DRAM SHOP LITIGATION AND LAWS IN ALABAMA

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I. INTRODUCTION

The term dram shop derives from the practice of English taverns to serve drinks by the "dram", a unit of measurement similar to the "shot." Consequently, English taverns were referred to as "dram shops" and this term then found its way into the common law. Under English common law, liquor liability did not exist and in particular, a tavern owner could not be held liable if an intoxicated person injured another person. Mosher, J. Liquor Liability Law, Section 2.01[2].

In 1886, Alabama adopted the common law approach and held that a claim for negligence could not be maintained for the sale of alcohol. King v. Henkie, 80 Ala. 505 (1886). The King rationale followed traditional negligence principles and held that the voluntary consumption of alcohol was an intervening cause between dispensing and injury, and thus could not be the proximate cause. In addition, the voluntary intoxication of the decedent in King was found to be contributory negligence as a matter of law.

In the late 19th century, public awareness of the dangers of intoxication arose in conjunction with the prohibition movement. As a result, many states enacted "dram shop" statutes designed to discourage the consumption of alcohol, with the Alabama legislature passing statues allowing private causes of action for the illegal disbursement of alcoholic beverages in 1907 and 1909. These statutes remain with us today in substantially the same form as enacted 100 years ago and are now codified at Ala. Code § 6-5-70 (1975) (Civil Damages Act) and § 6-5-71 (Dram Shop Statute). In commenting on the purpose of the 1909 act, the Alabama Supreme Court in 1934 stated as follows:

> "This act, one of the companion prohibition bills of that special session, covers more than thirty pages, and broadly speaking, may be deemed a prohibition enforcement measure." *Id.* "'The object of the early act was to correct the evils resulting from intemperate indulgence in intoxicating liquors, such as impoverishment of families, injuries to

> others, and the creation of public burdens."'
>
> Webb v. French, 152 So.2d 215, 216-217 (Ala. 1934).

The Alabama dram shop statute is designed to alter the common law negligence analysis regarding proximate cause and contributing negligence, thereby providing a cause of action to affected parties. Alabama courts frequently cite the following language from the 1907 case of Bistline v. Ney Bros. 111 N.W. 422 (Iowa 1907) as establishing the rationale for the Alabama Dram Shop Statute.

> . . .
>
> If a plaintiff, in an action of this kind, is to be held to establish immediate and proximate relation between the defendant's wrong and her injury, the statute has created no new right, for it is a general rule, as old as the common law, that every person is liable in damages for injuries directly and proximately resulting to another from his tort. The very purpose of the statute is to extend such liability to include injuries which, under the common law, would be held too remote. It is a matter of common observation that the average man when in his sober senses is not violent; is capable of exercising reason and judgment, and is mindful of his duty to his family, and to his neighbors. On the other hand, it is equally well known that intoxicants tend to dethrone the reason; to cast off self-restraint; to inflame the passions; to induce deeds of violence; and is not infrequently the moving cause which ends in murder or suicide. So true is this that when we see or hear or read of such an exhibition of human frailty, and are told that the person guilty thereof was drunk, we readily accept the statement as an all-sufficient explanation. Doubtless it was with this truth in mind that the Legislature enacted the statute which assumes that an injury done by a person while his reason, judgment, and discretion are dethroned by drink is chargeable to his abnormal condition, and that liability for such injury may extend back and affect him who furnished the liquor which produced that condition.
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> . . .
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> 111 N.W. at 424. (emphasis supplied)

In addition to relaxing the rules of proximate causation, the dram shop statute is designed to be penal in nature. In McIsaac v. Monte Carlo Club, 587 So.2d 320 (Ala.1991), the court noted that the dram shop statute provided strict liability and further stated as follows:

> . . .
>
> We conclude, based on these prior interpretations, that § 6-5-71 is penal in nature and that its purpose is to punish the owners of taverns who continue to serve customers after they have become intoxicated. The legislature intended to stop or to deter drunken driving facilitated by bar owners, in order to protect the public at large from tortious conduct committed by any intoxicated person who was served liquor by a bar owner while in an intoxicated condition.
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> 587 So.2d at 324.

II. THE ACTS

The term "dram shop" has been traditionally used to describe all alcohol related torts but instead actually refers to a specific statute found at Ala. Code § 6-5-71 (1975). A second code section, the Civil Damages Act found at Ala. Code § 6-5-70 (1975), addresses the illegal provision of alcohol to minors. There is no common law cause of action for the negligent dispensing of alcohol. See, Beeson v. Scoles Cadillac Corp., 506 So.2d 999 (Ala. 1987)(Company which hosted a party on business premises and provided free alcohol to visibly intoxicated employee was not acting contrary to law and was not liable to third party under negligence and dram shop counts).

