

NOT GUILTY v. CERBERUS; Winning Intoxicated Manslaughter Trials

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“Ma’am, we regret to inform you, but your son was killed by a drunk driver.”

“Ma’am, we regret to inform you, but your son has been arrested for killing someone while driving intoxicated.”

An intoxicated manslaughter case is every person’s worst nightmare, whether you or a loved one are charged with the offense or the victim of. You don’t have to be a bad person to be charged with intoxicated manslaughter. And, the only difference between making it to your destination safely after having consumed alcohol, medicine, or drugs or not is pure luck. Why some people’s lives intersect tragically at that one imperfect second is not for us to know.

In order to win an Intoxicated Manslaughter (“Intox Man”) trial, the lawyer needs to not only understand the above, but truly feel it and be able to communicate it to the jury. Most lawyers have won a Driving While Intoxicated (“DWI”) trial. The number becomes progressively less as the DWI involves an accident, a breath test, a blood test, and a dead body. Intox Mans are a second degree felony with each decedent carrying a possible range of punishment from 2-20 years in prison and a \$10,000.00 fine for the accused if found guilty.² It’s up to the Judge whether to stack the sentences for each victim. Most attorneys, rightfully, shy away from Intox Man cases because of the need to fully understand the science; the chances of losing are very high; and the punishment years add up fast. However, if you can win a DWI trial with an accident and chemical test, you can win an Intox Man trial, which is simply a complex DWI with a dead body.

In order to handle an Intox Man, one needs to understand and respect the true “beast” that it is. Intox Mans can carry a lot of emotion with juries, because it could happen to anyone and is every juror’s worst nightmare. It’s a case that has affected every single juror or someone that they know. The State rarely loses and is heavily favored. Few lawyers are willing to take these cases to trial for fear of receiving the max. Sometimes, the State can choose to offer probation or a reduction if they don’t feel confident in the case. The Intox Man trial is usually believed, by the State, to be rock solid. Trial cases will have bad driving facts, experts backing up the chemical result, and a dead body that will evoke tremendous emotion from the jury. To defeat the Intox Man “beast”, the trial lawyer first needs to know what this beast is and then figure out how to defeat it. No Beast is unconquerable.

CERBERUS

In Greek mythology, Cerberus (pronounced ¹sɜːrˈbərəs) is often referred to as the Hound of Hades. He is the monstrous, three-headed dog that guards the gates to the Underworld. Cerberus’ mother was the monster Echidna, half mortal woman and half snake. Cerberus’ father was the monster Typhon, an immortal giant serpentine.

¹ Thank you to my lovely wife, Taly Thiessen, for proofreading and her constant support.

² TEX. PENAL CODE SEC. 49.08 (West 2003).

Cerberus is described as a dog, by most Greek mythological texts, having three heads and the tail of a serpent.³

Cerberus⁴ prevents the living from entering, and ironically for an Intox Man case, he also prevents the dead from rising or leaving the Underworld. The State, like Cerberus, wants to prevent the client from walking away from killing someone while DWI. The State's beast of a case contains three separate attacks/heads: 1. Intoxication, 2. Causation, and 3. a dead body. Each head alone can pull at the heart of the juror enough to destroy the client and render a guilty verdict. When combined, these three heads make for a deadly and vicious case, which the State proudly parades around as unbeatable.

HERCULES and THE TWELVE LABORS

Zeus was the sky and thunder god; he was also king of the gods of Mount Olympus. Zeus' wife was the goddess, Hera. However, Zeus engaged in relations with a mortal woman, Alcmene, and she in turn gave birth to their son, Hercules.

