

Oklahoma Dram Shop Law: A Primer

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Dram shop liability in Oklahoma is judicial in origin, rather than legislative. The policy of holding a tavern owner, or other purveyor of alcoholic beverages, liable for injuries in certain circumstances was first announced in Oklahoma in the landmark 1986 case of *Brigance v. Velvet Dove*, 725 P.2d 300.

Fortunately, *Brigance* had good facts, in support of the old adage that good facts lead to good law. First, the Plaintiff in *Brigance* was both a minor and a passenger in a car driven by an over-served patron of the Velvet Dove Restaurant, who also happened to be a minor. Importantly, the issue of whether or not a claim could be maintained by the driver was not addressed. The important language of the decision is set out below:

“We, thus, hold that one who sells intoxicating beverages for on the premises consumption has a duty to exercise reasonable care not to sell liquor to a noticeably intoxicated person. It is not unreasonable to expect a commercial vendor who sells alcoholic beverages for on the premises consumption to a person he knows or should know from the circumstances is already intoxicated, to foresee the unreasonable risk of harm to others who may be injured by such person's impaired ability to operate an automobile.”

The claim then belongs to the third party injured as a result of the tavern owner's negligence in failing to use reasonable care not to serve a noticeably intoxicated person. As we will see later, the third party need not necessarily be innocent and may actually be an over-served patron as well. He simply may not be the one who drove.

It was only a matter of time until someone thought they had the case with the right facts that would result in the expansion of the doctrine to include the intoxicated driver who injures himself. In 1991, the Supreme Court heard *Ohio Casualty Co. v. Todd*, 813 P.2d 508, and declined to make such an extension, but it did so in a 6-3 decision, with healthy, well-reasoned

dissents by Justices Lavender and Wilson, and a totally baffling concurring opinion by Justice

Opala.

Justice Lavender pointed out the fallacy of the majority reasoning in the following language:

“¶8 Two persons go to a tavern to drink. Both become noticeably intoxicated and the tavern owner or his employee(s) continue to serve them alcohol. The two now intoxicated individuals travel home together in the same vehicle which is involved in a one-vehicle accident resulting in injury to both. Under *Brigance* the passenger has a cause of action against the tavern owner or its employee(s), but under the majority opinion's teaching the driver does not. I simply do not see the logic in treating the two individuals differently. Aside from this inconsistency, it is my view the majority focuses much too much attention on the wrongful conduct of the inebriate and [813 P.2d 523] much too little on the wrongful conduct of the seller of alcohol.”

Justice Wilson was more concerned with the fact that selling the alcohol to a noticeably intoxicated person was a direct violation of a statute, and therefore negligence per se. The right factual situation has yet to come along to convince the current court to expand our law to include the claims urged by Lavender and Wilson. Hopefully, those facts are out there somewhere and can be found in the near future.

The law next expanded in the 1993 case of *Tomlinson v. Love's Country Stores*, 854 P.2d 910. This case again involved minors. Here, the beer was bought by the minors at a convenience store for off premises consumption. Importantly, the expansion was a direct result of the facts. The Plaintiffs were the parents of a minor passenger killed in the one-car accident.

That decision directly led to *Busby v. Quail Creek*, 885 P.2d 1326 (1994). Here, Judge Cauthron certified the following question from the Western District Federal Court to the Oklahoma Supreme Court:

3

“May an 18-year-old person who consumed 3.2% beer on-premises state a cause of action against the vendor for her subsequent on-premises alcohol-related injuries, when both the vendor and purchaser presumably violated the provisions of state law

prohibiting the sale or purchase of beer by or to persons under 21 years of age?”

The Supreme Court answered affirmatively, pointing out that serving alcohol to a minor was a violation of an Oklahoma statute, and therefore negligence.

Busby was followed rather quickly by another certified question from Judge Cauthron, in *Mansfield v. Circle K*, 877 P.2d 1130 (1994). Whereas *Busby* dealt with on-premises consumption, *Mansfield* dealt with off-premises consumption. The Supreme Court had no problem expanding the rule and again, answering the question in the affirmative.

So, by the end of 1994, we had liability for selling to intoxicated persons for on-premises consumption, but only for injuries sustained by a third person, not by an over-served driver; and for selling alcohol to a minor, on-premises, off-premises, passenger, driver, regardless.

Our next decision of importance came in 1999, *Bennett v. Covergirls*, 973 P.2d 896. This case involved a drinking party at a local strip club, and a situation where the injured claimant was clearly a willing participant in the drinking and general misbehaving. Defendants attempted to use such legal doctrines as Assumption of the Risk, based on the unique facts of the case, but the strategy backfired.

In *Bennett*, the facts again proved important. Plaintiff, along with his stepfather and brother, went to Covergirls to engage in the time-honored tradition of taking a young man to a strip club to celebrate his twenty-first birthday. When things got rowdy, the step-dad left to fetch a designated driver, giving each of the boys \$20 to continue drinking and carousing in his absence. The problem was, birthday boy also had his truck in the parking lot, and no one took

the keys. When one of the girls short-changed the young man while paying for his next pitcher of beer, he got rowdier and was removed from the joint by a group of bouncers. He went to his

truck and started burning rubber in the parking lot. Big brother jumped in to try and calm him down, but he tore off into the night and eventually wrecked the truck, severely injuring the brother, our Plaintiff.

