The Admissibility of Evidence of Intoxication in Civil Proceedings

by Nicholas T. Williams

I. Introduction

In a 2008 National Survey of Drinking and Driving Attitudes and Behaviors administered to 6,999 American residents, the U.S. Department of Transportation found that 81 percent of respondents saw drinking and driving by others as a major threat to their personal safety and that of their families.[1] There are very few 80/20 issues in America, however the public's perception of the dangers and risks of drinking and driving is certainly one of them.

Illinois courts have considered the issue of intoxication as a basis for both fault and comparative negligence since at least the 19th Century. The 1878 Illinois Supreme Court decision of *City of Auroa v. Hillman* is an excellent starting point for review on the subject.[2] Although it is tempting to consider a nearly 150 year old decision outdated, the *Hillman* Court's analysis on the central issue of this article is actually in lockstep with the modern case law.

The primary consideration on the admissibility of evidence of intoxication in a civil proceeding is prejudice. The Department of Transportation study cited above clearly indicates the American people hold extremely negative views of drinking and driving. And why would they not? Alcohol impairment was implicated in the deaths of more than 13,000 people on America's roadways in both 2021 and 2022.[3] Whether due to drunk driving, alcohol-related diseases, or alcohol-associated violence and abuse, few people are fortunate enough to live their entire lives without experiencing some degree of pain or trauma from alcohol. These real life experiences and related negative impressions, fairly or not, can easily coalesce into unconscious bias and prejudice in the minds of jurors. And this prejudice can result in unfair outcomes.

Questions surrounding the admission of evidence of intoxication are not relevance issues. The consumption of an intoxicating substance by any party involved in an accident is usually relevant. This is a prejudice issue.

The reality is the consumption of alcohol by either a plaintiff or a defendant, prior to a motor vehicle collision, is almost certainly relevant to a finder of fact. But that is rarely the issue argued before the court. The real issue is whether the party seeking to introduce evidence of intoxication can meet the highly technical admissibility requirements of the Illinois common law, and be allowed to present those highly damaging facts at trial.

This article will provide a summary of the law of admissibility of evidence of intoxication in an Illinois civil proceeding. It will discuss the cases and the jury instructions likely to arise in the litigation of such evidence, as well as practice pointers for both plaintiff and defense attorneys. Above all, this article is designed to be a practical resource to help you navigate evidence of intoxication in your next case. Remember, this issue is not about relevance – It is about prejudice.

II. Summary of the Law

While *Hillman* is still good law, let us fast forward 105 years to *Sandburg-Schiller v. Rosello*.[4] This 1983 decision echoes much of *Hillman* and presents an excellent overview of many issues that commonly arise in litigation of the admissibility of evidence of intoxication.

In *Sandburg-Schiller*, the court acknowledged that the presentation of evidence of alcohol consumption prior to a motor vehicle accident is extremely prejudicial. In order to address this obvious prejudice, the court recognized that strict evidentiary standards must be applied to make sure that such evidence was instructive and not merely inflammatory. These evidentiary standards are discussed in detail below.

A. Technical Requirements for the Introduction of Evidence of Intoxication

Sandburg-Schiller explains how a court will evaluate evidence of intoxication before ruling on a motion to bar or admit such evidence. First, actual impairment from an intoxicating substance must be shown, not merely evidence of consuming an intoxicating substance. This prevents trial lawyers from taking evidence of the consumption of a potentially small amount of alcohol and baselessly alleging that the accused party was driving within the legal definition of "intoxicated."

Opinion evidence from an expert is considered appropriate, but lay eyewitness testimony may also be allowed into the record if certain requirements are met. These requirements force trial lawyers to demonstrate to the court both evidence of drinking *and* observed unusual behavior on the part of the allegedly intoxicated individual. Mirroring the rationale in *Hillman*, *Sandburg-Schiller* reminds us that whether a person is intoxicated is a question of fact, "patent to the observation of all,"

