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# **LIQUOR LIABILITY**

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## DRAM SHOP/LIQUOR LIABILITY IN PENNSYLVANIA

### A. LIQUOR CODE

The Pennsylvania Liquor Code, Section 4-493(1) provides the basis for imposing liability for negligent service of alcohol by liquor licensees.

1. Section 4-493.1 of the Liquor Code provides, in pertinent part:

It shall be unlawful and –

- (1) For any licensee or the board, or any employee, servant or agent of such licensee or the board, or any other person, to sell, furnish or give any liquor or malted or brewed beverages, or to permit any liquor or malted or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known untempered habits.
2. Section 47 P.S. 4-497 provides as follows:

No licensee shall be liable to third persons on account of damages inflicted upon them off the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malted or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

The Pennsylvania courts have clearly held that in order for a liquor licensee to be liable to a third person there must be service of alcohol to a visibly intoxicated person. Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964). Furthermore, the courts have held that Section 4-497 "does not create a cause of action against the licensee but in fact limits the extent of a licensee's liability." Detwiler v. Brumbaugh, 441 Pa. Super. 110, 656 A.2d 944 (1955).

The Court in Detwiler explained that:

Traditionally, liability is established after a finding is made that duty existed, a breach of that duty occurred and the resulting harm was proximately caused by the breach. Fennell v. National Mutual Fire

Insurance Company, 412 Pa. Super. 534, 603 A.2d 1064 (1992), allocatur denied, 533 Pa. 600, 617 A.2d 1274 (1992). Section 4-493 of the Liquor Code sets forth the duties associated with the service of alcohol.

Id. at 946.

Additionally, the Court in Detwiler stated that:

This section clearly imposes a duty on those parties identified to refrain from selling liquor to a visibly intoxicated individual. ‘A violation of the requirements of this statute is deemed negligent per se, and if the violation is the proximate cause of plaintiff’s injuries, then the defendant is liable.’

Id. at 946.

It is clear from the Detwiler case as well as other cases that the Pennsylvania Liquor Code, Sections 4-493 and 4-497, provides the basis for a claim concerning the service of alcohol.

Id. The law is quite clear that visible intoxication is a necessary element to establish liability against a licensee. 47 P.S. §4-497. That is, Section 4-497 specifically states that there will be no liability unless there is service of alcohol to one who is visibly intoxicated. Furthermore, as noted above, if plaintiff proves a violation has occurred, plaintiff must still prove that the violation was the proximate cause of the plaintiff’s injuries.

As stated in Fandozzi v. Kelly Hotel, 1998 Pa. Super. \_\_\_\_, 711 A.2d 524, 525-26 (1998) appeal denied, 558 Pa. 601, 735 A.2d 1269 (1999), plaintiff must prove two things in order to establish liability against a liquor licensee. That is, the plaintiff must prove the following:

1. That an employee or agent of the licensee served alcoholic beverages to a customer while visibly intoxicated; and
2. That this violation of the statute proximately caused the plaintiff’s injuries.

Id. It is not sufficient for a plaintiff to establish merely that alcoholic beverages were served to a

patron or that the patron was intoxicated at the time he or she caused injury to another. For civil liability to attach, evidence must be produced indicating the patron was served alcohol at a time when he or she was visibly intoxicated. Id. at 527.

**B. PROOF OF VISIBLE INTOXICATION**

To establish a state of visible intoxication, proof of service and consumption of alcohol is not sufficient; instead, to establish that a patron was served alcoholic beverages while visibly intoxicated, the plaintiff must prove that the plaintiff exhibited signs of visible intoxication before being served their last drink and that someone saw the patron exhibit such signs. McDonald v. Marriott, 388 Pa. Super. 121, 564 A.2d 1296, 1299 (1989).

However, it would appear, based on Pennsylvania caselaw that both direct and circumstantial evidence will be considered in evaluating whether the plaintiff can establish that an individual was served alcohol at a time when he was visibly intoxicated in the absence of direct eyewitness evidence. Although from a defense perspective, one would like to argue that the McDonald case, as noted above, and the case of Johnson v. Harris, 419 Pa. Super. 541, 615 A.2d 771 (1992) requires that direct eyewitness evidence of the alleged intoxicated person is necessary for plaintiff to meet her burden of proof, the Pennsylvania Superior Court, in Fandozzi v. Kelly Hotel, Inc., supra, 711 A.2d at 527, held:

We note, however, that in the 18 years since Couts was decided, neither this court nor our Supreme Court has held that direct evidence is required to prove that a patron was served alcohol while visibly intoxicated. Subsequent decisions of this court have addressed Couts, noting that it is not binding, but nevertheless examining whether similar circumstantial evidence has been presented. ... Accordingly, we conclude that a plaintiff can prove dram shop liability in the absence of direct eye witness testimony that an individual was served at a time when he or she was visibly intoxicated. Id. at 527.

