Twenty-First Century

Michigan Liquor Liability Law

By Frank S. Spies

"Liquor liability" is a civil cause of action for damages against an individual or business that sells, gives, or furnishes alcohol to a wrongdoer who injures a claimant. Liquor liability is primarily based on a statute commonly called the dramshop act.[1] It can also be based on Michigan common law, although the common-law cause of action is vague and still evolving.

Dramshop Act

The dramshop act is included in the statutes regulating the liquor industry, which have evolved throughout the years. Most recently, the Michigan Liquor Control Act[2] was recodified as the Michigan Liquor Control Code of 1998.[3] The consequent renumbering of the provisions can cause confusion when reading cases interpreting the former act.

At common law, there was no cause of action for selling or furnishing alcohol to an able-bodied adult—even one who was intoxicated and even if, as a result of intoxication, the intoxicated person caused an injury.[4] The dramshop act thus created a statutory cause of action that did not exist at common law. It provides for the vicarious liability of a commercial seller or supplier of alcohol for an injury visited on the victim-claimant by the imbiber of the alcohol.[5]

The dramshop act provides: "This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor…."[6] In *Jackson v PKM Corp,* the Michigan Supreme Court clearly held that an action under the dramshop act is the exclusive remedy against a licensed liquor retailer.[7] *Jackson* overruled many prior cases that allowed a remedy against licensed retailers outside the dramshop act based on a theory of gross negligence or willful, wanton, or intentional misconduct.

When the dramshop act was first enacted in the late nineteenth century, it was intended to protect the spouse and family of the individual to whom a licensed retailer served alcoholic beverages. Amendments in 1986 of what was then the Liquor Control Act changed that focus by eliminating any cause of action by the intoxicated person's family and allowing recovery only by an injured third party. In *LaGuire v Kain,* the Supreme Court held that a

FAST FACTS:

Liquor liability is primarily based on a statute commonly called the dramshop act. It can also be based on Michigan common law, although the common-law cause of action is vague and still evolving.

At common law, there was no cause of action for selling or furnishing alcohol to an able-bodied adult—even one who was intoxicated and even if, as a result of intoxication, the intoxicated person caused an injury. The dramshop act thus created a statutory cause of action that did not exist at common law.

The dramshop act has its own notice provision, statute of limitations, unusual defenses, and barriers to recovery.

minor sold or furnished alcohol by a licensed retailer could not recover for his injuries, nor could his family.[8]

Amendments in 1972 added the word "visibly" to the dramshop act and thus required a plaintiff to prove that the tortfeasor was visibly intoxicated when he or she was served, that is, that the tortfeasors's intoxication would have been apparent to an ordinary observer. Consequently, cases interpreting the dramshop act before the 1972 amendments cannot be relied on as correct statements of the law.

A person injured by a visibly intoxicated adult must prove three elements to maintain a cause of action under the dramshop act:

- A liquor licensee sold, gave, or furnished alcohol to a person who was visibly intoxicated.
- The visibly intoxicated person caused the claimant's injury.
- The intoxication was a proximate cause of the injuries.

"Visible intoxication" of an adult wrongdoer can be proved by a combination of circumstantial evidence and permissible inferences from that evidence.[9] The standard of "visible intoxication" is objective: whether an "ordinary observer" would see visible signs of intoxication.[10] The issue is whether the tavern employee should have noticed visible signs of intoxication, not whether the employee was actually aware of the person's intoxication.[11]

The Court of Appeals had held that intoxication can be proved by the testimony of a toxicologist or a medical expert that consumption of a particular amount of alcohol would cause a certain effect or that the results of a blood alcohol test can be extrapolated back to arrive at the intoxicated person's blood alcohol level when he or she was in the tavern.[12] The Court of Appeals also held that lay witnesses can offer opinions on intoxication if they show a qualification of experience with alcohol.[13]

In 2006, however, the Supreme Court held in *Reed v Breton* that

> while circumstantial evidence may suffice to establish this element, it must be actual evidence of the visible intoxication of the allegedly intoxicated person. Other circumstantial evidence, such as blood alcohol levels, time spent drinking, or the condition of other drinkers, cannot, as a predicate for expert testimony, alone demonstrate that a person was *visibly* intoxicated because it does not show what behavior, if any, the person *actually manifested* to a reasonable observer. These other indicia—amount consumed, blood alcohol content, and so forth—can, if otherwise admissible, reinforce the finding of visible intoxication, but they cannot substitute for showing visible intoxication in the first instance.[14]

