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THE DRAM SHOP ACT AND THE VISIBLE INTOXICATION STANDARD

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Drunk drivers injure, maim and kill hundreds of thousands of people in the United States each year. In 1997, 16,189 people were killed in crashes involving alcohol, an average of one every 32 minutes.¹ Additionally, 1,058,990 people were injured in alcohol related crashes, an average of one person injured every 30 seconds.² As part of the ongoing effort to decrease alcohol related injuries and deaths, New York State has sought to deter the sale of liquor to individuals who are already intoxicated. To this end, the legislature of the State of New York enacted Global Obligations Law Section 11-101(1), colloquially referred to as the Dram Shop Act.

The Dram Shop Act, which in one form or another dates back to 1873,³ provides that any person who is injured by an intoxicated person, or is injured by reason of the intoxication of such a person, is entitled to a right of action against any person who caused or contributed to the intoxication by the *unlawful* sale to or by the *unlawful* procurement of liquor for the intoxicated person.⁴

In order to prove that a driver was *visibly intoxicated* for purposes of a G.O.L. Sec. 11-101(1) action, sufficient evidence in admissible form must be submitted to the trier of fact to show that a reasonable person would have known that the driver was intoxicated at the time of the sale or procurement of the alcohol.

Beverage Control Law Sec. 65(2) which makes it unlawful to furnish any alcoholic beverage to a *visibly intoxicated person*.⁵ Section 65(2) was specifically designed to ensure that alcoholic beverage licensees have sufficient notice of a customer's condition before they are subject to a potential loss of their license or to civil liability for injuries subsequently caused by an intoxicated person.⁶

The "visibly intoxicated person" standard was further crafted to limit a tavern keeper's exposure and to preclude the imposition of a regulatory or monetary penalty when he or she had no reasonable basis for knowing that the consumer was intoxicated.

Further, the Dram Shop Act only applies to commercial vendors and distributors of alcoholic beverages, and New York courts have held that private hosts and employers are not included within the Act's scope for purposes of civil tort liability.⁷

Simply stated, in New York a tavern or bar is liable to a person injured or killed by a drunk driver only when it is shown that liquor was sold to the driver while that driver was *visibly intoxicated*. But what actually constitutes *visible* intoxication? And what type of proof is necessary to establish that a driver was *visibly* intoxicated when he was served alcohol by a tavern keeper for Dram Shop law purposes? These two questions, until recently, were subject to different interpretations by New York State courts.

Rounding out The Dram Shop Act is Alcohol and

In 1997 the Court of Appeals of the State of New York began to answer these question in the case of *Romano v. Stanley*.⁸ However, as will be seen, the *Romano* case resulted in more confusion and debate than answers.

In 1998, in *Adamy v. Ziriakus*,⁹ the Court of Appeals finally answered those questions.

The *Romano* case arose out of a motor vehicle accident occurring on January 18, 1991 in the Town of Colonie, New York when a car driven by Nancy Stanley crossed the center line of the road and collided with plaintiff Marie Romano's automobile. Romano was seriously injured and Stanley died in the collision.¹⁰

Romano commenced a personal injury action against the Stanley estate, and against three taverns that had purportedly served alcohol to Stanley, on the evening of the accident. Romano's Dram Shop Act cause of action alleged that the taverns unlawfully sold alcoholic beverages to Stanley, a visibly intoxicated person, in violation of ABC Law Sec. 65(2).

Upon completion of discovery, two of the three defendant taverns moved for summary judgment asserting that Stanley was not visibly intoxicated while on their respective premises. In support of their assertions, the defendants submitted proof in the form of testimony from eyewitnesses that Stanley did not appear intoxicated while on their respective premises.

Additionally, following ingestion of three drinks over the course of approximately two and one half hours in the moving defendant's taverns, Stanley proceeded to the establishment owned by the third, non-moving defendant. It was in the third tavern that she was sold and imbibed alcohol to the point of what eyewitnesses described as visual intoxication. The fatal accident occurred soon after Stanley left the third tavern.

In opposing the summary judgment motion, the plaintiff submitted an affidavit from a forensic pathologist which relied on a toxicology report showing a blood alcohol level of 0.26% and a .33% level in the urine when Stanley died. Based on the recorded levels it was asserted that Stanley would have had a substantial amount of alcohol in her sys-

tem four to five hours prior to the accident, at the time when Stanley would have been in each of the first two taverns.