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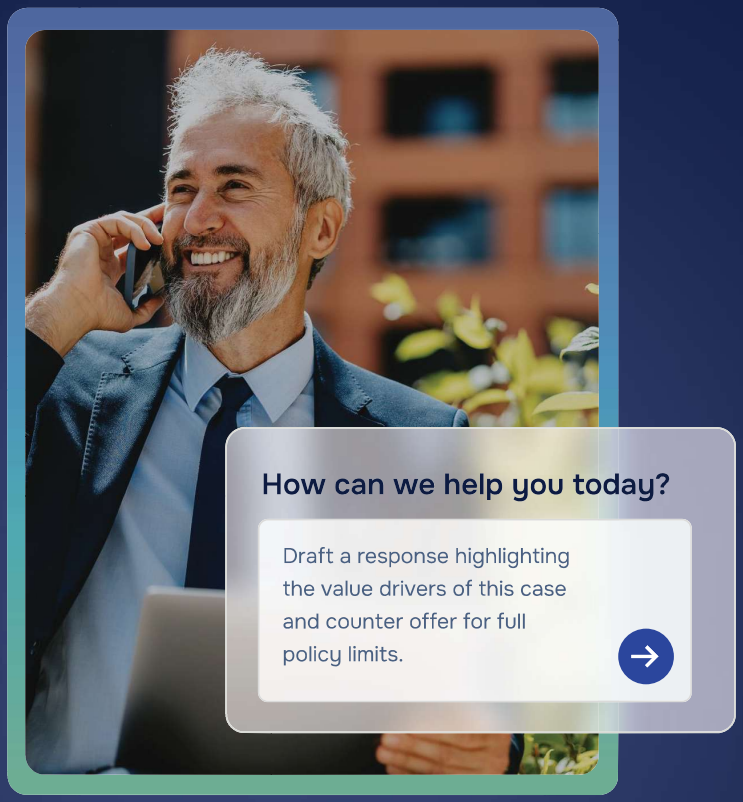

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without the necessity for particular scientific knowledge, and may be proven as other facts are proven. Translation: A doctorate degree is not required for a witness to testify about evidence of intoxication at the time of an accident, as long as the foundational requirements are met.

So what are the foundational requirements for the admission of evidence of the consumption of alcohol at a civil trial? According to *Sandburg-Schiller*, you need to show proof of the consumption of alcohol plus related unusual behavior. Although a BAC test may not be required, objective scientific data presented by a physician is the gold standard. In scenarios where the blood alcohol level is *extraordinarily* high, this fact alone *may* be sufficient. But practitioners should remember the "Drinking Plus" rule. That means presenting proof of the consumption of alcohol paired with evidence that the accused was acting unusual in a way that indicates impairment is usually required to get such evidence to a jury.

B. Reality Check

There is an underlying reality to litigation involving intoxication that is important to address right out of the gate. Most of the cases discussed below deal with a plaintiff's alleged intoxication in the context of an affirmative defense. The dearth of cases stemming from drunk driver defendants is stark in comparison to what can be found in the affirmative defense sphere of cases on the subject.

Reality check – Juries do not like drunk drivers. Full stop.

The lack of cases dealing with a drunk driver defendant can likely be attributed to this sentiment. The obvious conclusion is that defense lawyers are inclined to settle these cases before procedural or admissibility issues become ripe for appellate court consideration. Conversely, the fact that the majority of cases on the subject stem from affirmative defenses strongly suggests that defense lawyers are less likely to settle cases where the plaintiff was drinking.

C. The IPIs and Definitions of Intoxication

IPI 12.01 is the starting point for understanding the admissibility of evidence of intoxication. IPI 12.01 provides that an intoxicated person is held to the same standard as a sober person. It also tells us that evidence of intoxication can be used to determine whether a party was negligent, willful and wanton, or contributorily negligent. IPI 12.01 does not define intoxication however, it only states such evidence can be used by the trier of fact in a trial.

The pattern instructions for The Dram Shop Act define intoxication: "A person is intoxicated when as a result of drinking alcoholic liquor there is an impairment of his mental or physical faculties so as to diminish his ability to think and act with ordinary care." Critically, the Notes for IPI 150.15 clarifies that the instruction may be used in negligence or other cases where intoxication is claimed. This is the definition that practitioners should use throughout the case, as it is the definition that the jury will receive at the time of trial.

D. The Impaired Standard

In cases involving evidence of intoxication, it is important to invoke the proper terminology. And what is the magic word necessary to invoke the admission of evidence of intoxication?

"Impairment."

