THINKING and DRINKING:

Reconsidering Alcoholism, Intoxication and the Role of the Defense Forensic Expert

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Q: Patrolman Murphy, do you think that a year's experience as a police officer qualifies you to state that my client was intoxicated?

A: No, sir.

Q: Upon what, then, do you base your statement that my client was drunk?

A: Fourteen years of bartending.[1]

I. INTRODUCTION.

The goal of this presentation is to assist the Defense Attorney in utilizing a forensic expert as the proponent of evidence of alcoholism or intoxication in his/her defense of the affected client. At first blush, this would appear *not* to be a major problem. After all, how many times have we been faced with the following evidence against our imbibing clients in "common law" DWI cases:

> [The] defendant had slurred speech, was swaying, glassy eyed and smelled of alcohol; defendant also had to prop himself alongside his vehicle for balance. . . . Defendant admitted to another State Trooper . . . that he had consumed five shots of whiskey. *People v. Turner*, 234 AD2d 704, at 705 (3rd Dept. 1996).

[1] J.W. Ehrlich, *The Lost Art of Cross-Examination*, p.20 (Dorset Press, NY, 1970); a classic example of "one question too many."

Common sense would lead counsel to believe that if such evidence is admissible ***against*** our clients in DWI cases, that it will also be admissible on ***behalf*** of our clients who are attempting to mitigate a specific intent element through intoxication.[2] After all, if having slurred speech, swaying, being "glassy eyed," and smelling of alcohol is probative evidence "intoxication" for a Driving While Intoxicated offense, then such evidence should also be probative evidence to show "intoxication" to negate a specific intent element in other crimes. Such an assumption is not only false, but tantamount to ineffective assistance of counsel! While logically consistent, such evidence is legally *insufficient* to justify an "Intoxication Charge," in a criminal case, which of course one would wish to have if pertinent to a defense theory of the case. Why such a legal anomaly? The answer, after 23 years of "thinking" after trials,[3] is simple according to ***Rehkopf's Legal Theorems:***

THEOREM # 1: The Rules of Evidence are always relaxed if it will help the prosecution prove an element of the offense charged.

THEOREM # 2: Objections to the application of Theorem # 1, go to the *weight* of the evidence, not its underlying admissibility.

THEOREM # 3: The Rules of Evidence are strictly enforced if evidence is necessary to either establish a defense or negate an element of the offense, where the Defendant is the proponent of such evidence.

THEOREM # 4: Evidentiary objections to the application of Theorem # 3, must be overruled to prevent anarchy.

THEOREM # 5: *Constitutional* objections to Theorem # 3, may get the evidence admitted "for what it's worth," but will not guarantee a jury instruction on such.

THEOREM # 6: To be admissible for the Defense, evidence must be *relevant* under at least two [2] different legal theories; proper legal *foundations* must

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[2]"Intoxication" herein refers to any type of intoxication, not just alcohol related.

[3]Such "thinking" generally also involved developing an appreciation for fine wines. This of course was for "Educational Use Only," hence the instant title.

comply with (a) the CPLR; (b) *Richardson On Evidence*; and (c) two or more opinions authored by the presiding jurist; and no *Miscellaneous 2d* cases must exist that support the Prosecution's objections. The Court will then give a "modified" [watered down] jury charge.

THEOREM # 7: Any and all errors in applying Theorem # 6, will of course be "harmless beyond a reasonable doubt."

Counsel for an Accused in such a situation basically now has two options. To either maintain the traditional, *status quo*, or to re-think and reconsider our tactical and strategic approaches to making effective use of the "facts" handed to us as defense litigators. Basically, there are four [4] ways intoxication is relevant to criminal liability.[4]

1. The Defendant is so drunk that s/he is physically incapable of engaging in the crime charged, *e.g.*, rape, burglary;

2. The absence of "voluntary" conduct, *e.g.*, "joy-riding" as a passenger;

3. Intoxication negates or diminishes a required mental state, *e.g.*, actual knowledge or specific intent in "insider trading," grand larceny, etc.; and

4. As a basis for an insanity defense.

Consider the following. We have all had this client and it always begins like this:

COUNSEL: So, let's begin with the burglary 3rd charge, at Joe's Discount Liquors. That's the felony and we need to concentrate on that first.

