

INDIANA LIQUOR LIABILITY

I. INTRODUCTION

Indiana liquor laws (and with it, liability) have developed from traditional common-law foundations into, more recently, a statutory based system. Specifically, the Dram Shop Act allows for civil liability in certain situations when one furnishes alcohol to another who then causes injury due to his or her intoxication. The Act requires actual knowledge of the intoxication which proximately causes the injury. Despite Indiana's codification of the Dram Shop Act, however, common-law liability continues to exist.

Indiana courts routinely hold that the Dram Shop Act does not preempt common law actions for negligence. Generally, a special relationship must exist between the host and guest, which in turn creates a duty to exercise reasonable care. The rationale behind preserving the common law liability scheme is that persons engaged in the business of furnishing alcoholic beverages should be under the same duty to exercise reasonable care in the conduct of that business as those involved in non-alcoholic related business.

Notably, where liability is found, at least one Indiana court has allowed for a punitive damage instruction to go to the jury where the defendant's misconduct was willful and wanton. Further, although no court has specifically so held with respect to liquor liability, attorney fees are presumably recoverable when a party's actions are frivolous or in bad faith.

II. LIABILITY UNDER THE DRAM SHOP ACT

Indiana's Dram Shop Act—Ind. Code § 7.1-5-10-15.5—statutorily allows for civil liability in certain situations when one *furnishes* alcohol to another who then causes an injury due to their intoxication. This Act *does not* apply to actions accruing before April 1, 1986. The Act represents a legislative judgment that providers of alcoholic beverages should be liable for the reasonably foreseeable consequences of knowingly serving alcohol to visibly intoxicated persons. However, the Act precludes civil liability unless it is shown that the provider had *actual knowledge* that the person to whom the alcoholic beverage was sold was *visibly intoxicated* at the time the beverage was furnished. Further, the intoxication must be the proximate cause of the alleged damage. The Act's requirements apply equally to the furnishing of beverages to minors as well.

A. "Furnishes Alcohol"

The term "furnish" as used in the Act includes barter, deliver, sell, exchange, provide, or give away. In order to "furnish" an alcoholic beverage, a defendant must *possess or control* the beverage. He or she must be the active means by which the intoxicated individual obtains the alcohol. Neither the lending of funds to a minor to purchase alcohol with knowledge that the funds would be used



to purchase alcohol, nor having joint possession of alcohol with the minor and pouring his or her first drink constitutes "furnishing" alcohol in violation of the Act.

B. "Actual Knowledge"

A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless (1) the person furnishing the alcohol had actual knowledge that the recipient was visibly intoxicated at the time the beverage was furnished, and (2) the intoxication of the recipient was a proximate cause of the death, injury, or damage alleged in the complaint. Further, if a person who is at least 21 years of age suffers injury or death proximately caused by the person's voluntary intoxication, the person, the person's dependants, the person's personal representative, or the person's heirs may not assert a civil claim against a person who furnished an alcoholic beverage that contributed to the person's intoxication unless the foregoing applies.

When establishing "actual knowledge," the provider's knowledge must be shown by a subjective standard. Constructive knowledge is not sufficient to establish liability. Further, actual knowledge of intoxication can be inferred from indirect or circumstantial evidence.

The provider's knowledge is an issue of fact, and in order to survive summary judgment, the plaintiff must provide some evidence that could reasonably support an inference that the provider had actual knowledge that the person in question was intoxicated. The trier of fact may make reasonable inferences based on the facts and surrounding circumstances, such as the recipient's behavior at the time, the amount and type of alcoholic beverage served, and the recipient's condition shortly after leaving the provider's establishment. If the plaintiff has met this burden, testimony from the provider that he or she did not have actual knowledge of the person in question's visible intoxication merely creates an issue of fact, and summary judgment in such a case is not appropriate.

For example, where a guest injured another guest in the host's driveway, and there was no evidence that the host had any knowledge of the guest's intoxication at the time the alcoholic beverages were furnished, the host was not liable under the Dram Shop Act. Conversely, where a waitress served a tavern patron approximately ten beers, one every fifteen minutes, and collected money after each round, and where the patron was visibly intoxicated, the court held that the jury could reasonably infer that the waitress, who had ample opportunity to observe the patron during this period, had actual knowledge of the intoxication.

