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Garden State CLE Presents:

Winning your Dram Shop Case

Lesson Plan

Table of Contents

1. Dram Shop Acts under NJ Common Law

a. Rappaport v. Nichols, 31 N.J. 188, 205-206, 156 A.2d 1 (1959)

[Creates a duty on liquor license holders to third parties who are injured in automobile accidents by patrons who were served alcoholic drinks when already intoxicated. This duty was later extended to social hosts who serve alcohol to minors. *Linn v. Rand,* 140 *N.J.Super.* 212, 219-220 (App. Div. 1976) This duty was extended even further where the public interest in controlling the use and consumption of alcohol was considered significant. Kelly v. Gwinnell, 96 N.J. 538, 552-555 (1984).]

Other common law cases:

Thompson v. Victor's Liquor Store, Inc., 216 N.J.Super. 202 (App.Div.1987),

Geherty v. Moore, 238 N.J.Super. 463 (App. Div. 1990)

b. Contributory Negligence:

1. Soronen v. Olde Milford Inn, 46 N.J. 582, (1966).

c.) Comparative Negligence under NJSA 2A:15–5.2

1. Buckley v. Etstate of Pirolo, 101 NJ 68 (1985)

2. Lee v. Kiku Restaurant, 127 NJ 170, 184 (1992).

2. Apportionment of fault

The *Lee* holding does not impose strict liability for all injuries caused by a tavern patron after negligent service by a tavern. The presumption established in *Lee*—that if a tavern negligently served a patron after the patron reached the point of intoxication, the patron thereafter ordinarily will have lacked the capacity to appreciate the risks of her subsequent actions that led to the injuries at issue—is to be used in apportioning fault between a tavern and a patron only for that part of the injuries attributable to the patron's negligence caused by intoxication. In order to complete the apportionment of fault, the fact-finder must consider all of the causes of the incident. Steele v. Kerrigan, 148 NJ 1, 19 (1997)

First, an intoxicated patron may no longer avoid responsibility for injuries proximately caused by his or her voluntary decision to consume alcohol to the point of intoxication. Second, once a jury determines that a tavern continued to serve drinks to a visibly-intoxicated patron, the jury should not be instructed, absent exceptional circumstances, to determine the extent to which the patron retained some capacity to appreciate the risk of engaging in the activity that led to the accident. If the tavern serves alcohol to a visibly-intoxicated patron, a court will ordinarily presume the patron's lack of capacity to evaluate the ensuing risks. Lee v. Kiku Restaurant, 127 NJ 170, 184 (1992).

[T]he jury may allocate the fault involved in the negligent operation of the vehicle between the patron-driver and the tavern based on the jury's qualitative evaluation of all of the evidence bearing on the extent to which the respective conduct of the patron-driver and the tavern contributed to the negligent operation of the vehicle. In making that allocation, the jury may consider the patron-driver's conduct in becoming voluntarily intoxicated, the extent of the tavern's misconduct in continuing to serve the patron-driver, and the specific evidence relating only to the nature and circumstances of the negligent operation of the vehicle. Juries must be informed that they are authorized to allocate responsibility for negligent operation of a vehicle between the patron-driver and the tavern based on the relevant evidence. Lee v. Kiku Restaurant, 127 NJ 170, 185-186 (1992).

Exceptional Circumstances Case:

Fisch v. Bellshot, 135 NJ 374, 378 (1994)

[T]he trial court should have instructed the jury that if it determined that the tavern served the bartender after she became visibly intoxicated, it should not consider the bartender's negligence in subsequently deciding to drive. Emphasizing that the decedent had served herself despite her obligation not to do so while on duty and that, based on her occupational training and experience, she was equipped "with an increased ability to assess the progression of intoxication and to understand the debilitating effect of excessive drinking," the Court held that this was a case of "exceptional circumstances" in which the *Lee* presumption was inappropriate and therefore the *Buckley* instruction was correct.

