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Evidence--Blood Test for Intoxication-- Admissibility of Refusal to Submit

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The court employed the American Law Institute's test of insanity. Briefly the test is this: a person is not responsible for his criminal conduct if, as a result of a mental disease or defect, at the time of such conduct he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The court interpreted "mental disease or defect" as excluding an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

While the United States Court of Appeals for the Fourth Circuit has now rejected the M'Naghten test, this is the only test recognized in West Virginia state courts. *State v. Flint*, 142 W. Va. 518, 96 S.E.2d 677 (1957); *State v. Painter*, 135 W. Va. 106, 63 S.E.2d 86 (1950).

Evidence—Blood Test for Intoxication—Admissibility of Refusal to Submit

Defendant was charged with negligent homicide in connection with an automobile accident. Defendant refused to submit to a chemical test for intoxication. At the trial, the prosecuting attorney introduced evidence of defendant's refusal. On appeal defendant claimed the admission of such evidence constituted a violation of his privilege against self-incrimination under the fifth and fourteenth amendments to the United States Constitution. *Held*, conviction affirmed. Such evidence is admissible and does not violate defendant's constitutional rights. *State v. Dugas*, 211 So. 2d 285 (La. 1968).

It has generally been held that the admission of evidence of a defendant's refusal to submit to a chemical test for intoxication is not a violation of his constitutional rights in that such evidence is merely physical in nature. *See* Annot., 87 A.L.R.2d 370 (1963). This classification may be questioned, however, in that defendant's intoxication may be a substantive element of the crime charged. For example, defendant would not have been driving negligently but for the fact that he was intoxicated. If this is the case, perhaps the admission into evidence of a refusal to submit to the intoxication test may be likened to commenting on the accused's failure to testify in his own behalf. Since the prosecutor is specifically prohibited from making such a comment, he should also be prohibited from introducing the evidence of a refusal to submit to the intoxication test.