C. Proximate Causation

In order to establish proximate causation, the plaintiff must prove that the intoxication was “that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produce[d] the result complained of without which the result would not have occurred.” The existence of proximate cause is normally a question of fact to be determined by the jury. The courts have generally found proximate cause under the Dram Shop Act in cases where the injury occurs on the premises where the alcohol is provided. Similarly, proximate cause has been found where a patron drives while intoxicated resulting in injury within a short proximity of the premises where the alcohol was served.

III. COMMON-LAW LIABILITY

Unlike many states, Indiana’s common-law liability scheme regarding the furnishing of alcoholic beverages exists despite the existence of statutory provisions. Specifically, Indiana courts have held that the Dram Shop Act does not preempt common law actions for negligence where a *special relationship* exists between the host and guest, creating a duty to exercise reasonable care. Some Indiana courts have further held that common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving the breach of a statutory duty. Under the common law, persons engaged in the business of furnishing alcoholic beverages are under the same duty to exercise reasonable care in the conduct of their business as those involved in non-alcoholic related business.

It is axiomatic that to prevail in a negligence action, it must first be shown that the defendant owed a duty to the plaintiff. The question of whether a duty to exercise care arises is governed by the relationship of the parties and is an issue of law within the province of the court. The imposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm.

Special relationships have been recognized where the nature of the relationship is such that one party is in an advantageous position in relation to the other. For example, a business proprietor or an operator of public entertainment has a duty to exercise control over the conduct of third parties and to take precautions against the potential risks of providing alcohol. If a proprietor has, or should have, reason to know that a patron may become intoxicated and pose a general threat to the safety of other individuals, the proprietor’s failure to take reasonable precautions to protect other patrons from harm may constitute a breach of duty.

A. Social Host – Common-Law Liquor Liability

As a general rule, common-law liquor liability shall not be extended to a purely social host, except in cases involving a breach of a statutory duty. Where, however, the intoxicated individual is an employee of the individual or entity providing the alcohol, then the relationship between the two is not that of a purely social host and liability could attach.

IV. DAMAGES

Indiana’s Dram Shop Act does not specifically provide for punitive damages and/or attorney fees. Despite the lack of express language, punitive damages and/or attorney fees are potentially recoverable in Dram Shop actions.

A. Punitive Damages

The issue of punitive damages in liquor litigation has not received much attention by Indiana courts. However, it is well-settled law in Indiana that punitive damages may be awarded upon a showing of willful and wanton misconduct, regardless if the “willful and wanton” does not embody malice, ill will or intent, but rather conscious and intentional conduct which, under the circumstances, that actor knows will probably result in injury.

At least one Indiana case found that a punitive damage instruction was warranted where the operations of the alcohol providers where shown to be such as to permit and encourage the unfettered simultaneous consumption of alcohol by thousands of customers, with little if any restraints or opportunity to discern customers’ intoxication and curtail the serving of further alcoholic beverages where appropriate, and with heedless indifference to the consequences. Further, the provider’s location and volume of business compelled the reasonable inference that the provider was aware that customers which it permitted and encouraged to become intoxicated would be departing its premises by motor vehicle, thus subjecting other motorists to impending danger and probable injury.

B. Attorney Fees

Notably, no Indiana court has allowed for attorney fees with respect to Dram Shop Liability. However, under Indiana law, attorney fees may be awarded if either party (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party’s claim of defense clearly became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith. Ind. Code § 34-52-1-1(b). Therefore, presumably if either party in a Dram Shop action satisfies any of the elements above, attorney fees may be awarded.

INDIANAPOLIS OFFICE

Two River Crossing • 3925 River Crossing Parkway • Suite 280 • Indianapolis, IN 46240

phone: (317) 663-8570 • fax: (317) 663-8580

CONTACT ATTORNEY: Rick L. Weil • rweil@reminger.com

Rev. 4/2013. This has been prepared for informational purposes only. It does not contain legal advice or legal opinion and should not be relied upon for individual situations. Nothing herein creates an attorney-client relationship between the Reader and Reminger. The information in this document is subject to change and the Reader should not rely on the statements in this document without first consulting legal counsel.