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Coglin's Law: Beer is for Breakfast—Drink or Be Gone!
Liquor Liability and Defending Dram Shop Cases

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Overview

According to the Centers for Disease Control and Prevention (CDC), excessive alcohol use was the cause of more than 140,000 deaths each year between 2015-2019, or more than 380 deaths per day.ⁱ This cost United States citizens more than \$259 billion in 2010.ⁱⁱ One of the CDC recommendations for addressing these issues is stringent enforcement of regulations governing the sale and service of alcohol, including those that shift liability and costs to those that sell or provide alcohol.ⁱⁱⁱ While statutes, regulations and common-law principles vary by State, many have enacted specific “dram shop acts,” under which bars, restaurants and others who provide alcohol may be liable for damages caused by a person to whom they sold or served.

In this presentation, the panel will discuss the history of dram shop legislation, the differences that can exist across jurisdictions, best practices in defending dram shop cases, and the potential intersection between criminal and civil laws concerning alcohol-related incidents.

Dram Shop Liability

History

A dram shop is an establishment that sells alcoholic beverages, such as a bar, brewery, winery, liquor store, convenience or grocery store, or restaurant. Traditionally, spirits were sold by the “dram,” which is a small unit of liquid volume. Dram shop statutes, or dram shop *liability*, generally refers to the body of law which governs the liability of those that sell or serve alcoholic beverages.

At common law, most States did not recognize a cause of actions against alcohol sellers. The prevailing rationale behind the non-liability rule was that the consumption of alcohol, rather than its sale or service, was the proximate cause of any injuries caused by intoxicated persons. However, sensibilities in the United States changed, and dram shop laws began to find their way into our common law in the late 1800’s, largely in response to a strong temperance movement throughout the country. Common law rules were further brought into question by “the shift from comingling alcohol and horses to commingling alcohol and horsepower,”^{iv} and the perceived need to shift responsibility to those who may be able to better compensate injured persons for damages caused by intoxicated persons, which was and is most often—drunk drivers.

As public awareness of the problems associated with drunk driving grew, courts and state legislatures began to be more receptive to liability theories that held those who provided alcohol responsible for damages caused by those who became intoxicated by it. Today, legislatures and courts in most states have abrogated the common law to allow dram shop claims and legislatures in in at least thirty states have statutory provisions that allow licensed establishments to be liable for selling or serving alcohol to those who cause harm as a result of intoxication.^v

Variances in State Laws

Twenty-two states currently limit dram shop liability to cases where a licensed provider served or sold alcohol to an intoxicated individual or someone under the legal drinking age.^{vi} Statutes in Louisiana exempt providers from liability except in cases where they served an underage person, and Nevada and South Dakota exempt licensed establishments from liability altogether.^{vii}

Dram shop laws vary widely, and many statutes limit the class of plaintiffs who may recover, provide shorter periods of limitations on bringing actions, and many also contain damages provisions “capping” the maximum

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monetary recovery. For example, some States, like Colorado, limit dram shop actions to third-parties who were harmed by an intoxicated person, but preclude the intoxicated person themselves from recovering.^{viii} Other States, like New Mexico, allow an intoxicated person to sue the provider of alcohol, but provide a higher burden of proof than what is applicable to a third-party claim.^{ix} Most States, like Arizona, Colorado and New Mexico, require that the provider serve a “visibly” or “obviously” intoxicated person before liability can be imposed on the alcohol provider. However, some states, like Illinois and Alabama, require that a plaintiff simply show that the alcohol provided to the patron caused or contributed to the plaintiff’s injuries.^x

As noted above, some States only provide an action for the sale of alcohol to a minor, and others make licensed providers of alcohol immune from liability. Many States also limit the applicable statute of limitations in dram shop actions considerably. For example, Colorado’s limitations period for damages allegedly caused by the sale or service of alcohol is one year.^{xi} Other State statutes, like Connecticut, include the additional hurdle of a special notice provision, whereby a plaintiff must give written notice to the alcohol provider within a specific time frame before suit may be brought against the provider.^{xii}

