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Burden Of Proof Higher In New Dram Shop Bill

MATA, Restaurant Lobby Agreed To Change

By KRISTEN H. GARROWAY

kgarroway@mo.lawyersweekly.com

Plaintiffs with dram shop cases will face a higher burden of proof if a bill passed by the General Assembly is signed into law by the governor.

House Bill 1532, passed during the last week of the legislative session, will raise the burden from a "preponderance of the evidence" to a "clear and convincing" standard.

The measure was agreed to by representatives of the Missouri Association of Trial Attorneys and the Missouri Restaurant Association, who say they locked themselves in a hotel room and

hammered out the language.

The parties met in order to respond to a 2000 Missouri

Supreme Court case that declared part of the dram shop statute unconstitutional.

Since then, lawmakers and lobbyists have been pushing for new legislation that would strike a balance between protecting the public from drunk drivers and protecting bar and restaurant owners from skyrocketing insurance costs associated with tort claims.

"The Supreme Court ruling changed the way the law operates and there's an argument that the way it was unfair," said Rep. Tom Hoppe, D-Kansas City, the sponsor of HB1532. "Of course, I think there's an argument that, after the Supreme Court struck that down, it was more unfair the other way. In other words, I think it was extreme to one side and then extreme to the other. So I wanted to get a bill that everybody could meet halfway

Once that agreement was reached it pretty much stuck."

Rep. Ralph Monaco, D-Raytown, who is also a Kansas City attorney, said, "What we're balancing is corporate responsibility versus personal responsibility. I don't think we should be saying to the dram shop you are immune from liability. But at the same time we should be saying that the person is responsible for their own conduct, meaning the person who got drunk," he said, referring to the provision that does not allow the drunk patron to sue the dram shop.

"I think this law is a good balance because here's where we ended up: ultimately if a dram shop serves a minor under the age of 21 or if they serve someone who is obviously impaired, the dram shop can be held liable if the [third party] plaintiff can show that the injuries were the proximate cause of that act through what's called 'clear and convincing evidence.' So we've raised the bar to sue the dram shop from preponderance of the evidence to clear and convincing evidence, but not beyond a reasonable doubt. And frankly for a plaintiff to establish a case against the dram shop anyway, it's going to be weighted very heavily on the evidence."

Pile On

But critics of the bill question whether the compromise was balanced and say that the new standard prevents plaintiffs from having their cases decided by a jury.

St. Louis attorney James G. Krispin, who represented the plaintiff in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000) and who testi-

of the problem, a big part. But you are just taking away with this new law the ability for a jury to even make that call. And I think in most cases a jury would say no, he's the guy that got drunk and we're not going to reward him. But there might be a set of facts where the situation is such that you might want to say this bar really stepped over the line in serving this person and you don't have that opportunity under this new law."

But Krispin said his biggest problem with the law is the requirement of "visible intoxication." Krispin explained, "I think [the law] becomes vague at that point because they say it requires impairment shown by significantly uncoordinated physical action or significant physical dysfunction — that I can tell you is going to be the subject of appeals.

"Before, you just had to show that they provided alcohol to an 'obviously intoxicated' person. So, for example, if somebody had a blood alcohol content of .30 and was just sitting there like a zombie, they may not show [visible intoxication] because if they're sitting there almost passed out they're not showing any uncoordination or any obvious physical dysfunction," he said.

Krispin added, "I think it would have been more of a balance if they hadn't piled on. In other words, if they had just raised the standard to clear and convincing and left the rest of it alone. Or if they had defined visibly intoxicated the way they did and left it to the regular standard of preponderance, I think that would have been a little bit more of a balance."

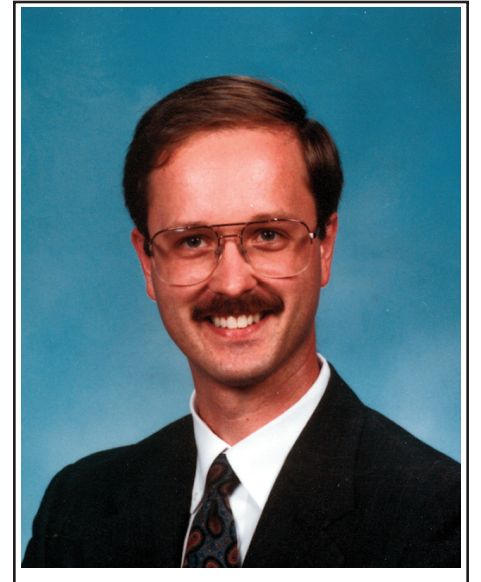
Level Playing Field

Other attorneys agree that the new standard makes it difficult for plaintiffs to reach the jury but say that the requirement of visible intoxication creates a more level playing field.

