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The State of Dram Shop Liability in New York

Many insurance carriers avoid writing commercial policies in New York because of confusion over the exact status of liquor liability in New York. The following is a synopsis of the legal repercussions of serving liquor in commercial settings.

General Obligations Law §11-101 gives a right of action by the injured party against any person who supplied the intoxicated individual with alcohol, if that seller engaged in the unlawful selling or assisted in the procurement of liquor to the intoxicated person or unlawfully contributed to such intoxication.¹

This section necessitates that the seller engage in "unlawful" conduct with respect to furnishing liquor to an intoxicant. The predicate statute that defines this unlawful conduct is the Alcoholic Beverage Control Law §65, which makes it illegal for any vendor of liquor to sell, deliver, or give away alcoholic beverages to any person who is either under 21 years of age, "visibly intoxicated," or a knowingly habitual drunkard.²

The legislative intent of these two statutes was to ensure that commercial vendors act responsibly when serving alcoholic beverages and to inhibit the sale of intoxicating liquor in situations that could lead to injuries to a third party.³

The term "visibly intoxicated" has become the standard in determining whether an intoxicated person's negligence should be imputed to the commercial vendor and usually presents a question of fact to the jury as to whether an illegal sale occurred.⁴ In order to succeed on a claim against a commercial vendor, a plaintiff must prove the vendor knew or should have known that the patron was already intoxicated before serving him alcohol.

The plaintiff has the burden of proving that the commercial establishment sold alcohol to a defendant while he was "visibly intoxicated," either by eyewitness testimony or other sufficient circumstantial evidence. Intoxication and a high blood alcohol level alone do not provide a sound basis for drawing inferences regarding the person's appearance or demeanor.

In *Sorensen v. Denny Nash, Inc.*,⁵ the intoxicated individual went to numerous bars throughout the night continuously consuming alcohol along the way. At the defendant's establishment, he was served liquor again



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and immediately thereafter caused an automobile accident and injured another driver. Although his blood alcohol level indicated that he was legally intoxicated, the other patrons at the bar claimed that he was not "visibly intoxicated."

The court granted the defendant's motion for summary judgment and found that the plaintiff failed to submit any direct proof of the individual's intoxicated demeanor at the establishment. It is essential that the plaintiff establish that the person who caused the injury acted or appeared to be intoxicated at the time he purchased drinks from the alcohol provider.⁶

Similarly, in *Donato v. McLaughlin*,⁷ the Appellate Division, Third Department, found that proof of visible intoxication was lacking. Witnesses stated that the intoxicated individual was not acting unusual, was not slurring his words and was not shouting, all of which would demonstrate a person to be "visibly intoxicated."

In contrast, in *Adamy v. Ziriakus*,⁸ it was determined that circumstantial evidence was

sufficient to find that the tortfeasor was "visibly intoxicated" at the time he was served alcohol. The jury considered evidence of the tortfeasor's high blood alcohol content; police statements that his eyes were glassy and

bloodshot at the scene of the accident; testimony that he was unresponsive, swaying and staggering while standing and walking; and of the failure of the defendant to call the bartender as a witness at trial. Based on this evidence it was permissible for a jury to find that the patron was in fact "visibly intoxicated."

General Obligations Law §11-101 has been found to have extraterritorial effect. If the sale of the intoxicating beverage occurs in New York and the resulting injury takes place out of state, the commercial vendor may still be liable.

In *Rutledge v. Rockwells of Bedford*,⁹ the Court of Appeals upheld a jury verdict that found a commercial vendor liable who sold liquor to a visibly intoxicated person in New York state even though plaintiff's death occurred later that evening while driving in Connecticut. The Court held that:

Insofar as the alleged egregious act by the tavern keeper occurred in New York State, the remedial objective of the statute would be nullified if the plaintiff were denied recovery merely because the decedent drove his vehicle across the State line before the fatal accident occurred.

With respect to commercial liability for serving alcohol to an underage drinker, the courts have repeatedly held that the "visibly intoxicated" standard is not required to find the sale of liquor illegal under the Dram Shop Liability law. In other words, an underage person need not be intoxicated at the time of the purchase for the sale to be unlawful. However, intoxication at the time of the accident is a relevant factor because liability arises under the Dram Shop Act only when the injuries are caused by an intoxicated person.

In *Johnson v. Plotkin*,¹⁰ two establishments sold alcohol to a minor, who at that time was not visibly intoxicated, and probably not intoxicated at all. Later that evening, after becoming intoxicated, the minor caused an accident, killing one passenger in his car and seriously injuring another. The appellate court reversed the decision of the trial court and denied summary judgment to the defendants. A motion for leave to appeal was dismissed.

New Trial Granted

The court found that the operators of the two facilities supplied the minor with liquor and contributed to his intoxication, this being sufficient evidence to grant a new trial against those facilities, despite the fact that the minor was not intoxicated at the time of the sale.

The "visibly intoxicated" standard does not apply when dealing with an underage drinker, and a minor does not have to be "intoxicated" at all at the time of the purchase for the sale of liquor to be unlawful. The defendant simply had to have sold the minor the liquor, thus playing a role in his intoxication, in order for him to be held liable for resulting injuries.¹¹

If a minor is not intoxicated at the time the incident actually occurs, the Dram Shop Act would not apply at all, and liability will not be passed to the liquor vendor.

Intoxication is defined in the New York State Vehicle and Traffic Laws, which now provides for the separate and distinct crimes of driving while intoxicated and driving with a blood alcohol content of .10 percent or more.¹²

In *Johnson*, the court found that a blood alcohol content of .26 per-

cent was enough evidence of intoxication and was sufficient to preclude summary judgment on the issue of intoxication at the time of the accident.

Liability in commercial settings is very fact specific. For a liquor vendor to be held liable for an injury caused by one of his patrons, the circumstantial evidence must show that the patron was "visibly intoxicated" and continued to be served alcohol.

Liability for the sale of liquor to a minor in a commercial setting is an easier burden for a plaintiff, since there are statutes that result in liability to a defendant for an injured party solely because the intoxicated person was underage.

The "visibly intoxicated" standard is not necessary to establish liability in a situation involving an intoxicated minor. As in most negligence cases, liability will involve a determination by a jury based on the unique facts and circumstances of each situation.

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(1) 1 NY CLS General Obligations Law §11-101(1) provides as follows:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

(2) 2 NY CLS Alcoholic Beverage Control Law §65(1), (2) and (3) provides as follows:

No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to any person, actually or apparently, under the age of twenty-one years, any visibly intoxicated person, or any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages.

(3) See *Rutledge v. Rockwells of Bedford*, 200 A.D.2d 36, 613 N.Y.S.2d 179 (2d Dept. 1994).

(4) See *Donato v. McLaughlin*, 195 A.D.2d 685, 599 N.Y.S.2d 754 (3d Dept. 1993).

(5) 249 A.D.2d 745, 671 N.Y.S.2d 559 (3d Dept. 1998).

(6) See *Nehme v. Joseph*, 160 A.D.2d 915, 554 N.Y.S.2d 642 (2d Dept. 1990).

(7) 195 A.D.2d 685, 599 N.Y.S.2d 754 (3d Dept. 1993).

(8) 92 N.Y.2d 396, 681 N.Y.S.2d 463 (1998).

(9) *Rutledge*, supra note 3.

(10) 79 N.Y.2d 977, 583 N.Y.S.2d 195 (1991).

(11) See *Powers v. Glenville Beer Distributors*, 129 A.D.2d 37, 516 N.Y.S.2d 811 (3d Dept. 1987).

(12) NY CLS Veh & Tr §1192 (2003).