One way a plaintiff may attempt to establish visible intoxication has been the use of the results of a blood alcohol test performed after the happening of the accident and "the relation back" by an expert to establish that the individual would have been appeared intoxicated at the time he was served the alcohol. However, the Pennsylvania Superior Court in Conner v. Duffy, 438 Pa. Super. 277, 652 A.2d 372 (1994) held that such evidence, without more, is insufficient to permit the case to go to a jury. Id.

In discussing this issue, the Court in Conner, noted that the evidence in that case could not rise to the level of establishing a general issue of material fact simply through the "relation back" testimony of the expert. Id. at 375. The Court noted that in Johnson v. Harris, 419 Pa. Super. 541, 615 A.2d 771 (1992), the Superior Court warned:

The Pennsylvania Supreme Court has on various occasions discussed the complexity of "relation back" and has indicated that it should be used guardedly. We are accordingly wary of any attempt to create genuine issue of fact as to "visible intoxication" based on medical testimony of what the average person's reaction might have been assuming [the driver's] "probable" blood alcohol concentration.

Furthermore, the Pennsylvania Superior Court in Suskey v. Loyal Order of Moose Lodge No. 86, 325 Pa. Super.94, 472 A.2d 663 (1994), held that a jury instruction on the presumption of legal intoxication that is set forth in the motor vehicle Code 75 Pa. C.S.A. §1547(d) is not proper since a person who might be "legally" intoxicated under that presumption would not necessarily be "visibly" intoxicated as required by the Dram Shop Act. Also, see Estate of Mickens v. Stevenson 2002 Pa. Dist. and Cnty. Dec. Lexis 131; 57 Pa. D. & C. 4<sup>th</sup> 287 (2002) . In said case, the Court of Common Pleas of Fayette County granted the Motion for Summary Judgment of the owner of the first bar as there was no evidence of negligence or violation of the Dramshop Act. The court found no liability under the Dramshop Act, Pa. Stat. Ann. Tit. 47, Subsections 4-497 or 4-0493 as the

plaintiffs failed to present an issue of fact regarding whether the patron was visibly intoxicated within the meaning of the statute. In said case, the court set forth the proper meaning of “visibly intoxicated as:

In defining the violation as the dispensation of alcoholic beverages to a person ‘visibly intoxicated,’ the statute displays considerable logic in placing stress upon what can be seen. The law does not hold a licensee or its agent responsible on any basis, such as blood alcohol level of a patron, which would not be externally apparent; instead, the law decrees that the alcoholic beverage dispenser shall not provide more alcohol when the signs of intoxication are visible. *The practical effect of the law is to insist that the licensee be governed by appearances, rather than by medical diagnoses.*” Johnson vs. Harris, 419 Pa. Super., 541, 551, 615, A.2d 771, 776 (1992) (emphasis [\*16] in original) quoting Laukemann vs. Commonwealth of Pennsylvania., 82 Pa. Commw. 502, 475, A.2d 955 (1984).

Furthermore, the Court found that:

...mere breach of the statutory duty to refrain from serving alcohol to visibly intoxicated persons does not alone establish liability, as plaintiff must also show that the breach was the proximate cause and cause in fact of an injury. *Id.* Thus, in order for an injured plaintiff to recover under the Dram Shop Act provision prohibiting service of alcohol to visibly intoxicated persons, the following two things must be proven: (1) that the plaintiff was served alcoholic beverages while visibly intoxicated, and (2) that the violation proximately caused injuries. See Johnson vs. Harris, 419 Pa. Super. 541, 550, 615 A.2d 771, 775 (1992). See also, Fandozzi vs. Kelly Hotel, Inc., 711 A.2d 524 (Pa. Super. 1998), allocatur denied, 558 Pa. 601, 735 A.2d 1269 (1999).