In many States, the dram shop statute is the sole remedy for which a plaintiff can recover from a licensed provider based on serving or selling alcohol to a patron, while in other states, plaintiffs may also recover under common law theories of negligence or under violations of other statutes.^{xiii} For example, in Florida, an alcohol provider may be held liable for violating a duty to safeguard customers from “extreme danger” on a premises that is caused by a patron’s intoxication.^{xiv} Many States also provide damages caps, which can operate to further limit the liability of the licensed provider. In Colorado, the current cap on damages is \$368,260.^{xv} These caps usually apply per claimant and are periodically adjusted by State legislatures to address inflation.

Because State dram shop laws vary greatly, it is important to know and understand the laws in your jurisdiction. Thus, a great deal of the presentation which these materials accompany will be dedicated to an illustration of the differences in state laws and their “real-world” application in practice.

Defending Dram Shop Actions

As noted, most dram shop statutes don’t allow actions simply for service of alcohol but require proof that the patron was “visibly,” “obviously” or “noticeably” intoxicated.^{xvi} Thus, the central theme in most dram shop actions is how a plaintiff may prove that a patron was “visibly” intoxicated at the time they were furnished alcohol. Because direct evidence of the patron’s presentation and intoxication at the time of service is often lacking, courts do not usually require “direct” evidence of intoxication in order for the plaintiff to prove their case.^{xvii} Thus, other extrinsic and corroborating evidence often plays a large role, and the successful defense of a dram shop claim is often dependent on an early and thorough investigation of the claim and incident and the preservation of crucial evidence. Below is a non-exclusive discussion of evidence that may be relevant to investigating and defending dram shop actions, which will be discussed in more detail, with specific examples and open debate, at the presentation.

Insurance

Many States’ liquor or regulatory laws contains provisions that require a minimum amount of insurance that a licensed alcohol provider must carry. Nonetheless, even in the absence of a specific legal requirement, every “licensee” or licensed seller of alcohol should obtain insurance that provides the appropriate coverages for both general and liquor liability. General liability policies, which provide coverage for injuries occurring on the premises, typically exclude coverage for claims arising out of the sale or service of alcohol. Therefore, a licensee

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should also obtain a separate liquor liability policy or endorsement which covers the licensee and the licensee's employees for claims arising from the sale or service of alcohol. As noted above, some states limit such claims to narrow dram shop statutes, and others default to common law or may allow "companion" premises liability or negligence claims to proceed along with dram shop causes of action. Thus, there is sometimes a "gray area" with respect to these types of claims, so it is important that a licensee understand its coverages. Generally, a liquor licensee should be concerned with ensuring their establishment and employees are insured against a wide array of general liability issues, such as assaults and batteries occurring on the premises, damages for bodily injury, mental anguish, etc. arising from causes like as slips, trips and falls, foodborne illness, etc., and liquor liability coverage that will provide coverage for claims and lawsuits brought by the intoxicated individual (if allowed by State) or third-parties who were injured due to alleged overservice. Some insurance policies may also exclude incidents that arise out of employee drinking, so it is important to understand your policies and your companies' needs. Obviously, it is important to ensure your policy will cover legal fees and defense costs and includes the proper endorsements to ensure that coverage is extended to the property owner, lessor, or landlord where appropriate. Some carriers may also offer incentives, like discounts for a positive track record, or discounts for employee training or certification through TIPS, Serve-Safe, or other alcohol-awareness-type trainings and certifications.

Case Investigation and Defense

Investigation and preservation of evidence is crucial and can determine whether an incident becomes a future claim or lawsuit and can certainly affect whether a future lawsuit is won or lost. The investigation of a dram shop incident or claim is very important, and begins the moment an alcohol provider, their insurers, or attorneys, first obtain knowledge of a potential claim or incident. Memories fade and evidence disappears with time. Because third-party incidents often occur off-site, the provider may not be aware of potential claims until long after the date of service. Thus, it becomes even more crucial that investigation efforts are initiated as quickly as possible. Given the "turnover" nature of those employed by bars and restaurants, employees and other witnesses tend to be transient, which presents additional challenges. Below is a short list and some commentary and suggestions for investigation of dram shop claims, which will be discussed and debated at the presentation, with case studies and roundtable discussion. Although the below is discussed in terms of an attorney's investigation, these issues apply equally to internal or insurance-directed investigations as well.