DEFENDANT: Hey man, I don't know - you know - I was shit-faced. I don't remember nothin' after we got tossed out of that topless bar. Next thing I know, some cop is kickin' my ass, screaming at me and trying to take my Tequila away?

COUNSEL: The Tequila is the *petit larceny* charge. The Crime Report says that after you busted the window in the door, which set the silent alarm off, you grabbed a bunch of booze, started drinking and *then* passed out before you could leave.

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[4]Adapted from, Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 Cardozo L. Rev. 393, at 419 *et seq.* (1988).

DEFENDANT: Hell if I know, man. C'mon, you gotta get me a misdemeanor and rehab man. I done real good the last time I was inpatient. I can't do no State bid for no damn burglary charge. I musta' been drunk, I hate that Mexican worm juice man, so when am I getting bailed on this crap?

COUNSEL: Inpatient? When was that and why?

DEFENDANT: Let's see. . . . It was after my last DWI, 'bout a year ago. Hadda go to some DETOX center, 'cuz no one believed I could drink a half gallon of Jack D. Then the Judge made me go inpatient at this place - worse than jail, man. No booze and meetings all day long. I did my 90 days and got the hell out of there.

COUNSEL: Do you remember what the diagnosis was?

DEFENDANT: Huh? Wha' daya mean?

COUNSEL: What did they say was wrong with you, besides being drunk?

DEFENDANT: Oh, let's see . . . . Oh yeah, some psycho-nurse gave me some damn tests and tried to tell me I was an alcoholic. Pure BS. I ain't no alcoholic man - some days I only drink beer and get high, so shows how much they know. But, hey, intoxication's a defense, right man?

COUNSEL: Not really, not in New York, but let me explain --

DEFENDANT: Don't give me that crap man, it sure as hell is. I want a new lawyer, you don't know what the f--k you're talking about. Telling me that BS that being drunk ain't no defense. You ain't no lawyer man, get outta my face![5]

So, despite this ominous beginning of the attorney-client relationship, what is there to work with here?

II. THE STATUTORY FRAMEWORK.

A. Penal Law [PL] § 15.25. *Effect of Intoxication upon liability.*

[5]The foregoing is a "composite" of numerous client interviews and is used for illustrative purposes. Anyone who has done a modicum of criminal defense work has heard the same story.

> Intoxication is not, as such, a defense to a criminal charge; but in *any* prosecution for an offense, evidence of intoxication of the *defendant* may be offered by the defendant whenever it is relevant to negative *an element* of the crime charged. [emphasis added][6]

Pay attention to the language of this section. It is *broader* than what one might preliminarily think. Here is what is required:

1. "***Any*** prosecution for ***an*** offense" - this does **NOT** limit the category of offenses to which it can be used, thus, the creativity of the Defense Counsel becomes paramount.

2. "Evidence of intoxication ***of the defendant***" - do not let prosecutor's cite this as a shield to bar you from going after their witnesses who are intoxicated. The statute on its face only applies to the defendant.

3. "***may*** be offered" - leaves this as a tactical/strategic decision for the Defense.

4. "by the defendant" - This is the key element. It unequivocally shifts this burden *of production* of evidence to the Accused. Cross-examination of the prosecution's witnesses *may not* be sufficient. However, if "intoxication" is important to the defense theory of the case, counsel is strongly urged to use an expert in this area, *i.e.*, someone with the expertise to explain the physiological and biological effects of intoxicants on the human body, especially its neurological structures.

