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The Application of New York's Driving While Intoxicated Statute

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THE APPLICATION OF NEW YORK'S DRIVING WHILE INTOXICATED STATUTE

I. Introduction

In *People v. Cruz*,[1] the New York Court of Appeals reversed an appellate term order[2] and upheld the constitutionality of section 1192 of New York State's Vehicle and Traffic Law.[3] That law, popularly referred to as the "Driving While Intoxicated Statute,"[4] was challenged in *Cruz* as unconstitutionally vague, specifically with regard to the terms "impaired" and "intoxicated" found in subdivisions (1) and (3) respectively.[5] Those provisions state: "1) No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol";[6] and "3) No person shall operate a motor vehicle while he is in an intoxicated condition."[7] The statute took effect January 1, 1971[8]

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1. 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979).
2. 99 Misc. 2d 634, 420 N.Y.S.2d 531 (Sup. Ct. App. T.), *rev'd*, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979).
3. Section 1192 provides:

> 1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol.
>
> 2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.
>
> 3. No person shall operate a motor vehicle while he is in an intoxicated condition.
>
> 4. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.
>
> 5. A violation of subdivisions two, three or four of this section shall be a misdemeanor and shall be punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment. A person who operates a vehicle in violation of subdivisions two or three of this section after having been convicted of a violation of subdivisions two or three of this section, or of driving while intoxicated, within the preceding ten years, shall be guilty of a felony. A person who operates a vehicle in violation of subdivision four of this section, after having been convicted of a violation of subdivision four of this section, or of driving while his ability is impaired by the use of drugs within the preceding ten years, shall be guilty of a felony.

N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1979) (footnote omitted) [hereinafter cited as VTL].

4. *Id.*
5. *Id.*
6. *Id.* § 1192(1).
7. *Id.* § 1192(3).
8. 1970 N.Y. Laws ch. 275, § 8.

and was accompanied by corresponding changes in other sections of the Vehicle and Traffic Law.[9] The most significant of these changes established that certain chemical test results were prima facie evidence of impairment[10] or the absence of impairment,[11] and that a chemical test of the offender's blood-alcohol level is not required to secure a conviction for driving while impaired or intoxicated.[12] Notably, however, the statute does not define either intoxication or impairment.[13]

The problem presented in *Cruz* was how to prove impairment or intoxication when no chemical test of blood-alcohol level was available because the defendant refuses to submit to a chemical test.[14] It is fairly easy to prove intoxication and impairment where a

9. Other sections of the New York Vehicle and Traffic Law that accompanied the changes in VTL, *supra* note 3, § 1192 include section 510 (suspension, revocation and reissuance of a drivers license for a conviction under the impairment provision of section 1192), section 1194 (administration of chemical tests), section 1195 (chemical test evidence), and section 1196 (conviction for a different charge).

10. VTL, *supra* note 3, § 1195(2)(c) states that evidence of more than .07 of one per centum but less than .10 of one per centum by weight of alcohol in the blood is prima facie evidence of impairment. Section 1195(2)(b) states that evidence of more than .05 of one per centum but not more than .07 of one per centum by weight of alcohol in the blood is prima facie evidence that the person is not intoxicated, but such evidence is given only relevant effect, and not prima facie effect, in determining whether the person was in an impaired condition. *Id.* § 1195(2)(b).

11. *Id.* § 1195(2)(a). This section states that evidence of .05 of one per centum or less by weight of alcohol in the blood is prima facie evidence that the person was not in impaired condition. *Id.*

12. People v. Cruz, 48 N.Y.2d 419, 424-25, 399 N.E.2d 513, 515, 423 N.Y.S.2d 625, 627 (1979).

13. VTL, *supra* note 3, § 1192.

14. 48 N.Y.2d 419, 423, 399 N.E.2d 513, 514, 423 N.Y.S.2d 625, 626 (1979). Other cases wherein the defendant refused to submit to a chemical test cited in this note include People v. Bradford, 96 Misc. 2d 298, 408 N.Y.S.2d 1013 (Sup. Ct. 1978), and People v. Herzog, 75 Misc. 2d 631, 348 N.Y.S.2d 510 (Dist. Ct. 1973). It should be noted that a defendant may lawfully refuse to submit to such a chemical test. VTL, *supra* note 3, § 1194(2).

