

Liability for Intoxicated Customers

By Stacy D. Fulco

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Dram-Shop Laws and Beyond

“Nothing good happens after midnight!” That saying may be true, but that won’t stop bars and restaurants from closing at 2:00, 3:00, or even 4:00 a.m., and when those late nights result in intoxicated customers acting irresponsibly,

people harmed by them will be looking to the bars and restaurants for compensation.

The majority of the country has some form of a dram-shop law or social host liability law, imposing liability on the servers or retailers of alcohol for the acts of those who become intoxicated. These laws differ greatly from state to state, requiring every bar and restaurant to understand the law fully in each state where it conducts business. However, dram-shop laws are not the only way that victims of an intoxicated customer can seek damages against a bar or restaurant. The following is a review of the most common situations where bars or restaurants are sued for the acts of an intoxicated person and recommendations that bars, restaurants, and carriers can implement to reduce liability for intoxicated customers.

Shootings and Altercations

Some of the most difficult situations to analyze are whether a bar will have a duty and whether liability will be imposed in events

involving a customer-related shooting or altercation. Often, these events take place outside of the bar, in the parking lot, or even farther from the property, but courts are still willing to impose liability on the bar under certain circumstances.

On a case-by-case basis, many of the cases can seem somewhat unfair or unjust to the bar or restaurant, imposing liability for a significant event that took place in the parking lot or on the sidewalk when there was merely an argument inside the establishment. However, a review of cases from around the country seems to shine a light on what the courts are really looking at: notice and foreseeability. If the bar or restaurant had notice or knowledge of a situation between two people, even if it was just an argument, the appellate courts tend not to grant summary judgment when that argument later resulted in a violent attack.

Notice and Foreseeability

In *Cooke v. Maxum Sports Bar & Grill, Ltd.*, 2018 IL App (2d) 170249 (2018), the plain-

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tiffs were physically attacked in a strip-mall parking lot, which was a one-and-half- to two-minute walk around the corner from a bar where they and their attacker were all patrons. The plaintiffs' sued the bar, claiming it failed to protect them from the attack. The attacker yelled at one plaintiff in the bar and at the bar exit. The plaintiffs claimed that they requested assistance from the guard, but he did not get involved. The attacker left after the plaintiffs, but once the plaintiffs reached their car, they were attacked. The bar argued that it was not responsible for protecting the plaintiffs once they left the bar property, and the bar deemed the issue de-escalated because the parties left separately.

In *Cooke*, the appellate court noted that the location of the attack alone did not dispose of the duty issue because there were situations when a duty could be found for an attack that occurred away from the defendant's premises. The court also found there was foreseeability because the guards knew the attacker was angry with the plaintiffs and that the attacker left shortly after the plaintiffs. There was also evidence the bar was familiar with the attacker and knew that he had a reputation for being aggressive. The court upheld the bench ruling in favor of the plaintiffs.

In *Covelli v. Silver Fist, Ltd.*, 167 A.D.3d 980 (N.Y. 2018), there was a quite different result from the *Cooke* case. In *Covelli*, two patrons of a bar fought on a public road outside the bar, resulting in a patron being killed. The court determined the fight was a sudden and unforeseen event, and the bar was not found liable.

In *Hammond v. San Lo Leyte VFW Post #7515*, 426 P.3d 539 (Kan. 2018), the appellate court reversed a summary judgment ruling in favor of the defendant, where the altercation took place outside and off the property involved. The people involved in the fight were in a VFW, and a verbal altercation started in the restroom. The manager told the plaintiff to leave because he was arguing with other customers. He was then escorted out of the building, and the person he was arguing with helped escort him out. Before the manager went back inside, the attacker pushed the plaintiff up against the wall. Once the manager returned inside, the plaintiff was attacked, but it happened on a public sidewalk out-

side. The court ruled that viewed in the light most favorable to the plaintiff, the assault on the plaintiff was entirely predictable and could have been avoided. The court ruled that a proprietor such as the VFW is liable for an assault on a guest or patron by another guest or third party, where the proprietor has reason to anticipate such an assault and fails to exercise reasonable care to forestall or prevent the same.

