

# Can a Forensic Toxicologist Ease Your Pain?

People sometimes make poor decisions, with catastrophic consequences. As trial lawyers, we seek to learn what happened and why it happened. Investigation of whether a driver was impaired at the time of an accident, by legal or illegal substances, is an important, if not elementary, consideration. Drugs (illegal and legal, including alcohol) are often involved when people get hurt. When

impairment or intoxication issues impact a case, a forensic toxicologist may ease a litigator's pain.



By Timothy D. Lange

## Intoxication Issues are Relevant to Liability, and Much More

Intoxication can impact a case in myriad ways:

- Insurance coverage can be impacted by the particular conduct of the insured.

Particular attention to policy exclusions should be made. Policy language may attempt to reduce or exclude coverage when intoxication is involved. See *Hodgin v. Allstate Insurance Company*, Ky App., 935 S.W.2d 614 (1996).

- A defendant's intoxication relates to liability and the character of damages that may be recovered. In addition to compensatory damages, punitive damages can be awarded against the intoxicated driver under a theory of gross negligence. See *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998).
- Whether or not the defendant was under the influence of drugs or alcohol when operating a motor vehicle also determines whether a judgment resulting from that impairment is subject to

discharge under the Bankruptcy Code. *11 USC Sec. 523 (a)(9)*.

- Comparative negligence considerations loom over the plaintiff. The drunken plaintiff, or the drugged plaintiff, is at best, a complicating factor in any given case. At worst, it may leave no case, excepting, perhaps, one against the intoxicated plaintiff!

## What Can the Forensic Toxicologist Do for the Case?

The Society of Forensic Toxicologists defines this expert as a scientist engaged in the analysis of biological tissues and fluids for drugs and/or poisons and who interprets the information generated from these analyses in a judicial context.<sup>1</sup> This expert should be able to assist you in reviewing and understanding pertinent medical records and/or test results, whether conducted by medical providers or governmental authorities. He or she will likely also want to review records of any related criminal prosecution and other witness accounts that may provide information as to the appearance and conduct of the person suspected as impaired.

As to specific issues that this expert may be able to address in the case, he or she may provide support with respect to the following considerations—and may suggest others as well:

- The effects of substances on judgment and critical thinking skills.
- The effects of substances on reflex and response times, as well as motor skills.
- The effects of substances on the ability to feel and perceive pain.
- The combined effects of drugs (including alcohol).

For instance, cocaine and alcohol combine to form cocaethylene, a substantially different drug than either alone. Cocaethylene produces a substantial increase in euphoria in excess of that of cocaine, is suspected to increase risk of

Tim Lange, a Contributing Club member, is an attorney with Benson Byrne Risch Siemens & Lange, LLP in Louisville. He may be reached at (502) 583-8373 or [tlange@timlange.com](mailto:tlange@timlange.com).

sudden death, and has a longer duration of action in the brain, per the National Institute of Health's National Institute of Drug Abuse.

- The duration of time that alcohol or drug ingestion will yield intoxication and impairment of an individual. Some substances will no longer be active to produce impairment in an individual, despite being present in detectable amounts in blood, hair, or urine samples. Tests, which quantify the amount of the drug present in the individual, provide some room for interpretation with respect to impairment levels.
- Differences in impairment of individuals who use a particular drug (again including alcohol) who are chronic or long-term users, as opposed to occasional users. For example, heavy drinkers are able to compensate with their behavior, perhaps appearing as functioning more "normally" to the observer, than would occasional drinkers with the same blood-alcohol level.
- Medical issues impacting intoxication or drug retention. For instance, persons with liver or kidney problems may retain higher levels of concentration of a substance in their bodies because of a resulting decreased ability to process the substance out of their system.
- Inadequacy of testing mechanisms. Some tests are more reliable than others. Some will detect the presence of a substance, but cannot quantify how much of the substance was present. This may prohibit testimony as to impairment of the individual, or as to the fact that a test was conducted, given the potential for unfair prejudice that a positive test for illegal drugs may generate under a KRE 403 analysis.
- False test results. In the event that a false test result is suspected, the forensic toxicologist may be able to

explain how or why inaccurate results could yield from a particular testing procedure. Substances such as hemp seed oil (with respect to marijuana) or poppy seeds (with respect to opiates) are argued to provide false results in some drug testing procedures, as are a host of over-the-counter or other legal drugs/substances. Contamination, mishandling of the sample, or other defective test procedures may also impact the case.

### **What Credentials Exist for an Expert in Toxicology?**

Forensic toxicologists can have many different specialties and backgrounds. Some are physicians, with specialties in forensic pathology or other related areas of practice. Non-physician experts similarly can have different backgrounds—some have degrees in biochemistry, pharmacology, toxicology, environmental sciences, or related specialty fields. Desirable credentialing for the non-medical doctor may require the expert to possess a Ph.D. in his or her particular field of practice.

When seeking this expert, industry resource organizations may assist in your selection. Among them, the Society of Forensic Toxicologists, the International Association of Forensic Toxicologists,<sup>2</sup> and the American Board of Forensic Toxicologists are

non-profit entities promoting the science of forensic toxicology. Board Certification exists for toxicologists as well as testing labs by the American Board of Forensic Toxicologists.<sup>3</sup> These organizations have different, and some liberal, membership criteria.

As always in your selection of the appropriate expert, be advised to seek references from fellow KATA members or other counsel having previously worked with the expert. Use KATA's ListServ to network and discover helpful information about the expert. Request references and background information on any expert with whom you are interested in working. Confirm the pertinent schedule of fees and document terms concerning payment and billing before engagement. Clearly convey your case timetables with respect to discovery and trial, and leave ample time for the scheduling and preparation of this expert for his or her discovery and trial depositions. Remember, experts can make or break your case. Choose wisely!

<sup>1</sup> The Society of Forensic Toxicologists maintains an informational Web presence at [www.soft-tox.org](http://www.soft-tox.org).

<sup>2</sup> The International Society of Forensic Toxicologists maintains an informational Web presence at [www.tiaft.org](http://www.tiaft.org).

<sup>3</sup> The American Board of Forensic Toxicologists maintains an informational Web presence at [www.abft.org](http://www.abft.org).





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