Marquette Law Review

Volume 41
Issue 1 *Summer 1957*

Article 9

The Alcohol-Blood Test in Wisconsin

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(2) Was it on an emergency call at the time?[13]
(3) a) Was the driver operating his vehicle negligently as to speed, lookout and management and control?
b) Was the driver operating his vehicle in a reckless manner as to going through stop signs, driving on the wrong side of the road, and right of way?[14]

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The Alcohol-blood test in Wisconsin—Wisconsin's legal position in regard to the alcohol-blood test has recently been clarified in large part by *State v. Kroening* (1956).[1] Defendant was the driver of a car which was involved in a head-on collision in the opposite lane of travel. Four persons in the other vehicle were killed and defendant was rendered unconscious. He was taken to a hospital where a nurse, acting upon the order of the District Attorney, removed a small quantity of blood from his arm for the purpose of obtaining a specimen for an alcohol-blood test. At the time the blood was removed, defendant was not under arrest and was still unconscious. Nine days later he was charged with, and subsequently convicted of, negligent homicide, analysis having shown an alcohol content of .13 of 1% of alcohol by weight.[2] Defendant made timely objection to the introduction of the results of the test into evidence upon three grounds which the Circuit Court certified to the Supreme Court: First, that admission of such evidence would constitute a violation of the Wisconsin Constitution, Art. I Sec. 8, which provides that:

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

Second, that admission would violate the Wisconsin Constitution, Art. I, Sec. 11, which provides that:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

Third, that admission would violate the Federal Constitution, Fourteenth Amendment, which provides that:

> "[No] state [shall] deprive any person of life, liberty, or property without due process of law . . ."

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[13] It is for the jury to decide whether the situation presented to the mind of the driver was such as would, under all the circumstances present, require him to operate his vehicle as he did. *Ibid.*, at 286.

[14] The *Montalto* Case is the only recent Wisconsin case dealing with this problem. See also Suren v. Zuege, 186 Wis. 264, 201 N.W. 722 (1925) which is in accord with the present decision and Swartz v. Sommerfeldt, 272 Wis. 17, 74 N.W. 2d 632 (1956) in which the standard of care required of emergency vehicles was not before the Court on appeal.

[1] 274 Wis. 266, 79 N.W.2d 810 (1956).

[2] WIS. STATS. §325.235 (1955).

To these contentions the Wisconsin Supreme Court answered that the Wisconsin self-incrimination privilege does not apply to the alcohol-blood test situation; but that under the facts of the case the evidence had been obtained by a search and seizure prohibited under Wisconsin law; and that the denial of defendant's rights by the illegal search necessarily resulted in a denial of due process as guaranteed by the U.S. Constitution.

I. Self Incrimination

Defendant's contention that introduction of the alcohol-blood test evidence would violate the privilege aganist self-incrimination was necessarily based upon the privilege as conferred by the Wisconsin Constitution rather than upon the Fifth Amendment to the U.S. Constitution. It is well settled that the Fourteenth Amendment to the U.S. Constitution, the only provision by which the Fifth Amendment could be made applicable to the states, does not include within the meaning of due process the self-incrimination feature of the Fifth Amendment.[3] The applicability of the Wisconsin guarantee depends upon the scope of the privilege as determined by the Wisconsin Court. The State contended that the privilege is to be restricted to testimonial compulsion, *i.e.* oral or written evidence, and "has no application to physical evidence disclosed by compulsory examination of defendant's person or attire or by compulsory entry into defendant's body."[4] Defendant's position was that in Wisconsin the privilege has been extended beyond testimonial compulsion and ought apply to the compulsory taking of blood for use as evidence against defendant in a criminal proceeding. Previous Wisconsin cases appeared to leave the matter in doubt. *Thornton v. State* (1903),[5] although it stated that " . . . it has become fully established that the prohibition against one's being compelled to be a witness against himself should not be limited to exclusion of merely oral statements,"[6] held that it was not error to admit physical evidence consisting of a comparison between tracks in the snow near the place where defendant allegedly committed the crime and a shoe belonging to defendant. The distinction made by *Thornton* between certain external observables, which must be disclosed, and more private bodily matters, revelation of which may not be compelled, was substantially approved in *Jessner v. State* (1930)[7] and *State v. Zuehlke* (1941)[8] In *Green Lake County v. Domes* (1945)[9] the Court determined that the