3. Statute

2A:22A-1. Short title; New Jersey Licensed Alcoholic Beverage Server Fair Liability Act

This act shall be known and may be cited as the "New Jersey Licensed Alcoholic Beverage Server Fair Liability Act."

2A:22A-2. Legislative findings and declarations

The Legislature finds and declares that licensed alcoholic beverage servers face great difficulty in obtaining liability insurance coverage. Even when insurance coverage is available, drastic increases in the cost of that insurance have recently taken place, and many licensed alcoholic beverage servers are no longer able to afford liability insurance coverage.

This lack of insurance adversely affects not only the licensed alcoholic beverage servers themselves, but also patrons and third persons who suffer personal injury and property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server.

In order to make it economically feasible for insurance companies to provide coverage, the incidence of liability should be more predictable. That predictability may be achieved by defining the limits of the civil liability of licensed alcoholic beverage servers in order to encourage the development and implementation of risk reduction techniques.

This act has been designed to protect the rights of persons who suffer loss as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server

while at the same time providing a balanced and reasonable procedure for allocating responsibility for such losses. It is anticipated that this act may result in the improvement of the alcoholic beverage liability insurance market in this State.

2A:22A-3. Definitions

As used in this act:

"Alcoholic beverage" means a fluid, or a solid capable of being converted into a fluid, suitable for human consumption and having an alcoholic content of more than one-half of 1% by volume. The term shall include alcohol, beer, lager beer, ale, porter, naturally fermented wine, treated wine, blended wine, fortified wine, sparkling wine, distilled liquors, blended distilled liquors and any brewed, fermented or distilled liquors fit for use for beverage purposes, or any mixture of them;

"Licensed alcoholic beverage server" or "server" means a person who is licensed to sell alcoholic beverages pursuant to R.S. 33:1-1 et seq. or who has been issued a permit to sell alcoholic beverages by the Division of Alcoholic Beverage Control in the Department of Law and Public Safety;

"Minor" means a person under the legal age to purchase and consume alcoholic beverages according to P.L.1972, c. 81 (C. 9:17B-1 et seq.);

“Person” means a natural person, the estate of a natural person, an association of natural persons, or an association, trust company, partnership, corporation, organization, or the manager, agent, servant, officer or employee of any of them;

“Visibly intoxicated” means a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication.

2A:22A-4. Exclusive civil remedy for personal injury or property damage resulting from negligent service

This act shall be the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages by a licensed alcoholic beverage server. Nothing contained herein shall be deemed to limit the criminal, quasi-criminal, or regulatory penalties which may be imposed upon a licensed alcoholic beverage server by any other statute, rule or regulation.

2A:22A-5. Conditions for recovery of damages

a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:

(1) The server is deemed negligent pursuant to subsection b. of this section; and

(2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and

(3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly

intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor.

2A:22A-6. Damage awards; limitations

Damages may be awarded in a civil action under P.L.1987, c. 152 (C. 2A:22A-1 et seq.) subject to the limitations set forth in this section.

a. The provisions of sections 1 and 2 of P.L.1973, c. 146 (C. 2A:15-5.1 and C. 2A:15-5.2) shall apply in all civil actions instituted pursuant to the provisions of this act.

b. Notwithstanding the provisions of P.L.1952, c. 335 (C. 2A:53A-1 et seq.), section 3 of P.L.1973, c. 146 (C. 2A:15-5.3) or any other law to the contrary, in any case where a licensed alcoholic beverage server or any other party to a suit instituted pursuant to the provisions of this act is determined to be a joint tortfeasor, the licensed alcoholic beverage server or other party shall be responsible for no

more than that percentage share of the damages which is equal to the percentage of negligence attributable to the server or other party.