Site Inspection, Document Gathering and Interviews of Employees

Scheduling a site visit and meeting with potential employee witnesses is crucial and should be accomplished immediately. As soon as possible, it is important to obtain all evidence available about the incident and the allegedly intoxicated person ("AIP") from the establishment and its employees. This includes, at a minimum, documents reflecting any alcohol service to the AIP, those in his/her party, and those around them. It is also important to obtain and review the establishment's policies and procedures related to the service of alcoholic beverages, staff training, and incident reporting. Obtaining video evidence (discussed below) is also crucial. It is helpful to understand the establishment's efforts in creating a "culture" of safe alcohol service and how employees and managers are trained to address these issues when they arise. Indeed, regardless of best efforts, all bartenders, servers and managers will likely (and often) be faced with alcohol-related issues, such as guests who arrive intoxicated, or those that become intoxicated and need to have service discontinued. Therefore, strong internal policies and employee effort is often key to not only prevention, but a successful defense if and when a claim occurs.

Regarding the importance of gathering these documents, receipts and other documentation in possession of the establishment may provide:

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- Evidence reflecting time the AIP arrived at the bar and how long they were present;
- What the AIP drank, how many drinks were consumed, and a timeline for when the drinks were served/consumed;
- Whether all the drinks on the AIP's tab are attributable to them or whether drinks on others' tabs are attributable to the AIP. It is common for others in the AIP's party to have also been drinking, or for "regulars" or other guests to purchase drinks for the AIP as well;
- The size of the drinks (ounces) served and the percentage of alcohol, by content, of the drinks served/consumed;
- If the AIP is a "regular" then there may also be receipts or other evidence existing from prior or subsequent visits;
- Receipts from others that could identify witnesses with relevant information regarding what the AIP consumed or whether they presented as "visibly" intoxicated while at the establishment;
- Regarding employee interviews and policy/procedure documents, it is important to determine:
- Whether the employees/managers were provided safe alcohol service training;
- Who provided the training. Often, the establishment will have internal training, but it may also require its employees obtain and maintain third-party certifications, like TIPS or Serv-Safe training;
- Whether the employees understood company policies and their responsibilities as employees;
- Whether the employees understood local law and their service responsibilities. In addition to local and state alcohol service laws, there may also be requirements that alcohol servers receive jurisdiction-specific training and certifications, or they may require alcohol servers to register and obtain a permit to serve alcohol;
- How alcohol is served . . . whether alcohol is "free-poured" or measured by hand or machine;
- Whether and how often the involved employees/managers have been involved in monitoring alcohol service, identifying intoxicated individuals and refusing and cutting off of service;
- Whether the establishment (and individual employees/managers) have been involved in prior lawsuits or cited for alcohol-related service issues;
- Whether the employees had prior knowledge of the AIP, including what the AIP usually drank, how much they drink, and how they present after consuming alcohol.
- During employee interviews, counsel should ask as many questions as possible and inquire regarding:
- How many customers were present the day or night of an incident?
- How many employees/staff were present?
- When did the AIP arrive?
- Did you know him or her?
- Was anyone with him or her? And if so, who? Did you know them?
- Who served him or her? And what training and experience did that person have?
- What did the AIP eat and drink and over how long?
- Did you monitor the AIP's drinking and condition? How carefully? Did you see anything that concerned

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you? Did he or she appear intoxicated? Did the AIP have a flushed face, bloodshot eyes, or slurred speech?

- Who paid for the items and how?
- If the AIP paid, did they have any problem handling cash or producing a credit card?
- Was the AIP ambulating normally?
- How did the AIP's presentation/appearance change during service?
- How did the AIP appear before service?
- Did anyone offer to call a cab/rideshare for the AIP?
- Did the AIP drink prior to coming to the establishment?
- When did the AIP leave?
- Did the AIP go somewhere else after leaving?