5. "Whenever it is ***relevant***" - the sole gate to admissibility. *See*, Farrell, *Richardson on Evidence,* § 4-101 (11th ed., 1995).

6. "to negative ***an element of the crime.***" - Pay attention to this clause! It does **NOT** limit admissibility to the "intent" element, which is what most DA's, and hence, most judges, erroneously assume.

B. PL § 15.05(3). "Reckless" Culpability.

This section defines the culpable mental state of one acting "recklessly." It imposes a limitation upon PL § 15.25, as follows:

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[6]*See, People v. Krist*, 168 NY 19 (1901) [voluntary intoxication is not a defense to a crime].

> A person who creates such a [substantial and unjustifiable] risk but is unaware thereof ***solely*** by reason of ***voluntary intoxication*** also acts recklessly with respect thereto. [emphasis added].

Failure to know the language of this statute can get counsel into significant trouble and cause serious damage to a client's defense. Note specifically that this "exception" has a built in escape mechanism, *i.e.*, it only applies if the ***sole*** reason for the unawareness is voluntary intoxication. Thus, if one is reckless due to the combined factors of "mistake of fact" [PL § 15.20(1)] and voluntary intoxication, such ***combined*** evidence statutorily should suffice to negate the element of "reckless" conduct. Additionally, if it is not "voluntary" intoxication, the limitation clearly does not apply. However, do not limit your cerebration here to the typical example of a "spiked drink." As will be discussed below, also consider the fact that drinking for an ***alcoholic***[7], not in remission, is involuntary! This obviously requires expert, forensic assistance and testimony.

1. *Register* was Wrong.

In *People v. Register*, 60 NY2d 270 (1983), the Court of Appeals decided in a 4-3 opinion, that it was *not* error to refuse to give a jury the "intoxication" charge to the crime of "depraved indifference" murder [PL § 125.25(2)], per PL § 15.05(3). As usual, bad facts end up making bad law for the Defense. Bruce Register and his friend, Duval, "had been drinking heavily that day celebrating the fact that Duval, though an administrative mix up, would not have to spend the weekend in jail" *id.*, at 273. They then moved their celebration to a bar[8] where, after an additional 4 to 5 hours of drinking, a bar fight erupted.

[7]This presupposes a *bona fide* medical diagnosis of such.

[8]The defense was not helped by Register's gratuitous comment that "I'm going to kill someone tonight," which probably explains the Court of Appeals' decision against him.

Register shot at Willie Mitchell, who was fighting Duval [self-defense of another], only he missed and "mistakenly injured" Evans [accident/mistake]. At that point, Lindsey, a friend of Register's, walked by and "For no explained reason, defendant turned and fired his gun killing Lindsey." *Id.*, at 275 [potential mistake of fact].

The Defense got into trouble at trial [and on appeal] as its sole defense was "intoxication," despite the existence of other compatible defenses, *e.g.*, self-defense of another, accident/mistake, and mistake of fact. While the trial judge gave the intoxication instruction for the intentional murder charge [for which Register was acquitted], the judge refused to give it on the "depraved indifference" count. The Fourth Department and Court of Appeals affirmed.

2. Where the Court Erred.

A hotly divided Court [4-3] initially decided that "depraved indifference to human life" was ***not*** part of the *mens rea* for the offense, holding that the sole element of intent was "reckless," thus bringing PL § 15.05(3)'s limitation into play. To have held otherwise by the majority, would have required a reversal, something obviously not palatable to the Black Robes under the facts of the case. The Court erred, by not reading the plain language of PL § 15.05(3), when it concluded:

> [T]he present statute [PL § 15.05(3)] when enacted in 1967 continued to foreclose the use of intoxication evidence in cases involving recklessness. The rationale is readily apparent: the element of recklessness itself - defined as conscious disregard of a substantial risk - encompasses the risks created by defendant's conduct in getting drunk. 60 NY2d at 280.