In *James v. Terrace Tavern, LLC*, 46 Misc.3d 470 (N.Y. 2014), the plaintiff was shot outside of a bar (not on the bar property) shortly after the shooter left the bar. The plaintiff attempted to recover against the bar under a dram-shop act and under a negligence theory, but the defendant's motion to dismiss was granted and affirmed. The dram action was dismissed because the plaintiff had no evidence the shooter was intoxicated or that he was served alcohol at the bar. The negligence action was dismissed because the plaintiff was not a customer of the bar, so there was no relationship creating a duty and no possible way the bar could have known or foreseen the shooting.

In *Tenhundfeld v. Michelle's Bar LLC*, 2013 WL 1285172 (Ohio 2013), the plaintiff was injured in a fight, and he filed suit against the bar in which his assailant had been drinking. Summary judgment was affirmed for the bar because the plaintiff failed to show the fight occurred on the premises, or in the parking lot of the bar, or that his assailant had been served alcohol at the bar while "noticeably intoxicated." While the issue between them started in the bar, there was also no evidence of any verbal altercation or threats inside the bar, so the bar could not have known of any issues between the two parties.

Foreseeability as an Element that a Plaintiff Must Prove

As with any assessment for liability of a third-party criminal act, the primary element that courts look at around the country is foreseeability in determining if a bar is liable for an altercation or shooting involving one of its intoxicated patrons. In the following cases, the courts made it clear that foreseeability was an actual element that the plaintiff had to prove.

In *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384 (Ind. 2016), the Indiana Supreme Court upheld summary judgment for a neighborhood bar, holding a shooting was not foreseeable as a matter of law. According to the evidence, the shooter heard someone at a nearby table make a derogatory comment about his wife, and this angered him, so he pulled

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out a gun and fired at the person making the comment. The court determined that foreseeability was a component of the duty analysis (and the proximate cause analysis). And under the duty analysis, it required a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence. Under the duty analysis in this case, the shooting was not foreseeable because the neighborhood was generally safe, there were no prior shootings at the bar, there were no prior gun incidents in the bar, and the shooter was not known to be violent. See also *Powell v. Stuber*, 89 N.E.3d 430 (Ind. 2018).

In *Wirth v. Wayside Pub, Inc.*, 142 A.D.3d 1346 (N.Y. 2016), the plaintiff sued a bar for injuries she sustained in an altercation she had with a patron, where there were preexisting tensions with the assailant and the plaintiff's friend. Summary judgment was affirmed for the bar. The plaintiff admitted that, prior to the altercation, the two only occasionally stared at each other from across

the room, and there was no evidence of past incidents between the parties. Therefore, the altercation was not foreseeable to the bar.

In *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex.2010), twenty to forty intoxicated customers in two rival groups yelled at each other, cursed, and shoved each other for over ninety minutes, until it resulted in a large brawl. Not surprisingly,

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the court found the brawl foreseeable and upheld a \$1.48 million award.

In *Reichert v. Adler*, 117 N.M. 628 (N.M. 1993), a wrongful death action was filed against a bar after a shooting in the bar resulted in the death of a patron. The jury's verdict for the plaintiff was affirmed in part and reversed in part. According to the evidence, the decedent and the shooter were in an argument in the bar, and the employees were aware of the argument but did not intervene. The argument escalated; the shooter pulled out a gun and shot six times. There was no security at the time of the incident. The court found that the establishment had a reputation as a dangerous bar and was "the scene of numerous murders, stabbings, shootings, assaults, and riots." The court also found that, despite the reputation for violence and large number of patrons who frequented the bar, no professional security was employed, only one individual provided security, and patrons

were only given a visual inspection as they entered the premises. The evidence also showed the two were fighting for five minutes before the shooting, which was enough time for the employees to intervene or call the police, neither of which was done.

In *Devine v. McLain*, 306 N.W.2d 827 (Minn. 1981), the plaintiff filed a premises liability action against a bar after he was shot in the bar by another patron, and the issue was whether the bar had a duty to protect. The plaintiff and the attacker's husband had a physical fight in the bar, but it was broken up, and the attacker left. The attacker was not known to the bar. Thirty minutes after the fight, the attacker returned to the bar and shot the plaintiff from the doorway. The court ruled the shooting was not foreseeable because once the fight ended and the attacker left, the event was reasonably over.