French v. City of Springfield[5] is an excellent case on the subject and definition of impairment. In *French*, evidence testimony from a physician indicated that a driver was probably "under the influence" because said driver's BAC was found to be .136. "Probably under the influence" are not the magic words.

The *French* court found that the test is not whether someone is "under the influence," but whether that person is "impaired." Related concepts, but different words.

Pursuant to IPI 150.15, a person must be "impaired" for there to be a finding of intoxication. Do "under the influence" and "impaired" mean the same thing? The Fourth Appellate District did not think so and ruled that the failure to invoke the proper terminology and present evidence of "impairment" may constitute reversible error.

E. Improper References to Alcohol

Now that we have our definitions and understand the significance of magic words, let us examine the common issues that arise in cases involving evidence of intoxication. We will start by discussing what barred testimony regarding alcohol actually limits. Remember, successfully barring such testimony is only the first step in the process. It is imperative that counsel remains vigilant against even references to alcohol that may bring the specter of the subject to the minds of the jury.

In *Wagner v. Zboncak,*[6] the court considered the dangers of testimony involving insinuations and innuendos referencing the consumption of alcohol in front of a jury. The trial court granted a pre-trial motion *in limine* barring evidence that the plaintiff consumed alcohol on the day of the motor vehicle accident. During the direct examination of the defendant, the defendant testified that the scene of the accident "smelled like a brewery" and that "there were beer bottles all over the place." The Second District ruled that insinuations and innuendoes based merely upon drinking are impermissible without evidence of intoxication. As a result, the court reasoned that even indirect reference of such prejudicial evidence was grounds for reversal, and even a mistrial. *Wagner* therefore presents a clear application of the Drinking Plus Rule. Even suggestions of the presence of alcohol are taboo, unless "impairment" can be shown.

Wagner is also instructive on how to deal with this issue in real time as it arises. The Second Appellate District makes clear in the *Wagner* decision that

objections and motions related to evidence of intoxication may be delayed until the jury has left the courtroom. This prevents further prejudice so that an attorney is not forced to try to object in front of the jury and draw more attention to the prejudicial evidence.

F. Other Intoxicating Substances

The same rules governing the admissibility of evidence of alcohol consumption in civil proceedings also apply to narcotics.

In *Logan v. U.S. Bank*,[7] the plaintiff was crushed by a truck in a workplace accident. Postmortem testing revealed the morphine level in plaintiff's blood was 10 to 20 times higher than the usual range for a person prescribed the substance to address moderate pain. The pharmacology expert in the case described this level of impairment as tantamount to having "molasses on the brain." The court allowed this evidence to be presented to the jury, holding that the laws that apply to the admissibility of alcohol evidence applied to the morphine evidence in that case. Additionally, the court held that very high levels of morphine found in the bloodstream were admissible as a circumstance to be considered by a jury on the issue of whether the plaintiff was acting with due care for his own safety. As the court recognized, such evidence was relevant as due care is a question for the trier of fact.

The *Logan* decision seems to fly in the face of the *Sandburg-Schiller* "Drinking Plus" rule, but it finds support in other cases, including *Sobczak v. G.M. Corp.*[8] The *Sobczak* case dealt with a plaintiff who brought a strict liability claim against General Motors after he was burned by a fire inside of his van. Retrograde alcohol analysis showed that the plaintiff's BAC was consistent with drinking 12-18 beers. Unsurprisingly, the trial court was more open minded to arguments that amounted to a kind of implied or inferred unusual behavior under such circumstances. The expert was allowed to review descriptions of the plaintiff's conduct prior to the fire, which included the plaintiff's unusual movements in the vehicle after smelling the fire, and his refusal to exit the vehicle when it became clear that there was danger. The expert testified that such behavior was unusual behavior and indicative of the plaintiff's impaired judgement.

Are tenuous third-party descriptions and/or inferences about how someone was behaving prior to or during an accident sufficient to meet the "Drinking Plus" standard? The *Sobczak* decision certainly seemed more interested in the plaintiff's very high BAC than it did with the behavior evidence. So, what is the rule? Is it "Drinking Plus"? Is it "Drinking Plus," unless the individual in question was extremely intoxicated with a very high BAC? Although we seem to be without a true brightline test, we do have two cases that get us very close.