A case in which no evidence of any type of chemical test was introduced at trial was People v. Kaeppel, 74 Misc. 2d 220, 342 N.Y.S.2d 882 (Dist. Ct. 1973). In People v. Kapsuris, 89 Misc. 2d 634, 392 N.Y.S.2d 785 (County Ct. 1976), the defendant submitted to a chemical test, but the court, instead, discussed the facts of People v. St. Ours, 54 A.D.2d 1080, 388 N.Y.S.2d 752 (4th Dep't 1976); however, it is unclear from the text of *Kapsuris* whether or not a chemical test was administered in *St. Ours*.

No chemical test was administered in the case of People v. Wenceslao & Marzulli, 69 Misc. 2d 160, 329 N.Y.S.2d 391 (Crim. Ct. 1972), *rev'd sub nom.* People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (Sup. Ct. App. T. 1973). In People v. Van Tuyl, 79 Misc. 2d 262, 359 N.Y.S.2d 958 (Sup. Ct. App. T. 1974) no chemical test was performed on the advice of the defendant's physician. In People v. Bump, 68 Misc. 2d 533, 327 N.Y.S.2d 97 (County Ct. 1971) the chemical evidence was held inadmissible at trial.

blood-alcohol content test is administered to the defendant. The law sets forth minimum levels of blood-alcohol content as prima facie proof of impairment[15] and establishes as a misdemeanor a violation of section 1192(2).[16] Any additional incriminating evidence of the defendant's conduct at the time and place of arrest is usually sufficient for conviction under section 1192.[17] Without the results of a chemical test, however, courts must base their decision to convict under section 1192 only upon objective evidence of the defendant's conduct.[18] This is especially difficult as the statute does not define what conduct constitutes intoxication or impairment.[19]

Notwithstanding this absence of detail, the courts have reached relatively consistent decisions, albeit through various means.[20] An analysis of *Cruz* and other cases reveals that there are three major elements necessary to convict a defendant of driving while intoxicated.[21] The elements are: 1) reckless driving which results in an accident or from which there is a reasonable probability of an accident; 2) a lack of physical coordination; and 3) the lack of a rational mental state.[22] Other important physical characteristics include bloodshot and watery eyes,[23] slurred speech[24] and alcohol-

15. *See* note 10 *supra.*

16. *See* note 3 *supra.*

17. People v. Cruz, 48 N.Y.2d 419, 424-25, 399 N.E.2d 513, 515, 423 N.Y.S.2d 625, 627 (1979).

18. *Id.* at 424-29, 399 N.E.2d at 515-17, 423 N.Y.S.2d at 627-30.

19. *See* note 3 *supra.*

20. People v. Cruz, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979); People v. St. Ours, 54 A.D.2d 1080, 388 N.Y.S.2d 752 (4th Dep't 1976); People v. Van Tuyl, 79 Misc. 2d 262, 359 N.Y.S.2d 958 (Sup. Ct. App. T. 1974); People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (Sup. Ct. App. T. 1973); People v. Bradford, 96 Misc. 2d 298, 408 N.Y.S.2d 1013 (Sup. Ct. 1978); People v. Kapsuris, 89 Misc. 2d 634, 392 N.Y.S.2d 785 (County Ct. 1976); People v. Herzog, 75 Misc. 2d 631, 348 N.Y.S.2d 510 (Dist. Ct. 1973); People v. Kaeppel, 74 Misc. 2d 220, 342 N.Y.S.2d 882 (Dist. Ct. 1973); People v. Bump, 68 Misc. 2d 533, 327 N.Y.S.2d 97 (County Ct. 1971); People v. Wenceslao & Marzulli, 69 Misc. 2d 160, 329 N.Y.S.2d 391 (Crim. Ct. 1972), *rev'd sub nom.* People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (Sup. Ct. App. T. 1973).