The Court's broad sweep however, overshadows the actual language used, *i.e.*, that a defendant's unawareness of the "risks" is due "***solely*** by reason of voluntary intoxication." But in Register's case, there were clearly other factors involved in addition to his intoxication, only they were never advanced in support

of the intoxication charge regarding the "reckless" conduct charged as depraved indifference murder.

C. The "Insanity" Defense.

Penal Law § 40.15, provides an affirmative defense for those individuals who "lacked criminal responsibility by reason of mental disease or defect." What are we talking about here? In a statute that most criminal defense lawyers are probably unaware of, this question is answered:

> ***General Construction Law***
> ***§ 28. Lunatic, mentally ill person, lunacy and mental illness.***
> The terms lunatic, mentally ill person, lunacy and mental illness include ***every kind of unsoundness of mind*** except idiocy or mental retardation. [emphasis added]

For our purposes, the next relevant question is, does this include intoxication? A bit of legal research shows the following. In *Weinberg v. Weinberg*, 255 AD 366, 8 NYS2d 341 (4th Dept. 1938), one Albert Weinberg suffered from "dementia praecox"[9] and was adjudged insane. Thereafter a woman got involved, Esther a/k/a "Fannie," who temporarily "cured" the loving Albert and promptly married him. Albert's mother Ida, guardian of his estate and person, became convinced that Fannie was only interested in Albert's money and potential inheritance and sought to have the marriage annulled "on the grounds of lunacy." The Fourth Department saw fit to tell us that:

> A serious distinction has always been recognized between lunatics and idiots. The one had lucid intervals; the other had no power of mind whatever. 8 NYS2d at 344-45.

While Albert was no doubt pleased to read that while he was a lunatic, he was not an idiot, this case does not yet quite help our clients, even though they may suffer the same diagnosis. Marriage, being a legal contract, then prompted the Court to note that "All contracts of a lunatic, ***habitual drunkards*** or person

[9] *Query:* a possible defense to Impeachment charges?

of unsound mind. . . are absolutely void. . . ." *Id.*, at 345. True love prevailed as the Court noted that Ida did not meet her burden to show that Albert was not lucid when he married Fannie, which the Appellate Division affirmed. Most alcoholics are going to have periods of sobriety or "lucid intervals."

Not to be left out of this jurisprudential picture, the Court of Appeals in *De Nardo v. De Nardo*, 293 NY 550 (1944), decided the appeal of this issue: "Was Mario De Nardo a lunatic at the time of his marriage to the defendant Stephania De Nardo on December 22, 1942?" As stated by the Court:

> We are concerned, in this case . . . with the meaning of the words "lunatic" and "lunacy." Formerly insane persons were divided into two categories: lunatics who, having been of sound mind, have lost their reason and were supposed to enjoy lucid periods, and idiots, who were without understanding from birth. 293 NY at 554.

Due to an instructional error on this topic, the Court reversed the decision in favor of Mario's estate, and granted poor Stephania a new trial.

While perhaps historically humorous, there is an important lesson for Defense Lawyers - the concept of "temporary insanity" has enjoyed a long history in New York's jurisprudence. *See, e.g.*, *People v. Schiavi*, 64 NY2d 704 (1984). However, Courts and prosecutors will cite *People v. Westergard*, 69 NY2d 642 (1986), for the erroneous proposition that "alcoholism" does not justify an "insanity" charge. *Westergard* did ***not*** hold that as a simple reading of the opinion shows. It dealt with a request for a "diminished capacity" charge based on the fact that the defendant was a diagnosed alcoholic and drunk at the time of the alleged offenses. The Court's holding was limited: "On this record, the court adequately instructed the jury regarding the possible effects of defendant's condition . . . on his state of mind." 69 NY2d at 645.

