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HOUSE BILL 391

45TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2002

INTRODUCED BY

Marsha Atkin

FOR THE CORRECTIONS OVERSIGHT AND JUSTICE COMMITTEE

AN ACT

RELATING TO BOATING; ENACTING THE BOATING WHILE INTOXICATED
ACT; PRESCRIBING PENALTIES FOR OPERATING A MOTORBOAT WHILE
UNDER THE INFLUENCE OF ALCOHOL OR DRUGS; AUTHORIZING TESTING
OF A PERSON'S BLOOD OR BREATH FOR ALCOHOL OR DRUGS; AMENDING
AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] SHORT TITLE. -- Sections 1
through 12 of this act may be cited as the "Boating While
Intoxicated Act".

Section 2. [NEW MATERIAL] DEFINITIONS. -- As used in the
Boating While Intoxicated Act:

A. "bodily injury" means an injury to a person
that is not likely to cause death or great bodily harm to the
person, but does cause painful temporary disfigurement or

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1 temporary loss or impairment of the functions of any member or
2 organ of the person's body;

3 B. "conviction" means an adjudication of guilt and
4 does not include imposition of a sentence;

5 C. "motorboat" means any boat, personal watercraft
6 or other type of vessel propelled by machinery, whether or not
7 machinery is the principle source of propulsion. "Motorboat"
8 includes a vessel propelled or designed to be propelled by a
9 sail, but does not include a sailboard or a windsurf board.

10 "Motorboat" does not include a houseboat or any other vessel
11 that is moored on the water, but not moving on the water; and

12 D. "operate" means to physically handle the
13 controls of a motorboat that is moving on the water.

14 Section 3. [NEW MATERIAL] OPERATING A MOTORBOAT WHILE
15 UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS. --

16 A. It is unlawful for a person who is under the
17 influence of intoxicating liquor to operate a motorboat.

18 B. It is unlawful for a person who is under the
19 influence of any drug to a degree that renders him incapable
20 of safely operating a motorboat to operate a motorboat.

21 C. It is unlawful for a person who has an alcohol
22 concentration of eight hundredths or more in his blood or
23 breath to operate a motorboat.

24 D. Aggravated boating while under the influence of
25 intoxicating liquor or drugs consists of a person who:

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1 (1) has an alcohol concentration of sixteen
2 hundredths or more in his blood or breath while operating a
3 motorboat;

4 (2) has caused bodily injury to a human being
5 as a result of the unlawful operation of a motorboat while
6 under the influence of intoxicating liquor or drugs; or

7 (3) refused to submit to chemical testing, as
8 provided for in the Boating While Intoxicated Act, and in the
9 judgment of the court, based upon evidence of intoxication
10 presented to the court, was under the influence of
11 intoxicating liquor or drugs.

12 E. Every person under first conviction pursuant to
13 this section shall be punished, notwithstanding the provisions
14 of Section 31-18-13 NMSA 1978, by imprisonment for not more
15 than ninety days or by a fine of not more than five hundred
16 dollars (\$500), or both; provided that if the sentence is
17 suspended in whole or in part or deferred, the period of
18 probation may extend beyond ninety days but shall not exceed
19 one year. The offender shall be ordered by the court to
20 attend a boating safety course approved by the national
21 association of state boating law administrators. An offender
22 ordered by the court to attend a boating safety course shall
23 provide the court with proof that the offender successfully
24 completed the course within seven months of his conviction or
25 prior to completion of his probation, whichever period of time

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1 is less. In addition to those penalties, when an offender
2 commits aggravated boating while under the influence of
3 intoxicating liquor or drugs, the offender shall be sentenced
4 to not less than forty-eight consecutive hours in jail and may
5 be fined not more than seven hundred fifty dollars (\$750). On
6 a first conviction under this section, any time spent in jail
7 for the offense prior to the conviction for that offense shall
8 be credited to any term of imprisonment fixed by the court. A
9 deferred sentence pursuant to this subsection shall be
10 considered a first conviction for the purpose of determining
11 subsequent convictions.

