

DRAM SHOP LIABILITY

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INTRODUCTION

The phone rings and the receptionist tells you there is a potential new client on the phone. The caller tells you two family members are in the ICU of a local hospital. They were hit by a drunk driver last week. The doctor has told the family if they survive, they will face a long road to recovery which will take months, if not years. The insurance company for the drunk driver has already called the family. The driver has minimum limits which they will pay for a full release. There is no UIM coverage. Is there anything you can do to help? You tell them there are no guarantees, but you will do what you can.

Many dram shop cases begin under similar scenarios. In most situations there is no need to take on the difficult task of establishing dram shop liability if there is adequate automobile coverage. In those cases where there is little or no automobile coverage and significant damages, dram shop liability can be the difference between a lifetime of physical and financial struggle or the resources a client needs to put their life back together.

This paper will discuss some of the issues that may arise early in a potential dram shop case.

HISTORY OF DRAM SHOP LIABILITY

The common law generally did not recognize the responsibility of those who furnish alcohol for injuries caused by someone who consumed it. Under the common law rule it was not a tort to either sell or give alcoholic beverages to ordinary able-bodied persons, and no cause of action existed against one furnishing alcohol in favor of those injured by the intoxication of the person who received it. The reason usually given for this rule was that the consumption of the alcohol, not the remote furnishing of it, was the proximate cause of the injury. See 48A C.J.S., Intoxicating Liquors, § 430 (1947); 45 Am.Jur.2d, Intoxicating Liquor, § 553 (1969) 97 A.L.R.3d 528, § 2 (1980).

The common law rule was succinctly stated in the off-quoted passage from *State for Use of Joyce v. Hatfield*, 197 Md. 249, 254, 78 A.2d 754, 756 (Md.App.1951):

Apart from statute, the common law knows no right of action against a seller of intoxicating liquors, as such, for “causing” intoxication of the person whose negligent or willful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between the sale of liquor and a tort committed by a buyer who has drunk the liquor.

As public awareness of the problem of drunk driving grew, courts and state legislatures became more receptive to the notion of holding those who furnished alcohol responsible for at least some of the harm caused by those who consumed it. Many states legislatively enacted a “Civil Damages Act” or a “Dram Shop Act,” which statutorily provided a cause of action for injuries resulting from the sales of alcoholic beverages to intoxicated customers who injure third persons. However, many of these statutes limit (1) the class of plaintiffs who may recover; (2) the maximum monetary recovery available; and (3) the period of limitations during which action may be commenced.

For example, the North Carolina Dram Shop Act (N.C.G.S. § 18B-302) limits the action to those who sell or furnish of alcohol to persons under 21 years of age and contains a damages cap of \$500,000. Statutory dram shop claims are also subject to a 1 year statute of limitations rather than the usual 3 year statute for personal injury claims.

Most state and federal courts that have considered the issue of dram shop liability since 1960 have rejected as patently unsound the rule that a seller cannot be held liable for furnishing alcoholic beverages to an intoxicated or minor patron who injures a third person on the grounds that sale or service is causally remote from the subsequent injurious conduct of the patron. A substantial majority have decided that the furnishing of alcoholic beverages may be a proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person, and nearly every court recognizing such a claim for relief against a licensed vendor has premised the action for negligence upon the violation of statutes imposing a duty upon licensees to refrain from selling or serving alcoholic beverages to a visibly intoxicated person.

Some states, such as North Carolina, have also recognized common law dram shop claims as well as social host liability for the furnishing of alcohol to intoxicated persons. The essential elements of the common law cause of action are well summarized in *Smith v. Winn-Dixie Charlotte Inc.*, 142 N.C.App. 255, 542 S.E.2d 288 (2001).

