Journal of Legislation

Volume 2 | Issue 1 Article 5

1-1-1975

A New Dramshop Act

Georgia Luks

A NEW DRAMSHOP ACT

Georgia Luks

I. Purpose

The purpose of this legislation is to limit the liability of educational institutions of higher learning to situations where those institutions have made a knowing and willful violation of the laws pertaining to control of alcoholic beverages.

II. Existing Law In Indiana

At common law, any person who furnished alcoholic beverages to minors or intoxicated persons in violation of the law was not liable for any resultant injuries sustained by third persons. This was true in Indiana until a Dramshop Act was passed in 1853. This Act was repealed two years later. ABA Sect. of Ins. Neg. & Comp. Law 448, 449 (1967). It is worthy to note that the Indiana Dramshop Act of 1853 stated that the vendor of alcoholic beverages would be liable; however, the law did not refer to the social host.

The leading case holding a seller of alcoholic beverages liable for injuries sustained by third persons is Elder v. Fisher, 247 Ind. 598, 217 N.E. 2d 847 (1966); (hereinafter cited as Elder). The court in Elder stated that Sec. 20, Ch. 13 of Acts of Ind. Gen. Assembly of 1875, which provides for "civil liability . . . to any person who shall sustain any injury. . . ." had been repealed because later Acts of Ind. purport to cover the entire field of regulation of alcoholic beverages. Id. at 600, 217 N.E. 2d at 848.

In Elder the court also held that at common law, a violation of a statute intended to provide for the safety of the public, is negligence per se. The Court in Elder determined this by using an Illinois interpretation of Indiana common law. See Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E., 2d 292 (1963).

The court extended Elder to find liability of a social host in Brattain v. Herron, 41 Ind. Dec. 341, 309 N.E. 2d 150 (Ind. Ct. App. 1974); (hereinafter cited as Brattain). In Brattain, the defendant was found to have violated the law forbidding persons "to sell, barter, exchange, provide or furnish an alcoholic beverage to a minor." IC 1971, 7.1-5-7-8. The court construed the defendant's failure to object to her minor brother's consumption of alcohol in her home as providing or furnishing an alcoholic beverage within the meaning of the terms used in IC 1971, 7.1-5-7-8. Consequently, after the minor had an auto accident a short time later, the court found the defendant civilly liable for the damages incurred. The court in Brattain held that where a

person knowingly gave alcoholic beverages to a person who was known to be a minor, with knowledge that a minor would be driving on a public highway, that person is liable for any injuries sustained by third persons.

III. Implications of Existing Law in Indiana

A. Social Host Should Not be Held Liable for Torts Committed by Guests Unless the Social Host Knowingly Violated the Law

The motivating force behind the enactment of most Dramshop laws was the control of the sale of alcoholic beverages. Comment: Application of Dramshop Acts to Non-Commercial Suppliers of Liquor, 1973 Wash. U.L.Q. 708, 710.

Generally, it is determined that it is impractical to hold a social host liable for furnishing alcoholic beverages. Since the tavern keeper receives pecuniary gain for providing alcoholic beverages to his customers, it is logical to shift the cost of damage to the vendor because the tavern keeper has a greater capacity to absorb the cost. Any cost of insurance or a bond can be passed on to his customers. However the social host must personally absorb the cost of any insurance, if it is available to him.

Unlike the tavern keeper, the social host does not necessarily physically confront every person who consumes alcoholic beverages in his home; the guest often merely serves himself. (This was the situation in Brattain.) The social host is not as effective in policing the activities of his guests. Thus, the social host has lesser means available for protection against liability and financial ruination. See Note: EXTENSION OF THE DRAMSHOP ACT: NEW FOUND LIABILITY OF THE SOCIAL HOST, 49 N.D.L. Rev. 67, 80 (1972).

Should the social host be aware of his liability, in the absence of the Dramshop Act, he may be unable to get adequate insurance due to either the prohibitive costs or the insurer's refusal to insure the private person against virtually unlimited liability.