Given the holdings of the cases discussed above, if the plaintiff and the assailant in the *Devine* case were ejected from the bar because of the altercation, and the shooting occurred in the parking lot or even down the street, the bar would likely be found liable. It also seems possible that if the assailant were ejected from the bar after the fight, and the bar allowed the plaintiff to leave shortly afterward, the bar possibly could be held liable, if the plaintiff were shot in the parking lot going to his car, and if the plaintiff requested assistance to his car from the bar.

Similar to *Devine*, in *Kipp v. Wong*, 163 Mont. 476 (1974), a directed verdict was entered and upheld for the defendant bar after a shooting in the bar. The attacker entered the bar, took out a gun, and rapidly shot the plaintiff and others. The attacker left the bar approximately two-and-a-half hours before the shooting and returned just minutes before the shooting. He had not caused any trouble earlier in the night, but there was conflicting testimony regarding whether he had a violent reputation. The court granted the directed verdict because the record did not reveal facts that would demonstrate the defendant caused the condition or that he had knowledge of it. The injury-causing condition was not of such a nature or duration that the defendant could have been charged with constructive notice.

It is interesting to note that *Kipp v. Wong* took place in 1974. Whether the court

would grant a directed verdict now, forty-some years later, is unknown, but based on the case law from around the country, it seems a court today might place more weight on the assailant's reputation than it had in the past.

In one case, the plaintiff attempted to place liability on a bar under a dram statute for a shooting, but was prevented from doing so since it was considered an intentional act. In *Mortensen v. Moravec*, 1 Wash.App.2d 608 (2017), the plaintiff was accidentally shot by an intoxicated person, and the plaintiff sued the bars that served alcohol to the shooter because they allegedly served him even though he was intoxicated. The bars' summary judgment motions were granted and upheld because an alcohol seller's duty not to serve a person apparently under the influence of alcohol does not extend to someone injured by the intoxicated person's criminal assault, regardless of whether the injury was intentional or accidental. The court noted that an alcohol seller could be liable for a criminal assault committed by one of its customers if the seller had some notice of the possibility of harm from the customer's prior actions, but that wasn't shown in this case.

In complete contrast to *Mortensen*, consider a case in Alaska, where a bar could be held liable for a stabbing at a nearby restaurant. In *Kalenka v. Jadon, Inc.*, 305 P.3d 346 (Alaska 2013), a fast-food restaurant patron was stabbed and killed by an alleged "drunken person" and the estate filed a wrongful death suit against the bar that allegedly served alcoholic beverages to the attacker. The Supreme Court of Alaska reserved a summary judgment ruling in favor of the bar. The issue in the case was whether the attacker's intoxication while at the bar was plain and easily observable enough to be considered a "drunken person" under the statute. Even though there was no evidence regarding how the attacker behaved at the bar, based on his high blood alcohol level at the time of the stabbing, the plaintiff's expert opined that the servers should have recognized his drunken state and stopped serving him at the bar. The police report also noted the attacker was visibly intoxicated at the fast-food restaurant. There was enough evidence for the court to find sufficient questions of mate-

rial fact as to whether the bar should have known the attacker was intoxicated.

Who Can Be Held Liable?

Finally, another relevant issue with cases involving shootings and altercations is whether the landlord or owner of the property can be held liable. Typically, the owners of real estate who lease the premises to a tenant who operates a bar are not liable for the actions or incidents that occur in the bar. This analysis typically focuses on the fact that the landlord is not involved with the operation and management of the business. However, where the plaintiff can show the attack was foreseeable, due to a history of prior, similar attacks on the property, liability can be imposed on a landlord. See *Winter v. Jimmy's Lakeside Inn, Inc.*, 200 A.D.2d 826 (N.Y. 1994); *Harkins v. Charles McBeardey*, 1992 WL 1071438 (Pa. Com. Pl. 1992); *Johnson v. Martin*, 28 Wash. App. 774 (1981); *Prather v. H-K Corp.*, 282 Pa. Super. 556 (1980); *Lewis v. Bendinelli*, 26 Ohio Misc. 189 (1970).