However, if the plaintiff is able to establish other evidence, the Courts have allowed expert testimony of the toxicologist. See Fandozzi v. Kelly Hotel, Inc., *supra*, 711 A.2d at 527. In that case, the Court concluded that the blood alcohol content and the opinions of the toxicology expert were supported by additional circumstantial evidence indicating that the decedent was visibly intoxicated while in the bar. Therefore, although the Court noted that this court had been "wary of

an attempt to create general issue of material fact as to 'visible intoxication' based on medical testimony of what the average person's reaction might have been assuming ([the patron's] 'probable' blood alcohol concentration", the Court found that in this case there was other evidence. Fandozzi v. Kelly Hotel, Inc., *supra*, 711 A.2d at 528-529. Also see, Jardine v. Upper Darby Lodge No. 1993, Inc., *supra*, 198 A.2d at 550. In Jardine, the Pennsylvania Supreme Court discussed the use of expert opinion in a dram shop case. The Court found that the doctor's testimony about the patron's physical condition and his opinion that he would have been intoxicated when served his last drink at the bar were admissible because the testimony did not stand alone. However, the Pennsylvania Superior Court in the Estate of Cron v. Club North 40, No. 0168 M.D. appeal DKT. 1997 552 Pa. 269 714 A.2d 1024 found that the expert opinion of the toxicologist "relating back" to the blood alcohol level was not sufficient to create a genuine issue of fact as to visible intoxication and found in favor of the liquor establishment. The Honorable Judge Russell Nigro wrote a dissenting opinion in which he believed that there was sufficient evidence of visible intoxication by individuals on the scene after the accident and that such evidence as well as the expert opinion should have been considered and should have prevented summary judgment from being granted.

The plaintiff may attempt to introduce the criminal conviction of a DUI in a case in which the driver and the bar establishment have been sued. The defense should object to the admission of a such a conviction. As noted above, although one may be found legally intoxicated, this does not establish visible intoxication. Furthermore, evidence of the criminal conviction would be highly prejudicial to the bar establishment.

### **C. LIABILITY FOR SERVICE OF ALCOHOL TO MINORS**

Originally, the Superior in Simon vs. Shirley, 269 PA. Super. 364, 409 A.2d 1365 (1979)

held that mere service by a liquor establishment of alcoholic beverages to a minor was not sufficient to render the licensee liable. The Superior Court in that case indicated visible intoxication was needed. However, in a series of cases by the Pennsylvania Supreme Court thereafter, the Pennsylvania Supreme Court overruled Simon vs. Shirley.

In Matthews vs. Konieczny, 515 PA. 106, 527 A.2d 508 (1987) and Mancuso vs. Bradshaw, 338 Pa. Super. 328, 487 A.2d 990 (1985), the Pennsylvania Supreme Court in the consolidated appeals held that: (1) The service of alcohol beverages to minors in violation of the liquor code formed the basis for a finding of negligence with regard to those subsequently affected by the legal service, even if beverages were served to one other than the ultimate actor in the ensuing automobile accident, i.e. the driver; and (2) the statutory "immunity" found at 47 P.S. 4-497 applied only to "legally competent" customers and did not, therefore, insulate a licensee from liability resulting from sales to minors, thus, negating the necessity of showing that the minor customer was visibly intoxicated at the time of purchase.

In Matthews, Matthew Capriatti, age 17 purchased a case of beer from the defendant distributor without being asked for verification or proof of age. In the Capriatti vehicle was another minor, James Matthews. Later, Capriatti and Matthews picked up John Konieczny. Eventually, Konieczny elected to be the driver of the automobile in which the three minors were riding. By that time, Konieczny had consumed five (5) or six (6) 16 ounce beers. He lost control of the car and struck a tree. James Matthews was killed. In Mancuso, William McGee (age 20) bought a case of beer from the defendant beer distributor. Thereafter, defendant, Richard Bradshaw, 19 years old, consumed approximately one-half of the case of beer. Thereafter, Bradshaw operated a motor vehicle which was involved in an accident with the plaintiff, Christina Mancuso.

Furthermore, the Pennsylvania Superior Court in Thomas vs. Duquesne Light Company, 396 Pa. Super 1, 545 A.2d 289 (1988) held that a beer distributor's duty to refrain from selling alcohol to minors can be breached by an indirect sale to a minor through an adult intermediary if it is known or should have been known by the licensee that the alcohol was being purchased for the use of a minor. Also, see Reber vs. The Commonwealth PA Liquor and Control Board, 101 PA, Cmmnwth 397, 516 A.2d 440 (1986) in which the Commonwealth Court held that the Pennsylvania Liquor Control Board also owes a duty not to furnish liquor to minors either directly or through likely intermediaries. A breach of this duty will yield liability if the breach is the cause of the injuries suffered.

Also, the Pennsylvania Supreme Court in Congini vs. Porterville Value Company, 504 PA. 157 470 A.2d 515 (1983) found that social hosts may be liable for supplying minors with alcohol. In this case, the Pennsylvania Supreme Court determined that social hosts serving alcohol to minors to the point of intoxication are negligent per se and can be held liable for injuries resulting from the minor's intoxication. The Court found that the social host would be responsible for injuries caused to the minor himself or to third parties. The court explained the reason for having a different rule for minors as opposed to adults served alcohol by a social host as follows:

However, our legislator has made a legislative judgement that persons under twenty-one years of age are incompetent to handle alcohol. Under Section 6308 of the Crimes Code 18 Pa. C.S. Section 6308, a person 'less than twenty-one years of age' commits a summary offense if he 'attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages'. Furthermore, under the Section 306 of the Crimes Code, 18 Pa. C.S. Section 306, an adult who furnishes liquor to a minor would be liable as an accomplice to the same extent as the

offending minor.

