Criminal Law

Another impaired defence goes to that 'great courtroom in the sky'

By AdvocateDaily.com Staff

Defence lawyers will have to devise new and innovative ways to succeed for those clients charged with impaired driving, Toronto criminal lawyer Jacob Stilman writes in *The Lawyer's Daily*.

Stilman, partner with Lo Greco Stilman LLP, writes in the online publication that the legalization of recreational marijuana use has also brought about changes to impaired driving laws.

"The 'golden age' of impaired driving defences has passed," Stilman says.

The latest defence to ascend to the "great courtroom in the sky" is the power-drinking argument, he says.

Stilman writes that before the passing of Bill C-46, if it could be demonstrated that a driver had downed massive amounts of alcohol just prior to being stopped by police, then it was "feasible" that the booze was still in the person's stomach and not yet absorbed into the bloodstream.

"On Oct. 17, while many Canadians were celebrating their new-found right to smoke weed with impunity, changes to our impaired driving laws came into effect under Bill C-46," he writes.

"Most of the bill modifies existing impaired driving laws in order to address the risks of drug/cannabis-induced impairment. However, thrown in with the cannabis-impairment provisions, bolus drinking as a defence has been eliminated."

Provisions in the bill stipulate:

- 320.14 (1) Everyone commits an offence who (b) subject to subsection (5), has, *within two hours after ceasing to operate a conveyance,* a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

- The companion provision provides that: (5) No person commits an offence under paragraph (1)(b) if (a) they consumed alcohol after ceasing to operate the conveyance; (b) after ceasing to operate the conveyance, *they had no reasonable expectation that they would be required to provide a sample of breath or blood;* and (c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with subsection 320.31(1) or (2) and with their having had, *at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg* of alcohol in 100 mL of blood.

"Ok, if you are bad at math I can walk you through this," Stilman writes in *The Lawyer's Daily*.

"A person now commits an offence when, regardless of whether their blood alcohol concentration (BAC) was under the limit at the actual moment of driving, within two hours of that time they were found to be over the limit.

"The exception to this would be where the person has already ceased driving and then commenced their drinking. Thus, you don't have to worry about being charged where you get home from work, put on your slippers and smoking jacket, and pour yourself a stiff one," he says.

However, Stilman cautions that drivers will be "out of luck" if they try to avoid an impaired driving charge by chugging alcohol right after they've ceased driving but just before police intervene.

"The law is now designed to prevent people from effectively sabotaging breath test results by engaging in deliberate post-driving alcohol consumption," Stilman writes.

While, he predicts the provisions in Bill C-46 will be challenged at the appellate level, he doubts such appeals will be successful, saying, “It is more likely that the courts will agree with the government that the deliberate action of rapidly consuming copious volumes of alcohol, jumping into one’s car, and trying to make it back to home base before all the alcohol has been absorbed into your bloodstream, runs contrary to good common sense and public safety considerations.”

From that perspective, Stilman writes, the new provisions could be viewed as creating a “subspecies of offence,” that of “tempting fate” by recklessly putting the public at risk.

“As we enter into a new era, therefore, defence lawyers will have to come up with new and creative approaches in order to succeed for their clients,” Stilman says.