21. People v. Cruz, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979); People v. St. Ours, 54 A.D.2d 1080, 388 N.Y.S.2d 752 (4th Dep't 1976); People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (Sup. Ct. App. T. 1973); People v. Bradford, 96 Misc. 2d 298, 408 N.Y.S.2d 1013 (Sup. Ct. 1978); People v. Kapsuris, 89 Misc. 2d 634, 392 N.Y.S.2d 785 (County Ct. 1976); People v. Bump, 68 Misc. 2d 533, 327 N.Y.S.2d 97 (County Ct. 1971); People v. Wenceslao & Marzulli, 69 Misc. 2d 160, 329 N.Y.S.2d 391 (Crim. Ct. 1972), *rev'd sub. nom.* People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (Sup. Ct. App. T. 1973).

22. Sometimes this third element is found through facts which prove the first and second elements. *See* People v. Bump, 68 Misc. 2d 533, 327 N.Y.S.2d 97 (County Ct. 1971).

23. People v. Cruz, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979); People v.

odored breath.[25] There is no holding indicating which, if any, of these additional factors are necessary for a finding of intoxication under section 1192. Each one, it must be presumed, could be an important consideration in a difficult case. A finding of impairment under section 1192 is drawn from the existence of the same elements as those found in the intoxication cases but with a lesser degree of intensity, as proven by expert testimony.[26]

This Note will first analyze the constitutional issues raised by section 1192. It will then set forth the major elements necessary for conviction under the statute with the purpose of clarifying the distinction between intoxication and impairment.

II. Constitutional Considerations

A unanimous court in *Cruz* rejected the defendant's contention that the exaction of penalties under section 1192 violates the due process clause of the United States Constitution.[27] The court held that the intoxication provision is violated when "the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver."[28] The difference between this provision and the impairment provision is one of degree.[29] At some point, as the degree of intoxication decreases, a boundary is crossed and intoxication becomes impairment. The court held that the impairment provision is violated when "by voluntarily consuming alcohol, [the] . . . defendant has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver."[30] It was noted that where the distinction between a lawful and an unlawful act is a matter of degree, the due process requirement of notice of the criminality of an act is decreased.[31] Furthermore, where a statute distin-

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Bradford, 96 Misc. 2d 298, 408 N.Y.S.2d 1013 (Sup. Ct. 1978).

24. People v. Cruz, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979).

25. *Id. See also* People v. Bradford, 96 Misc. 2d 298, 408 N.Y.S.2d 1013 (Sup. Ct. 1978).

26. People v. Van Tuyl, 79 Misc. 2d 262, 359 N.Y.S.2d 958 (Sup. Ct. App. T. 1974); People v. Herzog, 75 Misc. 2d 631, 348 N.Y.S.2d 510 (Dist. Ct. 1973); People v. Kaeppel, 74 Misc. 2d 220, 342 N.Y.S.2d 882 (Dist. Ct. 1973).

27. 48 N.Y.2d at 427-29, 399 N.E.2d at 517, 423 N.Y.S.2d at 629-30.

28. *Id.* at 428, 399 N.E.2d at 517, 423 N.Y.S.2d at 629.

29. *Id.* at 427, 399 N.E.2d at 516, 423 N.Y.S.2d at 628-29.

30. *Id.*

31. *Id.* at 427 n.1, 399 N.E.2d at 516 n.1, 423 N.Y.S.2d at 629 n.1.

guishes between two unlawful acts, an even lesser standard of clarity with regard to notice may be permissible.[32]

The Supreme Court[33] has developed a two-pronged test to determine whether a statute satisfies the constitutional requirements of due process: first, a statute must give reasonable warning to potential transgressors[34] and second, it must set standards which will limit the discretion left to law enforcement officers and the courts.[35] The Court in *Grayned v. City of Rockford*[36] stated both components: "[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[37] The language of *Grayned* echoes a theme that was announced in earlier cases. For example, in *Tozer v. United States*[38] the court called for "some definiteness and certainty" in describing the criminality of an act.[39] Similarly, in *International Harvestor Co. v. Kentucky,*[40] the Court struck down as unconstitutionally vague a statute which forced merchants to hypothesize the value they could legally assign to their farm machinery under imaginary market conditions.[41] In *United States v. Cohen Grocery Co.,*[42] the Court held unconstitutional a statute which imposed a fine or prison term on anyone who charged "any unjust or unrea-

