

A Refresher on New York Dram Shop Liability

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Introduction

At common law an individual who excessively consumed alcohol was solely liable for any injuries caused due to her intoxication. The Dram Shop Act established an exception to this rule by providing a cause of action against any person who unlawfully sold or assisted in procuring alcohol for an intoxicated person or a person under the age of twenty-one.¹ Specifically, the sale of alcohol to any person visibly intoxicated or any person actually or apparently under the age of twenty-one is prohibited.²

During the 1990s numerous cases interpreted and established the limits of New York's Dram Shop Act. However, over the past few years there has been a lack of activity in the Appellate Division and the Court of Appeals regarding such claims. This article provides a refresher to those who have not had Dram Shop cases and for those who have not recently handled one.

Applicable Statutes

New York General Obligations Law § 11-100 and § 11-101 read in tandem with New York Alcoholic Beverage Control Law § 65 comprise New York's Dram Shop Act. Section 11-100 provides a cause of action against "any person who knowingly causes such intoxication or impairment of ability by *unlawfully furnishing* to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years." Section 11-101 provides a cause of action against any person who *unlawfully sold* or assisted in procuring liquor for such intoxicated person and caused or contributed to such intoxication. The unlawful conduct set forth in § 11-100 and § 11-101 is defined in New York Alcoholic Beverage Control Law § 65, which provides that "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 (1) Any person, *actually or apparently*, under twenty-one years and (2) Any *visibly intoxicated* person."

Commercial Sale of Alcohol to an Intoxicated Person

Courts have consistently held that § 11-101 of the Dram Shop Act applies *only* in the context of a commercial sale of alcohol; that is, the sale of alcohol for profit.³ Accordingly, in *D'Amico v. Christie*, the Court of Appeals declined to apply the Dram Shop Act in the context of an employer and employee social function, and held that a commercial sale of alcohol did not exist even where the

employees contributed funds to purchase the alcohol.⁴ The Second Department also declined to impose Dram Shop liability in *Carr v. Kaifler* and *Custen v. Salty Dog, Inc.*, because of the non-existence of a commercial sale of liquor where the employers provided free alcoholic beverages to their employees during their work shifts.⁵ Beyond the workplace, Dram Shop liability will not be imposed in the context of alcohol consumption within the private home, even where the consumption was by underage individuals.⁶ Thus, in *Place v. Cooper*, the Second Department declined to impose § 11-101 Dram Shop liability on an underage individual's mother where it was undisputed that she had not commercially sold alcohol to her son and his friend.⁷

Direct Sale to the Tortfeasor

The Court of Appeals explicitly held in *Sherman v. Robinson* that once a commercial sale has been established, it must then be determined that a sale of liquor was made *directly* to the individual who allegedly caused the injuries at issue.⁸ An indirect sale irrespective of the quantity of alcohol purchased is insufficient to impose Dram Shop liability upon a vendor.

The plaintiff in *Sherman* contended that although the tortfeasor was not present during the actual sale, Dram Shop liability existed since the convenience store should have been alerted by the quantity of alcohol purchased, and realized that the purchaser was not intended to be the sole consumer of the alcohol. However, the Court found that the convenience store could not be held liable for an indirect sale, and that there is absolutely no duty imposed upon a defendant to investigate possible consumers of alcohol based upon the quantity of alcohol purchased. The Court noted that in order to impose such liability, the surrounding facts and circumstances would have had to dispel the notion of an indirect sale and have suggested that there was a sale to both the purchaser and the alleged tortfeasor. Such a showing would have been made if the tortfeasor was present during the sale, provided the money to purchase the alcohol, or took possession of the alcohol after the sale concluded.

Visible Signs of Intoxication

Much of the Dram Shop Act litigation arises regarding the requirement that there was a sale of alcohol to an inebriated tortfeasor who displayed visible signs of intoxication.⁹ This provision is meant to limit a commercial seller's liability where there was no reasonable basis for knowing that the consumer was inebriated.¹⁰ Visible

intoxication need not be established solely by direct evidence but may also be established by circumstantial evidence, including expert and eyewitness testimony.¹¹

Overall, courts find that a single piece of circumstantial evidence is insufficient to satisfy the requirement of visible intoxication. Blood and urine tests are the most common piece of circumstantial evidence utilized by plaintiffs; however, alone it is insufficient to meet the visible intoxication requirement since noticeable signs of intoxication vary from person to person.¹² Likewise, an eyewitness may also testify, for example, to the odor of alcohol on the alleged tortfeasor's breath or to the tortfeasor's motor impairment, but additional evidence is still needed.¹³ Thus, while individual pieces of circumstantial evidence may be inadequate to fulfill the requirement of visible intoxication, when considered in total the requirement may be satisfied.¹⁴

In *Romano v. Stanley*, the Court of Appeals held that an expert's conclusions that the tortfeasor must have exhibited symptoms of intoxication while frequenting the defendants' establishments was inadequate and speculative where it was based solely upon the tortfeasor's blood alcohol content at the time of her death.¹⁵ The expert's testimony merely gave information about how alcohol is metabolized but failed to provide a basis for the tortfeasor's blood alcohol content at the specific times when she was present at the defendants' establishments.

