



Expert testimony in sexual assault cases: Alcohol intoxication and memory



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ARTICLE INFO

Available online 12 September 2015

Keywords:

Expert testimony
Intoxication
Memory
Sexual assault

ABSTRACT

At court-martial tribunals in the United States military, cases involving alcohol facilitated sexual assault often pivot on the alleged victim's level of intoxication or impairment and ability to consent to the sexual act. These cases frequently arise following a night of partying and heavy drinking among a group of friends and acquaintances, military and civilian. The determination of whether a sexual act was consensual may rest on estimates of the alleged victim's blood alcohol concentration and related behavioral indicia of impairment. Expert testimony may be presented by the prosecution and/or the defense, from forensic toxicologists and psychiatrists or psychologists regarding the potential involvement of alcohol and its impact on the participants relevant to the charges at court-martial. A review of the state of the science is offered to bring such testimony into perspective. Appellate cases illustrate that the experts' testimony may sometimes elucidate, sometimes obfuscate, and sometimes exceed professional expertise and invade the province of the factfinder.

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1. Introduction

Sexual assaults in the military frequently occur among acquainted service members who are drinking heavily. When allegations of such assaults are investigated and charges are brought against the alleged assailant, a question may arise as to the assailant's belief that the sexual contact was wanted—that the acquaintance consented or was a willing participant. At court-martial, the alleged victim's level of impairment becomes an important issue because the law provides that an impaired¹ person cannot consent to sexual activity. The prosecution may seek to admit evidence of the victim's level of impairment to prove that consent could not have been meaningfully given. Or the accused individual may claim that consent occurred but may not be remembered because of memory impairment, or blackout, and that the level of impairment was not apparent. This defense, in the parlance of the Uniform Code of Military Justice, is referred to as “mistake of fact as to consent,” that is, the accused was operating under a reasonable but erroneous understanding that the victim was consenting to the sexual act.

Expert testimony may be offered, by either prosecution (the government) or defense, from forensic toxicologists or psychologists/psychiatrists, to elucidate the issues of alcohol intoxication, memory, and manifestation of the level of impairment. A review of actual cases shows that confusion may arise about how to present such testimony and what can and should be offered to assist the factfinder (the military

judge or a panel of officers or officers and enlisted members, depending upon the forum chosen by the accused). To assist in developing an understanding of the science, its application to these court-martials, and the limits imposed by the court, it is helpful to review the effects of alcohol on behavior and cognitive abilities. This will be followed by actual court-martial details to illustrate the complexity of applying the extant science to the case evidence. What will be illuminated through these court-martial details are the issues to be addressed through expert testimony. These include questions of the accuracy of data such as amount and strength of alcohol consumed, pace of consumption, estimates of blood alcohol concentration, manifestations of alcohol intoxication in behavior, relationship of those behaviors to blood alcohol concentrations, memories of the alleged assailant and victim, and/or observations of potentially biased or intoxicated bystanders. The degree to which expert testimony can contribute reliable data will be explored.

2. Alcohol intoxication

Alcohol intoxication results in disturbance in the level of consciousness, cognition, perception, judgment, affect, or behavior. Alcohol intoxication is manifested by such signs as facial flushing, slurred speech, unsteady gait, euphoria, increased activity, volubility, disorderly conduct, slowed reactions, impaired judgment and motor incoordination, difficulty focusing, insensibility, or stupefaction (World Health Organization, n.d.). Alcohol affects brain functions resulting in impairments in perception, speech, balance, motor coordination, and memory. To some extent, its effects on behavior are predictable. The effects of alcohol and the amount it takes to produce those effects varies from person to person and from situation to situation.

The behavioral and cognitive disruptions typically exhibited at various levels of BAC are of great importance to legal determinations, since

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¹ According to the Uniform Code of Military Justice, Article 120, Rape, “...consent cannot be given when the accused knew or should have known the victim was sleeping, unconscious, unaware, or incapable of consenting due to impairment, mental disease/defect, or physical disability.” Thus, an individual who is impaired cannot consent. Impairment has not yet been further defined.

Table 1
Stages of acute alcoholic influence/intoxication.^a

BAC grams/100 mL	Stage of alcoholic influence	Clinical signs/symptoms
0.01–0.05	Subclinical	Influence/effects usually not apparent or obvious Behavior nearly normal by ordinary observation Impairment detectable by special tests
0.03–0.12	Euphoria	Mild euphoria, sociability, talkativeness Increased self-confidence; decreased inhibitions Diminished attention, judgment and control Some sensory-motor impairment Slowed information processing Loss of efficiency in critical performance tests
0.09–0.25	Excitement	Emotional instability; loss of critical judgment Impairment of perception, memory and comprehension Decreased sensory response; increased reaction time Reduced visual acuity and peripheral vision; and slow glare recovery Sensory-motor incoordination; impaired balance; slurred speech; vomiting; drowsiness
0.18–0.30	Confusion	Disorientation, mental confusion; vertigo; dysphoria Exaggerated emotional states (fear, rage, grief, etc) Disturbances of vision (diplopia, etc.) and of perception of color, form, motion, dimensions Increased pain threshold Increased muscular incoordination; staggering gait; ataxia Apathy, lethargy
0.25–0.40	Stupor	General inertia; approaching loss of motor functions Markedly decreased response to stimuli Marked muscular incoordination; inability to stand or walk Vomiting; incontinence of urine and feces Impaired consciousness; sleep or stupor
0.35–0.50	Coma	Complete unconsciousness; coma; anesthesia Depressed or abolished reflexes Subnormal temperature Impairment of circulation and respiration Possible death
0.45 +	Death	Death from respiratory arrest

^a Dubowski, K. M. (2006). Stages of acute alcoholic influence/intoxication. Oklahoma City, OK: The University of Oklahoma Department of Medicine. Retrieved April 11, 2014 from <http://www.drugdetection.net/PDF%20documents/Dubowski%20-%20stages%20of%20alcohol%20effects.pdf>.

they relate to the individual's capacity to opt in or out of sexual acts and to how apparent the person's incapacity might be to others. Through controlled studies some behavioral and cognitive correlates to BAC have been established but there is clearly a significant range for impairments at various BACs based on a number of individual differences.