Consequently, the pathologist concluded that it would be physically impossible to have reached the level of intoxication recorded in her body while drinking solely at the third establishment. In Dr. Oram's opinion, Stanley had to have been intoxicated prior to the time she reportedly arrived at the third establishment.

Based on those findings, it was the doctor's opinion that Stanley would have, and did show, visible signs of intoxication while she was drinking at the first two establishments. The affidavit then went on to list the signs of intoxication that would have been exhibited by Stanley and that in his opinion should have been noticed by bartenders in the first two establishments.

However, the affidavit was silent as to the scientific or personal professional basis for the pathologist's conclusions about Stanley's blood alcohol count while a customer at the first two taverns and about how Stanley must have looked and acted in the first two taverns.

In reversing the lower court's denial of the summary judgment motions, the Court of Appeals began to define the level of proof necessary to sustain a Dram Shop Act cause of action. The Court rejected the defendants' contention that the statutory term *visible* required direct proof in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the liquor was served.

The Court held that eyewitness testimony is not required to sustain a Dram Shop Act cause of action, and that circumstantial evidence may be used to establish visible intoxication. But, in *Romano*, the Court refused to consider the plaintiff's expert's affidavit and the conclusions reported therein. The Court held that:

Although the underlying facts on which the plaintiff's expert based his opinion - i.e. Stanley's blood and urine alcohol counts and her physical characteristics were set forth in detail (citations omitted) there was nothing in the expert's affidavit

at all from which the validity of his ultimate conclusions about Stanley's appearance on the evening of the accident could be inferred.¹¹

Where an expert's affidavit is proffered as the sole evidence to defeat summary judgment, such affidavit must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation. If proffered alone at trial, such affidavit must suffice to support a verdict in proponent's favor.¹²

In *Romano*, the Court of Appeals took painstaking care in pointing out that although the expert's affidavit was rejected, it was the spurious content of the affidavit and not the fact that a non-witness expert was used, that led to the dismissal of the action. The Court pointed to the fact that:

The personal professional background of plaintiff's expert – a clinical forensic pathologist whose specialty is the performance of autopsies - is not alone sufficient to lend credence to his opinions, since individuals in his field are not ordinarily called upon to make judgments about the manifestations of intoxication in live individuals. Moreover, plaintiff's affidavit was devoid of any reference to a foundational scientific basis for its conclusions, and no reference was made either to Dr. Oram's own personal knowledge acquired through his practice or to studies or to other literature that might have provided the technical support for the opinion he expressed.¹³

The Court of Appeals did not discount the use of an affidavit by a properly qualified expert in a Dram Shop Act action, where such an expert's affidavit is part of a package of circumstantial evidence, and the expert has documented proper foundational scientific basis for his conclusions.

Adamy v. Ziriakus, is the most recent Court of Appeals decision to address these issues. *Adamy* involved a motor vehicle accident occurring in the early morning hours of January 27, 1990 in the Town of Amherst, New York. The accident occurred shortly after the defendant drunk driver, Ziriakus, left

T.G.I. Fridays, a nearby restaurant/bar.

In the hours preceding the incident, Ziriakus consumed a number of alcoholic beverages with friends at the bar. After failing field sobriety tests administered by police officers at the scene, Ziriakus was arrested and ultimately convicted of driving while intoxicated and failure to yield. Lieutenant Joseph Adamy, a member of the town of Amherst Police Department, was killed in the accident.

Decedent's widow, plaintiff Candice Adamy, sued both Ziriakus and T.G.I. Fridays, claiming that Fridays had violated the Dram Shop Act by serving Ziriakus alcohol while he was visibly intoxicated. A jury trial resulted in a verdict in favor of plaintiff, and a split of liability finding Ziriakus 40% liable, Friday's 30% liable and decedent 30% liable.

At trial, plaintiff presented several categories of circumstantial evidence along with the testimony of a forensic pathologist, Dr. Michael Baden, who testified that based on Ziriakus' blood alcohol content upon leaving Fridays, Ziriakus would have been visibly intoxicated when last served.