Motor Vehicle Accidents

Most dram-shop actions involve motor vehicle accidents, but specifically how liability can be imposed on the establishment that provided the alcohol greatly depends on the state and the statute involved.

More than thirty states have statutory or case law provisions that allow licensed establishments such as bars, restaurants, and liquor stores to be held liable for selling or serving alcohol to individuals who cause injuries or death due to their intoxication. Most, but not all, of those states statutorily limit the liability to cases where the establishment sold or served alcohol to an obviously intoxicated individual or a person under the legal drinking age.

The key to defending these cases is knowing the limited defenses available and investigating if there is any evidence to support those defenses as soon as possible. Otherwise, liability is almost absolute.

Alcoholics or Known Drinkers

In some states, a bar or restaurant can be held liable under dram-shop laws, even when the only person injured is the intoxicated person. Many times, these cases involve someone known to the bar or restaurant. The person typically frequents

the bar, becomes intoxicated often, and is served despite being intoxicated. See *Bayless v. TTS Trio Corp.*, 474 Mass. 215 (2016). In other states, the dram laws are only imposed if it is known that the purchaser is reputed to be habitually addicted to alcohol (such as in Florida). See *Gonzalez v. Stoneybrook West Golf Club, LLC, Inc.*, 225 So.3d 891 (5th Dist. 2017) (regular golfer who drank while he played had blood alcohol level of .302 at time of accident after playing round of golf).

One somewhat unusual case was not filed under a dram statute because the club did not have a license to sell alcohol. Even so, the club was held liable for the actions of someone who it knew to be intoxicated. In *Simmons v. Homatas*, 386 Ill. App. 3d 998 (Ill.2009), an adult entertainment club was sued for negligently allowing an obviously intoxicated person to leave its premises, even though the club did not serve alcohol. After the patron left the club, he caused a car accident and killed another driver. The defendant's motion to dismiss was denied, and the denial was affirmed. The patron parked his car with a valet at the club and brought his own hard alcohol to consume. According to the evidence, the patron was visibly intoxicated, and when he was found vomiting in the restroom, he was ejected from the club and given his car. The accident occurred after he left the club.

The appellate court in *Simmons* ruled that encouraging and facilitating the patron's drinking, ejecting him from the club, and placing him behind the wheel with the requirement that he drive his car away from the club and onto the public roadways constituted substantial assistance under Restatement (Second) of Torts, Section 876(b). The club clearly knew the patron was intoxicated, and if the patron were to drive, he would be engaging in negligent conduct, breaching his duty of ordinary care when operating a motor vehicle. Therefore, the club was subject to liability.

General Practical Tips

The above cases paint a clear picture describing under what scenarios the courts are willing to grant summary judgment in favor of bars and restaurants, and when liability will be imposed on a bar or restaurant for the acts of an intoxicated patron.

The question now is what to do with that knowledge to help mitigate risk, reduce liability, and increase the chances of summary judgment being granted in favor of your clients and insureds. The following are some practical tips to help reach a positive result:

- If employees see an altercation, they should get involved and stop it. Break up those involved and do not let them leave the establishment together.
- Do not stop an altercation by forcing all involved to leave the premises together.
- If a customer requests assistance because of a threat or potential threat from another person, provide that assistance.
- Have lots of surveillance cameras and preserve footage after any type of incident.
 - Have cameras from the bar facing out; this shows what the bartenders see from their point of view.
 - Have cameras, down the back hallway to the restrooms because that is where fights or altercations are more likely to take place.
- Complete a written report for every type of incident and document as much information about it as possible.
- Incident reports and surveillance footage can be kept on the premises: clients do not need to turn over every incident report or all footage to the insurance carrier, but even if reporting is not required, put the preserved footage and the report in a safe place and keep it there until the statute of limitations has expired.
- Bars and restaurants should know when an incident needs to be reported to their carrier, but just because it does not need to be reported, does not mean it should not be investigated. Have a system in place for what to do if a customer is too intoxicated to drive.
- Employees should not be allowed to drink alcohol while working.

Most importantly, ensure all employees and managers know the dram-shop and liquor laws of the state and fully understand how the establishment can be held liable for the acts of an intoxicated customer. This knowledge will help them be more aware and encourage them to act when they are placed on notice of a situation.

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