Similarly, in *Wolf v. Paxton-Farmer*, the Fourth Department found that mere evidence that a tortfeasor consumed one mixed alcoholic beverage and a portion of another was insufficient to establish visible intoxication.¹⁶ There *must* be adequate evidence to support the conclusion that the tortfeasor was visibly intoxicated, and when examining any circumstantial evidence supporting an assertion of visible intoxication, it must be "supported by the surrounding facts and circumstances in order to be probative."

Furnishing or Procuring Alcohol and Minors

With the objective of decreasing underage drinking rather than requiring a commercial sale, § 11-100 of the Dram Shop Act applies to *any provider* that unlawfully furnishes or assists in procuring alcoholic beverages for a minor under the age of twenty-one. In *Bregartemer v. Southland Corp.*, the Second Department determined that the phrase "assists in procuring" includes using one's own money to purchase alcohol and contributing money to the purchase of the alcohol.¹⁷ Further, actual knowledge or a reasonable belief that the individual is under the age of twenty-one is required, but a defendant will *not* be liable under § 11-100 where he was unaware of any alcohol consumption by minors, did not authorize the consumption of alcohol on his premises, and did not provide the alcohol to the minors.¹⁸

Accordingly, the First Department in *McGlynn v. St. Andrew the Apostle Church* found that adults in attendance at a private party were not liable where they were aware of alcohol consumption by underage individuals but had not encouraged the consumption. However, the court refused to dismiss the claims against the individual who had rented the hall to host the party and had procured and furnished the alcohol to the minors. The court also declined to impose liability upon the church as owner of the premises since it did not host the party and did not provide the alcohol or make it available to the minors.¹⁹ Similarly, in *Lombart v. Chambery*, the Fourth Department affirmed the lower court's decision granting the defendant summary judgment where the owner of the premises was unaware that alcohol was served to minors.²⁰

Regarding a commercial sale of alcohol to a minor, there is little guidance on what behavior is sufficient to protect the seller from liability where the seller verified the alcohol purchaser's identification but it was later proved that the identification was a counterfeit. Careful examination of the identification is imperative. Earlier this year the Third Department in *Johnson v. Verona Oil, Inc.*, denied defendant's summary judgment motion where the commercial seller had admitted that she had failed to adequately compare the identification card photograph to the purchaser. By contrast, a seller of simulated licenses will not be held liable under the Dram Shop Act. In *Etu v. Cumberland Farms, Inc.*, the Third Department declined to hold such a seller liable under a theory that the seller assisted the minor in procuring alcohol since there was no actual sale of alcohol.²¹

Lastly, concerning a bar's sale of alcohol to a minor, in order for the establishment to be held liable under the Dram Shop Act, there must be evidence demonstrating that the underage tortfeasor was intoxicated at the time of the incident. Thus, in *Basile v. Francino*, the court did not impose Dram Shop liability because there was no evidence that the minor tortfeasor was intoxicated despite evidence that she consumed alcohol at the defendant's bar.²²

Plaintiff's Own Intoxication

It is well settled that there is no Dram Shop Act cause of action for an individual injured due to his or her own intoxicated condition. Thus, in *Searley v. Wegmans Food Markets*, the Fourth Department held that the plaintiff could not prevail under the Dram Shop Act where the defendant unlawfully sold alcohol to the plaintiff's minor son but no other individual besides the minor sustained injuries.²³ Similarly, a plaintiff may not claim Dram Shop Act liability where the plaintiff was responsible for procuring and providing alcohol to the intoxicated individual who caused plaintiff's own injuries.²⁴ Accordingly, in *Reese v. Sierra*, the Second Department determined that

there was no cognizable cause of action against a restaurant for serving alcohol to a visibly intoxicated person, where it was the plaintiff who had purchased the alcoholic beverages for that person, and thus plaintiff was unable to recover for injuries sustained in the ensuing automobile accident.²⁵