The Civil Damages Act at Ala. Code § 6-5-70 (1975) prohibits service of alcohol to minors AND states as follows:

> **§ 6-5-70. Furnishing liquor to minors.**
>
> Either parent of a minor, guardian, or a person standing in loco parentis to the minor having neither father nor mother shall have a right of action against any person who unlawfully sells or furnishes spiritous liquors to such minor and may recover such damages as the jury may assess, provided the person selling or furnishing liquor to the

minor had knowledge of or was chargeable with notice or knowledge of such minority. Only one action may be commenced for each offense under this section.

The majority of litigation in Alabama focuses on the Dram Shop Act set forth at Ala. Code § 6-5-71 (1975) which provides as follows:

> **§ 6-5-71. Right of action of wife, child, parent, or other person for injury in consequence of illegal sale or disposition of liquor or beverages.**
>
> (a) Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.
>
> (b) Upon the death of any party, the action or right of action will survive to or against his executor or administrator.
>
> (c) The party injured, or his legal representative, may commence a joint or separate action against the person intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof.

III. ELEMENTS OF A CLAIM ARISING UNDER CIVIL DAMAGES ACT

In McLeod v. Cannon Oil, 603 So.2d 889 (Ala. 1992), the Alabama Supreme Court held that:

> [I]n order to establish liability under the Civil Damages Act, a plaintiff must prove that the defendant:

1. Sold spiritous liquors to a person who was a minor;

2. Was chargeable with notice of knowledge of the minority;

3. Once the plaintiff does that, the burden shifts to the defendant to show that he did everything required by the **statute and the regulations** to determine whether the purchaser was a minor. If the defendant cannot show that he complied with the statute and the regulations, then the plaintiff is entitled to a directed verdict on the issue of whether the Civil Damages Act was violated.

Id. at 891 (emphasis added).

The regulations referred to in McLeod are the Alabama Alcoholic Beverage Control ("ABC") Board Rules and Regulations which control the sale of alcoholic beverages by all entities licensed in the State. All licensees are chargeable with notice of minority. Section 20-x-6.10(2) designates the appropriate forms of identification for establishing non-minority:

> A licensee or his employee may only accept any one or more of the following documents for the purpose of determining the age of a person purchasing or attempting to purchase alcoholic beverages:
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> a. A valid driver's license of any state;
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> b. United States active-duty military identification;
>
> c. Passport;
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> d. A valid identification card issued by any agency of a state for the purpose of identification along with another form of identification.

Anticipating false identification, the McLeod opinion provides some relief to defendants: "If the purchaser produces a drivers license that appears to be valid . . . the seller escapes liability even if it is later determined that the driver's license is not valid or was not in fact issued to the purchaser." McLeod, 603 So.2d at 893. While this language specifically refers to a

driver's license, any identification listed in the ABC Regulations should be acceptable. When one of these forms of identification is produced by the plaintiff, and the identification "appears to be valid," the burden will shift back to the plaintiff to provide that the defendant was aware that the form of identification was not valid.

A. POTENTIAL PLAINTIFFS

The category of potential plaintiffs under the Civil Damages Act is well defined:

> Either parent of a minor , guardian, or a person standing in *loco parentis* to the minor having neither farther nor mother . . ..

The minor does not have an independent cause of action under the Civil Damages Act. Maples v. Chinese Palace, Inc., 389 So.2d 120 (Ala. 1980). In addition, the action is available only when the sale or provision in question was made directly to the minor who gives rise to the plaintiff's claim. Laymon v. Braddock, 544 So.2d 900 (Ala. 1989)(No evidence to support conclusion that adult, who purchased wine coolers while accompanied by juvenile, did so for purpose of permitting minor to consume some liquor). In Laymon v. Braddock, 544 So.2d 900 (Ala. 1989), the court held that a "totality of circumstances" test will apply to the issue of notice to the seller of the minority of the purchaser:

> We interpret the words 'furnishes' and 'furnishing' in § 6-5-70 [the Civil Damages Act] to extend liability under § 6-5-70 to a seller or furnisher of spirituous liquors, who, from the totality of the circumstances, must reasonably infer that the person to whom the spiritous liquor is sold or furnished will permit a minor to consume some of this spiritous liquor.
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> 544 So.2d at 904.

B. POTENTIAL DEFENDANTS

A licensee of the ABC Board is a potential defendant under the Civil Damages Act. The Civil Damages Act is not limited to licensees, and may be applied equally to individuals who provide alcohol to minors in a social setting. Runyans v. Littrell, 850

So.2d 244 (Ala. 2002).

