

It's All In The Evidence

By John Kwasnoski

Let's try a simple experiment. Everybody take out a calculator and multiply 23.4 by 4.52. Did you get 105.768? So what's the point? There are several basic reconstruction methodologies, e.g., time-distance relationships, linear momentum, speed from yaw or skid marks, vaults, etc. that an accident reconstructionist can use in reconstructing a crash. The evidence, however, not the accident reconstructionist, dictates which methodology (aka equation) is chosen. For example, if there is no evidence of braking (no marks on the road) the speed of the vehicle could not be determined using a speed from skid marks equation. However, that does not preclude use of vehicle or property damage as a means of determining vehicle speed.

Your investigators process the crash scene, see the physical evidence with their own eyes, take measurements, and gather the "numbers." This is where the prosecution has a tremendous advantage. In most cases, a defense expert's knowledge of the scene is gleaned from reports, diagrams and photos prepared by the state's reconstructionist.

So how can the defense reconstructionist attack the state's theory of culpability? A common strategy is to claim that the evidence was either incorrectly documented or misinterpreted by the state's reconstructionist. Such an attack affords the defense the opportunity to reach a different conclusion without relying on the state's evidence. Case in point: the state investigator uses a drag sled to determine road friction, but the defense expert claims to have used a more accurate instrument days or months after the crash and arrived at a lower road friction. Using the lower number, the defense expert opines the vehicle speed was considerably lower.

Anticipate this turn of events and prepare to overcome it head on. In your reconstructionist's direct exam establish not only the training and experience of your expert, but be sure to establish the reliability of the standard measuring techniques and tools used by your trained, certified and experienced accident reconstructionist.

Remember that the defense is reactive to your expert. If your evidence is credible, the defense is in trouble. The defense reconstructionist must convince a jury that the state either documented the evidence incorrectly or misinterpreted the evidence. Otherwise, everybody uses the same numbers, everybody has the same calculators, and everybody gets the same answer - yours.

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Equal Protection Challenges to Drinking/Driving Laws

The potential for equal protection challenges to criminal laws always exists, and driving-related laws are no different. Prosecutors from around the country periodically contact NTLC seeking information on combating equal protection challenges to graduated licensing, ignition interlock, zero tolerance and under-twenty-one drinking laws. While most equal protection challenges by defendants are easily defeated, prosecutors should know the basics of equal protection jurisprudence to effectively argue against such challenges:

- *Every law creates a class.* Because every law creates a class, an equal protection argument can be made in almost every case. The class is defined by the treatment given to a specific group of people compared with the rest of the general population. Graduated licensing laws create a class by placing restrictions on young drivers that do not apply to older drivers.
- *There must be a tight "means/end fit."* Equal protection requires that in most cases there be a tight "fit" between the government interest (the "end") and the necessity of creating a class to further that interest (the "means"). In the case of zero tolerance laws, the end is a reduction of

the number of youth involved in alcohol-related fatalities. The means is stricter standards (lower per se BAC) for young drivers who drink and drive. The fit would be evidence showing that zero tolerance laws further the important state interest of reducing the number of alcohol-related fatalities involving youth.

- *Some classes are subject to higher scrutiny under state law than federal law.* For example, under-twenty-one drinking laws treat those under twenty-one years of age differently than those twenty-one years of age and older, creating a class based on age. Under the Federal Constitution, this classification must only be rationally related to the government interest. In contrast, the Louisiana State Constitution treats age as a suspect classification, where the fit between age and the government interest must be more than rational.
- *Only similarly situated classes must be treated equally.* Most zero tolerance laws treat one class (people under twenty-one years of age) differently from the rest of the population (people twenty-one years of age and older). However, the fact that it is illegal in most states for people under twenty-one years of age to drink makes those affected by zero tolerance dissimilar from the class of people twenty-one years of age and older. Therefore, the class of people under twenty-one years of age need not be treated equally under zero tolerance laws.

Other factors, such as the scope of the class and the import of the government interest, may also determine the outcome of an equal protection challenge. It is important to remember, however, that just because a law creates a class, it is not automatically unconstitutional. In fact, the vast majority of criminal laws create classes that only require a rational relationship with the government interest.

Meeting DUI Defense Challenges: The Breath Test

In an ideal DUI case, where the defendant has demonstrated faulty driving, made gross errors on the field sobriety tests, and shown other signs of intoxication, the breath test serves to corroborate what the jury already knows--the driver was impaired. In the close case, however, where the driver is stopped for a violation unrelated to driving, makes seemingly minor errors on the SFSTs, and has only an odor of alcohol and blood shot eyes, the breath test becomes the key piece of evidence in the state's case--the more subtle the impairment, the more crucial the chemical test result.

A common defense tactic is to challenge the reliability of the breath testing instrument specifically playing into many jurors' distrust of technology that they may not understand. Therefore, it is essential that the prosecution allay jurors' concerns by establishing the specific reliability of the test result in a particular case. This can be accomplished by competent direct examination of the officer who administered the test.

Have the officer describe the training and certification process (where required) in the operation of the breath testing instrument and introduce proof of certification into evidence. The officer should be asked to describe each step of the breath testing procedure, its purpose and the result. If the officer is required to follow a checklist while administering the test, the checklist should be introduced into evidence. If there is not a checklist, then the officer should testify that the test was administered in accordance with the training received and/or state regulations. Finally the officer will testify that the defendant blew into the instrument, there was no malfunction, and a result was obtained.

Be aware of the limitations of the officer's testimony. The officer is trained in the operation of the breath testing device but not necessarily in the principles by which the device measures breath alcohol nor in the maintenance and repair of the machine. Therefore, the officer's testimony should be limited to what s/he did and observed regarding the test in question. The prosecutor should object to defense questions that attempt to have the officer explain how the instrument measures breath alcohol or speculate on errors which might occur. The officer should be firm when testifying that the instrument functioned as expected.

Defense counsel may attempt to make an issue of the fact that the officer cannot explain the technical process by which breath alcohol is measured. A common sense analogy is comparison to a television. Most of us cannot describe how a television works, however, that does not prevent us from watching it. When we turn it on, see a picture and hear sound we know the television is working. Likewise, a fuzzy or

distorted picture, strange colors, static or the lack of sound indicates a malfunction and we call for repair. When the breath testing instrument is turned on and performs as the officer was it should, it is safe to assume that instrument was working properly.

Did I Miss Something?

Due to an oversight, some of our newsletter issues were incorrectly numbered. So for those of you who keep track of these matters, Volume 3, Number 3 and 4 are "missing" as are Volume 4, Number 1 and 2. Rather than attempt to re-number any issues, we are just declaring our mistake and hope we have not caused our readers any confusion.

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