STATE - PENNSYLVANIA

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STATE - PENNSYLVANIA

I. GENERAL OVERVIEW OF THE LAW

a. First Party Liability

Pennsylvania Courts do recognize an action for First Party Liability brought by an injured intoxicated patron or customer. Generally section 4-493 of the Pennsylvania Liquor Code makes it unlawful for a licensee to serve one who is visibly intoxicated. Courts have noted that section 4-493 was enacted not only to protect society in general, but also to protect intoxicated persons from their inability to exercise self protective care. Schelin v Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958). Plaintiff must show (1) that he or she was served alcoholic beverages while visibly intoxicated and; (2) that this violation proximately caused his injuries. Schelin, supra.; McDonald v. Marriott Corp., 388 Pa. Super. 121, 564 A.2d 1296 (1989); Smith v. Clark, 411 Pa. 142, 190 A.2d 441 (1963).

In addition, a commercial licensee who serves alcoholic beverages to a minor will be liable for injuries sustained by the minor if such injuries are proximately caused by the furnishing of the alcohol. See Smith,supra. This furthers the legislative purpose of protecting both minors and the public from the perceived deleterious effects of service of alcohol to someone under the age of 21. Mathews v Konieczny,515 Pa. 106,112, 527 A2d 508, 511 (1987)

Breach of the statutory duty to refrain from serving alcohol to visibly intoxicated persons does not, by itself, prove a defendant's liability. Even if a patron has been served alcoholic beverages while visibly intoxicated, no liability will be imposed unless the patron's injuries were proximately caused by the patron's intoxication. Miller v Brass Rail Tavern, 702 A.2d 1072, 1078 (Pa. Super. 1997) citing Holpp v Fez, Inc., 440 Pa. Super. 512, 518, 656 A.2d 147,150 (1990).

b. Third Party Liability

Pennsylvania Courts do recognize an action brought by a third party injured by an intoxicated adult or minor served or sold alcohol by a liquor licensee. In the case of an adult, the plaintiff must prove: (1) that an employee or agent of the licensee served alcoholic beverage to a customer while visibly intoxicated; (2) that violation of the statute proximately caused the plaintiff's injuries. Hiles v Brandywine Club, 443 Pa. Super. 462, 662 A2d 16 (1995); Mathews v. Konieczny, 515 Pa. 106, 527 A2d 508 (1987)

It is not sufficient for a plaintiff to establish merely that alcoholic beverages were served to a patron or that the patron was intoxicated at the time the patron caused injuries to another.

Holpp v Fez, Inc., supra. 440 Pa. Super 517, 656 A. 2d 149. To establish liability the plaintiff must present evidence establishing that the patron was served alcohol at a time that he or she was visibly intoxicated. Id. Without evidence of visible intoxication, a licensee cannot be held liable for damages to a third party. Hiles v Brandywine Club, supra.

Visible intoxication can be proven by either direct or circumstantial evidence. Fandozzi v. Kelly Hotel, Inc., 711 A2d 524 (Pa. Super. 1998); Johnson v Harris, 419 Pa. Super. 541, 615 A2d 771 (1992); Couts v Ghion, 281 Pa. Super. 135, 421 A2d 1184 (1980). While expert testimony can be utilized to present "relation back" evidence, such testimony alone is insufficient to establish visible intoxication. See Johnson v Harris, 419 Pa. Super 541, 615 A2d 771 (1992).

> " In defining the violation as the dispensation of alcoholic beverages to a person "visibly intoxicated," the statute displays considerable logic in placing stress upon what can be seen. The law does not hold a licensee of its agent responsible on any basis, such as blood alcohol level of a patron, which would not be externally apparent; instead, the law decrees that the alcoholic beverage dispenser shall not provide more alcohol when the signs of intoxication are visible. The practical effect of the law is to insist that the licensee be governed by appearances, rather than medical diagnosis." Johnson v Harris, supra., 419 Pa. Super 551, 615 A2d 776.

