Employers (Still) Not Liable for Serving Alcohol to Intoxicated Employees

Pennsylvania is one of the many jurisdictions that has long recognized a cause of action against liquor licensees, such as bars and restaurants, for civil damages for injuries to third parties arising out of the service of alcohol to customers. This is the concept commonly referred to as liquor liability or dram shop liability.

The Legal Intelligencer
February 10, 2022
By Patrick T. Reilly and Lauren E. Purcell

In Pennsylvania, however, dram shop liability is not a common law cause of action. Rather, liquor liability sounds in negligence per se and most commonly arises out of the violation of Sections 4-493 and 4-497 of Title 47 of the Pennsylvania Consolidated Statutes (the Dram Shop Act), which relate to the sale of alcohol to a visibly intoxicated patron (VIP) or the sale of alcohol to a minor.

Negligence per se is a fairly basic legal concept. It essentially states that if you break the law, then you are automatically negligent. Thus, if a bar or restaurant breaches either Sections 4-493 or 4-497 of the Dram Shop Act, then that bar or restaurant is negligent in the eyes of the law. If that negligence causes injury to a customer or a third party, then the bar/restaurant is legally responsible and liable.

However, while bars, restaurants, caterers, hotels and all other liquor licensees may be liable for a breach of the Dram Shop Act, Pennsylvania courts have been historically very hesitant to extend this responsibility beyond those parties. From a logical perspective, this makes a lot of sense. If the Dram Shop Act regulates liquor licensees and liability arises out of violation of the Act, then liquor licensees should be the only ones held responsible for a violation. As the general public is not bound by the provisions of the Dram Shop Act, it can't violate the Act.

This distinction between "licensee liability" and "social host liability" is one that has long been recognized, particularly under Pennsylvania law. In Pennsylvania, the general rule is that while liquor licensees can be held liable for service of alcohol to VIPs, social hosts typically cannot. The social host can be held civilly liable for damages caused by his/her knowingly furnishing alcohol to a minor. This liability is also rooted in negligence per se—but because it is against the law for anyone to give alcohol to minors. This liability doesn't arise out of a violation of the Dram Shop Act, but rather from a violation of the Criminal Code.

It is against the backdrop of these general principles that the Superior Court of Pennsylvania was recently confronted with the following question: Whether an employer

can be held liable to a third party when it allegedly furnished alcohol to one of its employees at a golf outing even when that employee was both visibly intoxicated and a "habitual drunkard."

In *Klar v. Dairy Farmers of America*, 2021 PA Super 252 (2021), the plaintiff, David Klar, was traveling southbound on Route 18 on his motorcycle when defendant Roger Williams swerved into the southbound lane and struck him, resulting in multiple "serious and permanent injuries." Williams had just come from a golf outing and, according to the complaint, had a blood alcohol level of .23.

The plaintiff filed suit not only against Williams, but also against his employer, Dairy Farmers of America, Inc. (DFA). The plaintiff claimed that DFA had "furnished, served, and provided Williams alcohol when [the DFA] knew or should have known Williams was visibly intoxicated and a habitual drunkard."

Given the general principles of liquor law in Pennsylvania, establishing liability against DFA was always going to be an uphill battle for the plaintiff. It was undisputed that DFA was not a liquor licensee and Williams was not a minor. As such, it was likely not surprising when the trial court granted DFA's motion for judgment on the pleadings. However, on appeal to the Superior Court, the plaintiff relied upon a few key arguments.

First, the plaintiff argued that Section 4-493 of the Dram Shop Act was never intended to apply only to Licensees. Section 4-493 states that it is unlawful:

> For any licensee or the board, or any employee, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any minor.

The plaintiff contended that DFA, as Williams' employer, fell into the "any other person" category and thus, civil liability should apply.

Unfortunately for the plaintiff, the question of whether Section 4-493 could be used to extend liability beyond bars and restaurants had been previously answered in *Manning v. Andy*, 310 A.2d 75 (Pa. 1973). In *Manning*, the Pennsylvania Supreme Court refused to extend civil liability to an intoxicated employee's employer when that employer was not engaged in the business of selling alcohol. Relying upon and reinforcing this precedent, the Superior Court in *Klar* rejected the plaintiff's first argument and held that a violation of Section 4-493 only results in civil liability for liquor licensees.

In *Klar*, the plaintiff's second argument arose out of the fact that DFA collected money to offset the costs of the golf outing. The plaintiff alleged that this amounted to an illegal sale of alcohol and argued that the DFA had assumed "licensee status" and could be held liable on that basis. The Superior Court again pointed to the *Manning* decision and held that the Pennsylvania courts have long held that only licensees would be held civilly liable for breach of the Dram Shop Act. The Superior Court in *Klar* reinforced the reasoning set forth in *Manning* that any extension of liability beyond licensees was best left to the legislature of Pennsylvania to decide.

The plaintiff's final argument in *Klar* was that DFA owed a common law duty to refrain from serving Williams alcohol when he was visibly intoxicated. However, as discussed above, there is no common law cause of action in Pennsylvania for service of alcohol to visibly intoxicated patrons. To the contrary, even when employers provide alcohol to their employees (*Manning*, supra) or when friends pool money together to buy beer (*Brandjord v. Hopper*, 688 A.2d 721 (Pa. Super. 1997)), the general principle that liability extends solely to licensees has not been disturbed. The Superior Court in *Klar* was not willing to do so in this case and thus, refused to extend liability beyond licensees.

Importantly, despite an interesting fact pattern in which an employer allegedly accepted money to defray costs and then furnished its employee with alcohol to the point of a .23 blood alcohol level, when given the opportunity, the Superior Court refused to deviate from the above-noted general principles. In *Klar*, because DFA was not a licensee and Williams was not a minor, the court would not attach liability to DFA. Rather, the court affirmed the lower court's decision to grant DFA's motion for judgment on the pleadings.

While the plaintiff in *Klar* filed a petition for allowance of appeal to the Supreme Court on Jan. 18, the Supreme Court has yet to rule on it. For the time being, *Klar* remains in a long line of Pennsylvania cases refusing to extend civil liability for the service of alcohol to visibly intoxicated patrons beyond licensees.

The Superior Court in *Klar* has, for the time being, reinforced the general principle that unless a visibly intoxicated patron purchases alcohol from a licensee, civil responsibility for alcohol-related injuries rests with the adult that consumes the alcohol, not the friend or the employer that provides it.

Patrick T. Reilly is a shareholder and Lauren E. Purcell is an associate in the Pittsburgh office of Marshall Dennehey Warner Coleman & Goggin. As members of the firm's Hospitality and Liquor Liability Practice Group, they defend private and chain restaurants, bars, hotel properties and entertainment venues when claims are brought against them. They may be reached at ptreilly@mdwcg.com and lepurcell@mdwcg.com.