Under *Reed,* then, the use of hypotheses and extrapolations has changed. That evidence alone is not enough to prove visible intoxication, but toxicologists can still offer an opinion that a blood alcohol level or a number of drinks would produce visible intoxication if it is consistent with the testimony of those who observed conduct indicating intoxication. Unpublished opinions of the Court of Appeals have suggested that if the observed conduct was remote in time (for example, erratic driving occurred long after the tortfeasor left the tavern) or the tortfeasor drank or might have drunk alcohol after leaving the tavern, the toxicologist's opinion may not be admissible.[15]

The 1986 amendments of the dramshop act eliminated the requirement that the plaintiff prove that a minor was visibly intoxicated at the time he or she was furnished alcohol and required direct delivery of the alcohol by the licensee.[16] Thus, a person injured by a minor's consumption of alcohol must prove:

- A liquor licensee directly sold, gave, or furnished alcohol to a person under 21 years of age.
- The minor injured the plaintiff.
- The minor's intoxication was a proximate cause of the injuries.

MCL 436.1801(2) provides that the cause of action is against a "retail licensee." The dramshop act provides no other liability. The correct defendant is the business entity holding the liquor license.[17] The physical place where the alcohol was served is not a proper party defendant, nor is the employee who served the alcohol. A plaintiff's attorney commencing a liquor liability suit must identify the correct defendant before the period of limitation runs. A phone call to the records section of the Liquor Control Commission, however, will identify the license holder.

The period of limitation is two years for liquor liability claims.[18] More importantly, the statute requires a plaintiff to give written notice to possible defendants within 120 days.[19] The notice requirement is triggered not by the accident, but by the injured party's consulting an attorney. The 120-day period begins to run the day the plaintiff enters an attorney-client relationship, not when the plaintiff or the plaintiff's attorney learns the identity of the licensee that served the wrongdoer.[20] Dismissal is mandatory for failure to give notice. *Brown v JoJo-AB, Inc* held that a retail licensee need not show "prejudice" to obtain a dismissal.[21]

The courts have not allowed excuses for missing the 120-day notice requirement when the plaintiff did not retain the attorney to pursue a liquor liability lawsuit or the plaintiff did not have all the facts.[22] They have allowed an excuse when the plaintiff did not know where the intoxicated person was drinking because that person refused to tell.[23] When a police report stated that the intoxicated driver had come "from a wedding at the Country Club," however, notice was required to avoid dismissal.[24]

A basic requirement of the dramshop act is the "name and retain" provision. It requires that a liquor liability lawsuit "shall not be commenced unless the minor or the alleged intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement."[25]

The Supreme Court held that this is a per se rule, mandatory and strictly enforced.[26] The Court explained that "a defendant has not been 'retained in the action,' within the meaning of the statute, if a settlement of any kind is reached between the plaintiff and the allegedly intoxicated defendant before 'the litigation is concluded by trial or settlement.'"[27] The name and retain statute is violated when a plaintiff enters into an agreement with the intoxicated party that the intoxicated party will not object to the admission of his or her blood alcohol test results in exchange for the plaintiff's agreement not to seek to collect more than the intoxicated party's insurance policy limits.[28]

A mildly confusing Supreme Court decision, *Shay v John-KAL, Inc,* indicated that if a plaintiff unconditionally accepts a case evaluation award and the intoxicated tortfeasor also accepts—but the liquor licensee rejects it—the plaintiff has failed to "name and retain" and the case must be dismissed with respect to the licensee defendant.[29]

MCL 436.1801(7) provides that the liquor licensee has "[a]ll defenses of the alleged visibly intoxicated person or the minor." This means that the licensee can raise the defenses of the no-fault insurance threshold, comparative negligence, and voluntary entry into an affray. Note that one panel of the Court of Appeals has held in an unpublished opinion that the 5 percent limit on reducing damages for a plaintiff's failure to wear a seatbelt found in MCL 257.710e(6) does not apply in a dramshop action.[30]

The Revised Judicature Act provides for apportionment of fault in statutory tort cases.[31] This rule applies to dramshop act cases, so the trier of fact should apportion fault between the plaintiff, the allegedly intoxicated wrongdoer, and the licensee.[32] Furthermore, an intoxicated plaintiff can be barred from recovery if he or she was 50 percent or more the cause of the accident or incident.[33]

A long line of cases have held that the dramshop act does not provide a cause of action by an injured person who actively participated in the events leading to the tortfeasor's intoxication. This is the non-innocent-party rule. Someone who furnished drinks or participated in buying rounds of drinks with the tortfeasor or contributed to a kitty to buy the group's drinks or provided the intoxicated person with illegal drugs, whether adult or minor, has no cause of action.[34] Merely accompanying and drinking with an intoxicated person does not bar recovery, but it raises a question of fact on the issue.[35]