c. *Social Host Liability*

Under Pennsylvania law, there is no liability on the part of a social host who serves alcoholic beverages to his or her adult guests, even if visibly intoxicated. See, Klein v. Raysinger, 504 Pa. 141, 470 A2d 507 (1984); Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973). No liability will be imposed on the social host even if the host knew or should have known that the visibly intoxicated guest intended to drive a motor vehicle. Klein v Raysinger, supra. 504 Pa. 144, 470 A2d 508.The rationale is that in the case of an "ordinary able bodied man it is the consumption of the alcohol, rather than the furnishing of alcohol, which is the proximate cause of any subsequent occurrence." Klein v Raysinger, supra. 504 Pa.148, 470 A2d 511.

However, service of alcohol to minors is negligence per se and exposes the social host to liablity even if the minor was not served to the point of intoxication. Orner v. Malick, 515 Pa. 132, 527 A.2d 521 (1987). The breach occurs with the service of any alcohol to a minor, not just an amount sufficient to intoxicate the minor. Orner v Malick, supra. 515 Pa. 137, 527 A 2d 524. The affirmative action on the part of the defendant which gives rise to this negligence is the "furnishing of intoxicants to a class of persons legislatively determined to be incompetent to handle its effects". Congini v Portersville Valve Co., 504 Pa 157, 163, 470 A2d 515, 518 (1983).

In order to establish liability, it must be shown that the host "knowingly furnished" alcoholic beverages to a minor. The standard requires actual knowledge on the part of the social host as opposed to imputed knowledge imposed as a result of a relationship between the parties.

Alumni Ass'n v Sullivan 524 Pa. 336, 572 A2d 1209 (1990); Winwood v Bregman, 788 A2d 983 (Pa. Super. 2001).

A social host may assert the minor's comparative negligence as a defense. Congini v Portersville Valve Co.,supra. 504 Pa. 164. 470 A2d 518-519.

Further, there is no liability where a minor social host provides alcohol to another minor. Kapres v Heller,536 Pa. 551, 640 A2d 888 (Pa. 1994).

Liability Involving Minors

It has been held that the Pennsylvania Dram Shop Act establishes a duty on the part of licensees not to sell alcohol to minors. Reilly v. Tiergarten, Inc., 430 Pa. Super. 10, 633 A.2d 208, 210 (1993); 47 P.S. §4-493(1). The service of alcohol to anyone under the age of 21 constitutes negligence per se. Id., Herr v. Booten, 398 Pa. Super. 166, 172, 580 A.2d 1115, 1118 (1988). Liability will attach even if the minor is not visibly intoxicated or if alcohol was served to one other than the actor. Matthews v Konieczny, 515 Pa. 106, 527 A2d 508 (1987).

Furthermore, Pennsylvania Courts have held that a seller's duty to refrain from selling alcohol to minors can be breached by an indirect sale to an adult intermediary intended for a minor. Liability arises if the seller knows or should have known that the alcohol was being purchased for use by a minor. Thomas v. DuQuesne Light Co., 376 Pa. Super. 1, 545 A.2d 298, 294 (1988).

II. KEY STATUES & REGULATIONS

In Pennsylvania, liability of a tavern owner arising from the sale or service of alcoholic beverages derives from statute.

47 P.S.§ 4-493(1) of the Pennsylvania Liquor Code provides the basis for imposing liability for negligent service of alcohol by liquor licensee(s). The section provides:

"It shall be unlawful –

1. For any licensee or the board, or any employee, servant, or agent of such licensee or the board, or any other person, to sell, furnish, or give any liquor or malted or brewed beverages, or to permit any liquor or malted or brewed beverages to be sold, furnished or given, to any person visibly intoxicated or to any insane person, or to any minor, or to habitual drunkards or persons of known untempered habits.

§ 4-496 of the Pennsylvania Liquor Code provides as follows:

Liability of licensees

"No licensee shall be liable to third-persons on account of damages inflicted upon them off of the licensed premises by customers of a licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malted or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated."

A violation of the Dram Shop statute is negligence per se. Miller v Brass Rail Tavern, 702 A. 2d 1072 (Pa. Super. 1997).