12 F. A second or subsequent conviction pursuant to
13 this section shall be punished, notwithstanding the provisions
14 of Section 31-18-13 NMSA 1978, by imprisonment for not more
15 than three hundred sixty-four days or by a fine of not more
16 than seven hundred fifty dollars (\$750), or both; provided
17 that if the sentence is suspended in whole or in part, the
18 period of probation shall not exceed one year. In addition to
19 those penalties, when an offender commits aggravated boating
20 while under the influence of intoxicating liquor or drugs, the
21 offender shall be sentenced to not less than forty-eight
22 consecutive hours in jail and may be fined not more than one
23 thousand dollars (\$1,000).

24 Section 4. [NEW MATERIAL] GUILTY PLEAS--LIMITATIONS.--
25 When a complaint or information alleges a violation of Section
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1 3 of the Boating While Intoxicated Act, any plea of guilty
2 thereafter entered in satisfaction of the charges shall
3 include at least a plea of guilty to the violation of one of
4 the subsections of Section 3 of that act, and no other
5 disposition by plea of guilty to any other charge in
6 satisfaction of the charge shall be authorized if the results
7 of a test performed pursuant to that act disclose that the
8 blood or breath of the person charged contains an alcohol
9 concentration of eight hundredths or more.

10 Section 5. [NEW MATERIAL] MUNICIPAL AND COUNTY
11 ORDINANCES--UNLAWFUL ALCOHOL CONCENTRATION LEVEL FOR BOATING
12 WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS.--No
13 municipal or county ordinance prohibiting the operation of a
14 motorboat while under the influence of intoxicating liquor or
15 drugs shall be enacted that provides for an unlawful alcohol
16 concentration level that is different than the alcohol
17 concentration levels provided in Section 3 of the Boating
18 While Intoxicated Act.

19 Section 6. [NEW MATERIAL] BLOOD-ALCOHOL TESTS--PERSONS
20 QUALIFIED TO PERFORM TESTS--RELIEF FROM CIVIL AND CRIMINAL
21 LIABILITY.--Only a physician, licensed professional or
22 practical nurse or laboratory technician or technologist
23 employed by a hospital or physician shall withdraw blood from
24 any person in the performance of a blood-alcohol or drug test.
25 No such physician, nurse, technician or technologist who

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1 withdraws blood from any person in the performance of a
2 blood-alcohol or drug test that has been directed by any law
3 enforcement officer, or by any judicial or probation officer,
4 shall be held liable in any civil or criminal action for
5 assault, battery, false imprisonment or any conduct of a law
6 enforcement officer, except for negligence, nor shall any
7 person assisting in the performance of such a test, or any
8 hospital wherein blood is withdrawn in the performance of such
9 a test, be subject to civil or criminal liability for assault,
10 battery, false imprisonment or any conduct of any law
11 enforcement officer, except for negligence.

12 Section 7. [NEW MATERIAL] BLOOD-ALCOHOL TEST--LAW
13 ENFORCEMENT, JUDICIAL OR PROBATION OFFICER UNAUTHORIZED TO
14 MAKE ARREST OR DIRECT TEST EXCEPT IN PERFORMANCE OF OFFICIAL
15 DUTIES AUTHORIZED BY LAW.--Nothing in the Boating While
16 Intoxicated Act is intended to authorize any law enforcement
17 officer, or any judicial or probation officer, to make any
18 arrest or direct the performance of a blood-alcohol or drug
19 test, except in the performance of his official duties or as
20 otherwise authorized by law.

21 Section 8. [NEW MATERIAL] IMPLIED CONSENT TO SUBMIT TO
22 CHEMICAL TEST.--

23 A. A person who operates a motorboat within this
24 state shall be deemed to have given consent, subject to the
25 provisions of the Boating While Intoxicated Act, to chemical

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1 tests of his breath or blood or both, approved by the
2 scientific laboratory division of the department of health
3 pursuant to the provisions of Section 24-1-22 NMSA 1978 as
4 determined by a law enforcement officer, or for the purposes
5 of determining the drug or alcohol content of his blood if
6 arrested for any offense arising out of acts alleged to have
7 been committed while the person was operating a motorboat
8 while under the influence of an intoxicating liquor or drug.

9 B. The arrested person shall be advised by a law
10 enforcement officer that failure to submit to a chemical test
11 may be introduced into evidence in court and that the court,
12 upon conviction, may impose an increased fine for the person's
13 failure to submit to a chemical test.

