Florida Dram Shop Cases - Exceptions to Common Law

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The situation repeats itself time and time again. A client asks for your help in seeking compensation for an alcohol related traffic injury or death where the other driver had been drinking in a bar or a restaurant. The first reaction, of course, is to bring a civil action against the impaired driver. But that often provides only a limited remedy for the plaintiff if the driver has insufficient liability insurance limits to answer for your client's damages.

You may believe the beverage licensee and its employees were negligent in their actions and that over-service of alcohol resulting in the impairment of the driver was the root cause of the injury or death. But is this case suitable for a Dram Shop action under Florida Law?

Dram Shop, a phrase based on a unit of measure popular in Victorian times, approximately 1/8th of an ounce in our vernacular, is a term that has become synonymous with a prohibition on the over-service of alcohol to a patron or guest. The phrase originated in England and was utilized during early colonial times when alcohol was dispensed by apothecaries for medicinal purposes and was measured in *drams*.

The principal purpose of Dram Shop laws nationwide is to protect the public, and even the drinker himself, from the intentional or negligent over-service and over-consumption of beverage alcohol. Most States in the United States have enacted criminal statues and established avenues of civil redress in support of this public policy.

The presumption behind Dram Shop legislation in most States is that someone who has consumed beverage alcohol to the point that their blood alcohol content is approaching or exceeding the point of legal impairment is not able to assess their own intoxication level and, therefore, is not able to make prudent decisions. The result of impairment creates predicable risk. The logic of this presumption is undeniable and can be characterized as a downward and continuous spiral. The more alcohol one consumes, the lower one's judgment to assess intoxication and one's ability to safely operate a motor vehicle.

Florida has not enacted a statute recognizing liability for general over-service of alcohol which would legislatively create an exception to the common law rule that the dram shop owner is not liable. In addition, Florida law provides specific liability protection to beverage retailers and social hosts against civil action resulting from over-service of alcohol. Few other states provide this protection and most have both criminal and civil liability based on over-service of alcohol.

In Florida, the drinker, regardless of their mental or physical impairment through the consumption of alcohol (a mind altering substance) is left as the sole determinant of whether he or she has reached a safe capacity for that substance. This most certainly creates a "Catch 22" logic model in which the person responsible for determining whether their faculties are impaired becomes more and more impaired with each drink losing their ability to accurately make that determination.

According to the Florida Department of Transportation more than 1,000 people die and 17,000 people are injured annually in Florida as a result of impaired driving crashes. Many of these impaired drivers left beverage licensed premises after making the determination they were

competent to drive. There is no fail safe system in Florida, as there is in most States, requiring bartenders and servers to reduce or stop serving persons who may be in danger of becoming impaired or to prevent intoxicated drivers from leaving their premises and driving on Florida's roadways. This has resulted in devastating consequences to the drinkers and innocent victims.

While Florida does not have a comprehensive Dram Shop exception to common law for general over-service, Florida's current law is designed to protect those ***under the age of twenty one***, those who are ***habitually addicted to alcohol,*** and those they may injure as result of intoxication, from the dangers of alcohol and from driving while impaired.

Establishing that the person served was under the lawful drinking age of twenty one can be a relatively straight-forward fact situation. A driver's license, birth certificate, and parental testimony can easily establish actual age. A court appearance by the person under twenty one (the "minor"), or the use of a photo if the "minor" is now deceased, can illustrate for the jury that the "minor's" appearance and actions were such that a reasonable licensee or server should have determined the customer was under thirty years of age. The age of thirty is the alcoholic beverage industry standard for requiring the production and examination of a valid government issued photo ID for the purchase or consumption of alcohol.

The Plaintiff's allegations of willful and unlawful service to a "minor" can often be supported by examination of the licensee's alcohol service practices, alcohol management policies, and employee training. These may demonstrate to the jury that the business fell below a reasonable standard of care in the prevention of underage access and use of alcohol. This can be especially relevant when the defendant attempts to avoid liability by claiming the employee was not in the course/scope of their employment when making a "willful or unlawful" sale or if the defendant claims they had policies in place to prevent the sales from occurring, thereby making negligent/inadequate training admissible.

Determining that a person is habitually addicted to alcohol is not anywhere near as straightforward as determining that a person is under twenty-one years of age. Alcoholics rarely carry ID cards identifying them as such. Yet a beverage licensee's duty to prevent service to someone habitually addicted to alcohol is just as clear as the prohibition on serving someone under twenty-one.

The incidence of habitual addiction to alcohol is significant. According to Royce and Scratchley in their book <u>Alcoholism and Other Drug Problems</u>, the rule of thumb in the United States is alcoholics constitute about four percent of the general population (1). A simple extrapolation based on Florida's 2004 population indicates Florida may have over seven hundred thousand citizens habitually addicted to alcohol (2). And yet almost no alcoholic beverage retailer training program in Florida addresses the prohibition of service of alcohol to someone habitually addicted nor addresses how to recognize a customer who is habitually addicted to alcohol, or what to do about it.