2A:22A-7. Determination of effect of act on alcoholic beverage liability insurance market; reports and recommendations; rules and regulations

The Department of Insurance shall monitor the alcoholic beverage liability insurance market in the State following the effective date of this act. The department shall gather information and statistics on the number of insurers including surplus lines insurers, issuing alcoholic beverage insurance policies, the number of policies issued, the premiums for such policies, the number of civil actions filed in accordance with the provisions of this act, the amounts of damages awarded in civil actions or the amounts of settlements, and any other information deemed necessary in order to determine the effect of this act on the alcoholic

beverage liability insurance market. The department shall issue an initial report on the information obtained to the Governor and the Legislature and make appropriate recommendations within two years following the effective date of this act and a final report within three years following the effective date of this act. The Commissioner of the Department of Insurance shall promulgate any rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.), necessary in order to fulfill the requirements of this section.

4. Proof of Visible Intoxication

a. **Halvorsen v. Villamil, ___ NJ Super. ___ (App. Div. 2013)**

There is no requirement of eyewitness testimony as to visible intoxication in a dram shop case.

A fact may be proved by both direct evidence and circumstantial evidence. Both direct and circumstantial evidence are equally acceptable forms of proof. Indeed, circumstantial evidence may be

deemed more certain and satisfying than direct evidence. To defeat a motion for summary judgment in a dram shop case, a plaintiff must present sufficient direct or circumstantial evidence that would permit a jury to reasonably and legitimately deduce that a beverage server served alcoholic beverages to the person at issue while he or she was visibly intoxicated..

Plaintiffs presented the following evidence on the visible intoxication issue. Villamil testified at his deposition that he did not consume alcohol before going to T.G.I. Friday's or after leaving, and that the accident occurred only twenty minutes after he left T.G.I. Friday's. The police report documents erratic driving by Villamil when he struck a slowing vehicle in the rear with sufficient impact to cause it to flip on its side. When the police and paramedics arrived at the accident scene, they smelled alcohol on Villamil's breath. Additionally, Villamil told the police he was not in pain, despite the paramedics reporting that he sustained serious bodily injuries requiring hospitalization. Finally, Villamil's blood taken at the hospital revealed the very high blood alcohol concentration of 0.278 percent.

Dr. Saferstein's expert opinion bolstered this evidence. He opined that based on Villamil's height and weight, Villamil would have reached a blood alcohol concentration of 0.10 percent by 7:30 p.m., an hour before the time Villamil claimed to have left T.G.I. Friday's. According to Dr. Saferstein, in order to reach a blood alcohol concentration of 0.278 percent, Villamil "would have had to consume the equivalent of approximately seventeen [twelve] ounce containers of beer." Thus, Dr. Saferstein concluded that he could determine within a reasonable degree of scientific certainty that

T.G.I. Friday's served Villamil an alcoholic beverage while he was visibly intoxicated.

Note use of retro-grade extrapolation by experts in the case law:

Contrast: Riley v. Keenan, 406 NJ Super. 281 (App. Div. 2009) [No proof any alcohol had been served to defendant while he was in a second bar.]

Salemke v. Sarvetnick, 352 NJ Super. 319 (App. Div. 2002) [Based on autopsy (brain BAC .129) and expert's opinion, plaintiff would not have shown signs of intoxication until after last call.]

Mazzacano v. Estate of Kinnerman, 197 NJ 307 (2009) [No evidence of visible intoxication. Autopsy BAC .18. No duty to monitor slef-service drinking.]

Bauer v. Nesbitt, 198 NJ 601 (2009) [No proof Defendant was ever served any alcohol by the bar.]

History of serving intoxicated patrons at Giants stadium and evidence that defendants were served while intoxicated.
Verni ex rel. Burstein v. Harry M. Stevens, Inc.,387 N.J.Super. 160 (App. Div. 2006).