Hercules was a Roman hero/god and was essentially the same person as the Greek divine hero Heracles. Hera, jealous of Zeus' relations and offspring, made Hercules go mentally insane. While in this period of insanity, Hercules killed his own wife and child. When he awakened from his "temporary insanity," Hercules was shocked and upset by what he'd done. He prayed to the god Apollo for guidance, and the god's oracle told him he would have to serve King Eurystheus for twelve years, as punishment for the murders. As part of his sentence, Hercules had to perform twelve Labors, feats so difficult that they seemed impossible.⁵

Each Labor was increasingly difficult, with the most dangerous labor being the twelfth and final one. King Eurystheus ordered Hercules to go to the Underworld and kidnap Cerberus. The Underworld was ruled by the god Pluto/Hades. No mortal had ever entered the Underworld and returned. So, before making the trip to the Underworld, Hercules decided to take some extra precautions. He visited Eumolpus, a priest who began what were known as the Eleusinian Mysteries. The mysteries were sacred religious rites and those who learned the secrets of the mysteries would have happiness in the Underworld. Eumolpus initiated Hercules into the Mysteries.

You are Hercules. Hercules was mortal. Statues and descriptions of Hercules' physical features closely resemble that of the biblical David. Yes, Hercules was known for his strength, which probably came from being the son of Zeus. And like Hercules, the learned DWI trial attorney also has super strength in understanding the laws and sciences of DWI.⁶ Like Hercules, in order to beat the Intox Man beast, the trial

³ <https://en.wikipedia.org/wiki/Cerberus>

⁴ Cerberus appears in Homer's *Odyssey* and *Iliad* and Hesiod's *Theogony*. Cerberus is also portrayed in many sculptures and pottery

⁵ <http://www.perseus.tufts.edu/Herakles/labors.html>

⁶ Please read *Not Guilty v. Goliath* for a refresher on how to beat blood test DWI cases.

<http://www.voiceforthedefenseonline.com/story/not-guilty-v-goliath-conquering-giant-blood-tests-using-disconnect-defense>

attorney must understand and be shielded by the Mysteries: the DWI sciences. Before any trial attorney even attempts to take an Intox Man to trial, they need to know: the Standard Field Sobriety Test (SFST) manual, Intoxilyzer 5000 and 9000 Manuals, Drug Recognition Evaluation (DRE) manual, infrared spectroscopy, gas chromatography, gas chromatography mass spectrometry, human anatomy, retrograde extrapolation, and various aspects of accident reconstruction. The Intox Man trial lawyer must know the text books, articles, and studies dealing with the above. Significant time must be spent at CLEs and laboratories. While this may all seem like a lot, it's really the same knowledge that any successful DWI trial attorney already knows. Sure, trials are won on wheeling and causation without needing any scientific DWI knowledge, but if you can see the wheeling or causation issue, the State almost always knows it as well and you can disregard this entire article, because that's just a causation or wheeling trial. This article aims to defeat the three headed Intox Man beast that has no loopholes.

Hercules, like biblical David, is a huge underdog. Neither Hercules nor David were supposed to win. In Not Guilty v. Goliath we learned how to beat a blood test DWI and now many trial attorneys beat those cases regularly. Remember "if it bleeds, it pleads?" The State used to parade those cases around as unbeatable. Hercules and David can and will win because they have heart and precision in their attack.

THE TWELFTH LABOR

Hercules made his way down to the Underworld. He encountered monsters, heroes, and ghosts as he made his way through Hades. Finally, he found Pluto and asked the god for Cerberus. The lord of the Underworld replied that Hercules could indeed take Cerberus with him, but only if he overpowered the beast with nothing more than his own strength.

What's important to note is that Hercules, although mighty, is nice and politely asks Pluto for Cerberus. The trial attorney must be nice, until it's time not to be nice. The trial attorney, like Hercules, must respect the Beast. Typically, in a DWI trial, the State and the Defense are both trying to be respectful to the case, while also being educating and likeable to a jury. It's often been said, "if the jury is laughing with you, you are winning." An Intox Man is not that type of case. Every Intox Man that I have tried, I have seen the State start out friendly and light hearted in *voir dire*. As though the State is so worried about losing the popularity contest that they don't want to seem too aggressive. Let them. Let them keep it light, because this is a heavy case with nasty facts. Of all the cases for the Defense to be serious, this is it. There are two trial tactics that must be utilized in *voir dire* by the Defense.