F.S. 768.125 is the controlling statute on the service of beverage alcohol to habitually addicted persons. F.S. 768.125 says in part: "A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that … a person who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damages caused by or resulting from the intoxication of such …person".

For years, beverage retailers have been under the misguided impression they only had to worry about serving habitually addicted persons once they were put on written notice by a family member as outlined in F.S. 562.50 which says in part: "Any person who shall sell…furnish, … any alcoholic beverage, …to any person habitually addicted to the use of any or all such, …after having been given written notice by wife, husband, father, mother, sister, brother, child, or nearest relative that said person so addicted is an habitual drunkard and that the use of intoxicating drink or drinks is working an injury to the person using said liquors, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083".

This statute certainly speaks to a family member's ability to place a licensee on written notice that a patron was habitually addicted to alcohol. But many licensees did and do not understand the service prohibition is clear and simple and the written notification process is just one of many ways in which a beverage licensee or its employees can be placed on notice that the person served is habitually addicted to alcohol.

Florida Courts have determined that a beverage licensee can be independently put on notice that a patron is habitually addicted to alcohol through his actions based on two or more drinking occasions in which he exhibited behavior consistent with habitual addiction. This requirement has been deemed sufficient to satisfy the "knowingly served" requirement in F.S. 768.125.

These cases set the standard in Florida for beverage licensees putting them on notice they should be alert for those behaviors consistent with a customer habitually addicted to alcohol. The rulings implicitly require beverage retailers to have adequate policies, practices, and employee training in place to insure that a patron habitually addicted to alcohol is not served or over-served. It is clearly not sufficient for a retailer to wait for a relative to put the retailer on written notice that the patron is habitually addicted to alcohol and it certainly is not appropriate for a beverage retailer to fail to train its staff how to recognize someone habitually addicted to alcohol. Unfortunately, many beverage retailers have failed to take notice of the law and many habitually addicted impaired drivers have been allowed onto Florida's roadways year after year, with devastating results.

Hilliard vs. QMTD, Inc. (d/b/a Monkey's Uncle) (3) took the prevailing case law one step further in 2004 by recognizing that it does not always take two or more occasions for a retailer to be put on notice that a patron is habitually addicted to alcohol. Attorneys Fred Tromberg and Jim Kowalski of Jacksonville theorized that if a patron drinks a large amount of alcohol (an amount which should clearly manifest in outward signs of impairment) but shows few if any outward signs of intoxication, a reasonable licensee should recognize the person has developed a significant tolerance for alcohol and is habitually addicted.

The jury considered the facts in Hilliard and determined the drinker was exhibiting such a significant level of tolerance that he was addicted to alcohol. As a result, the jury found the beverage licensee liable for the injuries to a third party from a subsequent impaired driving crash based on only one drinking occasion in the licensed premises by the drunk driver. The case was upheld by the 1st District Court of Appeals in 2005. [QMTD, Inc., v. Hilliard, 911 So.2d 105 (Fla. 1st DCA 2005)]

Tolerance is one of the four key factors the National Institute on Alcohol Abuse and Alcoholism (4) has associated with alcohol addiction and involves the need for more and more alcohol to "get high." Significant tolerance levels manifest in a drinker's ability to consume larger qualities of alcohol than someone not habitually addicted without showing the same outward signs of intoxication or impairment. Well trained and managed alcohol servers should clearly be able to

identify this observable difference in their customers. While the habitually addicted drinker's high tolerance may significantly reduce the outwards signs associated with intoxication, the high tolerance drinker's gross and fine motor controls, essential to the safe operation of a motor vehicle, are still affected in a significant way. In Hilliard, the Jury felt the absence of behaviors typically associated with intoxication after consuming a huge amount of alcohol should have been observed by a responsible retailer who should have immediately ceased alcohol service. "Cutting off" a customer is literally a life-saving decision and it should not be made on the basis of financial considerations.

Alcohol tolerance, however, is not the only indicator beverage retailers (and juries) can rely on when making an assessment of habitual addiction. A person habitually addicted to alcohol may demonstrate a craving for alcohol, a loss of control in his or her ability to limit drinking on any given occasion, or physical dependence to alcohol resulting in withdrawal symptoms including nausea, sweating, shakiness, and anxiety, some or all of which occur when alcohol use is stopped abruptly (5).

