



# Comparative fault

*Keeping plaintiff's irrelevant drug and alcohol use away from the jury*

By **JIM BULGER**

Plaintiff is driving on the freeway outside Staples Center when he slams into another car that had abruptly slowed down in the middle of the road. After checking that he's ok and calling 911, Plaintiff exits his car to discuss the accident with the driver of the other car. While the two men are standing on the freeway waiting for help, a sheriff's deputy, driving significantly over the speed limit, crashes into one of the

stopped cars and smashes directly into Plaintiff, killing him instantly.

The sheriff's deputy is at fault, and the driver of the other car was also negligent for dangerously slowing down in the middle of the freeway. Plaintiff, on the other hand, seems to have done nothing wrong. However, although Plaintiff acted reasonably and did not cause either accident, there is a catch. Plaintiff had smoked medical marijuana the night before the crash and now the defense wants to use this act to inappropriately imply

that plaintiff was partly responsible for his own death.

Although laws and public perception regarding marijuana have changed drastically over the past few years, for some people, including potential jurors, there remains a stigma regarding its use. Potential jurors may also have strong feelings about the use of other illicit drugs as well as alcohol. If your client is found to have used marijuana, or any other controlled substance before suffering injuries, your case is at risk of jury prejudice and a re-



duction of your client's recovery, even if your client's drug use was not a cause of his injuries.

### **Negligence must be substantial factor in causing harm**

Until 1975, California law barred recovery for plaintiffs who had a percentage of fault for their injuries under the theory of contributory negligence. Since then, California courts have replaced this "all-or-nothing" contributory negligence system with a "comparative fault" system. Under the current scheme, liability for damages is borne by those whose negligence caused the damage in direct proportion to their respective fault. This calculation can include the negligence of multiple defendants as well as a plaintiff's own negligence. While a plaintiff's contributory negligence does not totally preclude recovery, any negligent conduct by plaintiff may be assigned a percentage of the fault. This percentage may in turn significantly reduce the amount of compensation a plaintiff receives, even with a large verdict.

Just as the plaintiff has the burden of proving defendant's negligence, the defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the plaintiff. To find comparative fault against a plaintiff, a jury must determine that the plaintiff's actions or omissions fell below the standard to which she should conform for her own protection. Additionally, a jury must find that plaintiff's negligent conduct was a "substantial factor" in causing her injuries.

The substantial factor standard is relatively broad. It requires only that plaintiff's contribution to his own harm was more than negligible or theoretical. If plaintiff's negligent act played only an "infinitesimal" or "theoretical" part in bringing about his injuries, that conduct is not a substantial factor in his loss. In the context of drug and alcohol use, even if such use was negligent, it will not be considered a substantial factor in plaintiff's injuries if it did not actually play a part in causing his injuries.

Although alcohol and, in some circumstances, marijuana is generally legal, use of other drugs may be violative of a statute and therefore negligence per se. With any intoxication legal, or otherwise, however, it is important to determine whether plaintiff's use of a substance was a substantial factor in causing his injuries.

In the case of drug or alcohol use, defendants must show that plaintiff used a drug and was impaired by it, but that's not all. Defendants must also show that there is a link between the plaintiff's impairment and his injuries. Although defendants may try to insinuate otherwise to a jury, there is no conclusive presumption of impairment or causal relationship to plaintiff's injuries from the mere existence of marijuana in the plaintiff's body. A defendant seeking to prove a link must provide evidence, such as expert witness testimony, to establish this link. The same is true for alcohol. There are, of course, statutes that make driving while intoxicated illegal, but the mere presence of alcohol in a plaintiff's bloodstream does not conclusively mean that all plaintiff's actions were negligent.

### **Intoxication evidence must be relevant**

In addition to showing that plaintiff's drug or alcohol use was not a substantial factor in the harm he suffered, plaintiffs can attack this evidence on relevance grounds. Drug and alcohol use can be kept from a jury if the plaintiff shows the court that such evidence is simply not relevant to any issue in the case.

In general, relevant evidence is evidence that has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action. (Evid. Code, § 201.) If a defense expert can show a causal connection between active drug use and injuries, such evidence may be relevant. However, as in the substantial factor test discussed previously, this link may be difficult for defense to prove.