A plaintiff may maintain a common law negligence action against a defendant who furnished alcoholic beverages to a third party provided the plaintiff presents substantial evidence to satisfy all elements of a common law negligence suit, that is, duty, breach of duty, proximate cause and damages. *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 202, 505 S.E.2d 131, 135 (1998). Generally, a defendant has a duty “to exercise that degree of care which a reasonable and prudent person would exercise under similar circumstances.” *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). A defendant who furnishes alcoholic beverages to third-parties breaches this duty of reasonable care owed to people who travel on the public highways, when it furnishes alcoholic beverages

“to a noticeably intoxicated person who is going to drive [a motor vehicle].” *Mullis* 348 N.C. at 201-02, 505 S.E. 2d at 135. Thus, the test for whether a defendant has, by its furnishing of alcoholic beverages, breached a duty to individuals traveling on the public highways consists of two parts. In order to prevail on the element of duty, the plaintiff must present substantial evidence the defendant: (1) furnished alcoholic beverages to someone the defendant knew or should have known was “noticeably intoxicated,” and (2) the defendant knew or should have known this “noticeably intoxicated” person was going to drive a motor vehicle. Evidence the defendant knew or should have known a person was “noticeably intoxicated” might include, but is not limited to, such outward signs of intoxication as slurred speech, lack of control over body motions, and an odor of alcohol. *Id* at 204, 505 SE2d at 136.

Many other states have similar causes of action. Common law claims are generally not subject to the damages limitations in the dram shop statutes nor to the shortened statute of limitations.

EARLY INVESTIGATION IS ESSENTIAL

How do you prove that a patron was “noticeably intoxicated” at the time they were furnished alcohol? Successful prosecution of a dram shop case is often dependent on an early and thorough investigation. Crucial evidence will be lost if steps are not taken to ensure it is preserved. An early investigative challenge can be as fundamental as determining where and when the impaired driver consumed alcohol.

We were faced with just that challenge in a recent case. A husband and wife were severely injured when their vehicle was struck by another vehicle driven by a drunk driver at a very high rate of speed. The drunk driver had lost control of his car while driving approximately 95 mph in a 45 mph speed zone. The adverse driver was killed in the collision. A record check revealed he had a prior conviction for driving while impaired. Not surprisingly, he had minimum limits of liability coverage. Initial toxicology studies showed the deceased driver had a blood alcohol content of .23. He was wearing a uniform that suggested he was a waiter in a restaurant or bar. That was all of the information available to us.

Obviously, there was no way to find out from the deceased driver where he had been drinking. Even if he had not died, we would have been unable to depose him until any pending criminal prosecution was complete. An internet search revealed the deceased drunk driver had a Facebook page. The page contained an announcement that there would be a “celebration” of his life at a local tavern. We arranged for a friend of the injured clients to attend the event. That friend learned where the deceased had been drinking immediately prior to the wreck from talking to others attending the event. We were also able to learn where he worked.

Once we had identified the restaurant/bar, we visited the establishment and determined they had video surveillance cameras throughout the dining and bar areas. We then did two things. First, we immediately sent a spoliation letter to the bar demanding that they preserve all video images recorded on the surveillance system along with all register receipts, credit card receipts, and

employee time record. A copy of that letter appears at the end of this paper. We sent a similar letter to his employer.

Next, we filed suit against the estate of the deceased driver so that we could subpoena the video surveillance images and other materials listed in the spoliation letter. With those items in hand we were able to establish that he had left the bar only 3 minutes before the collision and that he had consumed multiple drinks over a 2 hour period. We then amended our complaint to name the bar as a defendant.

The video surveillance system at the bar only stores images for 30 days. Had we not acted quickly those images would have been lost forever and we would never have been successful in proving our claim. In discovery, the bar produced a receipt that only revealed some of the drinks the drunk driver had consumed. The bar then claimed that some of the drinks on the receipt had been served to other customers and that the deceased was only served 2 beers and 2 shots of liquor the entire evening. Based on that evidence there was no way we could establish he would have been noticeably impaired at the time the last drink was served. Analysis of the video later showed that in fact he had been served no less than 10 drinks in 2 hours. That evidence, combined with the testimony of a toxicologist, enabled us to prove he was in fact noticeably impaired before the last drink was served.