G. Now Let's Talk About *Petraski v. Thedos I & II*

No article on the subject of the admission of evidence of intoxication in a civil proceeding would be complete

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without a discussion of the *Petraski* line of cases.[9] The *Petraski* cases represent controlling authority on the issue, and any trial judge will expect to see them cited in briefs when this issue is raised at trial. Even though *Petraski I* & *II* do not provide a bright line test, the cases do frame the rules of engagement for practitioners seeking to admit or exclude such evidence. There is no hiding from *Petraski* on the issue of the admissibility of intoxication issue.

In *Petraski II*, the court held that the granting of a new trial was not an abuse of discretion after the trial court realized that the defendant's introduction of certain evidence of plaintiff's intoxication and impairment was unreliable and prejudicial. The trial court found that given the level of alcohol in the plaintiff's blood, it was speculative for the defense expert to testify to the "possible" effects of alcohol on the plaintiff at or before the time of accident. As clarified by *Logan*, *Petraski II* did not announce a bright-line test, nor did it conclude that the admission of an expert's opinion of impairment would be an abuse of discretion based upon unusually high levels of blood-alcohol content.

The *Logan* decision is extremely helpful in understanding *Petraski*. The *Logan* court announced that *Petraski I* held that evidence of intoxication is relevant to the issue of contributory negligence, and that *Petraski II* did not change that. The court made it clear that *Petraski II* held that being "under the influence of alcohol" may not necessarily be the same thing as being "impaired by alcohol." We should therefore add *Logan* to our required reading list on the subject.

The specific issue raised in *Petraski II* concerned the presumption of impairment in a person without a high BAC test result. The court recognized that the presumption of being under the influence of alcohol due to a BAC over the statutory limit did not necessarily mean that the person was intoxicated according to the definition of impairment. As discussed in *Logan*, *Petraski II* held that when a test reveals an individual's BAC is relatively low, then a trial court does not abuse its discretion when barring evidence that the individual may have been impaired based solely on the BAC test results. The *Logan* court applied the same rationale to its own facts, finding that an unusually high level of intoxication confirmed by test results, say 10 to 20 times the normal level of morphine found in the body of a man being treated for moderate pain, would be grounds to let such test results into the record.

So, what is the rule? Per the First Appellate District's own words in the *Logan* decision, there is no bright-line rule. Does introduction of the evidence of the consumption of alcohol in a civil claim still require meeting the "Drinking Plus" rule? It certainly helps, but in cases concerning very high levels of drugs or alcohol conclusively determined to be in an individual's system, "Drinking Plus" may not be required.

There is no brightline rule for establishing the "Drinking Plus" standard. Instead, courts evaluate intoxication evidence by considering a combination of observable behavior and any available bloodalcohol testing. Although the *Sobczak* decision appeared to place greater weight on the plaintiff's exceptionally high BAC than on the accompanying behavior evidence, the other cases examined in this article illustrate how courts approach this analysis in practice.

III. Practice Pointers

The sections below are practical recommendations for how trial lawyers can successfully navigate discovery, pretrial motion practice, and trial where the admissibility of the consumption of alcohol is an issue in the case.

A. Depositions

"Impairment" is our magic word. No matter the level of intoxicating substance that is revealed in the test results, the standard never changes. If the probability of impairment cannot be established, then the evidence will likely be excluded.

If you are seeking the introduction of evidence of intoxication, then you need to develop appropriate facts to lay a proper foundation for impairment opinions. You should aways try to secure evidence of the type of drugs or alcohol consumed, as well as the amounts of the substance(s) consumed. A witness that can describe how a party was acting before and during the occurrence will be very important to prove impairment and unusual behavior. In every case, strive to meet the "Drinking Plus" test, even if the individual has a very high BAC. At an absolute minimum, disclose expert opinions that include the magic word "impairment."

If you are seeking to exclude the evidence, then attack the relied upon facts and the foundation of the opinions offered by the experts and occurrence witnesses. Challenge any witness that offers estimates or opinions based solely on test results. If the occurrence witnesses testifying to pre-accident behavior cannot be sure that the party in question was truly intoxicated, make the witness admit that fact. If an expert witness does not have facts of the pre-accident conduct or behavior in question, make the witness admit that fact. If the BAC results are relatively low, make sure the judge is educated on *Petraski II* and *French*, and that "under the influence" does not necessarily mean the same thing as "impaired." If an expert cannot testify to a reasonable degree of medical certainty that the individual was impaired, then that becomes the centerpiece of your attack in depositions and in motion practice.