Dram Shop Liability and Lessors of Premises

Dram Shop liability will not be imposed upon the premises owner where he leased the premises and his tenants are responsible for the operation and commercial sale of alcohol on the premises. Generally, a “premises owner has no duty to control the conduct of its patrons or tenants for the benefit of third persons.”²⁶ The premises owner will only be liable if he “is present and is aware that he can and has the opportunity to control the third parties’ conduct and is reasonably aware of the necessity for such control.”²⁷

Thus, in *Winter v. Jimmy’s Lakeside Inn Inc.*, the Third Department declined to hold the landlord of a bar liable where the landlord had leased out the premises and retained no control of the premises or the operation of the bar.²⁸ Likewise, in *McGlynn*, the First Department held that a church was not liable for injuries sustained due to an assault by an intoxicated tortfeasor where the church did not host the party but had rented out the use of its hall in exchange for a donation.²⁹

Conclusion

Case law reflects that the Dram Shop Act requirements and limits are rather concrete, but each case requires careful analysis of the facts and circumstances to evaluate potential liability. In order to have a valid Dram Shop Act cause of action under § 11-101 there must be a commercial sale of alcohol made directly to an intoxicated tortfeasor who displayed visible signs of intoxication. Under § 11-100, liability will be imposed upon *any person* who furnishes or assists in the procurement of alcohol for a minor, thus resulting in the minor’s intoxication or impairment of ability. Importantly, remember that plaintiffs may not bring a Dram Shop claim for injuries suffered due to their own intoxication. Further, absent very limited circumstances, a landlord will not have Dram Shop liability for the commercial sale of alcohol by a commercial tenant. Finally, be mindful that although Dram Shop liability may not be imposed, common law liability may still remain.

Endnotes

1. N.Y. Gen. Oblig. Law §§ 11-100, 11-101 (2007).
2. N.Y. Gen. Oblig. Law § 11-100 (2007); N.Y. Alco. Bev. Cont. Law § 65 (2007); *Johnson v. Verona Oil, Inc.*, 2007 N.Y. Slip Op. 00031 (3d Dep’t 2007).
3. *D’Amico v. Christie*, 518 N.E.2d 896, 898 (1987).
4. *Id.*; N.Y. Alcoholic Beverage Control Law § 65(1).
5. *Carr v. Kaifler*, 601 A.D.2d 584, 585 (2d Dep’t 1993); *Custen v. Salty Dog, Inc.*, 170 A.D.2d 572 (2d Dep’t 1991).
6. *Place v. Cooper*, 35 A.D.2d 1260 (4th Dep’t 2006).
7. *Id.*
8. *Sherman v. Robinson*, 606 N.E.2d 1365, 1368 (1992); *Stewart v. Taylor*, 167 A.D.2d 846 (4th Dep’t 1990).
9. *Kelly v. Fleet Bank*, 271 A.D.2d 654, 655 (2d Dep’t 2000); *Nehme v. Joseph*, 160 A.D.2d 915, 916 (2d Dep’t 1990).
10. *Romano v. Stanley*, 684 N.E.2d 19, 21 (1997).
11. *Romano*, 684 N.E.2d at 21-2; *Kish v. Farley*, 24 A.D.3d 1198, 1200 (4th Dep’t 2005).
12. *Romano*, 684 N.E.2d at 21-2.
13. *LaCatena v. M.C. & E.D. Beck, Inc.*, 35 A.D.3d 388 (2d Dep’t 2006).
14. *Id.*
15. *Romano*, 684 N.E.2d at 23.
16. 23 A.D.3d 1046 (4th Dep’t 2005).
17. 257 A.D.2d 544, 255 (2d Dep’t 1999).
18. *Guercia v. Carter*, 274 A.D.2d 553 (2d Dep’t 2000).
19. 304 A.D.2d 372 (1st Dep’t 2003).
20. 19 A.D.3d 1110 (4th Dep’t 2005).
21. 148 A.D.2d 821, 824 (3d Dep’t 1989).
22. 253 A.D.2d 779 (2d Dep’t 1998).
23. 24 A.D.3d 1202 (4th Dep’t 2005).
24. *Vandenburg v. Brosnan*, 129 A.D.2d 793, 795 (2d Dep’t 1987).
25. 17 A.D.3d 439, 440 (2d Dep’t 2005).
26. *Cavanaugh v. Knights of Columbus Council*, 142 A.D.2d 202, 204 (3d Dep’t 1988).
27. *Id.*
28. 200 A.D.2d 826, 827 (3d Dep’t 1994).
29. *McGlynn*, 304 A.D.2d at 373.

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