Video Evidence

Regarding video evidence, most systems only retain footage for a short period of time, typically 30 to 90 days. Given that most alcohol-related incidents occur off-site, many times the establishment does not become aware of a drunk-driving or other incident until well after relevant video evidence has been purged or overwritten. However, sometimes the police will investigate and obtain video evidence from a bar, or the establishment may learn of the incident or receive a spoliation letter from an attorney. Therefore, when possible, video should be immediately captured and preserved for use in future litigation. When available, video evidence can be helpful to:

- Determine a timeline of service and consumption (which should be reviewed together with available receipts);
- Determine who served the AIP;
- Determine who was with, around or near the AIP and may have evidence regarding whether the AIP appeared visibly intoxicated;
- Observe the AIP throughout their visit to the establishment. Do they appear visibly intoxicated? Are they stumbling, acting erratic, act overly friendly to those around them?
- Determine how many bathroom visits did the AIP have. This can be useful to determine whether the AIP was presenting with signs of intoxication and provide other information regarding the AIP's rate of processing alcohol;
- Determine who the AIP interacted with while at the establishment;
- Determine when the AIP leaves the bar and they appear to get in a cab/rideshare or another person's vehicle, or whether they left on their own?

Intersection with Criminal Law

Civil dram shop laws and criminal laws often intersect, and it is common for alcohol-related incidents to involve criminal prosecution. Therefore, it is important when investigating and defending a dram shop claim to obtain any available Police and D.A. files. However, these items may not be readily available if a criminal case is open. For example, a DUI prosecution, especially those involving death, can last a year or longer, and the civil case may be filed while the criminal case is still pending. This will most likely hamper the civil defense counsel's investigation, so counsel should consider filing motions to stay the case. If available, Police and D.A. files usually contain their investigative materials, including:

- Witness names and statements/interviews;
- Accident reconstruction, including measurements and opinions regarding direction, speed, and intensity of an auto collision;
- BAC levels for the AIP and others;
- Observations of the AIP, notes regarding bloodshot or watery eyes, smell of alcohol and roadside test results;
- Information regarding the “victims,” who are usually the plaintiffs in future civil cases;
- Whether intoxication from drugs were involved;
- Whether drugs or other alcohol were found on the AIP's person or vehicle;
- Information regarding where the AIP was the day or night of the incident, including other establishments where the AIP may have consumed alcohol;
- Background investigation of the AIP or victims;
- Charges filed and probable cause affidavits supporting the charges, and opinions of police investigators;
- Expert reports;
- Pleas and other information regarding trial or negotiations with the AIP/criminal defendant.

Experts in Dram Shop Cases

Experts are often very useful in defending dram shop lawsuits. In addition to medical and other experts needed in any personal injury case, consideration should be given to the retention of toxicologists, accident reconstructionists, and/or alcohol-retail practices as necessary.

Toxicologists are useful and needed to calculate blood alcohol levels at various times based on known consumption. They can also be useful to establish the rate the specific AIP was processing the alcohol consumed and can provide a timeline of “intoxication” applicable to the day or night of the incident. Toxicologists are also usually helpful to establish what outward signs of intoxication would be present at various alcohol levels, in the general population and for the specific AIP. This is always useful to determine the likelihood that the AIP presented with signs of intoxication at the time of service. Toxicologists are also very helpful at explaining how other substances (illegal, prescribed or over-the-counter drugs) could have influenced an AIP's intoxication or presentation.

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In drunk-driving cases, accident reconstructions can sometimes assist the defense by establishing alternative causation. For example, sometimes the plaintiff or other third-party was the party that caused the crash by crossing the center line in the road/highway or because of some other factor related to the operation of their own automobile. Accident reconstructions can also be useful, as they are in other personal injury cases, to establish the speed and nature of the collision and to defend the medical injury claims asserted.

