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Cross Examining the Defense Accident Reconstructionist

by John Kwasnoski

Just as you expected. The defense expert testified that the police reconstruction methodology was completely flawed and the state's opinion regarding speed is incorrect.

Don't waste your energy trying to get the expert to change his/her opinion. It rarely happens. Focus on a few points of attack. Concentrate on the parts of the defense theory that are intuitively dissatisfying to the jury.

For example, in a recent case the defense expert testified that he used a combined speeds method to determine an impact speed of 45 mph when the car struck a tree. To show that the defense estimate of speed was too low, the prosecutor asked the expert to calculate the car's kinetic energy before and after the impact. The defense expert had to agree that the damage the car would sustain, based on the defense estimate, was the equivalent of dropping the car to the ground from a height of only 14 feet. When the jurors looked at the photos showing the extensive damage to the car, they didn't believe the defense expert's assessment of only 45 mph. They rejected his opinion of speed and consequently, discounted everything else he had to say.

Make it clear to the jury that only one reconstruction is credible. Yours. Tell the jury that they cannot take bits and pieces from both opinions. The physical evidence only fits together one way. Force the jury to pick between the opinions. Look for an area in the defense theory that will go contrary to the juror's logic. Point it out. When they cannot match the defense expert's opinion with their own common sense it forces them to choose the state's theory of the case.

John Kwasnoski, a professor of forensic physics at Western New England College in Springfield, Massachusetts, reconstructs crashes and offers expert testimony.

Death Penalty Update

Last issue, we told you about a case in North Carolina where the defendant faced the death penalty for killing two college students while driving under the influence of alcohol and drugs. He was charged with two counts of felony-murder, a capital offense in North Carolina, where the underlying felony was assault with a deadly weapon upon the surviving passengers in the victims' car. On May 2nd, a jury found the defendant guilty of both counts and sentenced him to life imprisonment without parole, the longest sentence ever given for a DUI homicide in the United States.

That same jurisdiction and another in North Carolina have additional DUI homicide/death penalty cases pending. The prosecutor in the Kentucky case, also mentioned in last issue's article, decided not to seek the death penalty. We track all these cases and will update you in future newsletters.

Meeting DUI Defenses: Necessity

Defendant does not contest that he drove while impaired but claims that it was an emergency. Is necessity a recognized defense to DUI? Few courts have addressed this issue in relation to DUI, however, the same principles that would govern any defense of necessity apply. The defendant bears the burden of proving necessity and must show that there was no reasonable alternative to driving while impaired, such as taking a taxi, calling a friend for a ride, etc. In addition, the driving must stop once the necessity has ended.

In *People vs. Slack*, 210 Cal. App. 3d 937, 258 Cal. Rptr. 702 (Cal. Ct. App. 1989), a California appellate court listed the following elements as requirements of a necessity defense in a DUI:

- Defendant must have driven to prevent a significant evil.

- There was no adequate alternative.
- The harm resulting from impaired driving was not disproportionate to the harm avoided.
- Defendant had a good faith belief that it was necessary for him to drive.
- Defendant's belief was objectively reasonable under the circumstances.
- Defendant did not contribute substantially to creating the emergency.

If there is any reasonable alternative to driving while impaired, the defense will fail.

Prior Convictions in DUI Prosecutions: A Prosecutor's Guide to Prove Out-of-State DUI/DWI Convictions.

Prior Convictions in DUI Prosecutions: A Prosecutor's Guide to Prove Out-of-State DUI/DWI Convictions. Written by the American Prosecutors Research Institute's National Traffic Law Center and published by Michie, this 1,046 page manual contains all the information a prosecutor needs to obtain a certified copy of a prior DUI conviction quickly and easily, including:

- How to obtain out-of-state driving records showing prior convictions;
- How to obtain certified copies of conviction from the convicting court;
- Citations of cases interpreting DUI law; and
- Text of DUI statutes of each state from 1988.

Price: $100 (Prosecutors may call for a special price). Order from Michie, phone 800-562-1197; fax 800-643-1280; e-mail www.Michie.com.

ASK DOCTOR TOX

Q: I keep hearing different opinions about whether or not a toxicologist can extrapolate back in time to determine what a person's BAC was at the time s/he was driving. Is there agreement in the scientific community about this, and if so, what is the average burn-off rate?

A: In order to extrapolate an ethanol concentration to an earlier point in time, the individual must be post-absorptive. In other words, the individual must be in the elimination phase of the blood ethanol curve and no longer absorbing ethanol. The accepted elimination rate in the scientific community is a range of 0.01 - 0.02 gram percent per hour with an average of 0.015 gram percent per hour.

Welcome to our new column. Dr. Teri Stockham will answer questions submitted by our readers. Dr. Stockham received a doctoral degree in Pharmacology and Toxicology, a Masters of Science degree in Forensic Toxicology and an undergraduate degree in Chemistry. Until recently she was the Chief Toxicologist for Broward County Medical Examiners Laboratory in Fort Lauderdale, Florida, and is now a full-time consultant. Please submit questions in writing to: NTLC, 99 Canal Center Plaza, Suite 510, Alexandria, VA, 22314, or fax: 703-836-3195.

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