

HIGH TIMES: EVALUATING CLAIMS INVOLVING ALCOHOL OR DRUG USE

By: Paul W. Bennett

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INTRODUCTION

The making and consumption of alcohol dates back thousands of years, with multiple references in the Bible. Today alcohol consumption continues to be widely popular, with some 51% of the adult population of the United States drinking regularly, and another 13% drinking at least occasionally.¹ It is also a very large business. In 2012, retail sales of alcoholic beverages in the United States alone totaled almost \$200 billion.² That equates to a staggering 9.4 billion gallons of beer, wine and spirits, a figure second only to soft drinks in total consumption.³ According to industry figures, alcohol consumption also drives significant economic activity accounting for over 1.9 million direct jobs and over \$21 billion in state and local tax revenue.⁴

Canabis, or marijuana, is a psychoactive drug containing the active ingredient tetrahydrocannabinol (THC). It too has a long history of use, but, unlike alcohol, its production, sale, possession and use has largely been illegal in the United States for the past century. In Texas, it remains a crime to possess even small amounts of marijuana, with the sale or possession of larger amounts treated as a felony. Advocates have long asserted that marijuana was non-addictive and relatively harmless, and in some instances appropriate to treat medical conditions. Those arguments have achieved growing public acceptance. As of last year, some 20 states and the District of Columbia had decriminalized (if not legalized) the possession and

¹ Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2012. U.S. Centers for Disease Control and Prevention.

² Beverage Information Group Handbook Advance, 2013.

³ Id.

⁴ Economic Contribution Factsheet 2010, Distilled Spirits Council of the United States.

use of small amounts of “medical” marijuana, and two states (Washington and Colorado) had legalized recreational use.⁵ The legalization of marijuana sales is bringing the economic impact out of the shadows, with Colorado reporting over \$2 million in sales tax revenue from the first month of legal sales.⁶ Other illicit drugs, such as cocaine, methamphetamines and heroin, have not been part of the wave of decriminalization, and are less widely used.

With the widespread use of alcohol comes an attendant cost in individual and societal terms. In 2012, some 10,322 persons were killed in the United States in alcohol-impaired driving crashes.⁷ These deaths accounted for 31% of all traffic related fatalities.⁸ Although there is some debate as to whether the effects of marijuana on driving are as dangerous as alcohol, a recent study from Columbia University estimated that there has been a three-fold increase in fatal car crashes involving marijuana use during the previous decade.⁹ Studies have also shown that almost half of drivers killed in crashes who tested positive for drugs also had alcohol in their system.¹⁰ These statistics are chilling. Sooner or later, risk managers and their insurers will likely deal with some accident or incident involving allegations of alcohol or drug use by an employee, an insured or a claimant.

⁵ Report, Marijuana Policy Project.

⁶ Colorado Saw \$2 Million in Recreational Marijuana Taxes in January, The Denver Post, March 10, 2014.

⁷ “Traffic Safety Facts 2012: Alcohol-Impaired Driving” Washington D.C.: National Highway Traffic Safety Administration, 2013.

⁸ Id.

⁹ Fatal Car Crashes Involving Pot Use have Tripled in U.S., Study Finds, *WebMD*, February 4, 2014.

¹⁰ Johnston, L. D., O'Malley, P. M., Bachman, J. G., & Schulenberg, J. E. (2011). Monitoring the Future national survey results on drug use, 1975-2011. Volume I: Secondary school students (NIH Publication No. 10-7584). Bethesda, MD: National Institute on Drug Abuse, 734 pp.

TESTING

Some post-accident testing for alcohol or controlled substances (drugs) is required by law. For example, commercial motor vehicle carriers are required by federal regulation to test commercial drivers for alcohol or drugs “as soon as practical” following an accident involving a death, or involving disabling damage to a vehicle or bodily injury with immediate treatment away from the scene, if the driver is issued a citation by law enforcement.¹¹ The tests must be performed in a certified laboratory capable of providing reliable and valid results.¹² Such test results are likely to meet the scientific standards necessary to withstand a challenge as to reliability.