Pennsylvania Courts are split as to whether the Dram Shop Statute provides the exclusive remedy for individuals injured as a result of the service of alcoholic beverages or whether license holders can be exposed to liability based upon common law claims of negligence such as failure to provide adequate security, failure to properly train employees, or failure to have in place adequate policies and procedures. See e.g. Barr v Easton, 39 Pa. D. & C. 5th 211 (Lycoming Cty. 2014); Schuenemann v Dreemz, LLC, 34 A.3d 94 (Pa. Super. 2011); Rivero v Timblin, 12 Pa. D & C. 5th 233 (Lancaster Cty. 2010) (common law negligence claims can be asserted where service of alcohol to a visibly intoxicated patron has been established). See also Sims v Frank B. Fuher Holdings, Inc., 2012 Pa. Dist. & Cnty Dec. Lexis 309.

The Pennsylvania Liquor Control Board regulates the sale of alcohol in Pennsylvania.

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police has primary responsibility to enforce the Pennsylvania Liquor Code. It works with local law enforcement to enforce the alcohol laws.

In 2003, Pennsylvania lowered the legal blood alcohol content ("BAC') level from .10 percent to .08 percent. The law also created a tiered approach toward DUI penalties which varied based on an individual's blood-alcohol content and prior offenses.

General Impairment:	.080 - .099 percent
High BAC:	.10 - .159 percent
Highest BAC:	.16 plus percent

III. NOTABLE CASES

Jardine v. *Upper Darby Lodge*, 413 Pa. 626, 198 A.2d 550, (Pa. 1964)

A driver who struck a pedestrian had been drinking at a bar for several hours. The bar contended that there was insufficient evidence to show the driver was visibly intoxicated when he was last served. The bar also claimed there was no proof that the driver's alleged intoxication was the proximate cause of the injuries.

In this case, the Court found that the testimony of a surgeon who examined the driver within an hour of the accident as well as an officer who arrived to the scene of the accident shortly thereafter, were properly submitted to the jury. The officer's testimony stated the driver exhibited signs of visible intoxication at the scene. Additionally, a witness testified that the driver had bloodshot eyes while at the bar.

The Court affirmed the trial court's judgment finding that competent and sufficient evidence supported the jury's findings that the driver was intoxicated when he was sold intoxicating beverages at the bar and that his intoxication was the proximate cause of the pedestrian's injuries.

McDonald v. Marriott Corp., 388 Pa. Super. 121,564 A.2d 1296, (Pa. Super. Ct. 1989)

Appellant bar customer was involved in a single-car accident several hours after she left the bar of appellee hotel. Appellant had consumed four bloody marys and four beers in a four and a half hour period at appellee's bar. After leaving the bat Appellant smoked illegal substances and consumed additional beer. The accident occurred several hours after appellant left appellee's premises.

The trial court granted summary judgment in favor of appellee hotel. Appellant testified at trial that she was able to drive from appellee's bar to another bar with little trouble. On appeal, the court affirmed, finding that Appellant put forth no proof showing she was visibly intoxicated when served. The Court found that Summary judgment was appropriate and ruled in favor of appellee hotel. The Court stated that no genuine issue of material fact existed as to whether appellant was provided alcoholic beverages while "visibly intoxicated."

Schuenemann v. *Dreemz, LLC*, 34 A.3d 94, (Pa. Super. Ct. 2011)

The jury returned a verdict in favor of appellees/plaintiffs, determining that the decedent was 49 percent negligent. A post-trial motion seeking a judgment notwithstanding the verdict or, in the alternative, a new trial, was filed shortly thereafter by the appellant bar.

The Court determined the trial court properly denied appellant's post-trial motion because evidence regarding the bar's licensing, certification, and correspondence with the Pennsylvania

Liquor Control Board, and internal employee procedures, was appropriate rebuttal to its defense that its personnel were trained to recognize patrons who were visibly intoxicated.

The Court further found that no error occurred by allowing the decedent's blood alcohol content level into evidence as extensive corroborating evidence to support intoxication was presented.

Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (Pa. 1983)

Appellants, who were the victims of an accident involving an intoxicated driver and the estate of a deceased passenger, filed personal injury actions for injuries arising out of the accident against appellee, social hosts. The claims against appellee alleged negligence for serving alcoholic beverages to a visibly intoxicated adult guest who later drove. Appellants sought to have the court to recognize a cause of action against the social host.

The Court affirmed, holding that under Pennsylvania law there was no liability on the part of a social host who served alcoholic beverages to a visibly intoxicated adult guest. It did not matter that the host knew, or should have known, the intoxicated person intended to drive. The Court noted that no other jurisdiction, with few exceptions, had been willing to extend liability to a social host when serving his adult guests who were visibly intoxicated.

Matthews v. Konieczny, 515 Pa. 106, 527 A.2d 508, 1987 Pa. LEXIS 718 (Pa. 1987)

Appellant was a licensee able to sell alcoholic beverages. Appellees were individuals injured when appellant sold intoxicating beverages to minors. The Court reversed and remanded the trial court, stating that even though the minors were not served intoxicating beverages, appellants were liable to third parties for damages proximately cause by the service of alcohol to minors. The Court noted that appellant's duty to refrain from serving minors extended beyond the minor who was served and included a party who may be affected by the illegal service to a minor.

However, the Court also noted that evidence of comparative negligence may be submitted to rebut a claim involving the extent of a licensee's liability. The Court further noted that the Statutory immunity commonly recognized in 47 Pa. Cons. Stat. § 4-497 (requiring visible intoxication at the time of service) does not extend to the service of minors.

IV. STATUTE OF LIMITATIONS

Personal injury claims in Pennsylvania are subject to a two-year statute of limitations. 42 Pa.C.S.A. §5524.

Pennsylvania Courts apply the "discovery rule" which stands for the proposition that the statute of limitations does not commence to run until the injured party discovers or reasonably should discover that he has been injured and that his injury has been caused by another party's conduct. Fine v Checcio, 582 Pa. 253, 870 A2d 850 (2005).

V. COMPARATIVE NEGLIGENCE

Pennsylvania is a modified comparative jurisdiction. Under Title 42, Section 7102(a) " in all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff."

VI. JOINT & SEVERAL LIABILITY

In 2011, Pennsylvania passed the Fair Share Act, 42 Pa.C.S.A. § 7102. This Act altered traditional concepts of joint and several liability by adopting a system of proportional fault. Under the Act, a tortfeasor is only responsible for his or her percentage share of an award unless the tortfeasor is found to be 60 percent or more responsible. Other exceptions to application of proportional fault expressly include an award of damages as a result of intentional misrepresentation, intentional tort, or the release or threatened release of hazardous substances. 42 Pa.C.S.A. §7102 (a.1)

Most notably, a specific exception was also maintained for "a civil action in which a defendant has violated section 497 of the Act of April 12, 1951 known as the Liquor Code." Id.

As a result of the above, under the present state of the law, a liquor licensee found to be only 1 percent responsible, remains jointly and severally liable for the entirety of any verdict or award which is entered.

VII. CONTRIBUTION AMONG JOINT TORTFEASORS

The Pennsylvania Uniform Contribution Among Tort-feasors Act is found at 42 Pa.C.S.A. §§ 8321-8327. This Act provides for a "pro rata" contribution among persons jointly and severally liable to a Plaintiff. It allows the joint tortfeasor who paid to pursue a recovery limited to the amount paid by him in excess of his own pro rata share. 42 Pa.C.S.A § 8324 (b). Such an action must be brought within 6 years from the entry of judgment. Pennsylvania Nat'l Mut. Casualty Co. v Nicholson Constr. Co., 374 Pa. Super. 13, 542 A 2d 123 (Pa. Super. 1988).

Courts have held that the Act does not apply to intentional acts. Toll Bros. v Pantich, Schwarze, Jacobs & Nadel, 22 Pa. D. & C. 5th 119 (Montgomery Cty. 2011).