Your ability to admit or exclude intoxication evidence will ultimately depend on the facts developed in depositions. Unless the BAC results are extremely high or extremely low, judges tend to rely heavily on expert testimony and factwitness observations, meaning

you begin winning or losing this issue the moment depositions start.

B. Motions in Limine

The party seeking to exclude evidence of intoxication should file one or more motions in limine on this issue prior to trial. These motions will be heavily contested by the other side, so be prepared to argue the facts and the case law in detail.

First, the motions should have a written brief supporting your position. You should cite multiple cases and not merely rely on just one case that you believe is favorable. You must address the *Petraski* cases. If the *Petraski* cases are bad for you, distinguish them or point to better alternatives, but do not ignore them. The judge or opposing counsel will almost certainly discuss *Petraski*, so be ready to discuss the cases one way or the other. You should also reference the jury instructions in your brief, as a judge is going to put a lot of weight on arguments anchored to standard instructions that will be given to the jury.

If a motion to exclude evidence is granted, it is important to make sure that both direct and indirect evidence is excluded from the record. BAC tests, field sobriety tests, and bodycam footage are obvious types of evidence to exclude, but you should also request that the judge warn the parties that indirect references to alcohol are also disallowed under the reasoning in the *Wagner* case. In some cases, it may be necessary to advise the court that you will seek a mistrial if the order is violated you so that the other side is aware of the gravity of the issue, and does not try and play fast and loose with the ruling.

C. Voir Dire

Trial lawyers should recognize that drinking and driving is a lightning rod issue that should be addressed during *voir dire* if the judge has allowed the evidence into the case. Even if a potential juror does not have strong personal feelings about drinking and driving, they are unlikely to admit this in a courtroom. The reality is that there are no positive conversations to be had on this subject. Therefore, your best bet is to use *voir dire* to screen out potential jurors that have preconceived negative opinions of alcohol, or direct personal experiences where alcohol has caused damage in their lives. A good opening question is "Do you have strong feelings about drinking and driving or alcohol in general?".

If a potential juror who has suffered a personal loss due to drunk driving is discovered on the panel, the best thing to do is to be empathetic and swiftly move on. Avoid asking the potential juror to publicly share too many details about their tragedy. Simply establishing that they have a personal tragedy in their past related to alcohol or drunk driving is likely sufficient. From there, the conversation should then be taken into chambers so that additional facts about the negative experience can be discussed in a more private setting. Next, you should ask the potential juror whether they can see past their own individual experi-

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ences and render an unbiased decision based solely on the facts presented in the present case. If the answer is no, then this should allow you to pursue a "for cause" challenge against the potential juror, allowing you to save a very valuable peremptory challenge.

The risks described in this section should be a warning to litigators considering putting a case involving a drunk driver in front of a jury. If you represent a defendant that caused injuries while intoxicated, the end of *voir dire* is a good opportunity to reconsider going to verdict. If every panel has at least one potential juror describing a personal tragedy related to drunk driving, then your entire panel may be poisoned even if you succeeded at getting an individual potential juror struck for cause.

D. Objections at Trial

The case law is littered with decisions where appellate courts reversed lower court rulings on the issue of admissibility of evidence of intoxication. The *Petraski* line of cases is the perfect example of how monumental this change can be once the appellate court gets involved. In *Petraski I*, the jury ultimately found for the plaintiff and awarded her $35,835,684 (reduced down to $26,876,763 after a finding of 25 percent contributory negligence). The verdict was appealed, which resulted in the *Petraski II* trial where the evidence of alcohol consumption was admitted. The jury in *Petraski II* then found for the defense, erasing the plaintiff's $27 million jury victory in the first trial. The reversal of fortunes in the *Petraski* cases demonstrates the significance that this evidence has on a jury.

The *Petraski* cases also illustrate the importance of maintaining proper objections before, during, and after the trial. Because there is no bright-line rule on this issue, making proper objections, at the proper time, is critical in maintaining your client's future rights to appeal.