[3] Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L. Ed. 1903 (1947); Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908); State v. Lloyd, 152 Wis. 24, 139 N.W. 514 (1913).
[4] Plaintiff's (State's) brief, at 3, submitted in Kroening case.
[5] 117 Wis. 338, 93 N.W. 1107 (1903).
[6] *Ibid.*, 117 Wis. at 341; 93 N.W. at 1108.
[7] 202 Wis. 184, 231 N.W. 634 (1930).
[8] 239 Wis. 111, 300 N.W. 746 (1941).
[9] 247 Wis. 90, 18 N.W. 2d. 348 (1945).

admission into evidence, for the purpose of establishing intoxication, of physical facts disclosed by a compulsory physical examination of one criminally charged with drunken driving did not violate the privilege against self-incrimination. The examination included observation of mental attitude, odor of breath, congestion in the eyelids, pulse, handwriting, observation of gait, speech, tongue, knee reflexes, and ability to touch tip of nose with finger. However, the defendant was under arrest at the time of the examination, and there was no invasion of his body for purpose of obtaining blood or other body fluid. The *Domes* decision inclined some writers to believe that Wisconsin had definitely taken the position that the privilege is to be limited to testimonial, as distinguished from physical evidence.[10] This belief was apparently strengthened by the holding in *City of Barron v. Covey* (1955)[11] that admission into evidence of the fact that defendant in a prosecution for drunken driving refused to submit a urine sample for alcohol analysis would not have violated the privilege, although as a matter of fact the trial court in its discretion[12] excluded the testimony. This holding of necessity had to rest on the ultimate conclusion that the privilege itself did not extend so far. With apparent approval the Court stated:

> "For additional authorities holding that constitutional provisions against self-incrimination are confined to testimonial utterances see 8 Wigmore, Evidence (3rd ed.), pp. 374, sec. 2265; Morgan, The Law of Evidence, 1941-1945, in 59 Howard Law Review, 481, 523; Anno. 164 ALR 967, 972 . . ."[13]

Faced with this judicial history, the Court in the present case decided that the Wisconsin rule against self-incrimination extends beyond testimonial evidence,[14] but does not extend so far as to include analysis of blood for determination of alcohol content.[15] It appears that the

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[10] See William A. Paltz, *Work of the Wisconsin Supreme Court—Criminal Law and Related Cases,* 46 WIS. L. REV. 53, at 56; and Norris Malonwy, *A Code of Evidence for Wisconsin—Self-Incrimination,* 46 WIS. L. REV. 147, at 150.

[11] 271 Wis. 10, 72 N.W. 2d. 387 (1955).

[12] Before Wis. Laws 1955 c. 510—WIS. STATS. §325. 235 (1955), amended former §85.13 (2), the trial court had discretion in admitting alcohol-blood test evidence. The present statute is mandatory.

[13] 271 Wis. 10, at 13, 72 N.W. 2d. 387, at 388 (1955).

[14] State v. Kroening, 79 N.W. 2d 810, at 813 (1956).
> "We said, 117 W. at 341, 93 N.W. at 1108, 'that the prohibition against one's being compelled to be a witness against himself should not be limited to exclusion of merely oral statements against himself!' Once it is admitted that the right not to be a witness against one's self in a criminal case extends beyond mere oral statements, the line of demarcation beyond which it shall be held that a defendant's right has been violated is neither straight nor clearly marked."

[15] *Ibid.* 79 N.W. 2d, 810, 814.
> "We conclude now that the Domes and Covey decisions require us to answer that an analysis of a person's bodily fluids against his will in a criminal case and explanatory testimony thereon by the analyst does

Court has thus clearly indicated the two extremes, but the nature of the area between remains in doubt, for no Wisconsin case has been found in which it was sucessfully claimed that the admission of some physical fact constituted a violation of the Wisconsin privilege.

II. Search & Seizure[16]

Since in the present case the blood was obtained without a search warrant, the question arises as to the circumstances in which such a search can be considered reasonable and hence constitutional.[17] Wisconsin cases hold that a search of person or immediate surroundings made incident to arrest, *i.e.* immediately after valid arrest, even though without a search warrant, does not violate the Wisconsin prohibition against unreasonable searches and seizures.[18] However, in the present case, the defendant was not arrested until nine days after the blood was taken. The question then arises as to whether, as contended by the State, the fact that search preceded arrest is immaterial and does not prevent the search from being incident to the arrest[19] where probable cause exists to arrest the person searched without warrant. Without expressly deciding this issue the court stated, on the authority of *Hoyer v. State* (1923),[20] in which an arrest one day after search was held too late to save the search, that a time interval of nine days between search and arrest was clearly too long to allow the search to be classified as incident to the arrest. The basic problem is still open in Wisconsin, however, for neither the present case nor, it is believed

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not violate his privilege against self-incrimination within the meaning of sec. 8, art I, Wis. Const."

