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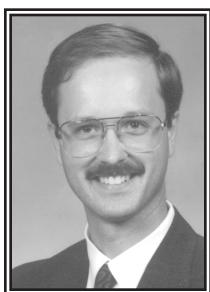
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Dram Shop Liability In Missouri *The Law Following Kilmer v. Mun*

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In May 2000 the Missouri Supreme Court handed down its opinion in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), which drastically affected the ability of injured parties to bring a civil action against those who improperly

serve alcohol to others who inflict the injury — otherwise known as a dram shop claim.

This article will briefly discuss the history of that cause of action in Missouri, the effect of *Kilmer* on these claims and issues to be dealt with in the future.

In 1985, the Missouri Legislature enacted §537.053 RSMo, the dram shop law, in response to a growing body of case law that was expanding the tort of negligently serving alcohol. By enacting this statute, the legislature specifically proclaimed that the policy of this state was to follow the rule that *furnishing* alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons, but rather the *consumption* of alcoholic beverages. In fact, in a rare move, the legislature declared “that the holdings in cases such as *Carver v. Schafer*, 647 S.W.2d 570 (Mo.App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo.App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo.App. 1981) be abrogated.”

However, the legislature attempted to carve out an exception to this rule. Subsection 3 provides that a cause of action can be maintained against a dram shop if there had been a conviction

injured by those who were negligently provided alcohol if that provision was not by a person licensed to sell intoxicating liquor by the drink for consumption on the premises. In other words, package liquor sales do not qualify under this section, and neither does the provision of intoxicating beverages by a social host.

One might argue that the sale of packaged liquor to a minor should expose that person to civil liability for injuries caused by that act, but there is no recourse under current Missouri law. Again, the theory is that these types of providers of alcohol have not received the training necessary to obtain a license for the service of intoxicating beverages for consumption on the premises, and are, therefore, not as experienced in determining the consumer’s ability to handle the alcohol.

Of course, this line of thinking doesn’t address negligent provision of alcohol to minors. It all boils down to duty, and this state has not elected to impose a duty on those types of providers of alcohol.

Standard

Since the thrust of the opinion in *Kilmer* had to do with the constitutionality of the conviction requirement under the statute, the opinion did not specifically address the tort standard under which such claims will be submitted to the jury. The question then becomes whether or not a jury must find a qualifying alcohol provider to be negligent in so doing (if so, what standard of care to impose) or whether the provision of the intoxicating liquor as prohibited in the statute renders that licensee strictly liable.

I would argue that there is nothing in the statute which sets forth a negligence standard, and that once a jury finds that a licensee has

regard.

Of course, if there are eye witnesses to actual service of the alcohol who can describe the mannerisms of the patron while he was being served, this could go a long way toward determining how “obviously intoxicated” that patron was when served.

However, it may well be the rare case where there is an independent witness to the service of alcohol who could be identified when the actual injury may be far removed in time and distance from the service of the alcohol itself. Most of the witnesses identified will either work for the establishment serving the alcohol or be acquainted with the drunk who inflicted the injury. The bias of these types of witnesses is obvious.

Another approach that would help determine the degree of intoxication of a patron and hence how “obviously intoxicated” he was while being served would be to focus on the science of alcohol and its effects on the human body. This involves a two pronged approach: 1) looking prospectively, by the sheer amount of alcohol being served, as to the probable effect the consumption of that alcohol is having on the patron; and 2) looking back retrospectively at blood alcohol content (BAC) results of the intoxicated patron after the occurrence giving rise to the claim, if available.

Many licensees these days will have some type of chart or guideline which will indicate how many drinks can be served a patron. This is usually done by using an approximate body weight of the patron, number and type of drinks consumed, and time period over which those drinks are consumed. These guidelines may include an approximate probable BAC. The various levels of BAC can then be broken into degrees of influence. If it can be determined how many drinks were served to the patron, this chart can then be used to show just how “obviously intoxicated” the patron was while being served.

The second approach utilizes the actual documented BAC of the patron, if obtained, usually by breath test or blood draw. By the use of these BAC results, expert toxicologists and forensic pathologists can recalculate various probable levels of BAC at different points in time and different numbers of drinks consumed, and further give opinion as to the probable effect that alcohol would have on the drinker’s mannerisms in determining whether they were “obviously intoxicated.”

Insurance Coverage

Another problem in deciding whether to pursue a dram shop claim has to do with whether there is coverage for the dram shop under their general commercial liability policy for the negligent provision of alcohol.

Many times, the injuries suffered by the victims of this tort are catastrophic, and liability coverage provided by the insurer for the drunk driver is minimal. Of course, in the situation where the intoxicated patron commits what would be considered an intentional tort (assault and battery in a drunken rage) there may well not be liability coverage available to the patron.

Prior to the holding in *Kilmer*, many establishments did not feel as though the exposure to this type of action was significant enough to obtain an alcohol rider to overcome the standard exclusion in most commercial general liability policies. For this reason, it is essential to conduct early discovery on the existence and amount of coverage, as well as whether the coverage is being questioned under a reservation of rights.