If the court decides to admit evidence of intoxication during pre-trial motions, then the first objection should occur before the opening statement is even made. If you believe that the judge has improperly allowed the admission of evidence of alcohol consumption, then you must make sure that you do not "open the door" to that evidence yourself. Smart trial lawyers know to get in front of difficult facts during opening statements. That said, by front running the introduction of facts related to alcohol, you have introduced the evidence voluntarily and have therefore waived any objections on this issue. The best practice is to make a continuing objection to any reference to alcohol during the pendency of the trial before the jury enters the room. Clarify on the record that any discussion of alcohol is made over your objection, including your own discussion of alcohol during the trial, and that your discussion of the admitted evidence does not constitute a waiver of your ability to appeal the issue.

If a court has excluded evidence of alcohol consumption and a party raises it at trial in violation of a motion in limine, do not feel obligated to immediately object. Such objections run the risk of highlighting the issue to the jury. If the trial is otherwise going well, you may want to consider a rehabilitative instruction from the judge instead of a motion for a mistrial. Remember, *Wagner* makes it clear that you can make sensitive objections outside the presence of the jury. If you feel the issue needs to be addressed immediately, then ask for a side bar or recess. Don't jump out of your chair and turn a potential spark into a lightning rod.

Finally, if evidence of intoxication is plead as an affirmative defense and the defendant fails to prove "impairment," you must make a motion for a directed verdict against the affirmative defense prior to closing arguments. This is the most effective way to present an appealable issue, as evidence will be closed at that time, and the court will have the full facts in the record for consideration. If there is no evidence is in the record that demonstrates "impairment," you should have a clean issue for appeal. It is also advisable to file a similar post-trial objection after the verdict.

IV. Conclusion

Although alcohol has its place in our society, only the willfully blind can ignore the damage that it causes every day. For some, the negative consequences of alcohol have been minor. For others, alcohol has destroyed their lives. Your jury will probably have some members from both sides of the spectrum, and certainly many in between.

Plaintiff lawyers should seriously consider taking a case when they learn that their perspective client had been drinking alcohol prior to the accident. Even if their alcohol consumption was not a cause of the accident, the specter of the intoxication affirmative defense will haunt the case and make settlement practically impossible. That said, there is a direct correlation between value and appetite for risk. If a plaintiff is seriously injured by a party with significant assets or insurance coverage, then the risk assessment probably inverts in favor of taking the case. But understand that such thinking is nothing more than part of the value proposition – The risk does not go away, or even really change, because even the most valuable potential claim can still be a zero when you ask twelve strangers to decide the outcome. On the flip side, defense lawyers representing a drunk driver who caused injuries should take a long, hard look at the policy limits of their insured before letting a plaintiff file a complaint. It is usually better to overpay on the case than it is to risk exposure to a bad faith claim if a jury comes back with an outsized award.

Petraski I generated a $27 million verdict and *Petraski II* reversed to a defense verdict. Long and costly appeals followed each trial. Whether you are

on the plaintiff or defense side of a case involving alcohol, these outcomes should always remain front and center in your mind because they are not just an example of what can happen, but what *did* happen.

Endnotes

[1] https://www.nhtsa.gov/sites/nhtsa.gov/files/tt392.pdf.

[2] 90 Ill. 61, 1878 WL 10108 (1878).

[3] https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813560.

[4] 119 Ill.App.3d 318 (1st Dist. Dist. 1983).

[5] 5 Ill.App.3d 368 (4th App. Dist. 1972).

[6] 111 Ill.App.3d 268 (2nd App. Dist. 1982).

[7] 2016 IL App 152549 (1st App. Dist.).

[7] 373 Ill.App.3d 910 (1st App. Dist. 2007).

[9] *Petraski I*, 382 Ill.App.3d 22 (1st App. Dist. 2008), *Petraski II*, 2011 IL App 103218 (1st).

Nick Williams *is a trial attorney in practice with his wife, Stephanie Shay-Williams, and father-in-law, Tim Shay, at Shay Law in Springfield and Decatur. Nick was previously the long-tenured CEO and General Counsel of two large, private-equity backed, multistate healthcare platforms.*