Other experts, such as biomechanical experts, or alcohol-server standard of care experts may be useful in a dram shop action. The latter may be useful to show an establishments policies and procedures or the establishment's and its employees' actions and efforts were reasonable.

Other Available Defenses

Because dram shop laws and statutes vary, defenses also vary by State. However, dram shop laws generally provide a number of defenses and affirmative defenses that an establishment and its attorneys can utilize to defend the case. The most viable defense available in States with dram shop statutes is simply holding a plaintiff to the strict language or burden of proof provided by the statute. As discussed herein, most dram shop liability statutes purposefully make it more difficult for a plaintiff to prove a dram shop claim. Legislatures do that by providing shorter statutes of limitation, including requirements that a plaintiff must prove more than simple service, but the alcohol was "knowingly" or "purposefully" served to a "visibly" or "obviously" intoxicated, individual. Some statues increase the burden of proof from a preponderance of the evidence to "clear and convincing."

Most States also allow a defendant to shift or apportion fault to other at-fault parties, so the defenses of comparative fault, contributory fault, or non-party fault may be available. Indeed, where the incident involves an AIP, they are most often the party that rightfully should bear the lion's share of the liability, so efforts should always be made to develop arguments which shift as much liability as possible to the AIP. Indeed, even though dram shop statutes exist, it is still the consumption, rather than the sale or service of alcohol, which is the most probable cause of incidents and or injuries related to the consumption of alcohol.

Conclusion

Although States with dram shop statutes typically make it a bit more difficult for bars and restaurants to be liable for injuries resulting from intoxication caused by the sale or service of alcohol, dram shop laws can subject alcohol providers to significant and varied forms of liability under particular circumstances. Unfortunately, due to the nature of alcohol and alcohol-service, these circumstances arise often, and the damage caused by irresponsible alcohol consumption can be very serious. Thus, liquor providers, defense attorneys and insurers providing liability coverage in this field can serve themselves and their clients best by familiarizing themselves with the applicable laws and advising their clients/insureds how they can reduce their risks to prevent or avoid liability. Alcohol providers are also advised to know and understand the law and risk and to seek to create policies and procedures geared towards preventing the service of intoxicated individuals and otherwise limiting or reducing the risk posed by overservice and overconsumption.

ⁱ <https://www.cdc.gov/alcohol/features/excessive-alcohol-deaths.html>

ⁱⁱ *Id.*

ⁱⁱⁱ *Id.*

^{iv} *Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302 (Colo. 2011).

^v National Conference of State Legislatures, <https://www.ncsl.org/research/financial-services-and-commerce/dram-shop-liability-state-statutes.aspx>.

^{vi} *Id.*

^{vii} *Id.*

^{viii} Colo. Rev. Stat. §12-47-801.

^{ix} N.M. Stat. Ann. §41-11-1.

^x Ill. Rev. Stat. ch. 235, §5/5-21; Colo. Rev. Stat. §12-47-801; N.M. Stat. Ann. §41-11-1;

Ariz. Rev. Stat. §4-301 et seq.

^{xi} Colo. Rev. Stat. §12-47-801.

^{xii} Conn. Gen. Stat. §30-102.

^{xiii} Colo. Rev. Stat. §12-47-801.

^{xiv} See, e.g., *Starling v. Fisherman's Pier, Inc.*, 401 So. 2d 1136 (Fla. Dist. Ct. App. 1981) (holding that a business had an affirmative duty to protect a drunk man who passed out on the business's pier so that he would not fall into the ocean and drown), *review denied*, 411 So.2d 381 (Fla.1981).

^{xv} *Id.* See also, CONN. GEN. STAT. § 30-102; MONT. CODE ANN. § 27-1-710.

^{xvi} However, some States, like Illinois, only require proof of service and that the alcohol provided contributed to the alleged injuries. Ill. Rev. Stat. ch. 235, §5/5-21.

^{xvii} See, e.g., *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, LLC*, 2012-NMSC-004, 274 P.3d 97 (N.M. Ct. App. Aug. 28, 2012).