

MOTOR VEHICLES

SUPREME COURT REVIEW

During the survey period the Nebraska Supreme Court dealt primarily with the same issues as it has in the past.¹ The area in which most of the litigation was centered was the Nebraska Drunk Driver Statutes.²

The first area of controversy was the interpretation of the drunken driving statutes relating to the operation or actual physical control of a motor vehicle while under the influence of alcohol.³ In *State v. Orosco*,⁴ an appeal was brought from a decision to revoke the defendant's drivers license for 1) operating or being in actual physical control of a motor vehicle while under the influence of alcohol, and 2) refusing to submit to a chemical test of his blood, breath, and urine for the purpose of determining the alcoholic content in his body fluid.⁵

The arresting officers found the defendant slumped over the steering wheel, the automobile was parked in the lane of traffic, the key was in the ignition, the motor was running, and the gear was disengaged and the lights were on.⁶ Despite testimony by witnesses who said the defendant did not drive to the location where the automobile was found,⁷ the court held that the operation or physical control of an automobile may be established by circumstantial evidence.⁸ They found that the testimony by the arresting officers as to circumstances surrounding the "operation" of the

1. In recent years the Nebraska Supreme Court has been confronted with the issue of interpreting the state's "implied consent" statute. See note 18 *infra*. See also 11 CREIGHTON L. REV. 250 (1977); 10 CREIGHTON L. REV. 170 (1976).

2. NEB. REV. STAT. §§ 39-669.07 to -669.19 (Reissue 1974).

A list of the decisions relating to other than the drunk driving statutes is as follows: *Hurlbut v. Landgren*, 200 Neb. 413, 264 N.W.2d 174 (1978) (determination that a pedestrian was not negligent with regard to her position upon a portion of the roadway open to vehicular traffic); *Wolfson Car Leasing Co. v. Weberg*, 200 Neb. 420, 264 N.W.2d 178 (1978) (no person shall acquire any right, claim, or interest in or to a motor vehicle until there is physical delivery of the motor vehicle and certificate of title); *Crink v. Northern Natural Gas Co.*, 200 Neb. 460, 263 N.W.2d 857 (1978) (person approaching intersection, although having the right of way, must still exercise caution when view is obstructed; failure to do so may subject him to being negligent as a matter of law).

3. NEB. REV. STAT. § 39-669.07 (Reissue 1974).

4. 199 Neb. 532, 260 N.W.2d 303 (1977).

5. *Id.* at 533, 260 N.W.2d at 305.

6. *Id.* at 535, 260 N.W.2d at 306.

7. *Id.* at 535-36, 260 N.W.2d at 306.

8. *Id.* at 535-36, 260 N.W.2d at 307. See also *State v. Webb*, 78 Ariz. 8, 274 P.2d 338 (1954); *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970).

motor vehicle at the time of arrest was sufficient to uphold the finding by the trial court.⁹

In *State v. Nielsen*,¹⁰ again the issue was raised as to whether or not the defendant was operating or in actual physical control of the motor vehicle while intoxicated.¹¹ In this case the officers observed the defendant asleep in the driver's seat, the engine was running, and the car was in driving gear.¹² The officers also found the defendant with his foot on the brake and his hands on the steering wheel.¹³ The court held, quoting *Uldrich v. State*,¹⁴ "that the word 'operates,' as used in the statute relating to operation of a motor vehicle while the operator was under the influence of intoxicating liquor, referred to actual physical handling of the controls while under the influence of intoxicating liquor."¹⁵

A second controversial area this past year concerned the administration of the blood, breath, and urine test itself.¹⁶ The implied consent laws have been the most common source of litigation in this area in recent years.¹⁷ The implied consent statute provides that any person who operates or has in his actual physical control a motor vehicle upon a public highway is deemed to have given his consent to a chemical test of his blood, breath or urine for purposes of determining the alcoholic content in his blood fluid.¹⁸

In *State v. Orosco*,¹⁹ the defendant was informed of the provisions of the statutes and was requested to give a blood or urine sample for testing, whereupon he refused.²⁰ The state conceded that no preliminary breath test was offered before the arrest, although the officer had in his possession the necessary equipment to conduct such a test.²¹ The defendant argued that where the officer had the equipment at the scene to give a "preliminary" breath test, the offering of the test was a condition precedent to any arrest and no arrest could be made without such an offer.²² Neverthe-

9. 199 Neb. at 535-36, 260 N.W.2d at 307.

10. 199 Neb. 597, 260 N.W.2d 321 (1977).

11. *Id.* at 599, 260 N.W.2d at 322.

12. *Id.* at 600, 260 N.W.2d at 322.

13. *Id.*

14. 162 Neb. 746, 77 N.W.2d 305 (1956).