32. *Id.*

33. The Supreme Court cases mentioned in the text of this Note include Grayned v. City of Rockford, 408 U.S. 104 (1972); Connally v. General Constr. Co., 269 U.S. 385 (1926); United States v. Cohen Grocery Co., 255 U.S. 81 (1921); International Harvestor Co. v. Kentucky, 234 U.S. 216 (1914). *See also* Tozer v. United States, 52 F. 917 (E.D. Mo. 1892).

34. Grayned v. City of Rockford, 408 U.S. 104 (1972); United States v. Harriss, 347 U.S. 612 (1954); United States v. Petrillo, 332 U.S. 1 (1947); United States v. Wurzbach, 280 U.S. 396 (1930); Connally v. General Constr. Co., 269 U.S. 385 (1926); United States v. Cohen Grocery Co., 255 U.S. 81 (1921); International Harvestor Co. v. Kentucky, 234 U.S. 216 (1914); Tozer v. United States, 52 F. 917 (E.D. Mo. 1892).

35. Grayned v. City of Rockford, 408 U.S. 104 (1972); United States v. Petrillo, 332 U.S. 1 (1947); Connally v. General Constr. Co., 269 U.S. 385 (1926); United States v. Cohen Grocery Co., 255 U.S. 81 (1921); Tozer v. United States, 52 F. 917 (E.D. Mo. 1892).

36. 408 U.S. 104 (1972).

37. *Id.* at 108-09.

38. Tozer v. United States, 52 F. 917 (E.D. Mo. 1892). In *Tozer,* the court found the "undue preferences" clause of the interstate commerce act to be indefinite and uncertain.

39. *Id.* at 919.

40. 234 U.S. 216 (1914).

41. *Id.*

42. 255 U.S. 81 (1921).

sonable rate or charge in handling or dealing in or with any necessaries."[43] This statute was held void for vagueness because its terms "merely penalized and punished all acts detrimental to the public interest."[44] The Court noted in *Cohen Grocery* that where statutes have been found to be constitutional, a standard for interpreting the statute was provided by the terms of a specific statute or "from the subjects with which those statutes dealt."[45]

These cases are consistent with the rule of construction which favors a constitutionally permissible interpretation of a statute as long as the statute is reasonably precise. A court generally will uphold the statute, even though there may be "marginal cases . . . where doubt might arise."[46] A corollary theme was expressed in *Connally v. General Construction Co.*[47] wherein the Court held that statutes containing technical or well-settled common law terms[48] are constitutional "notwithstanding an element of degree in the definition as to which estimates might differ."[49] It is upon this language which the court of appeals primarily based its holding in *Cruz*.[50] The court thereby refused to establish a definite standard of comparison for "impairment" and "intoxication."[51]

III. Application of Section 1192

A. Intoxication

The New York Court of Appeals' decision in *People v. Cruz* does not offer a standard to determine what conduct violates the intoxication or the impairment provisions of section 1192. The dissenting

43. *Id.* at 86.

44. *Id.* at 89.

45. *Id.* at 92.

46. United States v. Harriss, 347 U.S. 612, 618 (1954); United States v. Petrillo, 332 U.S. 1, 7 (1947); United States v. Wurzbach, 280 U.S. 396, 399 (1930).

47. 269 U.S. 385 (1926).

48. *Id.* at 391. An example of the application of a well-settled common law meaning of a statute occurred in Jordan v. De George, 341 U.S. 223 (1951), in which the Court upheld a statute containing the term "crime involving moral turpitude" in an action to defraud the United States of liquor tax monies. In the case, the Court noted that crimes of which fraud was a component had long been considered "crimes of moral turpitude," and then in a footnote, listed statutory language that had previously passed the constitutionality test. *Id.* at 231 n.15.