T.G.I. Friday's appealed the verdict asserting that there was insufficient evidence to find that Ziriakus was served alcohol by Friday's employees while he was visibly intoxicated. In an attempt to overturn the jury's verdict, appellant Friday's likened Dr. Baden's proffered testimony to that of the plaintiff's expert in *Romano*, and urged the Court to find that once again the expert's testimony and opinion were purely speculative and conclusory.

In affirming the Appellate Division's denial of Friday's appeal, the Court of Appeals further discussed the issue of what evidence is necessary to sustain a Dram Shop Act verdict against an establishment accused of selling alcohol to a visibly intoxicated patron. The Court held that "only where an expert's affidavit is proffered as the sole evidence to defeat a motion for summary judgment, that affidavit must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation, and would if offered alone at trial, support a verdict in the proponent's favor."¹⁴ This was not the case in *Adamy*.

In *Adamy*, in stating his expertise for testifying at trial, plaintiff's expert outlined his teaching career at

several institutions, articles he had written germane to his understanding of alcohol and its effects, and his experience as a medical examiner.¹⁵ Defendant Fridays made no objection to his qualifications to testify as an expert witness. Thus, the Court held that Friday's was precluded from arguing that the testimony was inadmissible as a matter of law, since Friday's had the opportunity to bring out weaknesses in the expert's qualifications and foundational support on cross-examination, an opportunity unavailable to a party seeking summary judgment as in *Romano*.

The Court further distinguished the evidence proffered in the *Adamy* case from that in the *Romano* case.

Unlike *Romano*, where plaintiff's only evidence offered to defeat summary judgment was an expert's affidavit, here, plaintiff also introduced the testimony of several police officers who observed Ziriakus' behavior and appearance at the accident scene. Finally, a missing witness instruction was given to the jury with respect to the fact that the bartender on duty on the night of the accident was not called as a witness by Fridays, and his absence was not explained.¹⁶

The Court held that:

Dr. Baden's testimony, when taken together with the police officers' accounts of Ziriakus' behavior at the accident scene only a short time after he left Friday's and the inferences the jury was permitted to draw from Friday's failure to call Doug Daly as a witness, provided ample evidence that Ziriakus was visibly intoxicated when served at Friday's.¹⁷

Conclusion

As it stands today, the Dram Shop Act provides for relief against a bar or tavern that unlawfully sells alcohol to a visibly intoxicated person. When endeavoring to prove that a person was visibly intoxicated, the evidence proffered at trial, or on summary judgment, must be sufficient to show that a rea-

sonable person would have determined that the intoxicated driver was visibly intoxicated when served his last drink. There also must be some other evidence to show or suggest that there were some visible manifestations of intoxication.

The *Adamy* case holds that these visible signs of intoxication may occur at the accident site, if the accident was within a short period of time after the service of alcohol. On the flip side, if the defendant driver did not show signs of visible intoxication after the accident, then one could use this evidence as a defense in a Dram Shop Act.

An affidavit offered in conjunction with a motion for summary judgment must eliminate any questions concerning the foundational scientific basis for conclusions reached in the affidavit before the court will consider it as evidence. At trial, it falls on the opponent of the testimony to bring out any and all weaknesses in the expert's qualifications and foundational support on cross-examination.

Governor's Approval Mem., 1986 McKinney's Session Laws of N.Y. @ 3194.

- 1 1998 Summary of Statistics – Mothers Against Drunk Drivers Web Page – The Impaired Driving Problem – 1997 Statistics.
- 2 *Id.*
- 3 General Obligations Law, Section 11-101(1).
- 4 *Id.*
- 5 See, generally, Alcohol and Beverage Control Law, Section 65(2).
- 6 Governor's Approval Mem., 1986 McKinney's Session Laws of N.Y. at 3194.
- 7 ABC 65(2)
- 8 (1987); *Greer v. Ferrizz*, 118 AD2d 536, 488 NYS2d 758, (1986).
- 9 90 NY2d 444, 661 NYS2d 589, 684 NE3d 19 (Ct. App. 1997).
- 10 *Romano v. Stanley*, *supra*.
- 11 *Romano*, *supra*, at 451.
- 12 *Id.*, at 402-403.
- 13 *Id.*, at 403.
- 14 *Adamy*, at 402 citing *Romano* at 451-452.
- 15 *Id.*, at 402.
- 16 *Adamy*, *supra*, at 402-403.
- 17 *Id.*, at 403.