First, you must recognize the serious and tragic nature of an Intox Man case. Usually the court will take a break after the State's *voir dire*. Many people visit the bathroom at this time; jurors may be thinking about the past hour of the State's *voir dire* and the horror of being a juror in an Intox Man trial is racing through their mind. When the defense attorney stands up, they should imagine what is going through all of the jurors' minds. Empathize with their fear and hate. Stand up, feel the energy in the room, accept the stares and disgust in their mind. "I know what you are all thinking, Mark, how can you represent a person that was drunk and killed someone in an accident." It's what you would be thinking as a juror. Recognize the elephant in the room and then address it with your theory of the case. "I promise you, I'm not here to waste your time. Not every accident is a crime." Let them know you are

exactly like them, you share their fears. “Believe me, this is my worst fear as well. I have a family. I wouldn’t want to be on either side of this case as a parent. This is everyone’s nightmare. This was a tragic accident, but it wasn’t a crime.” The defense attorney needs to let them know they respect this case to its very core, and they are not here just trying to get someone out of a crime. And we aren’t. We aren’t trying to win a game, or steal closure from a grieving family. We are trying this case because the evidence doesn’t add up, the wreck was unavoidable, a terrible investigation occurred, or the State just wants someone to blame in order to provide a reason for why someone died. The approach by the defense attorney is probably the most important factor in this trial. If you don’t believe in your heart of hearts in the case, you should not take the case to trial. This is not a case that can be won by going through the motions or by throwing spaghetti at the wall and seeing what sticks. Everyone involved in this case will never forget the verdict rendered. The jury should and will spend hours combing through the evidence and arguments. Jurors will be hardened and steadfast in their initial opinions. People will cry at the verdict, no matter what it is. You must respect and fear losing an Intox Man trial. Fear is your friend in an Intox Man trial. Fear will make you sincere in your fight.

Second, be nice.⁷ Someone lost their life and your client survived. However, there will come a time when the defense attorney may need to be stern and aggressive. Allow the jury to give you this power. In *voir dire*, include a discussion or slide about the Sixth Amendment.⁸ Ask the jury, “Heaven forbid, that you would ever be charged in a case like this, what kind of lawyer would you want/hire?” Keep going until someone says tough or aggressive. “Thank you, I appreciate that. I promise I will be respectful, but I am fighting for his freedom and future. I need to get some information to yall and I may have to ask tough questions.” It helps to know the kind of witnesses and experts that the State intends on calling and their reputation for testifying. For example, if an analyst in Lubbock is going to be very difficult and nonresponsive, then get that out in *voir dire*. “Now, I promise I will always be respectful, but what if I can’t even get a witness to agree that the sky is blue?” Most jurors will understand and allow you to be stern. Additionally, when you get cross ways with that witness on the stand and simply step back and ask “can we just agree the sky is blue,” and the witness replies “I don’t know, I haven’t been outside in a while,” you can just look at the jury and you will all recognize the evasiveness of that witness.⁹ This simple question can destroy the entire credibility of the analyst. And when the witness gets evasive, the jury gave you permission and understands the need to be not nice.

FIGHTING CERBERUS

Pluto would not just let Hercules “borrow” Cerberus. However, Pluto would not interfere if Hercules could defeat Cerberus without any weapons and with just what he had on. A weaponless Hercules set off to find Cerberus. Hercules wore the skin of the Nemean Lion (First Labor) around his shoulders. When Hercules found Cerberus, he threw the skin of the Lion over two of Cerberus’ heads and strangled the remaining

⁷ Thanks to Dalton from the Double Deuce. The best damn cooler in the business, other than Wade Garrett, who is not getting old.

⁸ Thanks to Ryan Deck of Georgetown, Texas for this idea and slide.

⁹ Thank to Lubbock analyst Jim Thomas for refusing to admit the sky was blue.

head. He then uncovered one of the remaining heads and strangled it. Then he strangled the last head.

