Using Rule 404(b) to Prove Enhanced Damages in Drunk Driving Cases.

by David S.V. Shirley, Esq.[1]

In 1983 the New Hampshire Supreme Court held that the victim of an accident caused by a drunk driver may not automatically seek enhanced damages in the ensuing litigation. Gelinas v. Mackey, 123 N.H. 690, 693 (1983) ("the act of driving while intoxicated did not constitute 'wanton or malicious' conduct"). There is some debate as to whether the Gelinas case should remain the law of New Hampshire, but recent decisions from the New Hampshire Federal District Court have continued to follow Gelinas. See McKinnon v. Harris, 2005 WL 2335350 (D. N.H.); Welcome v. Yezzi, D. N.H. Docket No. 08-CV-429-SM (McAulliffe, J., Order of June 9, 2009).

Attorney Jason Major, in his Winter 2008 New Hampshire Bar Journal Article, Enhanced Compensatory Damages in Drunk Driving Cases – It's Time to Overturn *Gelinas v. Mackey*, points out the conundrum that a sober operator driving recklessly faces paying enhanced damages while an intoxicated operator driving negligently does not. This, however, may not always be the case. It is not unusual for accident causing drunk drivers to have a past history of drunk driving. New Hampshire Rule of Evidence 404(b) allows the admission of prior bad acts to prove intent, including wantonness and malice. Thus, it may be possible to prove the intent necessary to support enhanced damages against a negligent drunk driver by introducing evidence of prior incidents of drunk driving. See Johnsen v. Fernald, 120 N.H. 440, 441 (1980) ("The tort involved in *Vratsenes*, however, was trespass, and the plaintiff there alleged that it was a 'willful and malicious' trespass, the defendant having previously committed a similar act.").

To prove enhanced damages, there must be evidence that the tortious act involved "is wanton, malicious, or oppressive". Johnsen, 120 N.H. at 441. The plaintiff has the burden to

prove "wanton or oppressive" conduct, Schneider v. Plymouth State College, 144 N.H. 458, 466 (1999), or "malicious" conduct based upon a "showing of actual malice" such that the defendant acted with "ill will, hatred, hostility, or evil motive", Johnsen, 120 N.H. at 441-442. As such, this element of "wanton, malicious or oppressive" conduct must be supported by some evidence in order to have the jury consider any enhanced damages claim.

New Hampshire Rule of Evidence 404(b) permits evidence of "other crimes, wrongs, or acts" as "proof of motive . . . intent . . . knowledge . . . or absence of mistake or accident". Thus, prior bad acts can be admitted as affirmative evidence of intent. Nor does the rule require a guilty plea or jury finding relative to the prior bad act. As such a prior conviction based upon a plea of no contest or even a prior arrest without conviction may be admissible.

Admissibility of Rule 404(b) evidence is the same in civil and criminal cases. Lapierre v. Sawyer, 131 N.H. 609, 611-612 (1989).[2] The New Hampshire Reporters Notes also state "[t]he Federal Rule appears to accurately reflect current New Hampshire law in this area." Thus, federal cases regarding Rule 404(b) may be instructive for interpreting New Hampshire's rule.

In the case of U.S. v. Flemming, 739 F.2d 945 (4th Cir. 1984), the defendant was convicted of 2nd degree murder for killing someone while drunk driving in excess of 40 miles per hour over the speed limit. The requisite intent proven by the prosecutor was more than the gross negligence for a vehicular homicide conviction. The trial court allowed into evidence under Rule 404(b) the defendant's prior drunk driving convictions as evidence of malice to prove the heightened intent. The appellate court stated: "the driving record was relevant to establish that

defendant had grounds to be aware of the risk his drinking and driving while intoxicated presented to others. It thus was properly admitted." Id. at 949; see U.S. v. New, 491 F.3d 369, 375 (8th Cir. 2007) ("a jury could infer from Defendant's prior drunk driving convictions that he is especially aware of the problems and risks associated with drunk driving") (quotations and citation omitted); U.S. v. Loera, 923 F.2d 725, 729 (9th Cir. 1991) ("prior misdemeanor convictions for driving while intoxicated are relevant to establish that the defendant had grounds to be aware of the risk his drinking and driving while intoxicated presented to others") (quotations and citations omitted). Thus, there are already Rule 404(b) cases that support the concept that prior incidents of drunk driving are admissible to show heightened intent such as wantonness and/or malice with regard to subsequent incidents of drunk driving.

New Hampshire follows a three part test for the admission of Rule 404(b) prior bad acts: "(1) the evidence must be relevant for a purpose other than proving the defendant's character or disposition; (2) there must be clear proof that the defendant committed the act; and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice to the defendant." This test, and its application, including the required evidentiary nexus for prior bad act evidence to be admissible to prove motive in a criminal case, was recently discussed in detail in State v. Costello, Slip Op. No. 2008-332 (N.H. July 23, 2009). Further, there is no time limit relative to when the prior bad act may have occurred beyond what is required by this test. See U.S. v. Edelmann, 458 F.3d 791, 810 (8th Cir. 2006) ("While the three prior convictions are approximately 15 years old, we find that they are not too remote in time because of their similarities with the crime charged.").

Every case is different, but whenever a drunk driver causes harm to another the evidence to prove enhanced damages may exist through the form of prior bad acts that reflect the drunk driver's repeated disregard of the law, and that previously educated the drunk driver of the seriousness of the unlawful conduct and the very real risk it creates relative to the welfare of others on the road.

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[2] Rule 404(b) evidence may not be admissible to prove ordinary negligence in a civil action. See Lapierre, 131 N.H. at 612.