If the Accused is going to raise a temporary insanity defense, counsel needs to keep two things in

mind. First, the burden is on the defense, by a preponderance of the evidence, to establish such. This means that absent the most unique circumstances, the Defense is going to need expert testimony. Second, CPL § 250.10, kicks in. A working knowledge of this statute[10] is mandatory - counsel ***must*** continuously cite and remind the Court that "'psychiatric evidence' means:

> (a) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of ***lack of criminal responsibility by reason of mental disease or defect***.
>
> (b) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of ***extreme emotional disturbance***. . . .
>
> (c) Evidence of mental disease or defect to be offered by the defendant in connection with ***any other defense not specified in the preceding paragraphs.*** CPL § 250.10(1).

Thus, psychiatric evidence of intoxication or alcoholism is admissible either as an affirmative defense *or* for "any other defense. . . ." However, do not forget the broad definitions set forth in the General Construction Law § 28, *supra,* when thinking about "any other defense."

[10]Counsel should not forget the "Notice" requirement contained in CPL § 250.10(2), which triggers admissibility of psychiatric evidence at trial.

D. The Disease of Alcoholism.[11]

As soon as a Defense Counsel decides that s/he has a viable defense based on intoxication, alcoholism or both, Theorem # 3, *supra,*[12] will become applicable. Indeed, the sophistry of the DA's and Court's arguments, in rejecting such will be as follows:

> While clearly defendant suffered from alcoholism which is recognized as a disease, there is no evidence that defendant suffered from a ***mental disease*** or defect within the meaning of the Penal Law (*see,* Penal Law § 40.15). *People v. McGee*, 220 AD2d 799 (3rd Dept. 1995).

With such enlightened jurists, one can only hope that mandatory retirement is near. The moral however is to *make your record!* Get your expert to testify that alcoholism is both a *bona fide* and recognized disease, but that it is also a mental disease. *See, e.g.,* Schroeder *et al., Current Medical Diagnosis & Treatment,* Chapter 19, Psychiatric Disorders, at 732 *et seq.,* ["Alcoholism is a syndrome consisting of 2 phases: problem drinking and alcohol addiction."]; DSM IV, *Alcohol Use Disorders,* 303.90, at 194 *et seq.*. Ironically, there is a fairly substantial body of case law in New York on this topic in the area of Unemployment Insurance decision, *e.g.,:*

> Alcoholism can excuse disqualifying misconduct if there is substantial

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[11]Unless one has significant experience with the legal effects and ramifications of alcoholism, counsel is urged to read and study an outstanding article on this topic, *see* Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law,* 10 Cardozo L. Rev. 393 (December, 1988).

[12]"The Rules of Evidence are strictly enforced if evidence is necessary to either establish a defense or negate an element of the offense, where the Defendant is the proponent of such evidence."

> evidence to show that an employee is an alcoholic, that the alcoholism caused the behavior leading to the employee's discharge . . . . Matter of Opoka, 232 AD2d 718 (3rd Dept. 1996).

See generally, Matter of Burns v. NY State Office of VESID, 233 AD2d 781 (3rd Dept. 1996). If alcoholism can "excuse disqualifying misconduct" for unemployment insurance benefits, a defendant should be able to not only introduce evidence of such pursuant to one of the subdivisions of CPL § 250.10(1), but should thereafter also be entitled to an appropriate jury charge. This very well may require a "blending" of both intoxication and insanity defenses.