The cases which have found the social host liable for torts committed by its guest in consequence of furnishing alcoholic beverages, have all expressly or impliedly required that the host knowingly violated the law, that is knowingly furnished alcohol to a person that he must have known was a minor or must have known was inebriated. See e.g., Brattain, p. 2 supra. (The defendant knew that her younger brother was a minor and knew that he would be driving on the public highway.); Weiner v. Alpha Tau Omega Fraternity, 485 p. 2d 18 (Ore. 1971) (where the defendant Fraternity served a person whom it knew to be a minor); Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d, 87 100 Cal. Rptr. 752 (1972) (where the defendant employer not only served a minor-employee a large amount of liquor, but also placed him in a car and directed him to drive the automobile through traffic).

B. Brattain Could be Extended to Unknowing Violations of the Law

The liability of the social host has been predicated on several theories. First, in applying a Dramshop Act, a court could find the defendant negligent if he knowingly served a minor under circumstances in which the unreasonable conduct of the guest is foreseeable.

See Wiener v. Alpha Tau Omega Fraternity, supra. Second, liability may be found by analogy to the negligent entrustment doctrine. This was advanced by Judge Dooling in his dissenting opinion in Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949). That is, it is negligence to furnish liquor to a minor or any persons to the point of intoxication knowing that he is going to drive an automobile while in that condition. Id. at 253, 210 P.2d at 535.

Third, is the theory advanced by Brockett v. Kitchen Boyd Motor Co., p. 4 supra; and followed by Brattain p. 2 supra. In these cases the courts of California and Indiana found that the defendant breached a duty to the person injured not by knowingly serving a person known to be a minor or known to be an inebriant but by violation of the law; and that a violation of a law pertaining to the safety of the population is negligence per se. See Elder v. Fisher, p. 1 supra. It is worthy to note that IC 1971, 7.1-5-7-8 does not require the social host to know that the person served is a minor in order to have a violation thereof. It is also worthy to note that in Brattain, the defendant did not actually serve her younger brother alcoholic beverages, but merely did not object to his drinking.

Since at common law a violation of a statute intended to provide safety of the public is negligence per se; and the law pertaining to serving alcohol to minors does not require the server to know that the person being furnished alcohol is a minor, it is conceivable that Brattain could be extended to unknowing violations of the law.

C. It Is Virtually Impossible for a Large Institution to Totally Prevent the Consumption of Alcohol

No matter how rigid the campus rules are regarding the consumption of alcoholic beverages there will always be those who will violate those rules. The probability of violations occurring is increased by the fact that a high percentage of persons pursuing post secondary education are legally allowed to drink. The flagrant violations of the Prohibition Amendment should only serve to evidence the fact that there are those who will drink despite the law. Universities and colleges can attempt to protect themselves from liability. However, the state should not hold these institutions responsible for the acts of one of its errant students where it is impossible to control or observe those acts.

Note that Illinois and Vermont have statutes which state that the owner or lessor of a building who knowingly permits sale of alcoholic beverages on the premises is personally liable to the same extent as the tavern keeper. Annot. 169 A.L.R. 1203 (1947). Since liability of the vendor and

social host, as derived from common law is, in essence, strict liability, it is virtually unlimited. That is, there is no requirement that the institution knowingly permit alcoholic beverages to be served to persons known to be minors, in order to incur liability. Therefore, the following legislation should be enacted to predicate the liability of an educational institution of higher learning for torts committed in consequence of a violation of the laws pertaining to regulation of alcoholic beverages, only where that violation was willful.

A BILL FOR AN ACT to amend IC 1971, 7.1-5-7-8 concerning the liability of educational institutions of higher learning for certain illegal sales of alcoholic beverages.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 1971, 7.1-5-7-8 as added by Acts 1973, P.L. 55, SECTION 1, is amended to read as follows: Sec. 8. (a) It is unlawful for a person to sell, barter, exchange, provide or furnish an alcoholic beverage to a minor.
(b) This section shall not be construed to impose civil liability upon any educational institution of higher learning, including but not limited to public and private universities and colleges, business schools, vocational schools, and schools for continuing education, or its agents for injury to any person or property sustained in consequence of a violation of this section unless such institution or its agent sells, barters, exchanges, provides or furnishes an alcoholic beverage to a minor.