

BURDEN OF PROOF IN DRAM SHOP ACTIONS

The State of New York's Dram Shop laws make it difficult for bar owners and restaurants to defend against civil actions stemming from alcohol related injuries or death. To figure out exactly when to stop serving alcohol to a patron in order to avoid civil liability for injury or death sustained by a third party is a difficult exercise in and of itself. The standard applied by the courts as to what constitutes 'visible' intoxication is a complex, varying one. What is absolutely clear is that a detailed, immediate investigation must be conducted of all customers and employees of a bar/restaurant upon learning of an alcohol related accident.

General Obligations Law Section 11-101(1) (Dram Shop Act) is a statutory vehicle created for monetary recovery distinct from the common law, permitting third parties injured or killed by an intoxicated person to recover from the server or seller of alcohol if they can prove that the intoxicated person who caused the injury was "visibly intoxicated" when served alcohol. Alcoholic Beverage Control Law Section 65(2) makes it unlawful for anyone to sell, deliver or give away alcoholic beverages to any "visibly intoxicated" person. However, the crucial question is which party has the burden of proving visible intoxication or the lack thereof, the plaintiff or the defendant.

Although it has been long recognized that Section 65 of the Alcoholic Beverage Control Law does not create an independent statutory cause of action, it has been left to the Courts to determine whether the defendant in Dram Shop cases served or sold alcohol to what is defined as a "visibly intoxicated" person. Under the Dram Shop statute, recovery for injuries sustained by the person whose *own* involuntary intoxication resulted from the sale is not permitted.¹

¹ *Butler v. New York City Transit Authority*, 3 A.D.3d 301, 770 N.Y.S. 2d 317 (1st Dep't 2004).

For the purposes of deciding motions for summary judgment in Dram Shop cases, the Courts have held that proof of “visible intoxication” or lack thereof can be demonstrated by *submission of circumstantial evidence*, including expert and eyewitness testimony. Many decisions are based upon submissions of eyewitness affidavits.

With respect to summary judgment motions, some recent appellate decisions have seemed to place the burden upon the defendant in a Dram Shop case to negate the inference of “possible” visible intoxication. Although the initial burden of proof usually rests with the moving party on a motion for summary judgment, the initial burden required of a defendant in a Dram Shop case appears to be greater and more difficult to sustain. In a recent case decided by the Appellate Division, First Department, *McGovern v. 4299 Katonah, Inc.*, the defendant tavern was denied summary judgment because the defendant tavern failed to satisfy its initial burden of “negating the possibility that it served alcohol to a visibly intoxicated person.”² The tavern had submitted affidavits containing a version from two bartenders on the night in question indicating that they had not served alcohol to a visibly intoxicated man on the night in question, however, the submissions did not mention a third bartender who worked that night and thus, the defendant was held not to meet its burden of negating the possibility of visible intoxication. *Id.*

The Courts liberally interpret Dram Shop actions when deciding motions for summary judgment, however, it is inexplicable why bar and restaurant owners became burdened by having to “negate the possibility of intoxication” when their very business is selling alcohol to patrons. Although the Dram Shop statute does not specifically state that the burden is upon the defendant to negate the possibility of visible intoxication, some judges have interpreted the statute and charged bars and restaurants with the responsibility of negating an inference of visible intoxication. Is that what the legislature intended when they enacted the Dram Shop statute?

This standard places an enormous burden upon bars and restaurants which serve alcohol as a

² *McGovern v. 4299 Katonah, Inc.*, 5 A.D.3d 239, 773 N.Y.S. 2d 285 (1st Dep’t 2004); see also *Costa v. 1648 Second Avenue Restaurant, Inc.*, 221 A.D.2d 299, 634 N.Y.S.2d 108 (1st Dep’t 1995).

primary source of business. The crucial step for the bar owner and restaurant owner is to conduct an immediate, full investigation with the assistance of an attorney familiar with the Dram Shop Act when apprised of an alcohol related injury. Attorneys representing bars and restaurants must interview all possible witnesses at an early juncture in an effort to satisfy the greater burden of proof upon motions for summary judgment. Consultation with a toxicologist who may testify as to the blood alcohol level of the alleged intoxicated person and factors based upon the plaintiff's age and weight should be considered by the attorney for the defendant as well.

Liability difficulties arise due to the passage of time and the inability of the bar or restaurant, sometimes years after the occurrence, to secure testimony from other customers and former employees who may be able to affirmatively negate the inference of visible intoxication. Because proof of a high blood alcohol count alone does not, in and of itself, establish 'visible' intoxication, *Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997)³, it becomes even more important to secure witness statements.

The "murky" nature of "visible intoxication" as interpreted by the Courts places the onus upon the defendant to demonstrate that the alleged intoxicated person, for example, was not "tripping" or "slurring his speech," through the testimony of eyewitnesses. In a recent Second Department case, *Greco v. Begley*, the defendant established entitlement to summary judgment at the appellate level even though the trial court denied the initial motion for summary judgment.⁴

In *Greco v. Begley, Supra*, the defendant, Dublin Pub, Inc., in four related personal injury actions stemming from a one car accident after the alleged intoxicated person had left the bar, was able to prevail at the Appellate Division level in by proffering specific evidence that the alleged intoxicated person, an almost 20 year old customer to whom it sold beer, was neither impaired nor intoxicated when she left the Dublin Pub. Thus, the Appellate Division reversed the decision rendered at the Supreme Court, Nassau County and held that the defendant, Dublin Pub, Inc., was

³ *Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997)

⁴ *Greco v. Begley*, 4 A.D.3d 505, 772 N.Y.S.2d 367 (2nd Dep't 2004).

entitled to judgment as a matter of law on the Dram Shop causes of action. The Appellate Division reversed the trial court decision after reviewing the Dublin Pub, Inc.'s evidence of non-impairment and non-intoxication.⁵

Although very difficult, proving a negative remains the most effective, if not only, way to obtain a dismissal of a Dram Shop action. Without an immediate, thorough investigation, the hurdle of proving that someone was not intoxicated, however, is near impossible.

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⁵ *Greco, supra*, 772 N.Y.S.2d 367 (2nd Dep't 2004).