14 C. A test of blood or breath or both, approved by
15 the scientific laboratory division of the department of health
16 pursuant to the provisions of Section 24-1-22 NMSA 1978, shall
17 be administered at the direction of a law enforcement officer
18 having reasonable grounds to believe the person to have been
19 operating a motorboat while under the influence of an
20 intoxicating liquor or drug.

21 D. A person who operates a motorboat in this state
22 and who is involved in a fatal boating incident shall be
23 deemed to have given consent, subject to the provisions of the
24 Boating While Intoxicated Act, to mandatory chemical tests of
25 his blood or breath or both, as determined by a law

1 enforcement officer and approved by the scientific laboratory
2 division of the department of health pursuant to the
3 provisions of Section 24-1-22 NMSA 1978.

4 Section 9. [NEW MATERIAL] CONSENT OF PERSON INCAPABLE OF
5 REFUSAL NOT WITHDRAWN. --A person who is dead, unconscious or
6 otherwise in a condition rendering him incapable of refusal
7 shall be deemed not to have withdrawn the consent provided by
8 the Boating While Intoxicated Act, and the test designated by
9 the law enforcement officer may be administered.

10 Section 10. [NEW MATERIAL] ADMINISTRATION OF CHEMICAL
11 TEST-- PAYMENT OF COSTS-- ADDITIONAL TESTS. --

12 A. Only the persons authorized by the Boating
13 While Intoxicated Act shall withdraw blood from any person for
14 the purpose of determining its alcohol or drug content. This
15 limitation does not apply to the taking of samples of breath.

16 B. The person tested shall be advised by the law
17 enforcement officer of the person's right to be given an
18 opportunity to arrange for a physician, licensed professional
19 or practical nurse or laboratory technician or technologist
20 who is employed by a hospital or physician of his own choosing
21 to perform a chemical test in addition to any test performed
22 at the direction of a law enforcement officer.

23 C. Upon the request of the person tested, full
24 information concerning the test performed at the direction of
25 the law enforcement officer shall be made available to him as

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1 soon as it is available from the person performing the test.

2 D. The agency represented by the law enforcement
3 officer at whose direction the chemical test is performed
4 shall pay for the chemical test.

5 E. If a person exercises his right under
6 Subsection B of this section to have a chemical test performed
7 upon him by a person of his own choosing, the cost of that
8 test shall be paid by the agency represented by the law
9 enforcement officer at whose direction a chemical test was
10 administered under Section 8 of the Boating While Intoxicated
11 Act.

12 Section 11. [NEW MATERIAL] USE OF TESTS IN CRIMINAL OR
13 CIVIL ACTIONS--LEVELS OF INTOXICATION--MANDATORY CHARGING. --

14 A. The results of a test performed pursuant to the
15 Boating While Intoxicated Act may be introduced into evidence
16 in any civil action or criminal action arising out of the acts
17 alleged to have been committed by the person tested for
18 operating a motorboat while under the influence of
19 intoxicating liquor or drugs.

20 B. When the blood or breath of the person tested
21 contains:

22 (1) an alcohol concentration of five
23 hundredths or less, it shall be presumed that the person was
24 not under the influence of intoxicating liquor; or

25 (2) an alcohol concentration of more than

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1 five hundredths but less than eight hundredths, no presumption
2 shall be made that the person either was or was not under the
3 influence of intoxicating liquor. However, the amount of
4 alcohol in the person's blood or breath may be considered with
5 other competent evidence in determining whether the person was
6 under the influence of intoxicating liquor.

7 C. When the blood or breath of the person tested
8 contains an alcohol concentration of eight hundredths or more,
9 the arresting officer shall charge him with a violation of
10 Section 3 of the Boating While Intoxicated Act.

11 D. The determination of alcohol concentration
12 shall be based on the grams of alcohol in one hundred
13 milliliters of blood or the grams of alcohol in two hundred
14 ten liters of breath.

15 E. The alcohol concentration in a person's blood
16 or breath shall be determined by a chemical test administered
17 to the person within three hours of the alleged boating while
18 under the influence of intoxicating liquor. In a prosecution
19 pursuant to the provisions of the Boating While Intoxicated
20 Act, it is a rebuttable presumption that a person is in
21 violation of the provisions of that act if he has an alcohol
22 concentration of eight hundredths or more in his blood or
23 breath as determined by a chemical test administered to the
24 person within three hours of the alleged boating while under
25 the influence of intoxicating liquor. If the chemical test is

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1 administered more than three hours after the alleged boating
2 while under the influence of intoxicating liquor, the test
3 result is admissible as evidence of the alcohol concentration
4 in the person's blood or breath at the time of the alleged
5 boating and the trier of fact shall determine what weight to
6 give the test result.

