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Dram Shop Liability Involving Intentional and Criminal Acts

While often involving negligent actors, liability under the Dram Shop Act can extend to intentional, and even criminal, acts. The most critical factor in establishing Dram Shop liability in these instances is establishing a reasonable or practical causal connection between the act and the intoxication.

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Criminal Law

By Robert S. Whitbeck and Andrea M. Alonso | August 16, 2024 at 03:44 PM



New York CLS General Obligations §11-101 (the Dram Shop Act), creates a right of action against alcohol-serving parties for injuries occurring as a result of such parties' illegal service of alcohol to a person.

Typically, claims under the Dram Shop Act involve an intoxicated person who negligently injures a third party. Dram Shop liability can also extend to intentional acts if a "reasonable or practical connection" exists between the act and the assailant's intoxication. See *Carver v. P.J. Carney's*, 103 A.D.3d 447, 448 (1st Dept. 2013). "Proximate cause" otherwise required at common law in a tort action is not required.

To establish a claim under §11-101, plaintiffs must prove that the defendant sold alcohol to a visibly intoxicated person or a minor. See *Aminov v. East 50th St. Restaurant Corp.*, 232 A.D.2d 592, 593. The court in *Sahr v. Schmidli* found that intoxication cannot be solely established by the amount of alcohol an assailant consumed. *Sahr v. Schmidli*, 236 A.D.2d 785 (4d Dept. 1997).

In *Sahr, supra*, although the plaintiff's assailants were served four or five beers and as many shots of liquor, the court found that, because of the varied effect alcohol has on different people, evidence of their consumption was not adequate to support a finding of intoxication. *Id.*

In *Gonyea v. Folger*, 133 A.D.2d 964, 965 (3d Dept. 1987), the only evidence presented of an illegal sale was the seemingly unexplained act of aggression at the center of the proceedings, and the assailant had not shown signs of intoxication or aggression before assaulting the plaintiff. As such, the court held that the assault itself cannot serve as the sole evidence of intoxication.

Where intentional torts are involved, establishing that causal connection can present a challenge. Plaintiffs must also establish that the illegal service of alcohol had a reasonable or practical connect to their assault. In *Lorenzo v. Great Performances/Artists as Waitresses, Inc.*, the plaintiff was assaulted by a fellow wedding guest. While the testimony established that the assailant had consumed alcohol, there was no connection established between his alcohol consumption and the assault.

The court noted that "[t]here is no testimony in the record that John was acting violent, aggressive, or belligerent prior to his assault of the plaintiff." Similarly, in *Zamore v. Bar None Holding Co., LLC*, 73 A.D.3d 601, 602 (1st Dept. 2010), the plaintiff was injured when she was assaulted by a glass thrown by a patron being escorted off of the premises. The court there found that the §11-101 claims had been properly dismissed because, inter alia, the plaintiff failed to establish a causal connection between the assailant's consumption of alcohol and the assault.

Conversely, in *Catania v. 124 In-To-Go, Corp.*, the court found a causal connection where there was uncontroverted testimony that the assailant's behavior became increasingly belligerent as he drank throughout the night, and where the assault on the plaintiff was sudden and unprovoked. As such, the court there found that there was no line of reasoning that could lead to any conclusion other than a causal connection between the assailant's intoxication and the assault. 287 A.D.2d at 478.

These cases suggest that creating a causal connection between an intentional act and the intoxication requires not only visible intoxication but some indication of increasing violence or belligerence throughout the period of alcohol consumption.

Courts have found at least issues of fact as to a causal connection between an act and intoxication even under seemingly attenuated circumstances. In *Church v. Burdick*, 227 AD2d 817 (3d Dept. 1996), issues of fact sufficient to deny summary judgment were found where a man undisputedly consumed alcohol for four hours, then returned home, slept for 10-15 minutes, and proceeded to shoot plaintiff with a firearm. Significantly, there, the court specifically made note of the plaintiff's criminal conviction for depraved indifference as an indication of his level of intoxication and its impact upon the criminal act. This precedent indicates that identification of motives and exploration of any associated criminal charges can be helpful in establishing, or severing, the necessary causal connection.

Finally, an important exception articulated by the courts is that recovery under §11-101 is precluded where a plaintiff themselves procured the alcoholic beverage for the defendant. *Esposito v. Rail Bar & Grill Corp.*, 169 A.D.3d 870 (2d Department 2019). In *Esposito*, the plaintiff filed sought recovery under §11-101 against a restaurant after he was assaulted by a fellow patron. The court denied recovery, finding that recovery under §11-101 was precluded because the plaintiff had ordered and paid for the drink he alleged was illegally served to his assailant. *Id* at 871.

While often involving negligent actors, liability under the Dram Shop Act can extend to intentional, and even criminal, acts. The most critical factor in establishing Dram Shop liability in these instances is establishing a reasonable or practical causal connection between the act and the intoxication. Some indication of growing belligerence or aggression is needed, but other factors, including the motive and degree of criminality involved, can be impactful in prosecution or defense of these claims.

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