

Dram Shop Laws – A Vehicle for Policy Change

By Major Mark Willingham

An American tragedy unfolds many times a day. A family traveling home from an outing is hit by an impaired driver with devastating results. Almost 20,000 people are killed and a quarter of a million people are seriously injured in impaired driving crashes in the United States each year. Even more shocking is that half of these deaths and injuries can be attributed to drivers who were coming *directly* from a beverage license premises where they were over-served or allowed to over-consume alcohol.

Beverage alcohol is the only universally available consumer product that when used as directed causes changes in the consumer's emotional state, his or her cognitive ability, their gross and fine motor skills, and diminishes their ability to make rational decisions. It is widely sold and consumed in businesses that are primarily accessible through the use of personal vehicles creating a reasonable expectation that many customers will also leave those businesses in their vehicles under the influence of the intoxicating effect of the product and unable to safely operate those vehicles. At least 80 million trips are made annually by drivers with a BAC over .08.

Even the business model under which the alcoholic beverage industry operates can be antithetical to the elements of responsible retailing. In many cases tips; a significant part of servers' income, come from "good service" which equates to heavy pours of alcohol, frequent replenishment, and a wink and a nod at increasing intoxication levels. The choices bartenders make in over-serving their guests often eliminate the choices their guests might have in moderating their drinking.

The phrase *dram shop* is based on a unit of measure popular in Victorian times; approximately 1/8th of an ounce in our vernacular, and has become synonymous with a prohibition on the over-service of beverage alcohol to a patron or guest. 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 or over-consumption of beverage alcohol and from the service of alcohol to persons under 21 years of age.

Laws exist in almost every state placing criminal or administrative responsibility on the bar and the bartender to monitor the behavior of the drinker and their consumption of alcohol. These laws call upon beverage licensees and their employees to play a significant role in the enforcement of this important public policy. No other business type readily comes to mind where the holder of a government license; by acceptance of that license, is required to act as an agent of the state in taking affirmative action to monitor and intercede in the behavior of a citizen/business invitee.

Just as we find criminal and regulatory remedies inconsistently applied, the availability of civil remedies available in alcohol related injury or death cases is equally inconsistent across the country. Twelve states do not allow the application of civil tort remedies for adult over-service or over-consumption by the licensee or the server in whole or in part. It

is clear that these twelve states look solely at the individual for responsibility for their own actions.

Individual responsibility alone may not be well founded because the consumption of beverage alcohol reduces the drinker's ability to assess their own intoxication level and, therefore, they may not be able to make prudent decisions as to whether they should continue to drink or if they should drive. The more alcohol one consumes, the lower one's ability to assess intoxication and one's ability to safely operate a motor vehicle. 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.

Thirty eight states and the District of Columbia have determined that their public policy interests are better served by placing some responsibility for over-service or over-consumption on the alcohol server or the licensee through the civil justice system. But even through they provide the ability for a plaintiff to bring an action against a tortfeasor for an alcohol related injury or death, the standards applied in these states vary widely.

Six states require a plaintiff to establish that the alcohol was served to an *intoxicated patron*. Two of the six require proof that the service was done in a *reckless manner* and one requires that the alcohol was provided with *reckless disregard to the rights of others*.

Six states require proof that the service was to an *obviously intoxicated* patron. One of the six states further requires proof that the patron *was intoxicated to the extent he or she presented a clear and present danger to self or others* while another state allows a civil remedy only after *the criminal conviction* of the alcohol server for service to an intoxicated person.

Eight states utilize a *visibly intoxicated* standard. One of those requires *willful and knowing* service while another places responsibility on the bartender if he or she continued to serve alcoholic beverages to the patron *when it should have been known that the patron was intoxicated*.

Alaska allows a civil action for service to a *drunken person in a criminally negligent manner* while Arkansas allows a civil action when the service was to a person *clearly intoxicated*. Arkansas, however, requires the jury to determine if the service constitutes a proximate cause of any subsequent injury to another person. Plaintiffs in two states must show that alcohol service to an intoxicated patron was a result of *wanton and reckless misconduct*.

Florida allows a civil remedy to be utilized only when the alcohol service was to someone *habitually addicted* to alcohol. This standard is particularly difficult because alcoholics do not carry or present identification cards identifying them as such.

And while most states allow civil remedies for injuries or deaths arising out of the service of alcohol to someone under the legal drinking age, several states allow an action against a retailer only when the alcohol service was to an *intoxicated minor*.

An increasing number of beverage retailers, especially themed casual dining outlets, are operating in multiple states. It is self evident that businesses operating in multiple states would have a difficult time developing one company-wide service standard that would comply with all the variances across the country. Unfortunately, these businesses tend to develop one standard for all of their stores resulting in alcohol service standards that do not adequately meet the standards in any of the states in which they operate.

It is evident that different standards reflect inconsistent state approaches to dealing with a crucial matter of public safety and public policy. The variances in state laws makes it is clear that not every citizen in the United States benefits from the same level of protection against over-service over-consumption and sales to underage.

There is a need for a consistent national policy on server and licensee responsibility in the prevention of over-service, over-consumption and service to underage patrons through the utilization of civil liability. Not only would a consistent national policy provide additional avenues of redress for those who are currently disenfranchised, it would elevate the level of responsible retailing of alcohol across the alcoholic beverage industry in the United States. However, the 21st Amendment to the Constitution vests authority over alcohol sales to each State individually. Absent a change in the Constitution, change in dram shops laws can only be driven by internal state pressures or by a national incentive program such as those used to raise the drinking age to 21 or to compel the enactment of seat belt laws.