Video surveillance images also proved crucial in another case. We represented a 4 year old child who was severely brain damaged after being in a collision with an impaired, underage driver. We had information that he had purchased alcohol at a local convenience store that was part of a large chain. The store denied that he had purchased alcohol there or that he had even been in the store that night. A review of the raw video images failed to demonstrate the sale of alcohol to him. We then retained a forensic video analyst who was able to isolate images on the surveillance tape which clearly demonstrated the man in the store and the sale of alcohol to him.

The importance of obtaining all video images cannot be overstated. Do whatever it takes to get them.

Other sources of information that need to be contacted immediately include the investigating police officer and the local alcoholic beverage control officer. ALE officers often conduct their own investigation following alcohol related crashes. They may have conducted interviews of the bartender, waiter or manager of the facility. The investigating/arresting officer may have video of the drunk driver's behavior at the scene of the crash or may have been able to obtain admissions from the driver as to where he was drinking and how much he had consumed.

Another valuable source of information can be the on-line version of the local newspaper. In the case involving the deceased driver, there had been an article written about the crash which was also published on line. While the article contained some useful information, the comments that had been posted after the article proved much more informative. First, it was essentially an early focus group in that the comments revealed a wealth of information about public attitudes in that area regarding who should be held responsible when a patron is overserved and causes serious injury as a result. Second, friends of the deceased had posted comments in an effort to defend his actions which revealed more information about his activities the night of the crash.

ASSEMBLE YOUR EXPERT TEAM

Before formal discovery is complete assemble your expert team. In addition to the usual experts needed for any personal injury case, most dram shop cases will require both a toxicologist and an expert in responsible alcohol retailing practices.

The toxicologist will be needed to calculate blood alcohol levels at various times based on known consumption. They can also establish what outward signs of intoxication would be present at various alcohol levels. For instance, in one case we knew from the video and documentary evidence the quantity of alcohol furnished as well as the time each drink was served. From that evidence our toxicologist was able to testify that based on estimated blood alcohol levels he would have been noticeably impaired prior to the last drink service.

A toxicologist can also calculate blood alcohol levels at various times based on a known blood alcohol level at a later point in time. In the case involving the child referenced above the defendant fled the scene of the wreck and was not arrested until 6 hours later. By the time he was given an intoxilyzer test his blood alcohol level was zero. Our toxicologist was able to calculate that his blood alcohol level could have been as high as .18 at the time of the sale and still be zero and the time the last was administered. With that testimony, the video from the store and the testimony of friends who had seen him immediately prior to entering the store we were able to establish his intoxication at the time of the crash and noticeable intoxication at the time of the sale.

Jurors may be hesitant to hold a restaurant or convenience store owner responsible for the conduct of a low level employee who the defendant will claim was acting on their own or contrary to policy. An expert in responsible alcohol retailing practices can assist in establishing that the sale in this instance was not an isolated event but that the facility failed to have reasonable policies in place regarding the service of alcohol, that they failed to enforce the policies that they did have and that the employees had not been properly trained to assess a customer's level of intoxication.

It is essential to obtain all past or current employee handbooks, manuals, training manuals, policies, guidelines, instructions or other training videos that relating in any way to the sale of alcoholic beverages. In many cases, the bartender or waiter will have violated the restaurant's own written policies at the time of the sale in question.

CONCLUSION

There are simply not enough police officers or alcohol law enforcement officers to ensure that every bar or restaurant implements and follows responsible alcoholic beverage retailing practices. Dram shop liability acts as a deterrent to those who would risk the lives of the general public in order to increase their own profits.

The pursuit of legitimate dram shop actions benefits not only the injured client but the public as a whole. With good case selection, thorough investigation and the proper expert witness team, pursuit of a dram shop claim can be a very rewarding experience.