Litigation Alert: What Can Bars and Restaurants Do to Protect Themselves from Dram Shop Liability when "Obviously Intoxicated" No Longer Seems to Be the Standard?

Joy Winkler

Under the Texas Dram Shop Act (the "Act"), bars and restaurants can be held liable if they provide, sell, or serve alcohol to a person who is obviously intoxicated to the extent that he presents a clear danger to himself and others, and that person then causes injuries to a third party.[1] The Act provides an avenue for parties who are injured by a drunk driver to recover damages from establishments if the establishments have served a patron who is obviously intoxicated.

The language of the Act indicates that an establishment may be held liable for damages caused by serving alcohol to an obviously intoxicated person. The Act does not provide that an establishment be held liable merely for serving alcohol to an individual who then injures a third party if that individual did not appear obviously intoxicated when served. However, since the Act was passed in 1987, Courts have "watered down" this requirement to the point that practically speaking, simply drinking alcohol at an establishment is enough for that establishment to be held liable.

Plaintiffs in dram shop cases are arguing that the driver must have been obviously intoxicated when served based on the driver's blood alcohol content ("BAC"), shown by the blood draw after the accident. This argument is not based on how the driver appeared when served alcohol at the bar or restaurant, but instead, relies on the driver's BAC when his blood is drawn by the police - often many hours later - and is extrapolated backwards. This is often an inaccurate calculation.

[1] TEX. ALCO. BEV. CODE § 2.02(b).

For example, in a recent Dallas area case, the trial court granted summary judgment in favor of Cadot, an upscale French restaurant in Plano.[2] In this case, Nasar Khan and his friend, Kelly Jones, had consumed several alcoholic drinks and ordered food at Cadot.[3] Khan then drove Jones home, remained at her home for approximately fifteen minutes, and then was involved in a car accident with the Plaintiff, Barrie Myers, on his way home.[4]

In its Motion for Summary Judgment, Cadot presented evidence that "[a]t no time at Cadot or afterward did Nasar appear to be intoxicated."[5] Myers presented no evidence of Khan's behavior at Cadot. Rather, Myers presented Khan's deposition testimony in which he stated that he believed the server at Cadot "should have observed" that he was intoxicated, although he did not testify as to what behavior he was exhibiting that the server should have noticed.[6] Myers relied upon the testimony of the police officer, who did not see any sign of obvious intoxication at the scene of the accident.[7] This officer determined Khan was intoxicated about an hour after the accident, once Khan was taken to the hospital.[8] Myers also submitted the affidavit of a forensic toxicology expert who concluded that Khan had consumed 10-19 standard drinks at Cadot in order to have reached the BAC level shown by the blood draw (which was taken approximately three hours after the accident), even though there was no evidence to support when or where that number of drinks was allegedly consumed.[9]

Myers appealed the trial court's summary judgment.[10] Cadot argued that Myers had presented expert evidence about Khan's BAC but had otherwise presented no evidence about Khan's conduct or behavior at Cadot that could or should have caused the server to conclude that Khan was obviously intoxicated.[11]

Even the Court noted that "[n]either party presented conclusive, non-party evidence on the question of Khan's demeanor and conduct at Cadot."[12] Nevertheless, the Court reversed summary judgment. [13]

---

2 *Myers v. Raoger Corp. d/b/a Cadot Restaurant*, No. 05-21-00988-CV, 2023 WL 4346826 at *1 (Tex. App.—Dallas, July 5, 2023, no pet. h.).
3 *Id.*
4 *Id.*
5 *Id.* at *4.
6 *Id.* at *5.
7 *Id.*
8 *Id.*
9 *Id.* at *6.
10 *Id.* at *1.
11 *Barrie MYERS, Appellant, v. RAOGER CORPORATION, Appellee, 2022 WL 2176671* (Tex. App.—Dallas), *7.
12 2023 WL 4346826 at *6.
13 *Id.* at *7.

The Court noted that Section 2.02 of the Act does not require evidence that the provider actually witnessed the intoxicated behavior.[14] Although the reasoning behind this ruling has been to prevent establishments from "turning a blind eye to signs of intoxication that are plain, manifest, and open to view,"[15] the effect has been to allow plaintiffs to rely upon expert testimony that the driver must have been obviously intoxicated when served at the establishment, based on the driver's BAC taken by the police sometime later.

Likewise, other Texas Courts have similarly overturned summary judgments based on circumstantial evidence, such as the driver's BAC taken after the accident.[16] Courts have held that such circumstantial evidence is sufficient to establish a genuine issue of material fact as to whether the driver was obviously intoxicated when served, thus rendering summary judgment improper.

Although the language of the Act is clear that the standard for liability is serving alcohol to a patron who is obviously intoxicated, Courts are hesitant to grant and uphold summary judgments, likely because they do not want to appear to be weak on drunk driving. Despite this delicate balance between the standard set forth in the Act and the desire not to condone drunk driving, it is a disturbing trend that summary judgments are so rarely granted and upheld in dram shop cases.

About the Author

Joy Winkler is a patent attorney focusing her practice on litigation matters. Joy received her J.D. from South Texas College of Law in Houston, Texas, and served as a judicial intern for Judge David Hittner of the United States District Court, Southern District of Texas. Joy also earned a B.S. in mechanical engineering from Rice University.

If you have any questions or would like to discuss the topic, Joy is available via email at: jwinkler@krcl.com and phone at: 214-777-4288.

[14] *Id.* at *4; Perseus, Inc. v. Canody, 995 S.W.2d 202, 206-07 (Tex. App.—San Antonio 1999, no pet.).
[15] Id.; *see Beamers Private Club v. Jackson*, No. 05-19-00698-CV, 2021 WL 1558738, at *4 (Tex. App.—Dallas Apr. 21, 2021, pet. dism'd) (mem. op.).
[16] *See, e.g., Bruce v. K.K.B., Inc.*, 52 S.W.3d 250,256 (Tex. App.—Corpus Christi-Edinburg 2001, pet. denied); *see also Love v. D. Houston, Inc.*, 67 S.W.3d 244, 248 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 92 S.W.3d 450 (Tex. 2002).