7 F. The presumptions in Subsection B of this
8 section do not limit the introduction of other competent
9 evidence concerning whether the person was under the influence
10 of intoxicating liquor.

11 G. If a person is convicted of operating a
12 motorboat while under the influence of intoxicating liquor or
13 drugs, the trial judge shall be required to inquire into past
14 convictions of the person for operating a motorboat while
15 under the influence of intoxicating liquor or drugs before
16 sentence is entered in the matter.

17 Section 12. [NEW MATERIAL] MOTORBOATS--INFLUENCE OF
18 INTOXICATING LIQUOR OR DRUGS--FEE UPON CONVICTION. --

19 A. A person convicted of a violation of the
20 Boating While Intoxicated Act shall be assessed by the court,
21 in addition to any other fee or fine, a fee of sixty-five
22 dollars (\$65.00) to defray the costs of chemical and other
23 tests used to determine the influence of intoxicating liquor
24 or drugs.

25 B. All fees collected pursuant to the provisions

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1 of this section shall be transmitted monthly to the crime
2 laboratory fund. All balances in the crime laboratory fund
3 collected pursuant to this section are appropriated to the
4 administrative office of the courts for payment upon invoice
5 to the scientific laboratory division of the department of
6 health for the costs of chemical and other tests used to
7 determine the influence of intoxicating liquor or drugs.

8 C. Payment of funds out of the crime laboratory
9 fund of fees collected pursuant to this section shall be made
10 upon vouchers issued and signed by the director of the
11 administrative office of the courts upon warrants drawn by the
12 department of finance and administration.

13 Section 13. Section 24-1-22 NMSA 1978 (being Laws 1981,
14 Chapter 165, Section 1) is amended to read:

15 "24-1-22. SCIENTIFIC LABORATORY DIVISION-- TESTING
16 METHODS-- CERTIFICATION. --

17 A. The scientific laboratory division of the
18 [~~health and environment~~] department of health is authorized to
19 promulgate and approve satisfactory techniques or methods to
20 test persons believed to be operating a motor vehicle or a
21 motorboat while under the influence of drugs or alcohol and to
22 issue certification for test operators and their instructors
23 [~~which~~] that shall be subject to termination or revocation at
24 the discretion of the scientific laboratory division. The
25 scientific laboratory division is further authorized to

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1 establish or approve quality control measures for alcohol
2 breath testing and to establish or approve standards of
3 training necessary to assure the qualifications of individuals
4 conducting these analyses or collections.

5 B. The scientific laboratory division ~~[will]~~ shall
6 establish criteria and specifications for equipment, training,
7 quality control, testing methodology, blood-breath
8 relationships and the certification of operators, instructors
9 and collectors of breath samples.

10 C. All laboratories analyzing breath, blood or
11 urine samples pursuant to the provisions of the Implied
12 Consent Act and the Boating while Intoxicated Act shall be
13 certified by the scientific laboratory division. The
14 certification shall be granted in accordance with the rules
15 and regulations of the scientific laboratory division and
16 shall be subject to termination or revocation for cause. "

17 Section 14. Section 66-12-11 NMSA 1978 (being Laws 1959,
18 Chapter 338, Section 10, as amended) is amended to read:

19 "66-12-11. PROHIBITED OPERATION. --

20 A. No person shall operate any motorboat or vessel
21 or manipulate any water skis, surfboard or similar device in a
22 reckless or negligent manner so as to endanger the life or
23 property of any person.

24 B. No person shall operate any ~~[motorboat or]~~
25 vessel, not defined as a motorboat pursuant to the provisions

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1 of the Boating while Intoxicated Act, or manipulate any water
2 skis, surfboard or similar device while intoxicated or under
3 the influence of any narcotic drug, barbiturate or marijuana."

4 Section 15. EFFECTIVE DATE. -- The effective date of the
5 provisions of this act is July 1, 2002.

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