A plaintiff's voluntary intoxication is relevant if there is an issue as to whether

he was negligent and therefore partially responsible for the accident which injured him. However, intoxication evidence is only relevant to the issue of apportioning liability for causing an accident and not for any other purpose. Of course, driving or riding a bicycle or even walking under the influence can impair a person's ability. But if a plaintiff were intoxicated or had used drugs or alcohol and such use was not a cause of his injuries, it is not relevant to the issue of apportioning liability and therefore not relevant at all.

In *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1613-1616, the Court found that the issue of whether or not plaintiff was intoxicated at the time he was killed was not relevant. Because defendants' experts could not identify any manner in which plaintiff's medical marijuana use contributed to the accident that injured plaintiff, the evidence was not relevant to the issues and had no probative value.

In the example at the beginning of this article, which is based on the *Hernandez* case, plaintiff's marijuana use did not cause the other driver to dangerously slow down on the freeway. It did not cause the sheriff's deputy to crash into the stopped car at excessive speed. While there may have been some question as to whether plaintiff's impairment caused him to leave his car, there was no expert testimony that it had. His drug use is therefore simply not relevant and it is improper for the jury to hear about it.

Other jurisdictions have concluded that evidence of a person's drug use is not relevant in the absence of a link between the evidence and the cause of the accident. A court in Montana found that because the State failed to demonstrate that any of the drugs detected in the defendant's blood and urine, or found in his car, were causally connected to the accident, evidence of their presence was irrelevant to the question of negligence or negligent state of mind. (*State v. Inghram* (1998) 290 Mont. 18.)



Also in Montana, a court found that the results of a toxicology report and evidence of alcohol consumption should have been excluded because, in the absence of testimony linking the evidence to the question of causation, it was irrelevant. (*Havens v. State* (1997) 285 Mont. 195.)

In Idaho, a court noted that the chemical substance Carboxy-THC, as opposed to THC, is not a drug or intoxicating substance but is, instead, a metabolite of marijuana. Based on this distinction, the court found that a test indicating the presence of Carboxy-THC shows nothing more than past marijuana use. (*Reisenauer v. State, Dep't of Transp.* (2008) 145 Idaho 948, 950-51.)

In Oklahoma, a trial court excluded toxicology evidence and expert testimony regarding the defendant driver's positive screening for marijuana and the court of appeals commented that the evidence could not come in unless there was some testimony to relate the ingestion of marijuana back to the accident. (*Clark v. Turner* (Okla. Ct. App. 2004) 99 P.3d 736). The *Clark* court indicated in dicta that toxicology reports testing positive for drug use need to be supported by expert testimony that extrapolates the ingestion of the drug back to the time of the accident.

Finally, in Texas, a trial court excluded evidence that the defendant truck driver tested positive for methamphetamine in a post-accident drug test. The court of appeals affirmed the trial court, and explained that evidence of intoxicants is inadmissible without "further evidence of negligence and improper conduct on the part of the user." (*Bedford v. Moore* (Tex. App. – 2005) 166 S.W.3d 454.)

### Probative versus prejudicial

Even if plaintiff's drug or alcohol use is in some way relevant, an issue remains as to whether it may be admitted into evidence. Even relevant evidence may not be admitted if its probative value is substantially outweighed by the probability that its admission

will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

Plaintiff's counsel should argue that evidence of drug or alcohol use must be excluded on the grounds that its probative value will be substantially outweighed by the undue consumption of time that the issue will require. If multiple experts are required to determine whether or not plaintiff was impaired and to what degree, the legality of plaintiff's drug use, the time and extent of such use, these issues may take substantial trial time and jury attention. If plaintiff's impairment was not a substantial factor in plaintiff's injuries, any slight probative value of this evidence will not outweigh the waste of time and judicial resources required to prove the fact.

More importantly, there is also a risk that drug or alcohol evidence might confuse the issues or mislead the jury. If experts spend time testifying as to the effects of drugs, a juror could interpret that time spent to indicate that the issue is important.

In weighing the prejudicial effect versus probative value of evidence, a court should not consider the prejudice or damage to a party's case that naturally flows from the evidence. Evidence will not be excluded based on whether it hurts the case or not. Rather, courts should focus on whether the evidence is unduly prejudicial. A finding of undue prejudice in Evidence Code section 352 will preclude evidence which uniquely tends to evoke an emotional bias against a party as an individual and which has very little effect on the issues.