The skilled trial attorney, like Hercules, must systematically knock out the heads of the Intox Man Beast one at a time. Remember the three heads: 1. Intoxication, 2. Causation, and 3. a dead body. An Intox Man trial should be viewed as an accident DWI blood test case with a dead body. What is the State's most emotional weapon? What is the one thing that makes jurors forget about following the law? What does the State keep pushing? What is the one thing that scares every juror? Someone **died**. Many jurors will base their verdict and punishment solely on the horror of someone dying. The Dead Body is the most dangerous head. Without a dead body, this is just a Class B misdemeanor accident DWI with a chemical test. And, plenty of lawyers have won those cases.

The fact that someone died in this case is tragic. Horrible. A nightmare. The worst fact. Deal with your worst facts in *voir dire*. You've acknowledged at the outset that this was a tragic accident. Every person knows that people die every day in automobile accidents. And not every accident is a crime. Towards the end of *voir dire*, deal with the fact that there is a dead body. Accept it head on. Prepare a slide that says "Pictures of Death." Additionally, stipulate to the fact that someone died as a result of this accident. "Ladies and gentleman, I told you that I'm not here to waste your time. Someone died in this accident. We are not playing games. In fact, your Honor, State, everyone here, I stipulate that Mr. Smith died in this accident. He is never coming back. Now knowing that, how many people need to see pictures of Mr. Smith dead? How many people want to see pictures of Mr. Smith dissected and the injuries he sustained? I've just stipulated to his death. So if the State shows you those pictures, why do you think they are showing you those pictures?" Most jurors understand that the purpose of pictures of death would just be to play with their emotions. No human likes to feel emotionally manipulated and jurors will repulse this tactic by the State. Remind them that they have taken an oath to follow the law and that they are better than basing their judgment on emotion rather than the law. The only purpose of showing pictures of death after the defense has stipulated to death, is purely psychological and to try and get the jury to vote on emotion rather than the law. Shame on the State. If the State does admit such pictures in evidence, remind the jury in closing that the State is just trying to manipulate their emotions. A juror in a case told me that the first thing she did when they got all the evidence for deliberation was to take the pictures of death and turned them upside down and put them in the corner of the room. She reminded all the jurors that they were better than letting the State manipulate their emotions and that they should all decide the case on the facts and follow the law.¹⁰ Remind jurors they are better than being manipulated by the State. All the defense lawyer wants is what the jurors swore to do: follow the law. Has the state proven intoxication, and if so, did that intoxication cause the accident that caused the death...Beyond **A** Reasonable Doubt.

The next head to handle will be dictated by the State. Do they put on their causation and accident reconstruction first or do they start with the intoxication investigation? Most State attorneys follow the chronological order of what happened that night: the accident and then the intoxication investigation and analysis of the chemical test. Every accident is different; therefore, to summarize how to handle every accident reconstruction would be impossible. First and foremost, you must inspect the scene

¹⁰ Thank you Ms. Barker.

yourself. Recreate the night as best you can by driving through every scene the jury will hear about. Many times you will see something in the experience of it all. Look for cameras in the area, the lighting, line of sight, distances, marks, character of the neighborhood, traffic patterns, light sequencing, location of the traffic light boxes, possible witnesses, etc. The defense attorney should be familiar with the total station mapping and diagrams of the scene and whether it accurately reflects the scene. A good accident reconstructionist can help educate the defense attorney on lingo like: yaw, friction coefficient, drag factor, linear momentum, perception reaction time, hot shock, cold shock, Delta-V, etc. Make sure the defense accident reconstructionist and yourself both visit the scene, together preferably. Ultimately, the sole issue is, did any alleged intoxication cause the accident. The law is bad for the defense on whether the decedent actually died as a result of something concurrent. For example, it's very difficult to argue that had they been wearing their seatbelts they would have survived. The State loves to argue: but for the client hitting them, would they have made it home alive even without a seatbelt on? The law is simply against the defense and takes a specific case to argue concurrent causation. The best causation argument I've ever heard came from Dick DeGuerin: "I don't care if he was drinking iced tea, or Long Island iced tea, this accident was unavoidable." Investigate the impact marks, speeds, line of sight, reaction times, and any braking immediately before the accident. Address this in *voir dire* as well. Obviously you can't discuss the facts of your case in *voir dire*, but you can find an example that is relatively similar. For example if the decedent pulls out from a stop sign at the last second and an accident occurs: "If I'm doing 70 on the feeder, sure the cross traffic can take a right on their red light, but can he just pull right in front of me? Does that person not have to judge whether it's safe? Does it matter if I'm speeding? If they pull out one second before impact, I don't care if I'm drinking iced tea or Long Island iced tea, I can't stop. What do yall think, did that accident have anything to do with intoxication." Most likely this will spark a discussion about perception reaction times which may ultimately aid in an acquittal.

