



Experts Are Important In Liquor Liability Cases

QUALIFICATIONS OF TOXICOLOGISTS, SECURITY PERSONNEL CAN VARY WIDELY

By JAN C. TRENDOWSKI

In 2003, the damage cap in the Dram Shop Act increased from \$20,000/\$50,000 per incident to a \$250,000 global cap. Cases which previously weren't worth bringing all of a sudden were often the primary source of recovery in many auto collision cases.

As the frequency of claims increased, more suits were tried rather than settled. Further, the injuries from alcohol-fueled collisions and assaults tend to be horrific, and the trials are high-stakes ventures. Trying a liquor liability suit is complex and is more and more reliant on expert witnesses to establish and dispute different aspects of the liability issue.

Further, while liquor liability trials have traditionally focused solely on the amount of alcohol served, the focus now is more on preventative measures and training for both service employees and security staff. The following are the types of experts who have been appearing more frequently in Connecticut liquor liability cases:

Toxicologists: Toxicologists have been retained for years to interpret blood alcohol readings, particularly to explain and translate whole, serum, and metric test results. Two newer areas of opinions are "reverse extrapolation" and "behavioral signs." Unlike a criminal case, a blood alcohol reading alone is insufficient to establish intoxication in a civil case. *Coble vs. Maloney*, 34 Conn. App. 655 (1994).

A toxicologist is generally necessary in

all but the most egregious cases to opine as to the level of intoxication at the time of last service. All toxicologists are not alike, however. Understand that while we are dealing with the relatively narrow area of the effect of alcohol on the human body, the field of toxicology encompasses all aspects of the effects of chemicals on the body. Further, most toxicologists are not employed in alcohol-related areas. The first, most obvious, step in evaluating the toxicologist is to run them on Google and see where they've been and what they've written. Many toxicologists work in testing the effect of medicines or industrial chemicals on the human body and have little, if any, experience with the effects of alcohol. In a recent case, the plaintiff's toxicologist had written and done extensive research in toxicology, but all on the effect of dust on carpet cleaners.

There is also a significant distinction between research and clinical toxicologists. As we are generally talking about outward signs, a toxicologist affiliated with a poison center or emergency room will have a greater practical basis to explain the effects of alcohol on behavior than one who never left a lab.

Finally, as regards reverse extrapolation, i.e., how did a person look at the time of service based on a blood test taken several hours later, is the toxicologist using a curve or straight-line analysis? You will find that medical toxicologists will testify that outward signs and blood alcohol levels rise, peak, and decline over time after consumption, while a research toxicologist will use a straight line analysis by simply deducting drinks metabolized from drinks consumed and describing signs for a person at that level. Drink volume, rate of consumption, absorption rates, and metabolic rates are all

critical factors in determining a patron's intoxication level at any particular point in time.

Further, a toxicologist who is experienced with alcohol testing can discuss the difference

between forensic and serum blood testing, urine tests versus a breathalyzer, and vitreous fluid versus metric testing.

Security Expert: There is some debate as to what credentials qualify a security expert. The subject matter in a liquor liability case is the sufficiency of staffing and training for a particular locale. I have seen qualifications range from ex-police and military personnel who can evaluate environmental design factors to an electrician who worked part time in a bar five years prior to the trial. That same electrician stated on direct that he did not consider himself an expert in security, but was allowed to testify as an expert anyway.

Common credentials for a qualified security expert include Certified Protection Professional (CPP) and a Certification in Patron Management (CPM). As the level of training at establishments lags behind classic security training, a security expert will almost always testify that security was deficient. The defense position benefits from the lag, however, as while there are many security experts, few have the knowledge and experience applicable



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to liquor establishments. An expert with the educational and training background, along with the “hands-on” experience with liquor establishments is preferred over a generalist. An excellent starting point for a security analysis in any particular case is the book, “Premises Liability Litigation,” by Chris McGoey.

Is a security expert necessary? Decisions across the country are split on the issue. In the District of Columbia, a security expert is legally required to establish both the standard of care and the breach of the standard of care. See *Varner vs. District of Columbia*, 891 A.2d 260 (2006) and cases cited therein. In Connecticut, there is no appellate or trial court decision *requiring* the use of a security expert, though several decisions apparently considered such experts to be helpful.

In *Service Road Corporation vs. Quinn*, 1996 Ct. Sup. 3799, the court based its decision in part on a security expert’s testimony that the placement of security cameras was “absurd.” In *Burban vs. Hill Health Corp.*, 2006 Ct. Sup. 22302, the court refused to grant the defendant’s motion for summary judgment, again relying in part on the fact that the plaintiff’s security expert had testified that the plaintiff was in a particularly vulnerable position at the time of an assault which should have been foreseen.

Finally, in *Rodriguez vs. Bridgeport*, 2002 Ct. Sup. 12140, the court held against the

plaintiff on an assault claim, stating that, “The court has no idea how large a security force would be necessary to better protect students from acts of isolated violence, and it cannot guess at that number. The plaintiffs have produced nothing to establish what the proper standard of care is so that a court could evaluate whether the standard has been met or violated.”

Safe Alcohol Service Expert: Safe alcohol service training programs have been around since the 1980s. The national programs are referred to by acronym, such as TIPS (Training Intervention Procedures for Servers), TAM (Techniques of Alcohol Management), SMART (Server and Manager Alcohol Responsibility Training), etc. Additionally, some of the larger restaurant chains use various in-house programs.

This is the one expert, however, who can pull the toxicological and security testimony together. A qualified standards expert can discuss house policy, the types of outward signs a server should be looking for, the amounts of alcohol in particular drinks, and what type of procedures should be in place. Note that a factor as simple as drink size can have a profound effect on the alcohol analysis. A generic martini may contain as little as 2 ounces and as many as 9 ounces of liquor depending on the server, glass size, etc.

The service standards experts themselves tend to run the gamut, from bartenders who have simply taken one or more of

the courses (servers), to people who teach the programs (trainers), to people who train the trainers (master trainers). There also are those experts who have actually created national programs or have the experience of having a liquor license in their own name.

Safe Service experts will evaluate written service guidelines, testify on the necessity for training, and render an opinion on whether the server’s actions were within the standard of care for the hospitality industry. Whether or not the expert has ever trained others and, indeed, whether they’ve ever taken a program themselves, is significant. A number of service experts also tend to be trained in other fields, such as state liquor agents, security personnel, or restaurant management, which does not necessarily translate into service knowledge.

Like many attorneys, I locate experts through a variety of sources, the main source being the internet. Various attorneys’ groups, such as the AACJ and DRI (Defense Research Institute), along with their Connecticut counterparts, the Connecticut Trial Lawyers Association and the Connecticut Defense Lawyers Association, have expert referral services. Non-referral expert companies, such as Robson Forensic (www.robsonforensic.com) and others will often evaluate a particular case if requested to determine what experts, if any, would be helpful. ■