C. DAMAGES

The Civil Damages Act allows the plaintiff to "recover such damages as the jury may assess." The phrase "recover such damages as the jury may assess" is identical to the language in the wrongful death statute and has been construed to allow only punitive damages. In Brackett v. Exit Inn, Inc., 604 So.2d 402 (Ala. 1992), the court traced the case law regarding recoverable damages under the Civil Damages Act. The Brackett court commented that the plaintiff had not raised the issue of whether only punitive damages were recoverable but suggested that the court might consider the issue when properly presented. In addition, Justice Maddox, writing for the court, cited in a footnote in his concurrence his view that the words "such damages as the jury may assess" are broad enough to include the assessment of compensatory damages when injury proximately results from an illegal sale. As a result, it appears that only punitive damages are allowable under the Civil Damages Act, although there is support for a broader view of damages.

IV. DRAM SHOP ACT

The Alabama Supreme Court requires proof of three elements in order to state a cause of action under § 6-5-71. Those elements are that the disposition or sale: (1) was contrary to the provision of law, (2) was the cause of the intoxication, and (3) the plaintiff's injuries were in consequence of the intoxication. Attala Golf & Country Club v. Harris, 601 So.2d 965 (Ala. 1992). The statute permits both compensatory damages and punitive damages, unlike the Civil Damages Act.

Recently, the Alabama Court of Civil Appeals, per Judge Terry Moore, reversed summary judgment in favor of a bar owner where the intoxicated person, a minor employee of the bar, served himself the alcohol. McGough v. G & A, Inc., 2007 WL 2333028 (Ala. Civ.App. 2007). The McGough court stated:

> The appellees lay much emphasis on the fact that the McGoughs presented no evidence indicating that any one, other than himself, actually served Jeremy alcohol on the date in question. However, the Dram Shop Act does not require physical service. Rather, the statute is triggered in any case in which a person unlawfully provides alcohol to a minor that results in the minor's intoxication and

proximately causes a covered injury. *See, Runyans v. Littrell*, 850 So.2d 244, 245 (Ala. 200). Hence, we do not find the mere fact that no one served Jeremy alcohol on the date of the accident to be dispositive of the case.

A. POTENTIAL PLAINTIFFS

Potential plaintiffs in a dram shop action include "every wife, child, parent, or other person" to be modified by the phrase "who shall be injured in person, property or by means of support." In Ward v. Rhodes, Hammond & Beck d/b/a The Brass Monkey, 511 So.2d 159 (Ala. 1987), the court undertook a lengthy review of the interpretation of the language regarding proper party plaintiffs and decided that the phrase should be read disjunctively, so that the phrase "wife, child, parent" is independent of the injured person, property or by means of support. The Ward opinion was quoted at length in McIsaac v. Monte Carlo Club, Inc., 587 So.2d 320 (Ala. 1991). The McIsaac court stated:

> A right of action under § 6-5-71 runs in favor of two classes of persons: "(1) The person injured in person or property, [and] (2) [the] wife, child, parent, or other person . . . who has been injured through loss of means of support because of personal injury to the person furnishing the means of support." Ward, 511 So.2d at 161. The phrase "other person" constitutes a second class of claimants that encompasses "anyone who is proximately 'injured in person, property or means of support by any intoxicated person or in consequence of the intoxication of any person.' And . . . this category of plaintiffs is as broad as proof of proximate cause will permit." James, 570 So.2d at 1229 (quoting Ward, 511 So.2d at 164). This court has interpreted § 6-5-71 to encompass a broad spectrum of plaintiffs and will not now start limiting them to "innocent" parties alone.
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> 587 So.2d at 324.

The best interpretation of results in these cases are that the courts create two categories of claimants:

(1) The person injured in person or property; and

(2) Any person injured through loss of support as a

result of the injury.

The intoxicated person does not have a cause of action under the dram shop statute. Maples v. Chinese Palace, Inc., 389 So.2d 120 (Ala. 1980). An innocent person who is injured by a drunk driver would have standing to bring a dram shop action. See, Ward v. Rhodes, Hammond & Beck d/b/a The Brass Monkey, 511 So.2d 159 (Ala. 1987). A patron of a bar injured in an assault committed by another intoxicated person who was served illegally alcohol will have a dram shop action. Ward, *supra*.