49. 269 U.S. at 391.

50. 48 N.Y.2d at 423-29, 399 N.E.2d at 514-17, 423 N.Y.S.2d at 626-30.

51. *Id.*

judge in the appellate term, describing the objective facts,[52] noted that the defendant was driving his vehicle "in an erratic and reckless manner," that he drove through a red light, that his eyes were "watery and bloodshot," that his speech was slurred and that "he was unsteady on his feet, with the odor of alcohol on his breath."[53] In addition, the defendant threw his license and registration at the arresting officer when asked to produce them.[54] A situation similar to that found in the principal case arose in *People v. Bradford*[55] wherein the defendant, who had been involved in an accident, refused to submit to a chemical test by the arresting police officer. The witnesses "smelled alcohol on the defendant's breath," saw that "his eyes were bloodshot and watery," observed that he could not intelligibly answer civil questions posed to him, and watched him "slump over the wheel and fall to the floor."[56] The court found the defendant to have been driving while intoxicated.

The similarity between *Bradford* and *Cruz* emerges as the facts are examined. In both cases, there was an accident[57] or the substantial likelihood of one.[58] Secondly, proof of a lack of physical coordination was found in the defendants' inability to balance, to walk steadily, or to answer questions intelligibly.[59] Thirdly, the defendants' conduct with the police in both cases was found to constitute a lack of a rational mental state.[60] Other factors such as slurred speech and red and watery eyes gave credence to the witnesses' conclusion that the defendants had operated a motor vehicle while intoxicated.[61]

In *People v. St. Ours,*[62] the defendant stopped his car so as to block two lanes on a busy highway and then told police that "everything was all right, that the car had been parked there all night long."[63] The position of the automobile clearly proved the element

52. 99 Misc. 2d 634, 641, 420 N.Y.S.2d 531, 535 (Sup. Ct. App. T.) (Hughes, J., dissenting), *rev'd,* 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979).
53. *Id.*
54. 48 N.Y.2d at 423, 399 N.E.2d at 514, 423 N.Y.S.2d at 626.
55. People v. Bradford, 96 Misc. 2d 298, 408 N.Y.S.2d 1013 (Sup. Ct. 1978).
56. *Id.* at 300, 408 N.Y.S.2d at 1015.
57. In *Bradford* it is not clear whether or not the defendant caused the accident.
58. 48 N.Y.2d at 423, 399 N.E.2d at 514, 423 N.Y.S.2d at 626.
59. *See* notes 50-52 & 54 *supra.*
60. *Id.*
61. *Id.*
62. People v. St. Ours, 54 A.D.2d 1080, 388 N.Y.S.2d 752 (4th Dep't 1976).
63. The facts in *St. Ours* were described in People v. Kapsuris, 89 Misc. 2d 634, 635, 392

of reckless driving. A lack of physical coordination was demonstrated by the defendant's inability to walk.[64] An irrational mental state was shown by the fact that the defendant parked the car as described above, thought it a rational act, and believed the car had been there for quite a while.[65] The facts in *St. Ours* provided the basis for the court's decision in *People v. Kapsuris*.[66] In this case the court stated that *St. Ours* established a test of "very, very drunk" for a conviction under the intoxication provision of section 1192.[67] The *Kapsuris* court found that the defendant Kapsuris had submitted to a chemical test, and the court remanded the case for trial. The *Kapsuris* test was followed in *People v. Barrett*,[68] but the decision in that case is inconsistent with both *Cruz* and *Bradford*. In *Barrett*, the defendant nearly side-swiped another motor vehicle, drove thirty-one miles-per-hour in a fifty-five mile-per-hour zone, spoke with difficulty, and had bloodshot eyes.[69] The court held that an intoxication level of "very, very drunk" had not been reached; rather, the defendant's conduct only amounted to a violation of the impairment provision.[70] This decision may have been reached because of uncertainty as to standards to be applied. It is clear, however, that the facts described were sufficient to amount to intoxication;[71] there was reckless driving, a lack of physical coordination, and an absence of a rational mental state.[72]

A slightly different fact pattern was presented in *People v. Wenceslao & Marzulli*.[73] In this case, a passenger, Marzulli, alone in a parked car, caused the car to move backwards across a road and crash into a parked car.[74] The defendant was arrested for driving while intoxicated. At trial, the defendant, after admitting that

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N.Y.S.2d 785, 786 (County Ct. 1976).

