

# VIRGINIA ACTS OF ASSEMBLY -- 1995 SESSION

## CHAPTER 130

*An Act to amend and reenact §§ 29.1-738.2 and 29.1-738.3 of the Code of Virginia, relating to drunk boating.*

[H 2580]

Approved March 8, 1995

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 29.1-738.2 and 29.1-738.3 of the Code of Virginia are amended and reenacted as follows:**

§ 29.1-738.2. Consent to blood or breath test.

A. Any person who operates a watercraft or motorboat which is underway upon waters of the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood ~~or~~, breath, or both blood and breath taken for a chemical test to determine the alcohol ~~or~~, drug, or both alcohol and drug content of his blood, if such person is arrested for operating a watercraft or motorboat which is underway in violation of subsection B of § 29.1-738, or of a similar ordinance of any county, city or town, within two hours of the alleged offense. Any person so arrested shall elect to have either the blood or breath sample taken, but not both for a violation of clause (i) or (ii), or both, of § 29.1-738 B, or of a similar ordinance, shall submit to a breath test. If either the blood test or the breath test is not available then the available test shall be taken. However, it shall not be a matter of defense if the blood test or the breath test is not available. In addition, if the accused elects a breath test, he shall be entitled, upon request, or the person is physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to administration of the test, be advised by the person administering the test that he has the right to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. If such equipment automatically produces a written printout of the breath test result, this written printout, or a copy thereof, shall be given to the accused in each case.

B. Any person, after having been arrested for a violation of clause (iii) or (iv) of § 29.1-738 B or of a similar ordinance, may be required to submit to a blood test to determine the drug or both drug and alcohol content of his blood. When a person, after having been arrested for a violation of clause (i) or (ii), or both, of § 29.1-738 B, submits to a breath test, in accordance with subsection A of this section, or refuses to take or is incapable of taking such a breath test, he may be required to submit to tests to determine the drug or both drug and alcohol content of his blood if the law-enforcement officer has reasonable cause to believe the person was operating a watercraft or motorboat under the influence of any drug or combination of drugs, or the combined influence of alcohol and drugs.

~~B.~~ C. If a person, after being arrested for a violation of subsection B of § 29.1-738 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a watercraft or motorboat which is underway upon the waters of the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood ~~or~~ and breath taken for a chemical test to determine the alcohol or drug content of his blood, and that the unreasonable refusal to do so constitutes grounds for a court to order him not to operate a watercraft or motorboat which is underway upon the waters of the Commonwealth, then refuses to permit the taking of a sample of his blood or breath ~~or both blood and breath samples~~ for such tests, the arresting officer shall take the person arrested before a committing magistrate. If he again so refuses after having been further advised by such magistrate of the law requiring a blood or breath ~~test sample~~ to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Supreme Court of Virginia, or refuses or fails to so declare in writing and such fact is certified as prescribed in § 18.2-268.3, then no blood or breath sample shall be taken even though he may thereafter request same.

~~C.~~ D. When any person is arrested for operating a watercraft or motorboat which is underway in violation of subsection B of § 29.1-738, the procedures and requirements of §§ 18.2-268.1 through 18.2-268.11 shall apply, mutatis mutandis, to this section.

~~D.~~ E. If the court or jury finds the defendant guilty of unreasonably refusing to permit a blood or breath sample to be taken, the court shall order such person not to operate a watercraft or motorboat which is underway for a period of twelve months for a first offense and for twenty-four months for a second or subsequent offense of refusal within five years of the first or other such refusal. However, if the defendant pleads guilty to a violation of subsection B of § 29.1-738, the court may dismiss the refusal warrant.

§ 29.1-738.3. Presumptions from alcoholic content.

In any prosecution for operating a watercraft or motorboat which is underway in violation of

~~subdivisions clause~~ (ii) or (iv) of subsection B of § 29.1-738, or of a similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the accused's blood or breath to determine the alcoholic content of his blood in accordance with the provisions of § 29.1-738.2 shall give rise to the following rebuttable presumptions:

1. If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

2. If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight by volume of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;

3. If there was at that time 0.10 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants of *subdivisions (1) through (3) of subsection A of § 18.2-269.*

**2. That an emergency exists and this act is in force from its passage.**