B. POTENTIAL DEFENDANTS

The class of potential defendants is ". . . any person who shall by selling, giving or otherwise disposing of to another, contrary to provisions of law . . ." As a result, a potential defendant in a dram shop action will be any entity or person violating laws relating to the use of alcohol in Alabama. The defense of contributory negligence (complicity in the drinking) is not available. McIsaac, *Id.* However, a defendant can raise the defense of assumption of the risk. McIsaac, *Id.*

C. CONTRARY TO LAW

Title 28 of the Alabama Code addresses the regulation and sale of alcohol. Section 28-3A-25 entitled "Unlawful acts and offenses; penalties", contains 21 subsections outlining "illegal acts" under the code. In addition, there are numerous regulations promulgated by the Alabama Beverage Control Board and given the force of law pursuant to Ala. Code § 28-3-49 (1975). A violation of these regulations support a dram shop claim.

In Attala, an individual who was not a member of the country club or a valid guest purchased alcohol from the defendant country club and was later involved in an automobile accident. The ABC licensee in Attala was not in compliance with ABC membership regulations for private clubs requiring a membership application, approval and payment of dues. Finding that the defendant did not satisfy these guidelines, the court found a violation of a code section prohibiting supplying alcohol after 2:00 p.m. As a result of the Attala opinion, any violation of a law regulating the sale or disposition of alcohol will satisfy the "contrary to the provision of law" element.

D. THE "APPEARS TO BE INTOXICATED" REGULATION

The primary ABC Regulation giving rise to most dram shop violations is the ABC Regulation prohibiting the sale of alcohol to

one who appears intoxicated:

> 20-x-6.02 On Premises Licensees
>
> . . .
>
> 4. No ABC Board on-premises licensee, employee or agent thereof shall serve any person alcoholic beverages if such person appears, considering the totality of the circumstances, to be intoxicated.
>
> . . .

In Krupp Oil Co., Inc. v. Yeargan, 665 So.2d 920 (Ala. 1995), the Alabama Supreme Court expounded on ABC rules prohibiting the furnishing of alcohol to visibly intoxicated persons. The Krupp Oil court defined "visibly intoxicated" as follows:

> A person of common intelligence will understand that someone "appearing to be intoxicated" could exhibit some or all of the following: The smell of alcohol on the breath; loud or boisterous behavior; slurred speech; glassy eyes; and unsteadiness. The list is not meant to be exhaustive, but it indicates the kind of evidence that supports certain elements of criminal charges involving intoxication.
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> 665 So.2d at 925.

Absence of visible intoxication is a ground for summary judgment in a bar owners favor in a subsequent suit by parents of a daughter injured in an auto accident with two bar patrons. Liao v. Harry's Bar, 574 So.2d 775 (Ala. 1990). In Harry's Bar, frequently cited by defendants, the bar patrons had several beers at Harry's before becoming intoxicated at a wedding reception. Because of a lack of evidence of visible intoxication while the patrons were in Harry's, summary judgment was appropriate. See, Odom v. Blackburn, 559 So.2d 1080 (Ala. 1990)(No evidence of visible intoxication where only witness who placed decedent in bar testified he was not visibly intoxicated); Adkison v. Thompson, 650 So.2d 859 (Ala. 1994)(Summary judgment appropriate where allegedly intoxicated person was seen drinking beer but witnesses said he was not intoxicated).

Plaintiffs frequently cite Duckett v. Wilson Hotel Management Corp. 660 So.2d 977 (Ala. Civ. App. 1995) on the visible intoxication requirement. In Duckett, there was evidence that the intoxicated person, normally shy, was loud and boisterous. In

addition, a bar tab was produced showing the intoxicated person consumed five Black Russians in a two hour period. This evidence was sufficient to create a question of fact.

E. TOXICOLOGY

Issues often arise regarding the import of expert toxicological testimony concerning the blood alcohol content of the intoxicated person and whether this expert testimony establishes the "appears intoxicated" requirement. On appeal to the Alabama Supreme Court is a case wherein summary judgment was granted in favor of the bar owner where the intoxicated person was .335 percent at the time he crashed into an innocent motorist.

Under Alabama law, toxicological evidence has been relied upon in numerous instances. For instance, a person is presumed impaired at .08 percent Ala. Code (1975) § 32-5A-194. In addition, murder convictions have been affirmed based on the testimony of a toxicologist regarding the effects of alcohol on the person. Patterson v. State, 518 So.2d 809 (Ala. Crim. App. 1987). Similarly, in Bailey v. State, 574 So.2d 1001 (Ala.Crim.App.1990), a defendant appealed his murder conviction arising out of the operation of a motor vehicle while under the influence of alcohol. In Bailey, it was shown that the defendant had a BAC of .11%. A toxicologist in the Bailey case testified that at .11% BAC "... it has been shown that 100% of the population is impaired in the operation of a motor vehicle..." 574 So.2d at 1004. The Bailey court affirmed the murder conviction and held that the toxicologist was "obviously qualified to testify as an expert about the effects of alcohol on human bodily functions." Id. Furthermore, the Bailey court held that the expert testimony of the toxicologist was such that it would have "aided the jury in considering the effect a blood alcohol content of .11%." Id.