"Very, very important to us was the definition of visible intoxication, which is an objective standard of when someone's intoxicated," said St. Louis attorney Harry W. Wellford, who negotiated on behalf of the Missouri Restaurant Association. "In several other states the definition uses the term 'obviously intoxicated'...and lets a jury opine whether the person was obviously intoxicated. It seems to be maybe a mincing of words but the use of the term visible intoxication is an objective standard, which has with it in the bill itself several indicia of what is visible intoxication. Things like uncoordinated physical action, significant physical dysfunction, things of that nature. Without that, if you just use the term obviously intoxicated, then it's going to become a jury issue as to whether the person is intoxicated or not," he said.

"I think that, as far as the servers are concerned, a plaintiff will have a more difficult burden of establishing that a server knew by clear and convincing evidence that the person they were serving reflected these physical manifestations of dysfunction. So it will be more like the law was before *Kilmer* came along than the law is now."

Wellford added, "The bill makes the playing field a little more even in terms of restauranters who have servers and the



JAMES G. KRISPIN
More difficult to get to jury

servers have an opportunity to know that the person they're serving is visibly intoxicated or not and the way the law came down on *Kilmer* is that...if the server serves someone a beverage and that person had been to several other restaurants and wasn't reflecting any kind of physical manifestation of intoxication the server could be liable if that person was ultimately involved in an accident and had a BAC of .08," he said.

"Clear and convincing requires a very high degree of probability," said St. Louis defense attorney Gerard T. Noce. "Your evidence has to be almost overwhelming to support making that case. I think what the caselaw and the MAI are telling us is that it's very rare that you would have that type of evidence to support that type of case. So it's a very high standard and will be very difficult to achieve.

"Missouri law in the past has always been that it's the consumption and not the provision of alcoholic beverages that is presumed to be the proximate cause of the injury. I think the legislature has said that we think there should be a high level of proof before a restaurant can be held liable because somebody had too much to drink there, because it's pretty hard to tell in many cases. I think the legislature did a good job," he said.

Steve White, who negotiated on behalf of the Missouri Association of Trial Attorneys, admits that the burden of proof is higher under the new law but adds that "the fact of the matter is in the day of the life of jury trials, if the case is a good case the jury is going to hold those responsible accountable."

He said, "It does increase the burden of proof but practically speaking I don't think it's going to make an appreciable difference. We stood fast that there needs to be accountability for situations where there's irresponsibility on the part of the tavern owner or restaurant serving liquor by the drink in the event they continued to serve someone who was obviously intoxicated or under 21 years old and that person goes out and causes injuries to folks on the highways and roadways."

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on, and clearly insurance rates were going through the roof and the [restaurant] industry and the lawyers needed some change to that law."

Marathon Session

According to Hoppe, a similar bill failed last year because the different sides would not budge from their respective positions. This year, he tried a different approach and got all the groups together for a marathon negotiating session in a Jefferson City hotel room.

Hoppe said, "We tried last year. This year, when I agreed to try it again I told the restaurant industry, the hotel industry, the Missouri Association of Trial Attorneys people, the insurance industry [that] we're not doing anything until you all sit down and try to work this out. It went on for several hours and...as the night progressed, they came up with a plan that both sides agreed to and shook hands on.

fied before the House and Senate regarding last year's dram shop bill, believes that HB1532 is a significant departure from the normal standard that plaintiffs must present to juries. "[The standard] was preponderance of the evidence, now it's clear and convincing," he said. "It also doesn't allow the person who was becoming intoxicated to bring their action and I understand that those types of cases don't have the same jury appeal that a totally innocent plaintiff's case might have, but that gets back to just the opportunity for a jury to make the call on that.

"One of the beefs I've had with this whole cause of action is that alcohol is one of those products that by its very nature is the kind of thing that the more you provide it to the consumer the less ability they are going to have because it diminishes their capacity to assess when they should shut it off," he said.

"And I don't mean to exonerate them, don't get me wrong, they are certainly part