

# ERN MYTHS

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CHARLES E. JOHNSON, Plaintiff vs. DOUGLAS E. WALTER, Individually, and DOUGLAS E. WALTER, RANDY A. JANSEN, and CHRISTOPHER E. LITZ, t/d/b/a TOTAL ELECTRONICS CARE, Defendants, C.P. Franklin County Branch, Civil Action - Law, No. A.D. 1996-459

*Johnson v. Walter*

*Admissibility of evidence of intoxication in civil case*

1. Mere fact of consumption of alcohol is inadmissible as unfairly prejudicial unless it reasonably establishes intoxication.
2. In motor vehicle cases, evidence of intoxication must establish a degree of intoxication which proves unfitness to drive.
3. Evidence of blood-alcohol level alone is not sufficient to prove intoxication which renders a person unfit to drive; there must be corroborating evidence which suggests intoxication, such as staggering, glassy eyes, slurred speech, erratic driving, or evidence of the consumption of a large amount of alcohol.
5. Where plaintiff had blood-alcohol level of .64% and police officer smelled alcohol on the plaintiff's breath but there was no other corroborating evidence suggesting that he was unfit to drive, evidence of plaintiff's consumption of alcohol was inadmissible.

*Jan G. Sulcove, Esquire, Attorney for Plaintiff*

*Thomas J. Williams, Esquire, Attorney for Defendants*

## OPINION AND ORDER

WALKER, P.J., February 2, 1999:

### Factual and Procedural Background

The following facts have been established regarding plaintiff's intoxication. A police officer was dispatched to the scene of the accident and he subsequently interviewed plaintiff at the Chambersburg Hospital. Plaintiff told the officer that he had consumed two 12-ounce beers between 7:00 a.m. and 8:00 a.m. that morning following a Christmas party his employer had provided after the night shift. Even though the officer did smell alcohol on plaintiff's breath, he had a coherent conversation with plaintiff and he noted in his report that plaintiff did not show any signs of being unable to safely operate a motor vehicle. The officer did not charge plaintiff with driving under the influence nor with any traffic violations. A blood test was performed. Toxicologists for both plaintiff and defendant, extrapolating back, have concluded that plaintiff's blood-alcohol level was between .052% and .064% at the time of the accident. Defendant's toxicologist, the late Dr. G. Thomas Passananti, furthermore concluded in his report that plaintiff had more to drink than two beers and that the blood-alcohol level as determined by him would have rendered plaintiff unfit to safely operate a vehicle. Defendant furthermore intends to introduce the report of an accident reconstructionist, concluding that plaintiff's alcohol consumption slowed his reaction time which prevented him from avoiding the collision.

Plaintiff filed a motion in limine seeking to prevent defendant from introducing evidence of plaintiff's intoxication on grounds of relevancy and unfair prejudice. Argument on the motion was held on January 7, 1999.

### Discussion

The standard for admitting evidence of intoxication is well-established:

[T]he well-settled law of this Commonwealth is that where recklessness or carelessness is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is inadmissible as unfairly prejudicial unless it reasonably establishes intoxication.

*Whyte v. Robinson*, 421 Pa. Super. 33, 39, 617 A.2d 380 (1992). It is furthermore required that such evidence of intoxication must

reasonably establish a degree of intoxication which proves unfitness to drive. *Id.* Evidence of a driver's blood-alcohol level alone is not sufficient to prove intoxication which renders him unfit to drive. *Locke v. Claypool*, 426 Pa. Super. 528, 534, 627 A.2d 801 (1993). There must be other evidence showing the actor's conduct which suggests intoxication. *Id.* The courts have admitted evidence of intoxication where there was such corroborating evidence as staggering, stumbling, glassy eyes, incoherent wandering, slurred speech, evidence of erratic driving, or testimony that defendant had consumed a large amount of alcohol. *Id.*, at 534-535.

