed by Highway Safety experts that the incidence of alcohol involvement in motor vehicle fatalities and injuries is under-reported. If we are to develop effective strategies, to deal with the problem of the drinking driver, the

procedural requirements delineate the limitations of the applicability of the statute. For example, a court order will not issue if only the driver under suspicion of DWI is killed or suffers serious physical injury,¹⁴⁴ or if a victim suffers injury which is not serious.¹⁴⁵ Nor will a court order issue if the individual who was the driver can not be identified as such.¹⁴⁶

If a VTL section 1194-a court order cannot be obtained,¹⁴⁷ may a court order to obtain a driver's blood test issue upon other statutory authority? The *Moselle* court ruled that a court order issued pursuant to the search warrant provisions of the CPL would be a proper means of obtaining a blood test from a driver provided there was: "(1) probable cause to believe the suspect ha[d] committed the crime, (2) a 'clear indication' that relevant material evidence [would] be found, and (3) the method used to secure it [was] safe and reliable."¹⁴⁸

The admissibility of a blood test obtained by a search warrant in vehicular assault and homicide Penal Law proceedings following the passage of VTL section 1194-a will depend upon whether the statute is interpreted as providing the exclusive statutory means of obtaining a blood test from a nonconsenting driver for these proceedings. The argument favoring the exclusivity of section 1194-a would brand the passage of the statute as pre-emptory of any other means by which a blood test could be obtained. Thus, to be admissible in these proceedings, the blood test would have to be obtained pursuant to a section 1194-a court order.

The argument favoring the admissibility of a blood test obtained pursuant to a search warrant in these proceedings would parallel that for the CPL discovery statute — a court order issued pursuant to the statute is not meant to prevent issuance of a similar court order.¹⁴⁹ Furtherance of the legislative intent of

full extent of the problem must be known.

Id.

144. VTL § 1194-a(2)(a). *See supra* note 129.

145. *Id.*

146. *Id.*

147. *See, e.g., supra* text accompanying notes 144-46.

148. *Moselle*, 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296 (citing *In re Abe A.*, 56 N.Y.2d 288, 291, 437 N.E.2d 265, 266, 452 N.Y.S.2d 6, 7 (1982), *see supra* note 53).

149. *Moselle*, 57 N.Y.2d at 109-10, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297. *See*

obtaining a blood test from a driver involved in a serious accident would favor this interpretation. Section 1194-a has numerous procedural subdivisions,¹⁵⁰ failure to comply with any one of them prevents the use of the blood test in prosecutions for serious offenses.¹⁵¹

The *Moselle* court had ruled that the VTL provides no guidance or authority for obtaining or using a blood test in Penal Law proceedings.¹⁵² Section 1194-a overrules this aspect of *Moselle* for the Penal Law offenses of vehicular assault and homicide.¹⁵³ Therefore, the ruling of *Moselle* still stands for other Penal Law offenses: VTL section 1194-a has no effect on the admissibility of a blood test in other Penal Law proceedings. If section 1194-a were to be interpreted as the exclusive authority for issuance of a court order to obtain a driver's blood test, the only Penal Law proceedings affected by a violation of section 1194-a would be vehicular assault and homicide. Thus, a search warrant would yield a blood test admissible in other Penal Law proceedings brought against a driver. Obviously, this narrow interpretation of section 1194-a fails to advance the legislative policy of obtaining a driver's blood test for use in serious offenses. Interpreting section 1194-a in this manner, therefore, ignores the very reason the statute was enacted: to guarantee that the state's interest in obtaining a blood test in serious accidents would outweigh the interest of an individual driver seeking to avoid a test.

supra text accompanying note 90.

150. VTL § 1194-a(2)(a)-(d). *See supra* notes 129, 133-34, 136-37 and accompanying text.

151. *See* Compulsory Chemical Tests for Intoxication, ch. 481, § 1195(3), 1983 N.Y. Laws 882, 885 (new provision) [hereinafter cited as VTL § 1195(3)], provides a means to suppress a blood test which fails to comply with VTL § 1194-a:

A defendant who has been compelled to submit to a chemical test pursuant to the provisions of section eleven hundred ninety-four-a of this chapter may move for the suppression of such evidence in accordance with article seven hundred ten of the criminal procedure law on the grounds that the order was obtained and the test administered in violation of the provisions of section eleven hundred ninety-four-a of this chapter or any other applicable law.

VTL § 1195(3) (footnote omitted).

152. *Moselle*, 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296. *See supra* text accompanying note 86.

153. *See supra* text accompanying notes 129-32.

V. Conclusion

In *People v. Moselle*,¹⁵⁴ the court ruled that a driver's actual consent, a court order, or compliance with the provisions of the VTL implied consent statute yielded a blood test admissible in VTL proceeding. The court held, however, that the VTL implied consent statute had no application to the Penal Law. Thus, only a driver's actual consent or a court order yielded a blood test admissible in Penal Law proceedings. The court required statutory authority for the issuance of a court order seeking a blood test from a driver.

The legislature enacted VTL section 1194-a¹⁵⁵ in response to the result of *Moselle*: the suppression of blood tests which proved drivers, responsible for the deaths of others, to be clinically intoxicated. This section provides statutory authority for the issuance of a court order to obtain a driver's blood test. Issuance of the court order is contingent, however, upon certain factors, including a refusal of the test by the driver, the driver's being under arrest, and someone other than the driver having been seriously injured or killed. Thus, the court order will issue only if it appears that the driver will be charged with vehicular assault or vehicular homicide.

In dictum, the *Moselle* court reasoned that a CPL search warrant was valid statutory authority for obtaining a driver's blood test. The underlying requirements for obtaining a search warrant are less stringent than for obtaining a section 1194-a court order. The courts will have to decide whether *Moselle*'s dictum survives the enactment of section 1194-a or whether section 1194-a now provides the sole authority for obtaining a driver's blood test.

Section 1194-a represents an erosion of the policy in effect in New York since the enactment of the implied consent statute. In accidents involving serious injury of an innocent victim, section 1194-a favors the state's interest in obtaining a blood test over the driver's interest in avoiding the test. This statute does not, however, overlook the driver's interest totally. The state must still obtain a court order before compelling the individual

154. 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).

155. VTL § 1194-a. See *supra* note 129.

to submit to the test. Furthermore, the court order will only issue if specific procedural safeguards favoring the interest of the driver are complied with. Nevertheless, the legislature has embarked upon a course which may ultimately bring the state policy in line with the policy recognized in *Schmerber v. California*:¹⁵⁶ that a driver suspected of the criminal offense of DWI has no constitutional right to refuse a blood test.

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156. 384 U.S. 757 (1966). See *supra* notes 16-17 and accompanying text.