As with any type of claim, the venue of the cause of action, the particular facts of the case involved, and the types of the parties must be considered in deciding how to pursue these claims. Usually, there will be three basic

options to consider in pursuing the claim against the dram shop establishment.

The first option is to reach a settlement with the intoxicated patron and then proceed solely against the dram shop defendant. Doing so would result in the plaintiff facing an “empty chair” argument by the defense in which the defense would suggest to the jury that the truly bad actor is not even before them as a defendant. On the one hand, the jury may “smell” a settlement with the patron and be more inclined to not hold the dram shop liable. On the other hand, they may get the feeling that this is the plaintiff’s only real opportunity to obtain a proper recovery.

The second option generally considered is to enter into an agreement with the joint tortfeasor pursuant to §537.065, known as a “Mary Carter” or some proper modification thereof, which would allow plaintiff to obtain a recovery against the patron in exchange for agreeing not to seek recovery beyond a specified amount (usually liability insurance policy limits). This approach keeps the joint tortfeasor in the case as a co-defendant with the dram shop, and allows the jury to apportion fault between the dram shop and the drunk they served who inflicted the injury. Pursuant to §537.067, in actions in which no fault is assessed against the plaintiff, these defendants would be jointly and severally liable to the plaintiff if they are assessed any percentage of fault by the jury. Clearly, this provides an advantage to the plaintiff. However, it is likely that the existence of that type of agreement will be made known to the jury during the course of the trial, and might therefore have an adverse effect on the jury’s decision in apportioning fault.

Finally, the third option is to not settle any portion of the claim with anyone and just let the jury sort it all out. Usually, the action of the drunk in inflicting the injury is so clearly negligent that there is no real danger of not prevailing at least against that defendant at trial. However, considerations of the plaintiff’s comparative fault and financial hardship might work against this approach. It would be this writer’s opinion that one would want to have a totally innocent plaintiff and a good strong case against at least one collectible defendant before turning down a significant settlement offer from the intoxicated patron.

There was a flurry of activity in the state legislature in the wake of *Kilmer*, which saw various lobbying groups backing proposed legislation that would severely curtail (or even wipe out) a victim’s ability to pursue this type of claim. However, there was no law passed during the 2001 legislative session.

The issue is now being addressed again during the current general assembly. The only reported appellate opinions post-*Kilmer* have to do with the proper application of the statute of limitations or appropriate venue of these types of claims, but do nothing to address the specific elements as discussed above. We will just have to wait to see how this cause of action is refined by future legislative action and legal opinions of the appellate courts of this state.

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Mr. Krispin, St. Louis, was the plaintiff’s attorney in *Kilmer v. Mun*.

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tion or suspended imposition of sentence arising from the conviction for a violation of §311.310 for the sale of intoxicating liquor to a person under the age of 21 or to an obviously intoxicated person. Practically speaking, this exception was illusory because it required an action over which the civil claimant had no control, namely the criminal prosecution of the dram shop for wrongful service of alcohol.

It was the requirement of intervening criminal prosecution and conviction which the Missouri Supreme Court found unconstitutional in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). Rather than strike down the whole statute, the court made clear that it was only declaring that portion of the statute requiring the criminal conviction to be unconstitutional. Therefore, subsection 3 of §537.053 as modified by the Supreme Court (removing the requirement of criminal prosecution and conviction) now frames dram shop liability in Missouri.

Type Of Claims

It is important to understand that dram shop liability claims can only be brought against those “licensed to sell intoxicating liquor by the drink for consumption on the premises.” This is a specific type of license issued by the Division of Liquor Control. The theory here is that type of server is in the best position to evaluate a patron’s ability to consume alcohol, be they a minor or “obviously intoxicated.”

Thus, there is still no liability to persons

provided alcohol as prohibited under the statute *and* that provision is the proximate cause of personal injury or death, then the elements of the claim have been satisfied. There is nothing in the statute, or in any case law interpreting the statute both before and after *Kilmer*, which would indicate a negligence standard. It seems to this writer that the real battle in winning a dram shop claim is proving that the provision of the alcohol leading to the injury was to an “obviously intoxicated person” or minor.

As mentioned above, there are two situations in which the provision of alcohol would expose a licensee to dram shop liability under §537.053(3).

The first is the sale of intoxicating liquor to a person under the age of 21 years. This should be easy enough to prove. However, most of the cases this writer has come across concerning injuries caused by intoxicated minors have involved the sale of packaged liquor or consumption at a social gathering, both of which do not fall within the cause of action set out in §537.053(3).

The other prohibited provision of alcohol under the statute would be that of the sale of intoxicating liquor to an “obviously intoxicated” person. It seems as though this is where most of the battle will be fought in prosecuting and defending these claims. None of the appellate opinions since *Kilmer* have shed any light on the quantum of proof required in this