64. *Id.*

65. *Id.*

66. 89 Misc. 2d 634, 392 N.Y.S.2d 785 (County Ct. 1976).

67. *Id.* at 635, 392 N.Y.S.2d at 786.

68. 89 Misc. 2d 631, 393 N.Y.S.2d 225 (J. Ct. 1976).

69. *Id.* at 632, 393 N.Y.S.2d at 226.

70. *Id.* at 634, 393 N.Y.S.2d at 227. Inexplicably, the *Barrett* court did not invoke VTL, *supra* note 3, § 1192(2) though there was proof of a blood-alcohol content level of .15 of one per centum by weight.

71. 89 Misc. 2d 631, 393 N.Y.S.2d 225 (J. Ct. 1976).

72. *Id.*

73. 69 Misc. 2d 160, 329 N.Y.S.2d 391 (Crim. Ct. 1972), *rev'd sub nom.* People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (Sup. Ct. App. T. 1973).

74. *Id.* at 161, 329 N.Y.S.2d at 393.

he had been intoxicated, testified that the automobile moved spontaneously and of its own volition, that he stepped on the accelerator instead of the brake, and that he did not remember much.[75] The elements of an accident, a lack of physical coordination, and a diminished mental capacity were present. Therefore, the defendant Marzulli was found guilty of a misdemeanor under section 1192.[76] On appeal, however, Marzulli's conviction was reversed because the appellate division determined that Marzulli's act of touching the automatic shift did not reach the statutory requirement of "voluntary operation" of the vehicle.[77] Had the element of "operation of the vehicle" been present, the trial court's finding would have been upheld.

In *People v. Bump*[78] the court found the defendant guilty of driving while intoxicated.[79] Although the court did not outline the facts in great detail, all the elements for a conviction under the intoxication subdivision were present: an accident, a lack of physical coordination, and a lack of a rational mental state.[80] The court reached its conclusion after hearing testimony from four police officers and the motorist whose car the defendant had hit.[81] Additionally, there was medical testimony respecting the coordination test results and the defendant's intoxicated condition during and immediately after the accident.[82] It should be noted that the existence of facts comprising the third element, a lack of a rational mental state, appeared to have been implied by the court after it had examined the facts supporting the first two elements.[83]

B. Impairment

In *People v. Herzog*[84] the defendant hit a parked car.[85] At trial, the police officer testified that the defendant displayed the behav-

75. *Id.*
76. 69 Misc. 2d at 163, 329 N.Y.S.2d at 395 (Crim. Ct. 1972), *rev'd sub nom.* People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (Sup. Ct. App. T. 1973).
77. 76 Misc. 2d at 972, 351 N.Y.S.2d at 776.
78. 68 Misc. 2d 533, 327 N.Y.S.2d 97 (County Ct. 1971).
79. *Id.* at 537, 327 N.Y.S.2d at 101.
80. *See* note 22 *supra.*
81. 68 Misc. 2d at 537, 327 N.Y.S.2d at 100-01.
82. *Id.* at 537, 327 N.Y.S.2d at 101.
83. *See* note 21 *supra.*
84. 75 Misc. 2d 631, 348 N.Y.S.2d 510 (Dist. Ct. 1973).
85. *Id.* at 632, 348 N.Y.S.2d at 512.

ior of an intoxicated individual.[86] The defendant refused to take a chemical test,[87] but agreed that "he was shaky, his speech was slurred, and he did lean upon objects for support."[88] He vigorously denied that the accident was the result of either intoxication or impairment due to the consumption of alcohol.[89] The defendant insisted that the accident was the result of negligence and claimed that his conduct was the result of a diving injury that was aggravated by the accident.[90] The defendant produced several witnesses, including a doctor who testified that the defendant was suffering from a cerebral concussion and broken ribs.[91] The defendant's vigorous denial and proof of the diving injury was sufficient to convince the judge that the People had not proved intoxication.[92] The defendant was convicted under the less severe driving while impaired provision.[93]