*Locke* involved a plaintiff who was hit by a car while riding a bicycle. The defendant sought to admit evidence that the plaintiff had been intoxicated. The court applied the same rule regarding the admissibility of intoxication evidence to plaintiff even though he operated a bicycle rather than a motor vehicle. *Locke*, at 532. The evidence in the *Locke* case showed that the police officer had smelled alcohol on plaintiff's breath and that he had a blood-alcohol level of .06%. An expert, who extrapolated the test results to the time of the accident, concluded that because plaintiff was a minor, he would have an exaggerated reaction to the alcohol which rendered him unfit to ride a bicycle. *Id.*, at 533. The court did not admit the evidence of plaintiff's intoxication because he did not exhibit any physical conduct which would indicate that he had been unfit to ride his bicycle. He did not have any slurred speech or appear to be intoxicated, he did not operate his bicycle erratically, nor was there any testimony regarding the amount of alcohol he consumed. *Id.*, at 535. The court found that the only independent evidence which might indicate that the plaintiff was intoxicated was the police officer's testimony that he smelled alcohol on plaintiff's breath. *Id.* The court held that "without more, however, this evidence proves only that Locke consumed alcohol; it is insufficient to prove intoxication." *Id.* The court furthermore found the expert's testimony that the plaintiff's reaction would have been exaggerated to be speculative in light of the absence of any evidence that the plaintiff was unfit to ride his bicycle. *Id.*, at 535-536. Since there was no independent evidence to corroborate the defendant's contention that plaintiff was intoxicated, the court found the possibility too great that the jury would place undue emphasis on the mere fact that the plaintiff consumed alcohol

on the night of the accident, and thus found that the trial court had abused its discretion in admitting it. *Id.*, at 537.

In the underlying case, the facts are similar to *Locke*. Plaintiff's blood-alcohol level was, at most, .064%, which is well below the legal limit. The results of the blood test, however, may not be admitted to prove intoxication without other evidence showing the actor's conduct which suggests that he was unfit to drive. Such corroborating evidence does not exist in the underlying case. Similarly to *Locke*, the only independent evidence which might indicate that the plaintiff was intoxicated is the police officer's statement that he smelled alcohol on plaintiff's breath. The officer did not observe any staggering, stumbling, glassy eyes, incoherent wandering, or slurred speech. To the contrary, the officer had a coherent conversation with plaintiff following the accident and the officer himself noted that plaintiff did not show any signs of being unable to safely operate a motor vehicle. There was no evidence of any erratic driving by plaintiff, nor is there any evidence that plaintiff had drunk a large amount of alcohol prior to the accident. Without more, this evidence proves only that plaintiff consumed some alcohol; it is insufficient to prove intoxication. Furthermore, the expert's testimony that plaintiff had more to drink than two beers and that the blood-alcohol level as determined by him would have rendered plaintiff unfit to safely operate a vehicle, would be speculative in light of the absence of any corroborating evidence that the plaintiff was unfit to ride his bicycle. *See Locke* at 536-537. Thus, since there is no independent evidence to corroborate the defendant's contention that plaintiff was intoxicated, the possibility is too great that the jury would place undue emphasis on the mere fact that the plaintiff consumed alcohol before the accident, and thus may not be admitted at trial.

#### ORDER OF COURT

February 2, 1999, after consideration of plaintiff's motion in limine, the briefs submitted to the court, and the arguments made by counsel, this court finds that there is no corroborating evidence to show that plaintiff was intoxicated to

## DENIAL

**Denial is the state of mind of a chemically dependent person which prevents them from seeing the truth about their use of alcohol or other drug.**

**Denial allows the alcoholic or addict to keep using their drug of choice despite adverse consequences.**

**Denial allows the disease of addiction to progress causing increasingly more harm to the person's physical and emotional health and their personal and professional lives.**

**The disease of addiction will eventually lead to divorce, disbarment and early death.**

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