III. THE TEACHING OF *PEOPLE v. GAINES*.

Gerry Gaines, like Albert Weinberg above, got into trouble over a woman. He was convicted of Assault 2nd after an altercation with one Boyd who, for pay, was to drive Gaines and "a prostitute known as 'Blondie' to a designated location." Gerry, the macho-man, testified that he "had a couple of drinks," Blondie testified that "defendant was 'high,'" and a police officer testified that "defendant had glassy eyes and alcohol on his breath." *People v. Gaines*, 83 NY2d 925, at 926-27 (1994). The trial judge denied a defense request for an intoxication charge stating that the evidence of intoxication was "insufficient" [*but see*, *People v. Turner*, *supra* {p. 1, above}]. Both the First Department and Court of Appeals affirmed. According to the Court of Appeals, "Defendant's evidence lacked requisite details tending to ***corroborate*** his claim of intoxication . . . ." [*See* Theorem's # 3 & 6, above]. Of course, until Gerry got involved with Blondie, "corroboration" had never been an element of intoxication. One need not speculate however, that instead of paying Boyd to drive him and Blondie to their "designated location," had Gerry Gaines been stopped for driving Blondie to their *rendezvous*, that the above evidence surely would have been admitted against him in a common law DWI case. Gerry Gaines not only got convicted without an "intoxication" charge, but got arrested *before* he and Blondie could "do their thing!" *Gaines*, *supra*, should now be used

by Defense Counsel in all common law DWI cases, to show that "corroboration" is required of any police officer's testimony, that merely being "glassy eyed" and reeking of alcohol is legally insufficient to even justify an instruction on DWI![13]

So, where did Gaines' Defense Counsel go wrong, besides forgetting Theorem # 3? As stated by the Court of Appeals, what is necessary to justify an intoxication charge is:

- Evidence of the number of drinks consumed [or amount of intoxicant ingested];
- The period of time in which such was consumed;
- The lapse of time between such consumption and the event in issue;
- Whether such consumption was on an "empty stomach;"
- Whether the drinks were "high in alcoholic content" [or the "purity of the powder"]; and
- "[T]he specific impact of the alcohol upon his behavior or mental state."

[13]In view of the current phenomena of "global warming," it is dubious that hell will freeze over anytime soon. That being the case, Theorem's # 1 and 2, will apply to such arguments.

Gaines of course is inconsistent with the statutory language of both PL § 15.25 and CPL § 250.10(1)(c), which never imposed such evidentiary hurdles. However, unless or until *Gaines* is overruled, as Defense Counsel, we have to live with it and follow it. That is the bad news. The good news is that for those unenlightened jurists who abhor Defense Expert Witnesses,[14] the Court's express admonition that the Accused must now show "the specific impact of the alcohol upon his behavior or mental state," basically requires expert witnesses. While certainly a lay witness could still testify that Joe Defendant was unable to stand up unassisted after "doing 17 shots of Watermelon schnapps," as that is a physical observation. However, to say that Joe was "too drunk to stand up" probably will now require an expert on the physiological and neurological effects of Watermelon schnapps at 46% alcohol by volume, on a 23 year old, 175 pound male, who had a "Big Mac" meal 8 or 9 hours earlier, and split an order of chicken wings after shot number 3, thirty minutes earlier.

Gaines however, should not have come as a shock to the Defense Bar. In *People v. Rodriguez*, 76 NY2d 918 (1990), the Defendant was tried for Murder 2nd, Robbery 1st, etc.. The Trial Judge refused a defense request for an intoxication charge. As the Court of Appeals observed:

> Defendant presented only inconclusive evidence that he had been using various forms of narcotics on the day of the crime *and the jury could not reasonably infer from that evidence that his capacity to form the necessary intent had been thereby affected.* ***There was no evidence of when defendant ingested narcotics, the quantity ingested or the effect they had on him.*** 76 NY2d at 921 [emphasis added].

All is not lost however, as *Rodriguez* was just lazy lawyering. The Court also noted:

> The evidence of intoxication, sufficient to warrant the instruction. . . may

[14]Generally, these are the same judges who will allow the prosecution to qualify anyone as an expert in any area or areas that the prosecution's proof is weakest in. *See* Theorem # 1.

include evidence that defendant's mental capacity ***has been diminished*** by intoxicants. . . . 76 NY2d at 920.