An analysis of the case reveals that a finding of impairment under section 1192 results from the existence of the same elements as those found in the intoxication cases but with a lesser degree of intensity, as proven by expert testimony. Although there was an accident, there was no proof of a severe lack of physical coordination and a rational mental state.[94] Most importantly, what appears to be determinative is that the defendant's expert witness was able to cast a reasonable doubt on the prosecution's evidence.[95]

Another case in which the evidence was sufficient only for the lesser charge of driving while impaired was *People v. Kaeppel.*[96] In this case, there was no accident, and, from the judge's description, little likelihood of one.[97] Additionally, according to the testimony of

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86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* The defendant did describe the amount of his liquor consumption, three to four hours prior to the accident, as "two beers and a small amount of scotch." *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 633, 348 N.Y.S.2d at 513-14.
93. *Id.* at 634, 348 N.Y.S.2d at 514.
94. *Id.* at 633-34, 348 N.Y.S.2d at 513-14.
95. *Id.*
96. 74 Misc. 2d 220, 342 N.Y.S.2d 882 (Dist. Ct. 1973).
97. *Id.* at 222, 342 N.Y.S.2d at 885. The court stated:

> From the testimony of the two officers it appears to the court that the defendant was not intoxicated at the time of the incident, but that defendant operated his automobile with a degree of impairment, only. When the defendant exited from the restaurant parking area, he drove his automobile in a southerly direction on Deer Park Ave-

police officers, the defendant was able to maneuver his vehicle in a reasonable manner and satisfactorily perform a physical coordination test given by the policemen.[98] The court refused to hold a time-consuming "thumbing" through a wallet to find a license and registration to be a symptom of intoxication.[99] In sum, any evidence shown of a lack of physical coordination was of a lesser degree than that present in the intoxication cases. Also missing in this case was a lack of a rational mental state.

A slight twist in the usual line of cases was presented in *People v. Van Tuyl*,[100] where the defendant's apparently alcohol-influenced behavior after an automobile accident was found to be the combined result of a drug prescribed by his doctor[101] and the shock of the accident.[102] The defendant's behavior was characterized by slurred speech, alcohol-odored breath, and a failure to remember the accident.[103] Although these facts are similar to those found in the intoxication cases, the elements that emerge from the facts are of a lesser degree of severity than those that emerge in the intoxication cases.[104] This lesser degree of severity was proved by medical

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nue and then made a U-turn in a reasonable manner and then drove north for a distance of 150 feet or 900 feet. The U-turn was made at a point in the highway which permitted such a maneuver.

Id.

98. *Id.* The court stated: "When asked to do some physical tests at the precinct, such as walk a straight line, touch his nose, repeat words and write certain words, the defendant's performance was rated by the police officers as 'fair.'" *Id.*

99. *Id.* at 222-23, 342 N.Y.S.2d at 885.

100. 79 Misc. 2d 262, 359 N.Y.S.2d 958 (Sup. Ct. App. T. 1974).

101. *Id.* at 265, 359 N.Y.S.2d at 960.

102. *Id.*

103. *Id.* at 264, 359 N.Y.S.2d at 959.

104. The *Van Tuyl* court described the use and effect of the prescription drug:

> Butazolidin Alka is an "anti-inflammatory agent" sometimes used for treatment of arthritis. However, its use is limited because scientific tests have proved that approximately 40% of the persons using said drug have severe orientation problems. The adverse side effects that the drug has been found to cause include a "confusional state," lethargy, vertigo, unsteadiness afoot, blurred vision and possibly even slurred speech. The drug has a "half life" interval of 36 to 72 hours which means that one half of its dosage remains in the central nervous system so that potential adverse effects might not occur until the fourth or fifth day of continual medication. An average dosage of 2 tablets per day could cause the side effects mentioned above. . . .Defendant further stated that his physician failed to warn him about the potential side effects of the medication and, in fact, he experienced no adverse effects prior to July 4, 1972.