Defendant assumed that in this situation surely the Court would find that the Plaintiff was not innocent and could not possibly maintain a claim. He was an adult. He was actively involved in drinking and misbehaving. Some good lawyering by Greg Haubrich encouraged the Court of Appeals to instead focus on the conduct and policies of Covergirls. They got the kid drunk, serving him when he was obviously intoxicated. Short-changed him and then kicked him out. Covergirls attempted to combat with testimony of several employees to the effect that the boy was not “noticeably intoxicated.” The Court of Appeals didn’t buy it, and affirmed the jury verdict in favor of Plaintiff.

Bennett is significant in three respects. First, it further established the right of a passenger, regardless of circumstances and the extent to which he was on a common venture, to maintain a claim when injured. Secondly, it laid the groundwork for the argument that under certain circumstances, noticeable intoxication was a question for the jury and reasonable minds could differ, even when the testimony of all witnesses was that the driver was not noticeably intoxicated. Finally, it established the rule of thumb that the Courts could look at the policies of the tavern to see if they had rules in place to avoid selling to intoxicated persons, and whether or not they had followed those rules.

The logic of *Bennett* was quickly adopted by the Supreme Court in *Copeland v. Tela*

Corporation, 996 P.2d 931 (1999). Here, the plaintiff was a poor pedestrian, run over by a patron of one of Oklahoma City’s finest institutions, The Red Dog Saloon. Judge Dixon had

granted summary judgement to the tavern because Plaintiff could produce no evidence that the Red Dog had served alcohol to a noticeably intoxicated person. Like in *Bennett*, the Red Dog had attached affidavits of virtually every employee working the night in question, all stating that no one who was noticeably intoxicated on that night was served anything.

The Supreme Court held that the plaintiff “is still entitled to use inference and circumstantial evidence to prove during trial” that the driver “was served when noticeably intoxicated.” They also pointed out that “the policies, procedures, training, and environment at the Red Dog operated to prevent its employees from recognizing when a patron had become noticeably intoxicated.”

The following laundry list, from the deposition of one of the Red Dog’s operators, presents a perfect case study for all plaintiffs’ lawyers to review when considering the merits of a potential dram shop case:

- “1. A strong odor of alcohol would be difficult to detect on a patron due to the smell of cigarette smoke in the bar.
 2. Due to the volume of music in the bar, a loud patron would not necessarily indicate an intoxicated patron.
 3. A patron may purchase 3.2 beer from a waitress, a table dancer, or the bartender.
 4. No running tab is kept for patrons in order to keep a tally of how much beer has been served.
- 6
5. The Red Dog does not train its employees to keep track of the rate at which its patrons consume alcoholic beverages and employees are not required to do so. There is no training for recognizing intoxicated patrons.
 6. The Red Dog has no policy about how much beer can be served to a patron.

7. Waitresses are not assigned a specific section of tables. Therefore, a patron might not have the same waitress each time beer is ordered.

8. Dancers also serve beer to customers. Dancers are allowed to drink while working and the Red Dog sets no limit to how much dancers can drink.

9. The bar is sunken into the floor such that the bartender can see only the tables just in front of him.

10. Intoxicated patrons may leave unobserved through a side exit.”

The state of the Oklahoma law remains basically unchanged, to this date. A couple of Court of Appeals decisions have been produced, each dealing with the issue of whom the actual tavern operator was. *King v. Modern Music*, 33 P.3d 947 (2001). *Pate v. Alain*, 49 P.3d 85 (2003). Neither expands the law, but both should be required reading when considering whom the proper party is in any dram shop action.

The issue of who may maintain a claim is still out there and available under the right set of facts. Some states have held that the family of a deceased, intoxicated drivers are innocent third parties who have suffered injury, and therefore can maintain a cause of action against a tavern owner. Such a right already exists in Oklahoma when the victim is a minor. The right set of facts can expand our law to include this exception.

There have been other decisions, not always good for the plaintiff's. Each of the cases

cited above should be required reading for anyone considering taking on a dram shop case. As is the case in all trials, close attention should be paid to the requested jury instructions. A very good trial lawyer once told me he always drafted his jury instructions in a case before he drafted the petition. Brilliant! But, frequently not practical.

Oklahoma has but one OUCJI instruction dealing with dram shops:

DRAM SHOP DUTY OF CARE:

A bar owner [or other commercial vendor that sells liquor for on-the-premises consumption] has a duty to use ordinary care not to serve alcohol to a person that the bar owner [or other commercial vendor] knows or reasonably should know from the circumstances is already intoxicated.

Notes on Use

If the claim is based on sale of alcohol to a minor, this Instruction should be modified to read as follows: "A seller of alcohol has a duty to use ordinary care not to sell alcohol to a person that [he/she/it] knows or reasonably should know from the circumstances is under 21 years old."

Always include a Negligence Per Se instruction, based on violation of 37 O.S. §537. 8

Finally, here is a short checklist of things to look for when investigating a dram shop case:

1. Who was driving - who was the passenger?
2. Was the driver served while noticeably intoxicated?
3. Was the injured person a minor?
4. Did the bar have a policy to identify intoxicated persons and insure that they

weren't served?

5. What was the policy of the bar or store? Was in written? Did they train on it?
6. Did they follow their policy?

By reading the cases and finding the answers to these questions, you'll know whether or not your case is a good one, or maybe one with sufficient facts to move to the next level.

Good Luck.