What is an appropriate *Dram Shop* standard that trial lawyers and others could put forward in their state? Two components should be considered. One is an appropriate *standard of intoxication*. And the other is the *availability of civil remedies* to provide justice to those damaged through inappropriate acts or omissions and to use the *power of the purse* to encourage retailers to meet responsible retailing standards.

Standards of intoxication in civil dram shop actions should be simple. In fact, the thrust of responsible retailing which is supported through dram shop laws should be to *prevent* intoxication, not to develop policies and practices dealing with an intoxicated patron after they have become so. Beverage servers should be subject to civil actions if they have served someone who *is intoxicated* or *served someone to the point of intoxication*. It is that simple.

An *intoxication* standard should include an acknowledgment that the time interval between drinking and the crash or incident does not break the chain of causation. A prima-fascia standard of evidence of over-service should be established for a BAC of .08 or higher 1 hour after last drink based on extrapolation.

The pattern and practice of the business's marketing should be admissible to demonstrate the nature of the business. For example, happy hour and other gender, price, time, or quantity based drink specials and promotions should be prima-facie evidence of intent to encourage drinking, perhaps to intoxication.

And the standard should not require that the server *knew* the patron was approaching intoxication or was intoxicated. Requiring this knowing may necessitate evidence of what was in the server's mind rather than examining the behaviors and actions from a more objective view based on resulting consequences.

An Arizona Supreme Court ruling can be useful as a guide for the development and implementation of a consistent *intoxication* standard across the nation. The Arizona Supreme Court abolished the common law doctrine of no tavern owner liability stating that "those who furnish liquor have an obligation or "duty" to exercise care for the protection of others". The Court held that the general rules of liability applicable to all other persons in Arizona should apply to licensed sellers of alcohol and that they "may be held liable when they sell liquor to an intoxicated patron or customer under circumstances where the licensee or his employee know or should know that such conduct creates an unreasonable harm to others who may be injured either on or off the premises". (This ruling was later amended by the Arizona Legislature again limiting dram shop exposure).

A standard based on *intoxication* will require servers and licensees to concentrate on training and on policies and procedures that involve an analysis of factors that *predict and prevent* intoxication including: the customer's gender, body weight, body mass (fat vs. lean); food intake prior to and during drinking; type of drink being consumed (carbonated, sweet, etc); alcohol volume in the drink (doubles, cocktail with several types of alcohol, etc) and the customer's emotional state. These are key factors in predicting and preventing intoxication which is the primary tenet in responsible retailing.

Alcohol service standards should be based on what a *properly trained* bartender could observe. A properly trained bartender or server should be monitoring the customer for changes in their emotional state and utilizing subtle clues that a fellow customer might not be aware of. This is entirely different than what a customer may be able to observe.

Bartenders should be trained not only to assess the customer's predicted alcohol intake capacity on their initial observation and continuously re-evaluate the customer throughout their beverage service; they should be trained in techniques to monitor the drinking behaviors of the patrons while in the premises and to observe the subtle clues that will tell them the customer's intoxication level.

Evidence indicates that the implementation and utilization of a civil dram shop law and the establishment of an intoxication standard will significantly impact impaired driving crash deaths and injuries. Texas experienced a 6.5% decrease in single vehicle nighttime crashes resulting in injury after a liability case was filed in 1983 and an additional 5.3%

decrease after another case was filed in 1984. A similar decrease was observed in 2001 with a 5.8% decrease in fatal crashes from the implementation of dram shop laws.

The use of Dram shop laws and the civil justice system increases awareness of the negative consequences of over-service and over-consumption and alcohol because of the publicity that is generated from dram shop cases and verdicts. Studies show that states that have a high level of dram shop liability have more publicity about the impact of liability resulting from these cases and have more servers and managers who are aware of liability.

Dram shop laws decrease excessive and illegal alcohol consumption by both adults and underage persons. Studies also have found that states with high dram shop liability also had fewer lower-price drink promotions (like “happy hours”) that encourage excessive consumption in a limited amount of time and are attractive to underage drinkers.

States with dram shop liability also have more thorough checks of identification on average, which means that fewer underage drinkers are able to drink illegally in beverage licensed premises.

And finally, dram shop laws do not decrease personal responsibility as more responsibility is shifted to beverage retailers. Creating a cause of action against an establishment that engages in over-service of alcohol does not mean that the individual is not also held responsible. Rather, punitive damages for both drinking drivers and serving establishments serve similar purposes – to show that penalties come with these actions and to cause the retailer and server to rethink their practices leading to over-service, over-consumption, and alcohol consumption by underage persons.

About the author: Major Mark Willingham served with the Florida Division of Alcoholic Beverages and Tobacco for 30 years where he policed and regulated the alcoholic beverage industry. He is a national expert in matters pertaining to responsible retailing and dram shop and provides litigation support, expert witness services, and consultation on matters pertaining to the Responsible Service and Use of Beverage Alcohol. Major Willingham can be reached at 904 707 4400, mwilling@fbinaa.org, or www.alcoholsolutions.org.