Id. at 264-65, 359 N.Y.S.2d at 960. The defendant first took the drug on July 1, 1972. *Id.*

testimony.[105] The court dismissed the charge of impairment.[106] However, had the requirement that the voluntary consumption of alcohol sufficient to cause the accident been met, the defendant's failure to remember the accident probably would have been sufficient to meet the lesser standard for an impairment conviction. It is unclear whether, had the above hypothesized facts been present, the defendant's lack of recollection of the accident would have been sufficient for a conviction under the intoxication provision.

It is significant that in these three impairment cases,[107] the factor that prevented an intoxication conviction and resulted in the lesser impairment conviction, or a dismissal of both charges, was the testimony of expert witnesses.[108] In *Herzog*, the testimony of the defendant's doctor, coupled with the defendant's vigorous denial, caused the court to reduce the charge to one of driving while impaired.[109] It was the testimony of medical experts in *Van Tuyl* that enabled the court to dismiss the impairment charge under the pertinent provision of section 1192.[110] In the *Kaeppel* case, the court treated the policemen as expert witnesses, so that their testimony supported a conviction under only the lesser charge of driving while impaired.[111] Thus, in each case, factors which might otherwise have resulted in fines or imprisonment, or both, for the defendants were demonstrated to merit punishment less severe than that attendant to an intoxication conviction. Therefore, the defendants were convicted, if at all, only under the impairment provision.

IV. Conclusion

The New York Court of Appeals in *People v. Cruz* stated that

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105. *Id.* at 264-65, 269, 359 N.Y.S.2d at 960, 964.

106. *Id.* at 269, 359 N.Y.S.2d at 964.

107. People v. Van Tuyl, 79 Misc. 2d 262, 359 N.Y.S.2d 958 (Sup. Ct. App. T. 1974); People v. Herzog, 75 Misc. 2d 631, 348 N.Y.S.2d 510 (Dist. Ct. 1973); People v. Kaeppel, 74 Misc. 2d 220, 342 N.Y.S.2d 882 (Dist. Ct. 1973).

108. People v. Van Tuyl, 79 Misc. 2d at 264-65, 269, 359 N.Y.S.2d at 960, 964 (Sup. Ct. App. T. 1974); People v. Herzog, 75 Misc. 2d at 632-33, 348 N.Y.S.2d at 512-13 (Dist. Ct. 1973); People v. Kaeppel, 74 Misc. 2d at 222, 342 N.Y.S.2d at 885 (Dist. Ct. 1973).

109. 75 Misc. 2d at 634, 348 N.Y.S.2d at 514.

110. 79 Misc. 2d at 269, 359 N.Y.S.2d at 964.

111. 74 Misc. 2d at 223, 342 N.Y.S.2d at 886. *See also* People v. Dusing, 5 N.Y.2d 126, 128, 155 N.E.2d 393, 394, 181 N.Y.S.2d 493, 495-96 (1959); People v. Magri, 3 N.Y.2d 562, 566-67, 147 N.E.2d 728, 731, 170 N.Y.S.2d 335, 338 (1958); People v. Meikrantaz, 77 Misc. 2d 892, 901-02, 351 N.Y.S.2d 549, 561 (County Ct. 1974); People v. Morris, 63 Misc. 2d 124, 127, 311 N.Y.S.2d 53, 56 (Dist. Ct. 1970).

some amount of uncertainty may be permissible in a criminal statute when there are two degrees of unlawful acts.[112] Although such ambiguity may be constitutional, a great hardship may be suffered by the defendant who violates the lesser, but is charged with the greater. In presenting evidence at the trial of such a defendant, the use of an expert witness is important in reducing an intoxication charge to impairment, or in dismissing an impairment charge.

Elizabeth Gross

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112. 48 N.Y.2d at 427 n.1, 399 N.E.2d at 516 n.1, 423 N.Y.S.2d at 629 n.1.