The importance of this "diminished capacity" language is that to the extent that judges and prosecutors cite *People v. Westergard*, *supra*, that rejected a "diminished capacity" charge, it is clear that (a) *Westergard* is fact-based and of limited precedential value, and (b), *Rodriguez*, clearly more recent, states the current rule on "diminished capacity," *i.e.*, it is admissible, thus requiring a charge, if Defense Counsel jumps through the legal hoops created by the Court of Appeals.[15]

IV. MISCELLANEOUS MEANDERINGS.

This is not a treatise on the parameters of using alcoholism and intoxication proactively in your defense. However, hopefully it will stimulate some cerebration - thinking that will get you by the evidentiary hurdles the Courts have erected. A few additional tidbits:

- *People v. Butler*, 84 NY2d 627 (1994). Sidney Butler, after getting both drunk and high on marijuana and cocaine, went "crazy" and stabbed a woman 34 times. He won the battle but lost the war - the judge gave the intoxication instruction for the Murder 2nd charge, but refused to instruct on the LIO of Manslaughter 1st and 2nd . The Court held that this was not error [*but see* the Dissenting Opinion]. Apparently, Sidney did not opt for an EED defense.

- *People v. Cruz*, 48 NY2d 419, at 427 (1979), *app. dismissed* 446 U.S. 901 (1980): a lay person may testify that a person appears intoxicated upon establishing a foundation for such observation;

- *People v. Gerdvine*, 210 NY 184 (1914); jury question as to the extent of intoxication and its effect on intent or premeditation.

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[15] *But see, People v. Ardila*, 85 NY2d 846 (1995), where in a DWI case the Court noted that to convict for being "impaired" [V & T Law § 1192(1)], only requires a showing that the Defendant's "faculties were impaired 'to any extent.'" Obviously, a double standard exists.

- *People v. Piscitelli*, 156 AD2d 596 (2nd Dept. 1989); drug use may also raise issue of intoxication.

- *People v. Scott*, 111 AD2d 45 (1st Dept. 1985). John Scott was "drinking in *Anita's Topless Bar*. He had at least two bottles of beer." Things did not go well for John, as after buying drinks for "several of the 'girls,'" John pulled a gun and threatened "to blow the place away." Things continued to go bad for John, and he got convicted of CPW2nd. He then got to read the First Department's opinion which stated, "even an inebriated person is capable of forming intent." 111 AD2d at 46. John was a loser.

V. CONCLUSIONS AND OBSERVATIONS.

The state of the law in this area is deceptive. If there is any indicia that the client was intoxicated at the time of the alleged offense, Defense Counsel has two additional duties: to verify the necessary facts surrounding the intoxication, as required by *Gaines*, *supra,* and to ascertain if either a medical diagnosis of alcoholism or addiction is applicable. Obviously a medical diagnosis requires a forensic medical expert. But that is just the first step. Defense Counsel must now integrate this into the defense theory. Returning to the Attorney-Client "dialogue" in Part I, above as an example, the *tactical* issue becomes how best to utilize the client's alcohol problems. Such a decision must be based on the totality of circumstances surrounding the Defense theory of the case and made with the client's understanding. Assume *arguendo* that the decision is made to go with the mis-named "intoxication" defense, as opposed to an alcohol-related mental disease defense. Counsel is going to have to have available as witnesses the Accused's colleagues who were either drinking with him or observed him drink the 17 shots of Watermelon schnapps. Ask the client how the "bar bill" got paid. A $75.00 credit-card receipt for "drinks & wings," can be powerful corroboration. Most likely the client is going to have to testify about his food intake in the preceding 24 hours, how the alcohol effected him and his memory, and that he had no recollection of going into the liquor store. The bouncer who ejected the Defendant from the "topless bar" because he was "drunk and

obnoxious" may also be an important factual witness.

The "key" witness, other than the Defendant however, is going to be your forensic expert. The jury [and the record] is going to have to be educated on the specific effects this type, strength and amount of alcohol has on a male of the Defendant's age, size, weight and food intake. The concept of "alcoholic blackouts" or amnesia needs to be addressed in detail. Finally, the *specific* effects of these combinations on the Defendant's ability to (a) think rationally, (b) form a specific "purpose" or intent, and (c), as *Gaines* requires, "the specific impact of the alcohol upon his behavior or mental state." That should get you the "intoxication" charge.