The last and most complex head of an Intox Man trial is whether the client was intoxicated. The possibilities for defense are highly fact dependent. The Intox Man trial lawyer will use every single tool they use in a normal DWI trial. The defense attorney must choose the line of attack intoxication whether it be 1. attacking the meticulous grading of the SFSTs; 2. the alcohol concentration number is inaccurate or unreliable; 3. Disconnect defense; or 4. retrograde extrapolation and the client wasn't intoxicated at the time of the accident. Whatever the defense, follow exactly what you would do in a regular DWI trial. In fact, if anything, a jury will follow the law and scrutinize the intoxication evidence even more, knowing the ramification of their verdict. Many jurors in a misdemeanor DWI tend to just blindly believe in the intoxication evidence knowing that the punishment for a misdemeanor doesn't carry significant jail time. Juries tend to be much more critical in an Intox Man trial and will hold the State to their burden because they know 20 plus years of incarceration are on the line. The defense attorney should remind the jury in closing that even though this is just guilt/innocence, it's impossible not to think about the ramifications of their decision. In inhuman not to think about the punishment and years in prison that could result from a guilty verdict. And jurors honestly should think about punishment in guilt/innocence because the verdict will invariably affect many friends, families and their future families.

COMPLETING THE TWELFTH AND FINAL LABOR

Cerberus submitted to the force of Hercules, and Hercules brought Cerberus to King Eurystheus. Afterwards Cerberus was returned safely to Hades, where he resumed guarding the gateway to the Underworld. Presumably, Hercules inflicted no lasting damage on Cerberus, except, of course, the wound to his pride. When Hercules returned to King Eurystheus to attain his immortality, the King was nowhere to be found. So Zeus granted Hercules his immortality for completing his penance of the Twelve Labors.

The State's case, like Cerberus cannot sustain a systematic and calculated attack. But recognize, the while Hercules may have choked Cerberus, he did not kill him. The trial attorney must not kill the case, it's the jury's job to decide the fate of the case. And overzealous and aggressive defense attorney just as effective as an incompetent one. Your closing argument should summarize your theory of the case and entrust it to the jury. As Gerry Spence has long taught: find the villain, promote righteous indignation and empower the jurors. While it may be the State and Defense putting on their respective cases, the verdict belongs to the jury. As you sew your theory of the case through the facts, recognize and expose the villain. By that, did the State overzealously prosecute this case, did the police perform a terrible investigation, or is the lab biased or unreliable? Whatever the injustice, remind the jurors that this could happen to any of us. Regardless of the side we are on, the defendant's or the decedent's, they and their loved ones and ultimately the People of this county deserve better. Empower the jurors that they have the voice, they have the ultimate decision. Their verdict will invariably affect lives and they will never ever forget their verdict. The jurors should be proud of their verdict, for they can remember for the rest of their lives that they followed the law, they were not swayed by emotion, and did not compound the tragedy of this accident. They choose whether they remember for the rest of their lives the day they gave a person their life back or the day they label a man a criminal forever. The trial attorney fought passionately and in the end, he humbly returns to the jury to surrender the tamed Beast. And if done gracefully, the jury will recognize every Beast has weaknesses.