

Dram Shop Cases Are Perfectly Suited for Early Mediation

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Three young men and a female companion, all in their early 20s, stopped at a small bar in central Pennsylvania shortly before closing at 2 a.m. The group had been consuming alcohol earlier that evening at various social locations but not at bars. A bar receipt reflected the group's purchase of three beers, four shots and a mixed drink at 1:35 a.m. The tab was closed shortly before 2 a.m. A second receipt from takeout reflected the purchase of a 12-pack of Natural Light beer at 1:57 a.m. An exterior videotape showing the bar parking lot depicted the four young people walking to their vehicle with the 12-pack in tow and not showing signs of intoxication including stumbling, tripping or falling. The vehicle left the parking lot on video without speeding, spinning its wheels or fishtailing.

At the same time, less than 10 miles to the east, another young man, also in his early 20s, left his home to get coffee and gas at a local Wawa. This young man was single with a college degree and a good job. Notably, he was stone cold sober leaving his parents' home at around 2 a.m. on a misty and foggy night, sharing the same winding country road as the bar group traveling in the opposite direction. At 2:17 a.m., a neighbor heard an "explosion" outside her home discovering two mangled vehicles and called 911 ... the accident resulted in the deaths of both drivers, one intoxicated (.19 BAC) and one sober and the front seat

passenger in the vehicle, which had just left the bar ... both rear seat passengers in the bar vehicle survived but had no memory of how the accident happened. Long before the toxicology results were known, state police determined that the sober driver had crossed the center line in a heavy fog causing the accident. Nonetheless, the families of the sober driver and the deceased front seat passenger in the bar vehicle filed suit against the deceased drunk driver and the bar for violations of the Pennsylvania Dram Shop, i.e., serving the drunk driver at a time when he appeared visibly intoxicated.

Why Early Mediation?

If we accept as true the proposition that 98 percent of civil cases settle, it would seem to make perfect sense for any one of the attorneys retained by any of the parties outlined above to ask themselves if this claim is the 2 percent case that will ultimately have to be decided by a jury in a small town in central Pennsylvania. More importantly, if the case can be settled, why not try to do so long before the parties incur litigation costs including expert fees through trial (and appeal) in the hundreds of thousands of dollars? Early mediation allows the parties to control not only litigation costs but also the pace of the litigation and obviously the outcome. Early mediation requires an appetite, usually acquired, to immediately investigate the

facts and gather and analyze documents many times available pre-suit like the police investigation, accident reconstruction and criminal hearing notes of testimony. Early mediation, emphasis “early,” forces the litigator to analyze the case focusing almost exclusively upon those facts and issues which move the needle critical to our evaluation. Each and every interrogatory need not be answered, each and every witness need not be deposed and each and every expert need not be retained in advance of early mediation ... only those that move the needle! If all parties approach early mediation seriously, there is nothing “unsuccessful” about the result whether or not the case settles as each party is presented with a golden opportunity to educate the others.

Unlike other complex tort matters including medical malpractice, products liability, construction defect, building collapse or environmental/toxic tort, dram shop cases examine conduct which is not foreign to a juror. Simply put, most jurors have “been there, done that” as it relates to bar service of alcohol including over service and impaired driving. Voir dire confirms that nearly all prospective jurors in a dram shop trial have been impacted by alcohol use or misuse and, indeed, most prospective jurors have fixed opinions one way or the other as it relates to the service or consumption of alcohol. The persuasive dram shop case is not expert driven and most jurors have a good understanding of blood alcohol levels, impairment and tolerance. The same cannot be said when educating/persuading a jury how a newborn died after birth or a crane operator was electrocuted. Accordingly, an attorney’s ability to eyeball and evaluate dram shop facts, documents, videotape and their impact on a jury is

rarely dependent on an expert or science too complicated for the lay juror. Early mediation allows the dram shop attorneys to explore the impact of common knowledge and emotions on a jury when evaluating what a jury will do with the case if it does not settle.

When hearing of dram shop, most of us envision the death or serious injury suffered by an innocent victim of the drunk driver. Conversely, that same drunk driver operating his vehicle off the road into a tree, while tragic, rarely evokes the same level of sympathy as the innocent victim. Somewhere in the middle is the drinking passenger with his best friend drunk driver ... the passenger many times ends up in a wheel chair while the best friend driver goes to jail uninjured. Early mediation allows the parties to explore how society/potential jurors view the status of each claimant. Under our facts, there likely were no innocent victims although that was the argument made by the parents of the sober driver who crossed the center line killing himself and two others. In a bizarre turnabout, the sober driver was killed as the result of an accident with a drunk driver but he likely caused the collision eliminating causation between the dram shop violation and the accident. The other driver’s estate likely recognized the natural animosity against the drunk driver and did not file suit. The deceased passenger’s estate had to recognize her comparative negligence drinking and driving with a driver her attorney would now plead appeared visibly intoxicated. Like the drunk driver, she was not an innocent victim but it took a mediation before any depositions were conducted to convince the parents of the sober driver that their son may have caused his own death and the deaths of two

others, and the parents of the deceased passenger that “Friends Don’t Let Friends Drive Drunk.”

Dram shop cases are particularly well suited for early mediation requiring mediators who demonstrate common sense, empathy and an understanding of how alcohol awareness programs and MADD have impacted society over the past 40 plus years. Nearly all dram shop cases involve tragedy, serious injury or death as well as anger directed at the drunk driver and sometimes the bar. Who bears what responsibility is oftentimes not a function of evidence/proof or expert opinion, but rather a discussion of how society and a potential jury will view the conduct and responsibility of the various parties. In my view, the best opportunity for that sort of

discussion to take place is mediation and the earlier each party can present that view, the better.



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