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DRAM SHOP CASES: WHEN THE BAR CAUSES THE CRASH

Quentin Brogdon

Author contact information:
Quentin Brogdon
Crain Brogdon Rogers, LLP
3400 Carlisle Street, Suite 200
Dallas, Texas 75204

QBROGDON@CBRLAWFIRM.COM
214-598-1009 Cell
214-613-5101 Fax

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I. INTRODUCTION

In every car crash case, there is an extra party that potentially belongs in the case – a dram shop that over-served one of the drivers. In Texas, the majority of drivers on the road are either uninsured or they are driving with the minimal required limits of \$30,000 per person and \$60,000 per accident. Finding culpable, insured dram shops can make seriously injured car crash victims whole in cases where that would not otherwise be possible. Lawyers handling car crash cases must be thoroughly familiar with the Texas Dram Shop Act and must carefully screen cases to determine whether a driver was over-served.

II. TEXAS DRAM SHOP ACT

At common law, the consumption of alcohol, not its sale or service, was viewed as the sole proximate cause of the patron's intoxication and later injury to a third party, and injury to a third person was viewed as an unforeseeable result of the intoxication. *El Chico Corporation v. Poole*, 732 S.W.2d 306, 309 (Tex.1987). In *El Chico Corporation v. Poole*, 732 S.W.2d 306 (Tex.1987), the Texas Supreme Court recognized that the foreseeable likelihood of causing injury by serving alcohol to an obviously intoxicated person is as great as one would expect from releasing a rattlesnake in a shopping mall, and the Court created a new common law cause of action for over-service to a patron. *El Chico*, 732 S.W.2d at 311.

In 1987, the same year that the Court issued its *El Chico* opinion, the Texas Legislature enacted the Texas Dram Shop Act to protect "the welfare, health, peace, temperance, and safety of people of the State." In fact, the *El Chico* court noted in its opinion that the legislature had "this week" enacted the Dram Shop Act, in which the legislature had "created a much more onerous burden of proof for an injured plaintiff than we have in this opinion." *El Chico*, 732 S.W.2d at 314. The purpose of the Dram Shop Act is to discourage sellers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated persons who may cause serious injury to themselves or others. *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). A provider's liability under the Dram Shop Act is direct because it is based on the provider's own wrongful conduct in serving an obviously intoxicated person. *Id.* at 689.

The Dram Shop Act establishes an exclusive cause of action against a provider of alcoholic beverages if, at the time the provision occurred it was apparent to the provider that the person being provided with the alcoholic beverage was "obviously intoxicated to the extent that he presented a clear danger to himself and others," and the intoxication of the person was a proximate cause of the damages suffered. Tex. Alco. Bev. Code § 2.02(b).

III. "PROVIDER" OF ALCOHOL

If the provider holds a license to serve alcohol under the Texas Alcoholic Beverage Code, it is a "provider" under the Dram Shop Act, regardless of whether it charges for the alcoholic beverage. Tex. Alco. Bev. Code § 2.01; *Calvillo v. Frazier*, 511 S.W.3d 194, 196 (Tex. App.—Dallas 2015, no pet). An unlicensed server of alcohol is a "provider" under the Act only when it charges for the alcohol, however. Tex. Alco. Bev. Code § 2.01; *Whitney Crowne Corp. v. George Distribs.*, 950 S.W.2d 82, 91 (Tex. App.—Amarillo 1997, writ denied).

“Social hosts” are not providers. *Smith v. Merritt*, 940 S.W.2d 602, 605-606 (Tex. 1997); *Graff v. Beard*, 858 S.W.2d 918, 918-919 (Tex. 1993). But an adult is liable under the Act for: 1) serving or providing alcohol to the minor, 2) or allowing the serving or providing of alcohol to the minor on the adult’s premises, 3) when the alcoholic beverage contributed to the minor’s intoxication, and 4) the minor’s intoxication proximately caused the plaintiff’s injury. Tex. Alco. Bev. Code § 2.02. The “adult” must be at least 21 years old, and must not be the minor’s parent, guardian, spouse, or custodian. *Id.* The “minor” must be under 18 years old. *Id.*

IV. PROXIMATE CAUSE

Under the Dram Shop Act, a plaintiff must show that the recipient’s intoxication was the proximate cause of the plaintiff’s injury. Tex. Alco. Bev. Code § 2.02(b)(2); *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680, 684 (Tex. 2007). The recipient’s intoxication must be a cause-in-fact of the plaintiff’s injury – a substantial factor in bringing about the injury. *Boyd v. Fuel Distribs.*, 795 S.W.2d 266, 272 (Tex. App.—Austin 1990, writ denied); *Southland Corp. v. Lewis*, 940 S.W.2d 83, 85 (Tex. 1997). In *Southland Corp. v. Lewis*, 940 S.W.2d 83 (Tex. 1997), the Court found that the cause-in-fact requirement could not be met in a case involving an intoxicated passenger in a car crash unless the intoxicated passenger interfered with the operation of the automobile. *Southland Corp.*, 940 S.W.2d at 85.

Proximate cause under the Act also requires a showing that the plaintiff’s injury was a foreseeable result of the defendant’s intoxication. A car crash involving an intoxicated patron certainly is foreseeable. *See, e.g., Venetoulis v. O’Brien*, 909 S.W.2d 236, 241 (Tex. App.—Hous.[14th Dist.] 1995, writ dim’d). But the recipient’s intentional murder of another person is not foreseeable. *See, e.g., Boggs v. Bottomless Pit Cooking Team*, 25 S.W.3d 818, 825 (Tex. App.—Hous.[14th Dist.] 2000, no pet.).

Proximate cause under the Act does not require showing a causal link between the plaintiff’s injury and the defendant’s conduct, but merely showing a causal link between plaintiff’s injury and the recipient’s intoxication. *Borneman v. Steak & Ale*, 22 S.W.3d 411, 412-13 (Tex. 2000).

When the alcoholic beverage is provided to an *adult*, the plaintiff is *not* required to prove that the alcohol contributed to the recipient’s intoxication, or even that the recipient actually drank the alcohol. Tex. Alco. Bev. Code § 2.02(b); *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680, 700 (Tex. 2007) (Jefferson, C.J., dissenting). When the alcoholic beverage is provided to a *minor*, however, the plaintiff *is* required to prove that the alcohol contributed to the plaintiff’s intoxication. Tex. Alco. Bev. Code § 2.02(c).

V. PROPER PLAINTIFFS

Proper plaintiffs in a Dram Shop Act case include: 1) the intoxicated recipient (so-called “first party cases”), and 2) innocent third parties who were injured by intoxicated recipients (so-called “third party cases”). *See, e.g., Smith v. Sewell*, 858 S.W.2d 350, 355 (Tex. 1993) (intoxicated recipient); *Borneman v. Steak & Ale*, 22 S.W.3d 411, 412 (Tex. 2000) (innocent third-party passenger in automobile).

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