MCL 436.1801(6) gives the liquor licensee a right of "full indemnification" from the visibly intoxicated person for any damages awarded. This means that the licensee's liquor liability insurance policy is an umbrella policy, providing excess coverage over the tortfeasor's liability insurance. The intended effect of this statute is that the intoxicated tortfeasor's insurance coverage and assets should be exhausted before the vicariously liable licensee is required to pay damages. The licensee can seek indemnity for an award it paid in a cause of action against an intoxicated wrongdoer in a separate lawsuit against that wrongdoer.[36]

Under MCL 436.1801(8), the "last tavern" presumption, the last licensed retailer that served the tortfeasor is presumed to have been the only licensee that served the tortfeasor when he or she was visibly intoxicated. However, this statutory provision may be rebutted by clear and convincing evidence that a defendant tavern other than the last retail licensee served the allegedly intoxicated person while visibly intoxicated.[37]

MCL 436.1815 allows a liquor licensee that followed responsible business practices to assert those practices as a defense to a dramshop action. If the licensee asserts that its reasonable business practices should have prevented the sale, however, it might open the door to the plaintiff offering testimony of other instances of illegal sales.

MCL 436.1803 requires a licensed retailer to maintain liability insurance with policy limits of at least $50,000. A surprisingly large percentage of licensed retailers, however, maintain only the required minimum insurance coverage. If the insurance is canceled or expires, the Liquor Control Commission will revoke the license. Many policy defenses an insurer might have are eliminated by MCL 436.1811, at least for the $50,000 minimum coverage.[38]

Common-Law Liquor Liability

As noted earlier, Michigan tort law has always been that there is no common-law cause of action for selling or furnishing alcohol to an able-bodied adult.

Could a gross negligence theory, however, be applied against a person who is not a liquor licensee and to whom the dramshop

Someone who furnished drinks or participated in buying rounds of drinks with the tortfeasor or contributed to a kitty to buy the group's drinks or provided the intoxicated person with illegal drugs, whether adult or minor, has no cause of action.

act's exclusive remedy defense is thus not available? In *Morris v Markley,* the Court of Appeals held that furnishing alcohol to the plaintiff with actual notice of her helpless condition constituted gross negligence or willful, wanton, and intentional misconduct.[39] *Morris* involved a defendant who sought a commercial advantage by plying an alcoholic go-go dancer with drinks to encourage her to dance "wild and crazy." She was injured on the way home from work in an automobile crash. In *Millross v Plum Hollow Golf Club,* the Supreme Court rejected the proposition that an employer-employee relationship required a liquor licensee to protect third parties from off-premises injuries by supervising the employee's consumption of alcohol.[40] It thus appears that a common-law liquor liability action against social hosts would require an aggravated fact situation involving willful, wanton, and intentional misconduct or a situation in which the defendant sought a commercial advantage.

Social host liability has been found against a person other than a liquor licensee who sold or furnished alcohol to a person under the age of 21. This liability is based on MCL 436.1701, which makes selling or furnishing alcohol to a minor a misdemeanor. Even intoxicated minors who cause injury to themselves because of consuming alcohol have a cause of action against the social host.[41] There must be an actual giving or furnishing of alcohol. All reported cases hold that opening one's house for an underage drinking party, however, does not provide a cause of action.[42] The non-innocent-party doctrine does not preclude a cause of action by a party who furnished alcohol to the minor who later injured him or her.[43]

Use of other criminal provisions of the Liquor Control Act in a civil lawsuit has not been allowed when the statutory violation did not cause the sort of injury the provision was intended to protect against. For instance, a "bottle club" provision, which prohibited the consumption of alcohol on unlicensed premises for any consideration, was not accepted as a basis for the lawsuit.[44]

In summary, it should be kept in mind that the dramshop act creates a statutory cause of action and that many accepted negligence law rules may not apply. The act has its own notice provision, statute of limitations, unusual defenses, and barriers to recovery. There can be common-law causes of action outside the dramshop act, but likely only for giving or selling alcohol to minors or situations involving gross negligence or more serious misconduct. ■

For 29 years, Frank S. Spies has concentrated in the defense of liquor liability lawsuits. A graduate of the University of Michigan Law School, he served as United States attorney for the Western District of Michigan from 1974 to 1977.

