THE DEFENCE OF DRUNK DRIVING – A SHIFT OF ONUS

Until July, 2008, a person charged with either ".08" or "impaired" could call evidence to the contrary to raise a reasonable doubt as to their guilt. You could raise a doubt by giving evidence supported by an expert's opinion that what you had had to drink did not put you over the limit or that there was a doubt as to whether or not you were actually over the limit by giving a range of readings between below and above the .08 mark. There was nothing tricky about it and it was scientifically supportable. A successful defence in this mode relied on the credibility of the witness which is basic to any defence.

The Code was amended to shift the onus so that to have a judge consider evidence to the contrary, you have to show three things: 1) that the breathalyser was malfunctioning or being operated improperly; 2) that the malfunction or improper operation caused a reading over .08; 3) that the actual blood alcohol was below .08. The odds of succeeding in that is akin to being struck by lightening or winning the lottery – virtually impossible. To make the point clear, a section was enacted to state that evidence of your drinking pattern, with an expert's calculation, will not be considered as evidence to the contrary sufficient to rebut the presumptions of the breathalyser test.

The irony is that the presumption that the Crown has produced an accurate reading of blood alcohol levels at the time of the alleged offence is a fiction and has been recognized as such by the Supreme Court of Canada even while upholding the law. So while you can be convicted on the basis of a legal fiction, you can not defend on the basis of the same fiction. This is a situation that the Mad Hatter would thoroughly enjoy.

The law has created huge and complicated problems which are currently being debated at various court levels across the country. Interestingly enough, calling the usual form of evidence to the contrary and raising the inherent difficulty that the law breaches your right to make full answer and defence through the Charter of Rights may still be the only manageable way to deal with the situation.

Regardless, the fact is that if you are to challenge a charge, the law has become too complex to be able to do it without a lawyer on your side. Further, you virtually have to go to trial as a conviction brings a fine, a year long suspension, loss of your insurance discount and a criminal record. The criminal record will bar you from the United States and, if reports are correct, at least Great Britain amongst other nations. As well, few people understand that if they are convicted, they must not drive, not so much because to do so is to attract more charges, more fines and more suspensions (all of which might be viewed as the "vortex of despair"), but because while your licence is suspended, you have no insurance meaning that if you have an accident you are personally responsible for the damages – consider for a moment the financial ramifications of an accident that resulted in turning someone into a quadriplegic.

The bottom line is that you should at least consult with a competent criminal lawyer before you decide what course of action to take. If you have any questions, call me at 604-437-0461 or e-mail me at johnb@gbclaw.ca.

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