It is clear jurors feel capable of determining if someone is habitually addicted to alcohol. Two thirds of Americans drink alcohol, at least occasionally, and almost all Americans have a close association with someone who drinks (6). About 40% of U.S. Adults – 76 million people – have been exposed to alcoholism in the family (7). They either grew up in a family with an alcoholic, were married to an alcoholic, or had a blood relative who was an alcoholic. Because jurors often have personal experience with someone who they believe has a drinking problem, they believe they can recognize a person habitually addicted.

The Courts have accepted a *reasonable man* understanding of habitual addiction. Jurors have demonstrated they have the ability to determine if someone is exhibiting behaviors consistent with habitual addiction and by their actions are rhetorically asking retailers why their highly trained and experienced staff cannot or will not make this same determination preventing the risk to the drinker and others.

Jurors understand the Plaintiff's expectation that experienced and well trained bartenders and servers should know how many drinks to serve a patron based on size, weight, gender, age, current intoxication level, food consumption, fatigue, and emotional condition and how to regulate drinking behaviors to avoid over-intoxication. Jurors understand the Plaintiff's argument that by the time a patron exhibits indications of intoxication, it is too late to slow the drinking down to avoid impairment. And jurors understand that customers who are over-served become public safety risks, risks to everyone on the highways as well as to themselves, and this risk is based on the *illegal behavior* of the retailer through the initial service and subsequent over – service of alcohol to someone who is habitually addicted to alcohol.

Florida's Responsible Vendor Act (FS 561.701) states in part that it is: "…the intent of the statue is to reduce intoxication related accidents, injuries, and deaths in Florida; encourage alcohol beverage vendors to implement responsible policies for serving and promoting alcoholic beverages and; by doing so; prevent the over-service of alcoholic beverages to customers and the over-consumption of alcoholic beverages by customers while on the licensed premises of vendors; and promote an attitude of professionalism and responsibility on the part of vendors who sell or serve alcoholic beverages which is expressed in a commitment to responsible service."

While compliance with the Responsible Vendor Act is voluntary in Florida, it sets forth a compelling legislative intent for the operation of a business that is dispensing an inherently dangerous product and for which the State requires a license setting forth extensive requirements

and qualifications for the person entrusted with dispensing the product. A beverage license is a privilege, a public license held in trust by the licensee subject to revocation if it is not operated in the public's interest.

Beverage licensees have a statutory obligation to prevent all violations of law from occurring on their premises. This responsibility includes preventing the sale of alcohol to minors, the sale or service of alcohol to someone habitually addicted to alcohol, gambling, prostitution, illegal drug sales and use, and a wide range of other law violations. The licensee must provide the training, supervision, and an adequate number of sober and competent employees necessary to prevent those violations from occurring. It can also be argued a beverage licensee has the responsibility to prevent harm to Florida citizens as the holder of a license that requires it to act reasonably and prudently. Responsibility for a beverage licensee under Florida law is very broad.

George Gobel, the late actor and comedian, seemed to identify the problem at the very core of Dram Shops cases when he said: "I've never been drunk, but often I have been over-served." Bartenders and servers in Florida work for tips. Tips come from good and sometimes generous service and often from not challenging or questioning customers, even those customers acting contrary to the server's training and experience. Many licensees seem to have adopted the practice of limiting staff-to-customer ratios and providing little or no training for staff concentrating instead on maximizing alcohol flow and profits. And many businesses seem to strive for "good customer relations" rather than monitoring and controlling their patron's alcohol consumption. All of these practices can reduce a beverage licensee's ability to comply with Florida Law and prevent the service of alcohol to a person under 21 years old or a person habitually addicted to alcohol.

How do you assist that client who asks for your help in seeking redress for an alcohol related death or injury? You look beyond the drunk driver to see if a beverage licensee violated his or her obligation under law and served alcohol to a "minor" or to a person habitually addicted to alcohol. That is where you may find compensation for your client.

(1) Royce, James E., PhD and Scratchley, David, PhD, Alcoholism and Other Drug Problems, Free Press, 1996.
(2) US Census, 2004 Population Estimates, Florida - (17,397,161 citizens).
(3) Answer Brief of Appelee in the First District Court of Appeals for QMTD, INC (Appellant) v. Ellis v. NGN of Tampa, Inc. Appellee represented by Fred Tromberg and James Kowalski, Attorneys – at – Law, Jacksonville, Florida.
(4) http://pubs.niaaa.nih.gov/publications/GettheFacts_HTML/facts.htm
(5) Ibid.
(6) NIAAA, Eighth Special Report, USDHHS, p 233.
(7) National Center for Health Statistics {NCHS}, Advance Data, USDHHS, No. 205, 9/30/91, p1.

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Alternate Titles:

1) Dram Shop Cases: Plaintiff's Expectations for the Reasonable Service and Use of Alcoholic Beverages.
2) Dram Shop Cases: "Minor" and "Habitually Addicted" Exceptions to the Common Law