One last area that counsel needs to address is the anticipated cross-examination of the Defense Forensic Expert. If the *only* evidence of the so-called "Gaines" factors comes from the Accused him/herself, the expert is going to have to concede that his/her opinion is therefore dependant upon the Defendant's testimony. The DA will then be able to argue that the Accused is biased, an "interested witness" etc., which of course is true, and then diminish the effect of the Defense Expert. Remember, the goal is to win an acquittal for your client. Thus, the more corroborative evidence that is available, bartenders, bouncers, police officers, bar tabs, drinking "buddies," etc., that is available, should always be utilized, as the Defense Expert, while conceding the Accused's testimony, can easily point to the independent corroboration. Two remaining areas of "vulnerability" that are easily handled. First, the DA almost always asks a series of questions that go like this:

Q: Doctor, isn't it true that different people metabolize and eliminate alcohol at different rates?

A: Yes, to some extent that is true.

Q: You do not know specifically how this Defendant metabolizes and eliminates alcoholic

beverages, do you?[16]

A: There are medical and scientific "norms" that are applicable to adult males which we use, in the absence of some evidence to the contrary, which I did not find, so to a reasonable degree of medical certainty, I do know how alcohol affected the Accused.

Q: You didn't do any specific tests, did you?

A: No, I relied upon years of research, research that by the way has been accepted by the Courts of this State in DWI cases for years.

The other area of "canned cross" generally goes as follows:

Q: Doctor, you never observed the Defendant in the drunken condition that he claims to have been the night of the burglary, have you?[17]

A: There was no need to as I had independent corroboration, so the answer is "no."

Q: So you do not know *for sure* how much the Defendant was under the influence of alcohol, if any, do you?

A: I don't know "for sure" if you are under the influence of alcohol. My standard is to a reasonable degree of medical certainty. Based on the totality of evidence available to me ***and to you***, I stand by my opinion that he was extremely intoxicated.

Q: Doctor, that's just your opinion, you do not know that for a fact, do you?[18]

A: My opinion is based upon the fact that Officer Jones testified that when he arrested him, the Defendant was passed out on the floor, had urinated in his pants, had a strong odor of

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[16]Here's where you need to work with your expert!

[17]Your expert needs to be prepared here.

[18]Technically, this is an improper question as it is irrelevant to the "expert's" testimony. Whether or not to object then becomes a tactical decision.

alcohol, needed assistance walking and could not remember how he got into the liquor store. Unless you are telling me that Officer Jones lied, I have nothing to suggest that his facts are not true, and so my testimony is based on those facts.

Q: You never specifically tested this Defendant's mental abilities in a controlled situation, while he was under the influence of alcohol, did you?

A: No, there was no need to. The effects of alcohol on human beings have been medically and scientifically known for years. That is the basis for the DWI limits. The Defendant, based upon my review of his medical records, has no other medical condition, such as diabetes that would have taken him out of the norm.

Q: Just answer the question please, doctor, OK?

A: I never specifically tested the Defendant when he was drunk, but I didn't test him for brain cancer either, because there was no medical reason to do so.

Q: Your "opinion" is nothing more than a professional guess, right?

A: Absolutely not! My medical opinion, is based on known and corroborated facts, combined with my medical and scientific education and experience, my 23 years of specialized experience in this field, and is based upon the required degree of medical and scientific certainty.

Obviously, if the expert is an expert and has been provided with all available relevant data, *and* counsel takes sufficient time to both prepare and simulate the anticipated cross-examination, the impression or psychological effect upon the jury is going to be maximized. While there are no guarantees as a trial lawyer, especially in criminal defense, sufficient cerebration and thorough preparation will make the "reasonable doubt" decision, much easier for the jury.