

Dram Shop Cases: “Minor” and “Habitually Addicted” Exceptions to Common Law in Florida

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Your client runs a successful bar or restaurant and seems to do everything necessary to prevent problems from occurring in the business. Even so, he finds himself facing a “Dram Shop” lawsuit based on an alcohol related death or injury allegedly suffered by a customer or based on the actions of a customer. What are the issues you should consider in developing a defense strategy? And what could your client have done to prevent this action from being brought in the first place?

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 generally stated legislative 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 statutes and established avenues of civil redress in support of this public policy.

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. Florida places responsibility for limiting alcohol consumption on the drinker himself.

Responsible vendors of alcohol in Florida, both those who subscribe to the elements of Florida’s Responsible Vendor Act (F.S. 561.701) and those who self describe themselves as *responsible vendors*, often go beyond the requirements of the typical dram shop law seen in most states by insuring their customers do not consume alcohol to the point of impairment. They accomplish this through the employment of progressive alcohol service practices that focus on preventing impairment rather than dealing with the effects of impairment after-the-fact.

While Florida does not have a comprehensive Dram Shop exception to common law for general over-service, the 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. In each instance, the drinker is deemed not to possess sufficient abilities to independently and effectively monitor and control their own drinking. As a result, the burden of protecting these individuals from the use and the subsequent affects of alcohol falls to the beverage licensee and his employees.

Preventing the sale of alcohol to and consumption of alcohol by individuals under the age of twenty one is a task that responsible retailers deal with everyday. In addition to the requirements outlined in Florida’s Responsible Vendor Act, a wide variety of national industry standards have evolved to guide beverage retailers in compliance with this prohibition. For example, even though

the drinking age is twenty one, the prevalent industry standard is to check the identification of any drinker who appears to be under thirty years of age before providing alcohol or allowing consumption of alcohol.

The Plaintiff's allegations of willful and unlawful service to a "minor" can often be overcome by examination of the licensee's effective alcohol service practices, alcohol management policies, and employee training setting forth reasonable standards to prevent unlawful sales, service, or consumption. Responsible retailers understand that preventing "minor" sales and consumption violations is an ongoing effort and must be reinforced daily.

Equally important to preventing the sale or service of alcohol to someone under twenty one years of age is the prohibition on the service of alcohol to someone *habitually addicted* to alcohol. Unfortunately, many otherwise responsible vendors do not place sufficient emphasis on preventing alcohol service to habitually addicted patrons and find themselves defending an alcohol related injury or death lawsuit based on this allegation.

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 Alcoholism and Other Drug Problems, 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). The sheer number of habitually addicted citizens in Florida presents a significant risk to beverage retailers of the possibility of a violation unless they have adequate training and service practices in place to insure that such service does not take place.

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 misinformed 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 the drinker's 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. 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.

A 2004 case (3) took the prevailing case law one step further 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. The Plaintiff's Attorneys 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 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.

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 quantities 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 the case involving a single drinking occasion, 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.

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. By their actions Jurors 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.

Responsible beverage retailers can prevent these fact situations from ever reaching a jury by insuring their experienced and well trained bartenders and servers 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. By the time a patron exhibits indications of intoxication, it is too late to slow the drinking down to avoid impairment. 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 may be based on the *illegal act* of servicing and the subsequent over – service of alcohol to someone habitually addicted to alcohol. The author’s *Habitual Addiction Training Curriculum* is but one example of the training that can be given to bartenders and servers helping them prevent service to habitually addicted patrons.

Florida’s Responsible Vendor Act (FS 561.701) states in part that it is: “...the intent of the statute 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 every business that is dispensing alcohol. Beverage retailers should remember a beverage license is a privilege and held in trust by the licensee.

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. It is important to remember that good service also protects the drinker and the public from the results of over-service, service to “minors”, and service to habitually addicted patrons.

How do you assist your client with the defense of a dram shop complaint? You help them develop appropriate service standards and practices before problems occur. And then you let those standards speak for themselves in defense of a dram shop complaint.

(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 Appellee 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. 911 So.2d 105 (Fla. 1st DCA 2005)

(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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