### Evidence of drug or alcohol use can be highly prejudicial

"Exclusion of evidence under Evidence Code section 352 is reserved for those cases where the proffered evidence has little evidentiary value and creates an emotional bias against the party."

(*Hernandez v. County of Los Angeles*, 226 Cal.App.4th at p. 1613.)

Plaintiff's use of illegal narcotics would likely be highly prejudicial because such drug use has a social stigma and "uniquely tends to evoke an emotional bias." But even plaintiff's legal use of alcohol or medical marijuana may have an emotional effect on a juror that may be prejudicial. Jurors are people and each has his own particular biases and feelings about various topics. Perhaps a juror grew up in a home with an alcoholic or lost a child to drug addiction. When it comes to highly charged issues, such as alcohol or drug use, there is a risk that a juror's emotional response may be improperly triggered.

Drug use, even legal medical marijuana use, may paint a plaintiff as dangerous or lazy, or may trigger any number of negative associations for some jurors. Use of other illegal substances may paint a plaintiff as a law breaker or poor decision maker and impair a juror's ability to fairly weigh the relevant evidence.

There is also a risk that the jury might be left to speculate whether marijuana intoxication caused plaintiff's questionable conduct which led to his death, even in the absence of evidence that it did.

If defense counsel asks repeated questions about drug or alcohol use, the jury's judgment may be clouded and they may be distracted from other, true issues. It may also focus the jury's attention on plaintiff's conduct as opposed to defendants' conduct. A juror viewing plaintiff's actions through the prism of his drug or alcohol use may focus on irrelevant details instead of the real cause of his injuries.

Even if the jurors do not harbor a bias, evidence should be excluded where there is a danger that if the proffered testimony were admitted, the jury would be unduly distracted on side issues. Those issues may include whether the plaintiff did smoke marijuana, whether it was legal for him to do so, whether his prescription was valid, the amount that he smoked,



when he smoked it and the effect it may have had on his decision making or physical abilities. If these issues would affect the jury, then this prejudicial effect must be weighed against the probative value.

### **Punitive and character evidence**

Another reason to seek to exclude evidence of drug or alcohol use is the risk that jurors may use the evidence to punish the plaintiff. Punitive judgments are inappropriate in a case where the jury is being asked to apportion liability for the purposes of dividing compensatory damages. It is not the jury's role in such cases to punish plaintiff or to make an example of him for a choice he made where that choice did not cause his injuries. As with prejudice, if a juror harbors negative personal feelings about drugs or alcohol he may disregard the evidence of defendant's negligence or weigh plaintiff's negligence more heavily. This type of evidence, if improperly admitted, can give those jurors who feel strongly about drug or alcohol use an excuse to argue for plaintiff's comparative fault in order to improperly punish plaintiff.

In the *Hernandez* case cited above, at trial the defense attorney used marijuana

evidence as a means to improperly attack plaintiff's character. The defense attorney encouraged jurors to speculate whether marijuana was a factor even though no expert could say that it was. The defense then went further and suggested that the plaintiff may not have had a legitimate medical need to smoke marijuana. On appeal the court determined that this insinuation was impermissible character evidence that had nothing to do with the negligent actions on the night of plaintiff's death because plaintiff's character was not at issue.

### **Don't let drug use become a theme for the defense**

If you learn that your client was using drugs or alcohol prior to the incident, you should investigate the details of such use and consult with an expert. Find out if your client's drug or alcohol use contributed to his injuries at all and, if so, determine whether that contribution constitutes a "substantial factor" sufficient to lessen plaintiff's recovery through comparative fault.

If plaintiff's drug or alcohol use does not constitute a substantial factor, be sure to file a motion in limine before trial to exclude any evidence of intoxication or

plaintiff's actions before the injury. Explain to the court that any evidence of drug or alcohol use presented to the jury is not relevant to the issues in the case. Explain that admitting that evidence will be a waste of time and judicial resources and that it will likely be highly prejudicial to your client.

Jurors have personal experiences and biases that they bring with them to the jury box. Even jurors who try their hardest to be impartial may be affected by these biases. So it is best to keep any evidence of your client's irrelevant drug or alcohol use completely out of their sight.



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