5. Proximate Cause

Davis v. Barkaszi, 424 N.J.Super. 129, 145-146 (App. Div. 2012)

KC's Korner notes that the language of *N.J.S.A.* 2A:22A–5(a)(2) speaks solely to the "negligent service of alcoholic beverages." Only the drinks served after "the server served a visibly intoxicated person," *N.J.S.A.* 2A:22A–5(b), are to be considered in a proximate cause analysis. The trial judge's interpretation of the law of proximate cause under *N.J.S.A.* 2A:22A–5, as he instructed the jury in his charge and placed in the verdict sheets, was *146 incorrect because it allowed the jury to conclude that if KC's Korner served Barkaszi one drink after he was visibly intoxicated, then it is liable for the result of his drunk driving, even if that one drink did not contribute to his intoxication at the **749 time of the accident because it was not yet absorbed into Barkaszi's bloodstream.

In circumstances such as these, where a defendant reasonably raises the defense that no alcohol served after visible intoxication entered the driver's bloodstream prior to the accident, the trial judge should amplify the proximate cause paragraph of the model jury charge. In these limited circumstances, the judge should instruct the jury that the negligently served alcohol must have had sufficient time to negatively effect the driver's ability to drive. The facts underlying the time of consumption in relation to the time of the accident will necessarily limit a defendant's access to this amplified charge.

6. Drunk Driving Conviction no bar to cause of action [NJSA 39:6A-4.5]

Finally, it is no small matter in our analysis that the bar in subsection 4.5(b) can coexist with the Dram Shop Act's deterrence and liability-imposing principles. There is no incompatibility between the two provisions. An intoxicated person is deterred from driving drunk by losing the right to sue under Title 39 for insurance coverage for his injuries. On the other hand, permitting an injured drunk driver to file an action against a liquor establishment and its servers for serving a visibly intoxicated patron similarly advances the goal of deterring drunk driving. In allowing the latter form of action to proceed, rather than barring it *ab initio* by *N.J.S.A.* 39:6A–4.5(b), we can be assured that the application of established principles of comparative negligence will apportion properly responsibility for damages as between dram shop parties and the injured drunk driver.

Voss v. Tranquilino, 206 N.J. 93, 96 (2011)

7. Special Issues for non-auto & minors

Showalter v. Barilari, Inc., 312 N.J.Super. 494, 504-505 (App. Div. 1998)

In dram-shop cases in New Jersey, questions of causation and foreseeability are usually insignificant because dram-shop liability has arisen most often in the context of drunken driving, where causation and foreseeability are well established. There are, however, few dram-shop cases that have considered issues relating to liability in a non-auto setting.

Steele v. Kerrigan, 148 NJ 1, 7 (1997) [where a tavern's underaged, intoxicated patron assaulted another patron]

Finney v. Ren-Bar, Inc., 229 N.J.Super. 295, 297, 551 A.2d 535 (App.Div.1988) [where a tavern's underaged, intoxicated patron negligently set a fire]

Jensen v. Schooley's Mountain Inn, Inc., 216 N.J.Super. 79, 522 A.2d 1043 (App.Div.1987) [where a tavern's intoxicated patron climbed a tree, fell into a body of water, and later drowned].

In *Finney*, this court held that the concept of foreseeability has been extended in cases involving a duty not to serve liquor to minors. That is so because a tavern's liability for negligently serving minors has historically preceded and even exceeded that respecting service of alcohol to adults. Our decision in that case adopted the foreseeability analysis of a Pennsylvania court on the subject. Specifically, we held that it was foreseeable that an intoxicated minor might engage in "aggressive, combative, and often reckless behavior" as well as "damage property."

In *Steele v. Kerrigan* , decided shortly after the trial of this case, the Court cited with approval our decision in *Finney* and recognized that minors are especially likely to be adversely affected by alcohol and to cause damage to themselves and others. Indeed, the Court noted that a minor is entitled to an instruction that such behavior, in general, is considered one of the foreseeable risks of negligent alcohol service and further instructed on the policy reasons for [the] heightened duty owed to underage patrons.