Hospitals will often perform a drug or alcohol screening test. However, these tests are usually performed for the purpose of treating the patient and not for legal purposes. They often reveal only the presence of alcohol or drugs, with little or no information on the amount detected. They are usually not verified with secondary testing. Such test results may not withstand a challenge as to their validity and reliability.

Law enforcement officers will sometimes order post-accident tests if they suspect a driver was intoxicated, under the authority of a warrant if there is not consent. Although the test procedures may vary, these are usually performed with the expectation that the information may be used in some judicial proceeding and are thus conducted in such a manner as to produce reliable results which would qualify for admission into evidence.

¹¹ 49 C.F.R. §382.303.

¹² 49 C.F.R. §40.1 *et seq.*

Some employers require employees to submit to post-accident testing even if not required by law. The policies and testing procedures vary widely. Presumably, an employer who goes to the trouble to administer such a test would want reliable results which would be admissible at the courthouse, but that is not always what happens in practice.

ADMISSIBILITY OF ALCOHOL OR DRUG USE TO PROVE LIABILITY

Perhaps the most obvious use of test results would be to show causation of an incident or accident. A party's use of an intoxicant such as alcohol or marijuana may be both relevant and admissible to prove liability.¹³ Such evidence is material and admissible where there is further evidence of negligence or improper conduct on the part of the plaintiff.¹⁴ However, alcohol or drug usage, without further evidence of negligence, is inadmissible.¹⁵

A case from the Fort Worth Court of Appeals is instructive. In *Bedford v. Moore*,¹⁶ the plaintiff sought to offer evidence of a post-motor vehicle accident drug screen to establish that the defendant driver had tested positive for methamphetamines immediately following an accident. The plaintiff offered the testimony of an expert who said that the driver had ingested drugs within a few days before the incident, about the correctness of the drug screen and the effects methamphetamine can have on an individual, but who was unable to state whether the driver was impaired at the time of the accident. The trial court excluded the evidence. On appeal, the court ultimately concluded that the trial court correctly excluded the testimony of the

¹³ Nichols v. Howard Trucking Co., 839 S.W.2d 155, 158 (Tex. App.—Beaumont 1992, no writ); Trans-State Pavers, Inc. v. Haynes, 808 S.W.2d 727, 733 (Tex. App.—Beaumont 1991, writ denied).

¹⁴ See Dorman v. Langlinais, 592 S.W.2d 650, 652 (Tex. Civ. App.—Beaumont 1979, no writ).

¹⁵ See Trans-State Pavers, Inc. 808 S.W.2d at 729; Dorman, 592 S.W.2d at 652.

¹⁶ 166 S.W.3d 454 (Tex. App.—Fort Worth 2005, no pet.).

expert since evidence of drug usage must provide some explanation for negligence and improper conduct. However, this was not present under the facts because the expert could not tie the presence of methamphetamines in the driver's body to impairment at the time of the accident, and therefore could not connect the presence of the drug to causation. The court did note that once evidence of improper conduct or negligence is presented, exclusion of evidence of a party's use of intoxicants is reversible error.

Evidence of alcohol or drug use is relevant and probative on the issue of contributory negligence when paired with evidence of other negligent acts.¹⁷

Once the connection with other evidence of negligence is made, parties are not required to put on evidence of the amount of alcohol or drugs used. Evidence of the use of intoxicants is the controlling issue.¹⁸ In *Nichols v. Howard Trucking Co.*, supra, there was no quantitative evidence of usage.¹⁹ In fact, the evidence showed only that the decedent had used marijuana in the past. Despite the lack of quantitative evidence, the court held that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice.²⁰ Other courts have likewise found that quantitative evidence is unnecessary.²¹

¹⁷ *Harris v. Kubota Tractor Corp.*, 2006 WL 2734460, at *3 (W.D. La. 2006); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1155 (5th Cir. Unit A Sept. 1981); *Missouri-Kansas-Tex. R.R. v. Alvarez*, 703 S.W.2d 367, 369-70 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *Soriano v. Medina*, 648 S.W.2d 426, 428 (Tex. App.—San Antonio 1983, no writ).