[16] The Fourteenth Amendment's search and seizure provision applies to the states via the Fourteenth Amendment (Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). But uniformity does not exist in the method of implementation of the privilege. Thus, while evidence obtained by federal officers in violation of the Fourteenth Amendment is inadmisable upon criminal trial in federal courts, (Weeks v. U.S., 232 U.S. 383, 34 C.Ct. 341, 58 L. Ed. 652 (1914)), the states are left free to determine for themselves whether they will admit or exclude such evidence (Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L.Ed. 1782 (1949); Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951); Irvine v. People of the State of California, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 (1954)). Wisconsin has adopted the federal rule and excludes the evidence (State v. Cox, 258 Wis. 162, 45 N.W. 2d 100 (1950); State v. Drew, 217 Wis. 216, 257 N.W. 681 (1934); Glodowski v. State, 196 Wis. 265, 220 N.W. 227 (1928); Heyer v. State, 180 Wis. 407, 193 N.W. (1923)).

[17] The test of reasonableness is given in the words of the privilege, §11, Art I, Wisconsin Constitution:
"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

[18] State v. Phillips, 262 Wis. 303, 55 N.W. 2d 384 (1952); State ex rel Tessler v. Kubiak, 257 Wis. 159, 42 N. W. 2d, 496 (1950); State v. Flanagan, 251 Wis. 517, 29 N.W. 2d 771 (1947); Scaffido v. State, 215 Wis. 389, 254 N.W. 651 (1934); Hoch v. State, 199 Wis. 63, 225 N.W. 191 (1929); Thornton v. State, 117 Wis. 338, 93 N.W. 1107 (1903).

[19] See: plaintiff's (State's) brief at 16, submitted in the *Kroening* case.

[20] 180 Wis. 407, 193 N.W. 89, 27 A.L.R. 673 (1923).

any of the earlier decisions may be characterized as authority for the proposition that arrest may in any instance follow search. In *State v. Hoffman* (1944),[21] although arrest followed search, the search was at all times reasonable and valid without regard to an arrest, because a statute gave officers the right to enter tavern premises to determine whether there was any violation of beverage tax laws. In *Potman v. State* (1951)[22] there appears to have been no true search by police officers, but only the acceptance of evidence, to wit, the partially decomposed body of an infant, found by garage mechanics in the trunk of a car in their custody after their own search. Nor can support be obtained from Wisconsin cases involving illegally possessed liquor, wild life, or other such articles. Illustrative of this type of case is: *Wilder v. Miller* (1926)[23] (alcohol and whiskey in auto in violation of prohibition laws), *Hallbach v. State* (1929)[24] (whiskey in auto in violation of prohibition laws), and *State v. Leadbetter* (1933)[25] (trout caught and transported in auto during closed season in violation of conservation laws). The U.S. Supreme Court in *Carroll v. U.S.* (1925)[26] made clear that for purposes of determining the legality of a search and seizure, distinction must be made between articles which themselves offend aganist the law, such as alcohol possessed in violation of prohibition laws, and articles possession of which is not in itself independently a violation. This latter category would include, for example, clothing or, it would seem, blood of the person searched which might be used as evidence against him in a trial for some criminal offense. In both cases the basic norm is the reasonableness of the search. However, assuming for the moment that in both the requirement of a search warrant could be excused,[27] in the first instance the validity of the search depends upon the reasonable cause the officer has for believing that the person or place searched is in possssion of, or contains illegal articles. In the second instance the validity depends upon the right to arrest without a warrant. In *Carroll,* the defendant argued that the whiskey found after search of their car was obtained by an unlawful search, inasmuch as the officers had no basis upon which they might have arrested the defendants without a warrant before the search. To this the Court replied:

> "The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory

[21] 245 Wis. 367, 14 N.W.2d 146 (1944).
[22] 259 Wis. 234, 47 N.W.2d 884 (1951).
[23] 190 Wis. 136, 208 N. W. 865 (1926).
[24] 200 Wis. 145, 227 N.W. 306 (1929).
[25] 210 Wis. 327, 246 N.W. 443 (1933).
[26] 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).
[27] See Carroll v. U.S., 267 U.S., 132, at 153; 45 S.Ct. 280, at 285; 69 L.Ed. 543, at 551 for instances when requirement of a search warrant may be excused.