15. 199 Neb. at 599, 260 N.W.2d at 322. *See also* *People v. Chamberlain*, 5 Ill. App. 3d 235, 282 N.E.2d 784 (1972); *State v. Harris*, 295 Minn. 38, 202 N.W.2d 878 (1972); *Nicolls v. Commonwealth*, 212 Va. 257, 184 S.E.2d 9 (1971).

16. *See* NEB. REV. STAT. §§ 39-669.08(3) and 39-669.09 (Reissue 1974).

17. NEB. REV. STAT. § 39-669.08 (Reissue 1974). *See* note 1 *supra*.

18. NEB. REV. STAT. § 39-669.08 (Reissue 1974).

19. 199 Neb. 532, 260 N.W.2d 303 (1977).

20. *Id.* at 536, 260 N.W.2d at 307.

21. *Id.*

22. *Id.* at 538, 260 N.W.2d at 307. The defendant contended that there was a conflict between § 39-669.08 and § 39-669.14. The argument was that the latter was

less, the court held that the statute²³ imposed no such requirement that a preliminary breath test be offered prior to arrest.²⁴

In *State v. Wahrman*,²⁵ the issue was raised as to whether the test, as given, could properly be admitted into evidence.²⁶ The majority stated that if the defendant was refused the presence of a physician after the test, either to evaluate his condition or to perform further tests, then the tests performed by the state would clearly be inadmissible.²⁷ However, the record disclosed that the arresting officer testified that no such request was made and if it had been made he would have honored the request.²⁸ The majority held that the nature of the testimony was such that it was for the trial court to determine the support of the testimony "i.e., whether it was a denial that a request was made or a failure to recall whether the request was made."²⁹ The majority upheld the district court's view that the officer's testimony was a denial of the defendant's testimony regarding the request.³⁰

LEGISLATION

During the survey period the Unicameral made various changes in the area of motor vehicles, the most significant of which are outlined below.

L.B. 248 made changes in several areas of the motor vehicle statutes,¹ including: 1) the county clerk is authorized to destroy records upon the transfer of a motor vehicle after "five years";² 2)

worded so as to *require* a preliminary breath test prior to arrest when the equipment was available, otherwise there was no need for the exception found in § 39-669.14. The court found the statutes to be non-reconcilable. However, upon an examination of the legislative history, permissive wording was used in the discussion of § 39-669.08 so as to give the arresting officer the option of administering the test. *Id.* at 539, 260 N.W.2d at 308.

23. NEB. REV. STAT. § 39-669.08 (Reissue 1974).

24. 199 Neb. at 540, 260 N.W.2d at 308.

25. 199 Neb. 337, 258 N.W.2d 818 (1977).

26. *Id.* at 338, 258 N.W.2d at 819.

27. *Id.*

28. *Id.* at 339, 258 N.W.2d at 819. Compare with *Zadina v. Weedlun*, 187 Neb. 361, 190 N.W.2d 857 (1971) (officer is not required to notify arrested party of his right to additional test by a physician of his own choice).

29. 199 Neb. at 339, 258 N.W.2d at 819.

30. *Id.* Judge White in his dissent felt the majority opinion further restricted § 39-669.08. He stated that "the state [should] meet a positive assertion of request and denial, with an equally positive assertion that the request was not made." *Id.* at 341, 258 N.W.2d at 820 (White, J., dissenting).

1. L.B. 248, 1978 Neb. Laws 129.

2. *Id.* § 1 at 130.

motor vehicles owned by an auto dealer³ may be driven by the dealer's and his employees' "immediate family who reside in the household";⁴ 3) the number of dealer plates which may be obtained is increased;⁵ 4) the terms motor vehicle dealer, trailer dealer, and motorcycle dealer have been expanded to include those who "offer or attempt to sell" three or more of the particular vehicles involved in a given year;⁶ 5) the fees allowed to be collected for the licensing of dealerships has been increased;⁷ and 6) the Nebraska Motor Vehicle Licensing Board now has the "discretion" to issue a dealership license to an applicant who has a felony charge pending against him.⁸

L.B. 673 was expanded so that one who is convicted of being under the influence of alcoholic liquor "or any drug" must pay "court costs," including costs incurred by "any agency administering the tests."⁹

L.B. 574 amended the process for applications for a license to operate a motor vehicle to include the process for renewal of the license while out of state¹⁰ and the process for issuing the new photo driver's license.¹¹

3. For a definition of auto dealer, see NEB. REV. STAT. § 60-1401.02 (Reissue 1974).

4. L.B. 248, § 2, 1978 Neb. Laws 130.

5. *Id.* § 2 at 132.

6. *Id.* § 3 at 134-36.

7. *Id.* § 7 at 144.

8. *Id.* § 8 at 145.

9. L.B. 673, § 1, 1978 Neb. Laws 578.

10. L.B. 574, § 3, 1978 Neb. Laws 381.

11. *Id.* §§ 4-10 at 381-82.