Often cited in discussions and testimony are tables setting forth manifestations of impairment at various BAC levels (for example, Dubowski, 2006; National Institute of Alcohol Abuse and Alcoholism, n.d.; Notre Dame Office of Alcohol and Drug Education, n.d.). However, the source of data on these popular charts is not cited and an extensive literature review reveals an absence of empirical research to inform such statements. One often cited chart, in Table 1, known as the Dubowski chart, is illustrative of the sort of data that might be useful to factfinders if the reliability of the categorization could be established.

It should be noted, however, that individuals may differ considerably in what symptoms of intoxication are exhibited at various levels. It is speculative what symptoms of intoxication any specific person would exhibit at BAC levels. For example, in a study of 117 Japanese male alcoholic patients undergoing various tests to address alcohol influence, researchers found that BACs ranged from 29 to 577 mg/dL² (0.029 to

² The US uses a weight over volume method (in essence, assuming 1 dL of blood weighs 100 g; it actually weighs 105–106 g). To convert dL to percentage: 1% is 1 g (1000 mg) per deciliter; 0.1% is 100 mg/dL; the 0.08% limit for driving while intoxicated is 80 mg/dL; 252 mg/dL is 0.252%.

Table 2
As BAC increases, so does impairment.^a

BAC	Level of impairment
0.0–0.05%	Mild impairment Mild speech, memory, attention, coordination, balance Impairments Perceived beneficial effects, such as relaxation Sleepiness can begin
0.06–0.15	Increased impairment Perceived beneficial effects of alcohol, such as relaxation, give way to increasing intoxication Increased risk of aggression in some people Speech, memory, attention, coordination, balance further impaired Significant impairments in all diving skills Increased risk of injury to self and others Moderate memory impairments
0.16–0.30	Severe impairment Speech, memory, coordination, attention, reaction time, balance significantly impaired All driving-related skills dangerously impaired Judgment and decision-making dangerously impaired Vomiting and other signs of alcohol poisoning common Loss of consciousness
0.31–0.45	Life threatening Loss of consciousness Danger of life-threatening alcohol poisoning Significant risk of death in most drinkers due to suppression of vital life functions

^a National Institute of Alcohol Abuse and Alcoholism (n.d.). Alcohol Overdose: The Dangers of Drinking Too Much. Retrieved from author website March 10, 2014 <http://pubs.niaaa.nih.gov/publications/AlcoholOverdoseFactsheet/Overdosefact.htm>.

0.577) in all patients and from 200 to 299 mg/dL (0.200 to 0.299) in 48 of these male alcoholics (Adachi et al., 1991). Researchers found that 51 of these alcoholic subjects could stand erect (mean BAC = 189 mg/dL), while 48 of the subjects showed apparently normal walking and turning (mean BAC = 192 mg/dL). Some subjects whose BACs exceeded 300 mg/dL (0.300) could still stand and walk while others with BACs under 100 mg/dL (0.100) already showed psychomotor impairment. By contrast, seven out of 10 healthy (non-alcoholic) volunteers given 1.6 to 2.0 g/kg of alcohol as a control could do nothing but sleep after reaching peak BAC (mean = 232 ± 21 mg/dL (0.232)). Thus, there are clearly significant individual variations in response to alcohol both among and between alcoholics and healthy individuals.

Further, examination of published tables reveals that there are minor variations in behavioral and cognitive impairments and other

Table 3
Dose specific effects of alcohol on behavior and cognition.^a

BAC level	Generalized dose specific effects
0.020–0.039%	No loss of coordination, slight euphoria and loss of shyness. Relaxation, but depressant effects are not apparent.
0.040–0.059%	Feeling of well being, relaxation, lower inhibitions, and sensation of warmth. Euphoria. Some minor impairment of judgment and memory, lowering of caution.
0.06–0.099%	Slight impairment of balance, speech, vision, reaction time, and hearing. Euphoria. Reduced judgment and self-control. Impaired reasoning and memory.
0.100–0.129%	Significant impairment of motor coordination and loss of good judgment. Speech may be slurred; balance, peripheral vision, reaction time, and hearing will be impaired.
0.130–0.159%	Gross motor impairment and lack of physical control. Blurred vision and major loss of balance. Euphoria is reducing and beginning dysphoria (a state of feeling unwell)
0.160–0.199%	Dysphoria predominates, nausea may appear. The drinker has the appearance of a sloppy drunk.
0.200–0.249%	Needs assistance in walking; total mental confusion. Dysphoria with nausea and vomiting; possible blackout.
0.250–0.399%	Alcohol poisoning. Loss of consciousness.
0.40% +	Onset of coma, possible death due to respiratory arrest.

^a Notre Dame Office of Alcohol and Drug Education (n.d.). <http://oade.nd.edu/educate-yourself-alcohol/blood-alcohol-concentration/>.

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