> were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law . . . The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure."[28]

Although no specific Wisconsin authority supports the point that arrest may follow a search, it is probable that a search under such circumstances could be upheld if the arrest followed so shortly after the search that the two could reasonably be regarded as simultaneous.[29] It would, of course, be necessary that the right to make the arrest could be successfully asserted without resort to support from whatever evidence was discovered by the search. The present case appears to determine that the permissible maximum time lag may be somewhere short of one day.

The Wisconsin Court has also indicated that it will be difficult for the State, in the alcohol-blood test situation, to show that probable cause exists to arrest the defendant without a warrant.[30] In its argument the State maintained that Kroening could have been arrested on probable cause because he was the driver of an automobile involved in an accident in the opposite lane of travel and on being admitted to the hospital smelled of liquor. The Court replied that "the statement of facts in the report of the learned trial court hardly warrants the assumption that there was probable cause to arrest Kroening without warrant. . . "[31]

The question left unresolved is whether the result in *State v. Kroening* would have been different if there had been no violation of the Wisconsin constitutional provision on searches and seizures. What if the defendant had been under valid arrest, with or without warrant for arrest, or if a search warrant had been obtained, before the blood was taken? Would the evidence of the test have then been admissible? Such would seem to be the corollary to the decision except for the fact that Wisconsin had not yet answered the basic and primary question of whether the results of a compulsary alcohol-blood test may ever be used as evidence against the defendant in a criminal proceeding. In no Wisconsin case has such evidence been successfully introduced. It is possible that when the issue again arises, defendant may be successful in excluding the evidence on the ground of violation of the Wisconsin guarantee of due process.

[28] *Ibid.*, 267 U.S. at 158-9.
[29] See plaintiff's (State's) brief at 17 et seq., submitted in the *Kroening* case.
[30] If the state can show probable cause to arrest without a warrant it will be justified in searching without a search warrant. See *supra*, note 18.

III. Due Process

The *Kroening* case decided that the defendant's rights under the due process clause of the Fourteenth Amendment to the U.S. Constitution had been violated. The grounds, however, for so deciding rendered the holding incidental and of little future value. The Court commented:

> "But it appears to us that evidence admitted in violation of defendant's rights under the state constitution is a denial to him of due process of Wisconsin law, and for a state to violate its own constitution to the prejudice of the defendant in a criminal case is to deny him process within the meaning of the Fourteenth Amendment."[32]

Of more importance is the question whether, positing no violation of state self-incrimination privilege or state or federal search and seizure protection, the State may extract blood from a defendant without his consent for the purpose of performing thereon an alcohol-blood test and introduce the findings into evidence against the defendant in a criminal prosecution without thereby necessarily offending either federal or state due process provisions.

It is now definitely settled that this may be done without giving offense to federal due process.[33] Expressly stating what had obviously long been its opinion,[34] the U.S. Supreme Court in early 1957 in *Breithaupt v. Abram*,[35] decided that the Fourteenth Amendment was not offended by removal of blood from the body of an unconscious, non-consenting, defendant for the purpose of an alcohol-blood test. The defendant was convicted of involuntary (automobile accident) manslaughter and received six to ten years in the New Mexico penitentiary. The opinion was supported by observations that "there is nothing brutal or offensive in the taking of a sample of blood when done, as in this case, under the protective eye of a physician,"[36] and " . . . certainly the test as administered here would not be considered offensive by even the most delicate,"[37] and "the increasing slaughter on our

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[31] State v. Kroening, 79 N.W. 2d 810, at 815.

[32] *Ibid.*, at 816-17.

[33] The possible effect on federal due process is relevant because the U.S. Supreme Court can review state court criminal convictions under the general authority of the due process clause of the Fourteenth Amendment—Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936).

[34] See: Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R. 2d 1396 (1952); Block v. People, 125 Col. 36, 240 P.2d 512, cert. den. 343 U.S. 978, 72 S.Ct. 1076, 96 L.Ed. 1370 (1952); People v. Haeusler, 41 Cal. 2d. 252 260 P.2d 8, cert., den 347 U.S. 931 (1953); Walton v. People, 24 L.W. 3007 (1954), cert. den. after argument and briefs, on grounds that no federal question was involved, 350 U.S. 868 (1954).

[35] U.S.—77 S.Ct. 408, 1 L.Ed. 2d 448 (1957).

[36] *Ibid.*, 77 S.Ct. at 410, 1 L.Ed. 2d at 451.