¹⁸ See *Dorman*, 592 S.W.2d at 652.

¹⁹ 839 S.W.2d at 159 (Burgess, J., concurring).

²⁰ *Id.* at 158

²¹ See, e.g., *Buchanan v. Mattingly*, 2012 WL 1580777, at *3 (S.D. Ohio 2012) (even though no specified level was established, evidence of marijuana use was relevant to issue of comparative fault and any prejudicial effect did not outweigh probative value of the evidence); *Southwestern Bell Tel. Co. v. Ferris*, 89 S.W.2d 229, 238 (Tex. Civ. App.—Dallas 1935, writ dismissed) (evidence that driver had been drinking or odor of alcohol on breath admissible).

ADMISSIBILITY FOR PURPOSES OTHER THAN PROVING LIABILITY

Even if evidence of alcohol or drug use, may not be admissible to prove liability, it may be highly relevant and probative of a plaintiff's claims for future damages, including loss of earning capacity, medical care, pain and suffering and mental anguish.²² For example, a person who has tested positive for drug use may be disqualified from numerous jobs and by numerous employers which would arguably limit his earning capacity. Drug use may contribute to mental anguish, and may require medical treatment. While a lack of evidence of negligence or wrongdoing may prevent its admission to prove liability, the jury may ultimately hear the same evidence of drug use when offered for another purpose, i.e., to prove that there are other reasons why the plaintiff's loss of earning capacity is impaired, or why he is requiring psychiatric care.

DRUG TEST REFUSAL

Even the refusal to take a post-accident drug test may be admissible. *Huynh v. R. Warehousing & Port Servs., Inc.*, 973 S.W.2d 375, 378 (Tex. App.—Tyler 1998, no pet.) (relevance of refusal goes to issue of whether person was in some manner affected by his drug use at time of accident).

²² See, e.g., *Butler v. French*, 83 F.3d 942, 945 (8th Cir. 1996) (evidence of alcohol abuse relevant to issue of damages for future lost income); *Howell v. Star-Kist Foods, Inc.*, 1993 WL 483477, at *2 (6th Cir. 1993) (evidence of marijuana use relevant to plaintiff's claim for lost wages); *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1475 (11th Cir. 1984) (history of alcohol and drug abuse admissible because plaintiff sought damages for future mental anguish and loss of earnings); *Martinez v. Rycars Constr., LLC*, 2010 WL 6592942, at *1 (S.D. Ga. 2010) (marijuana usage relevant to future earnings and future pain and suffering); *Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 811 (Iowa Ct. App. 1995) (use of marijuana is relevant to issue of projected future earnings).

WEIGHING OF PREJUDICE AGAINST PROBATIVE VALUE

Finally, the party objecting to the evidence will often argue that the prejudicial value of the evidence far exceeds its probative value.²³ However, as the Fifth Circuit noted in *Ballou v. Henri Studios, Inc.*, supra, unfair prejudice is not to be equated with testimony simply adverse to the opposing party. “Virtually all evidence is prejudicial or it isn’t material. The prejudice must be ‘unfair.’”²⁴ That court went on to hold that although there was a slight possibility that evidence of the party’s intoxication might adversely affect the jury’s deliberations on other issues, the slight potential for unfair prejudice was virtually insignificant when compared with the high relevance and probative value of same.²⁵ In other words, the mere fact that drug use is prejudicial is not enough to keep it out if it’s highly relevant and probative.

²³ See *Martinez v. Graves*, 2003 WL 21466962 (Tex. App.—San Antonio 2003, pet. denied) (not designated for publication) for the proposition that the probative value of the evidence of marijuana use is outweighed by the prejudicial effect it may have on the jury.

²⁴ 656 F.2d at 1155.

²⁵ *Id.*

About The Author:

Paul W. Bennett - A Partner in the firm, is a trial lawyer who focuses on Complex Litigation, Professional Liability, Construction Litigation, Products Liability Defense and General Defense. He has practiced in the state and federal courts for over 20 years.