Courts in other jurisdictions have held that testimony of a toxicologist regarding impairment of bodily functions is admissible evidence regarding visible intoxication. In Hulsey v. Northside Equities, Inc., 548 S.E.2d 41 (Ga.App.2001), an employee left the 1bar after consuming at least four cocktails and then caused the vehicular death of an innocent minor. In the Hulsey case, the employee's blood tested positive for alcohol at .18% BAC. In support of a summary judgment motion in a dram shop action, the club filed numerous affidavits stating that the employee did not appear visibly intoxicated at the time she left the club. In opposition, the parents of the deceased child filed only the affidavit of a toxicologist who testified that "at this level there are a number of manifestations of intoxication..." 548 S.E.2d at 478. The Hulsey appellate court reversed a grant of summary

judgment in favor of the club finding that a jury could find the eyewitness testimony inherently improbable when "juxtaposed with the objective and reliable scientific evidence, which is the strongest circumstantial evidence that the nature of the case will admit." Id. The Hulsey court further stated as follows:

> Courts and juries are not bound to believe testimony as to facts incredible, impossible, or inherently improbable. Great physical laws of the universe are witnesses in each case, which cannot be impeached by man, even though speaking under the sanction of an oath.
>
> 548 S.E.2d at 478.

Similarly, in Booker, Inc. v, Morrill, 639 N.E.2d 358 (Ind.App.1994), the family of an intoxicated driver killed in an automobile accident obtained a judgment in a dram shop liability action against the bar that served him alcohol on the morning of the accident. The only evidence against the bar was a blood test that revealed that the decedent's BAC was .21% and the testimony of a toxicologist who opined that "any person who has a blood alcohol content of .21% will exhibit physical signs of intoxication." 639 N.E.2d at 360. The bar in the Booker case appealed and contended that the toxicologist's testimony was mere speculation and was in direct conflict with testimony of eyewitnesses. The Booker court affirmed the judgment against and held that there was sufficient evidence from which the trier of fact could conclude that the bar had actual knowledge that the decedent was visibly intoxicated.

F. PROXIMATE CAUSE

In Laymon v. Braddock, 544 So.2d 900 (Ala.1989), the Alabama Supreme Court considered jury charges in a dram shop case relative to the causation issue and there is an existing pattern charge based on Laymon. The Laymon court held that the trial court's jury charge sufficiently complied with existing dram shop law by giving the following charges:

. . .

> We believe that the trial court's charge sufficiently complied with the following proposition of law in *Phillips v. Derrick*, supra:
>
> > "[T]he person injured by the illegal sale of alcoholic beverages is not held to the usual standards of proof

> of causal connection between the illegal sale of the beverages and the injury."
> Likewise, we believe that the trial court properly instructed the jury that a person selling alcoholic beverages could be responsible for remote or possible consequences, if the damages complained of were "in consequence of" the intoxication of the person.
>
> . . .

Laymon v. Braddock, 544 So.2d at 903.

V. FINANCIAL RESPONSIBILITY REQUIREMENTS

In order for an ABC license to be issued, the prospective licensee must show the following:

> 20-x-5-.14 Requirements of Financial Responsibility by Licensees.
>
> (1) All retain licensees of the ABC Board shall comply with the following conditions of requirements of Financial Responsibility.
>
> (a) Prior to the issuance of any retail alcoholic beverage license after January 1, 1999, or renewal of existing alcoholic beverage retail license after January 1, 1999, each applicant must provide the ABC Board with sufficient information that it has a net worth of at least one hundred thousand dollars ($100,000.00). This information may be shown as follows:
>
> 1. A statement from a certified public accountant that the applicant has a net worth of at least one hundred thousand dollars ($100,000.00) according to generally accepted accounting principles; or
>
> 2. A coverage sheet from a reputable insurance company showing that the applicant has liquor liability (dram shop) insurance of at least one

> hundred thousand dollars ($100,000.00) for each incident and that coverage is valid from October 1, to September 30.
>
> . . .

The insurance industry has almost uniformly responded to the liquor liability insurance requirement by providing policies with "eroding limits." These policies start with limits of $100,000 but are diminished during the policy period by "supplementary payments" which would include defense costs and costs associated with prior claims. Thus, dram shop defendants with an eroding limits policy who litigate the defense, will necessarily have less than $100,000 to apply to the settlement of a claim.