[37] *Ibid.*, 77 S.Ct. at 410, 1 L.Ed. 2d at 451.

highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."[38]

It would seem, however, that the protection of the Fourteenth Amendment is not entirely denied a defendant in this position. If he is fortunate enough to be conscious at the time the authorities attempt to remove his blood he might put up a determined struggle, causing the officials to likewise resort to less gentle means, perhaps a most violent type of force. He might thus bring his plea within the doctrine of the *Rochin case*[39] and secure application of the due process clause on the ground that the evidence was secured by "conduct that shocks the conscience"[40] and by "methods that offend a sense of justice."[41] Under the *Rochin* doctrine consciousness and a willingness to oppose the authorities with physical force are put at a premium and seem to be conditions precedent to the existence of constitutional rights in the U.S. Supreme Court.

It is submitted that the unconscious and non-fighting Wisconsin defendant may yet entertain some hope that the evidence will in the last analysis be inadmissible, even if obtained with search warrant or when defendant is under arrest, because of the Wisconsin due process clause, Artcle I, Section 8, Wisconsin Constitution:

> "No person shall be held to answer for a criminal offense without due process of law . . ."

No Wisconsin case has yet raised this defense, but then, as previously observed, no Wisconsin case has yet permitted the results of an alcohol-blood or related test to be introduced into evidence in a criminal prosecution. The defense of violation of a state due process clause has, unfortunately, not been popular in the alcohol-blood test cases.[42] If the defense is raised in Wisconsin, however, it seems that a number of valid arguments could be presented.

The philosophy of the U.S. Supreme Court ought not to sway the Wisconsin Court. The argument which the U.S. Supreme Court has used[43] to deny application of the federal due process clause overlooks

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[38] *Ibid.*, 77 S.Ct. at 412, 1 L.Ed. 2d at 453.

[39] See Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R. 2d 1396 (1952), wherein state authorities used a stomach pump to extract some narcotic capsules which defendant had swallowed. Conviction for possessing morphine followed, based on the evidence of the capsules. The U.S. Supreme Court reversed the conviction because the total course of conduct showed violation of federal due process.

[40] *Ibid.*, 342 U.S. at 172.

[41] *Ibid.*, 342 U.S. at 173.

[42] See: 127 A.L.R. 1513; 159 A.L.R. 209; 164 A.L.R. 967; 25 ALR 2d 1407. In this connection note also State v. Height, 117 Iowa 650, 91 N.W. 935 (1902); and criticism thereon in Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191 (1939).

[43] In *Rochin v. California, supra,* note 39; and in *Breithaupt v. Abram, supra* note 35.

discussion and analysis of the nature and essentials of the act of entering the body of the defendant against his will to obtain evidence for use against him in criminal proceeding, and relies instead on accidentals such as the means used, the presence of a doctor, and the effect on the conscience and senses of the judges hearing the case.

The police power of the state does not justify use of the blood-test in getting evidence for a criminal prosecution. Cases upholding blood test requirements in marriage license, paternity, and venereal disease situations do not furnish a direct analogy because they do not involve criminal prosecutions. There is no prudent reason for denying use of the compulsory test in the non-criminal cases. In criminal cases such evidence is in conflict with the spirit, if not the letter, of a body of law that includes a privilege against self-incrimination and a presumption of innocence.

The party objecting on the ground of violation of the state due process clause could logically claim that if such a decisive and dangerous legal step as the admission of this evidence in a criminal proceeding is to be taken in so uncertain an area it ought be taken by the people themselves through their legislators. In this connection it could be observed that the present Wisconsin blood-test statute is not compulsory,[44] and that a bill[45] introduced by Senator Van De Zande in 1953 to the Wisconsin Legislature, on request of the District Attorney's Association, which would have provided for legally implied consent to alcohol-blood tests by every user of Wisconsin highways, failed to pass.

Perhaps the strongest argument to be made against the test without consent is that if the line is not drawn at penetration of the defendant's body, the logical stopping-point has been ignored and exceeded:

> "To subject a person against his will to a blood test is an assault and battery, and clearly an invasion of his personal privacy. It involves the sticking of a surgical needle into his body. Perhaps the operation is harmless in the great majority of cases, although the risk of infection is always present. But if we admit such an encroachment upon the personal immunity of an individual where in principle can we stop? Suppose medical discovery in the future evolvese a technique whereby the truth may infallibly be secured from a witness by trepanning his skull and testing the functions of the brain beneath."[46]

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[44] See 53 WIS. L. REV. 852.
[45] Bill 217 S, introduced February 11, 1953.
[46] Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80, at 90 (1940). Unfortunately the case is not completely relevant to the alcohol-blood test situation. It involved the question of whether or not the court could require the defendant in a divorce preceeding and her daughter to submit to one or more blood-grouping tests to determine the parentage of the daughter.