FOOTNOTES

1. MCL 436.1801.
2. Former MCL 436.1 *et seq.*
3. MCL 436.1101 *et seq.*
4. *Jackson v PKM Corp,* 430 Mich 262, 267; 422 NW2d 657 (1988).
5. MCL 436.1801(3).
6. MCL 436.1801(10).
7. *Jackson,* 430 Mich at 264–265.
8. *LaGuire v Kain,* 440 Mich 367; 487 NW2d 389 (1992).
9. *Laskey v Baker,* 126 Mich App 524, 529; 337 NW2d 561 (1983).
10. An attorney filing or responding to a motion for summary disposition based on a claim of insufficient evidence of visible intoxication might wish to review *Salt v Gillespie,* 485 Mich 1090; 777 NW2d 430 (2010), for a discussion of those issues.
11. *Miller v Ochanpaugh,* 191 Mich App 48; 477 NW2d 105 (1991).
12. *Crider v Borg,* 109 Mich App 771; 312 NW2d 156 (1981).
13. *Heyler v Dixon,* 160 Mich App 130; 408 NW2d 121 (1987).
14. *Reed v Breton,* 475 Mich 531, 542–543; 718 NW2d 770 (2006) (citations omitted).
15. *Bergman v Anderson,* unpublished opinion per curiam of the Court of Appeals, issued May 13, 2008 (Docket No. 276955), 2008 WL 2038395; *Shaina v Compton,* unpublished opinion per curiam of the Court of Appeals, issued September 25, 2007 (Docket No. 274045), 2007 WL 2780997; *Eaton v Bobby G's Lounge,* unpublished opinion per curiam of the Court of Appeals, issued October 26, 2006 (Docket No. 269566), 2006 WL 3040651.
16. MCL 436.1801(2) and (3).
17. *McGuire v Sanders,* 474 Mich 1098; 711 NW2d 77 (2006), rev'g 268 Mich App 719; 708 NW2d 469 (2005); see also *Ray v Taft,* 125 Mich App 314; 336 NW2d 469 (1983).
18. MCL 436.1801(4).
19. *Id.*
20. *Id.*
21. *Brown v JoJo-AB, Inc,* 191 Mich App 208, 212; 477 NW2d 121 (1991).
22. *Chambers v Midland Country Club,* 215 Mich App 573, 578; 546 NW2d 706 (1996); *Lautzenheiser v Jolly Bar & Grille, Inc,* 206 Mich App 67, 70; 520 NW2d 348 (1994).
23. *Turnley v Rocky's Teakwood Lounge, Inc,* 215 Mich App 371; 547 NW2d 33 (1996).
24. *Chambers,* 215 Mich App at 575.
25. MCL 436.1801(5).
26. *Putney v Haskins,* 414 Mich 181; 324 NW2d 729 (1982).
27. *Id.* at 183.
28. *Riley v Richards,* 428 Mich 198; 404 NW2d 618 (1987).
29. *Shay v John-KAL, Inc,* 437 Mich 394, 403–404; 471 NW2d 551 (1991).
30. *Rumfield v Henney,* unpublished opinion per curiam of the Court of Appeals, issued September 26, 2006 (Docket No. 260540), 2006 WL 2739331.
31. MCL 600.2957; MCL 600.6304.
32. *Weiss v Hodge,* 223 Mich App 620; 567 NW2d 468 (1997).
33. MCL 600.2955a.
34. *Craig v Larson,* 432 Mich 346, 358–360; 439 NW2d 899 (1989); *Larrow v Miller,* 216 Mich App 317; 548 NW2d 704 (1996); *Dhuy v Rude,* 186 Mich App 360; 465 NW2d 32 (1990); *Plamondon v Matthews,* 148 Mich App 737, 740; 385 NW2d 273 (1985); *Goss v Richmond,* 146 Mich App 610, 613; 381 NW2d 776 (1985); *Morton v Roth,* 189 Mich 198; 155 NW 459 (1915).
35. *Todd v Biglow,* 51 Mich App 346; 214 NW2d 733 (1974).
36. *Green v Wilson,* 455 Mich 342; 565 NW2d 813 (1997).
37. *Reed,* 475 Mich at 533–534.
38. *Helder v Sruba,* 462 Mich 92; 611 NW 2d 309 (2000).
39. *Morris v Markley,* 143 Mich App 12; 371 NW2d 464 (1988).
40. *Millross v Plum Hollow Golf Club,* 429 Mich 178; 413 NW2d 17 (1987).
41. *Longstreth v Gensel,* 423 Mich 675; 377 NW2d 804 (1985); *Traxler v Koposky,* 148 Mich App 514; 384 NW2d 819 (1986).
42. *Bambino v Dunn,* 166 Mich App 723; 420 NW2d 866 (1988); *Reinert v Dolezel,* 147 Mich App 149; 383 NW2d 148 (1985).
43. *Arbelius v Poletti,* 188 Mich App 14; 469 NW2d 436 (1991); *Poch v Anderson,* 229 Mich App 40; 580 NW2d 456 (1998).
44. *Gardner v Wood,* 429 Mich 290; 414 NW2d 706 (1987).