The legislative judgment compels a different result from Klein, for here we are not dealing with the ordinary able bodied men. Rather, we are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affect of alcohol. Id. at 517.

The Pennsylvania Supreme Court in Orner vs. Malick, 432 Pa. 580, 515 Pa. 132, 527 A.2d 521 (1987), further interpreted the decision in Congini to hold that the service of intoxicating liquors to a minor by a social host is negligence per se, even if the liquors are not served to the point of intoxication. The Pennsylvania Supreme Court found that the Superior Court, in Orner, had narrowly interpreted Congini to indicate that the plaintiff had to prove service to the point of intoxication before liability would be imposed on a social host. Instead, the Pennsylvania Supreme Court in Orner rejected such a narrow reading of Congini and made it clear that any service of alcohol to a minor can yield liability and again emphasized the reasons for such a strict rule. Orner vs. Malick, *supra*, 527 A.2d at 521.

In Orner, the plaintiff, 19 ½ years old, attended a series of high school graduation parties during a particular night in June of 1981. At the home of an acquaintance, plaintiff was served intoxicating liquor. The same was true at a home of a second acquaintance. Finally, at the Regency Hotel, the minor plaintiff was served intoxicating beverages again. At the Hotel, the plaintiff, now intoxicated, fell over a second floor railing and sustained serious injuries. The defendants/social hosts filed preliminary objections which, were argued before the issuance of the Supreme Court decision in Congini vs. Porterville. Therefore, the lower court held that no social host liability existed even for service to a minor and dismissed the complaint. However, after the decision in Congini vs. Porterville. Therefore, the lower court held that no social host liability existed even for

a service to a minor and dismissed the complaint. However, after the decision in Congini, the Superior Court affirmed the lower court's order finding that even under Congini, the plaintiff had failed to state a cause of action against one of the social hosts whom he had visited before going to the Regency Hotel.

However, as noted above, the Pennsylvania Supreme Court, found that the Superior Court narrowly read its prior holding and, instead, found that the holding in Congini was to be read that any service of alcohol to a minor can yield liability. Thus, the social host of the plaintiff could be liable.

The Pennsylvania Superior Court in Jefferis vs. The Commonwealth of Pennsylvania, 371 Pa. Super.12, 537 A.2d 355 (1988) established a tripartite test to determine whether a social host would be subject to liability for injuries arising out of a minor's intoxication. The Court outlined the following test to be used:

- (1) the defendant must have intended to act in such a way as to furnish, agree to furnish or promote the furnishing of alcohol to a minor,
- (2) the defendant must of acted in a way which did furnish, agree to furnish, or promote the furnishing Of alcohol to a minor; and
- (3) the defendant's act must have been a substantial factor in furnishing, agreement to furnish, or the promotion of alcohol to the minor.

The Court also noted that factors relevant to determining whether the defendants' act was a substantial factor in the commission of the tort included the nature of the act incurred, the amount of assistance given, the defendant's presence or absence at the time of the tort, the defendant's relation to the tort feasor and foresee ability of the harm that occurred. Id. at 358 citing Section 876

of the Restatement (Second) Torts.

After *Jefferies*, the Pennsylvania Supreme Court again addressed the issue of social host liability in *Alumni Association vs. Sullivan*, 524 Pa. 356 Pa. 572 A.2d 1209. In *Alumni*, the Pennsylvania Supreme Court concluded that the social hosts liability extends only to persons who "knowingly furnish" alcohol to minors. Consequently, the court refused to impose liability on a university and the national fraternity for injuries suffered by a minor after an alcohol party held in a dormitory and hosted by a fraternity's local chapter. The court refused to impose liability because there was no indication that either the fraternity or the university was involved in the planning or serving, supplying or purchasing the alcohol. The Pennsylvania Superior followed this reasoning in *Millard vs. Osbourne*, 416 Pa. Supra 475 , 611 A.2d 715 and *Kapres vs. Heller*, 1992 Pa. Super. Lexis 2310, 612 A.2d 987 (1992).

As to the liability of a minor social hosts to another minor, the Pennsylvania Supreme Court in *Kapres vs. Heller*, 536 Pa. 550, 640 A.2d 888 (1994), held that a minor cannot be liable for serving alcohol to another minor. The Pennsylvania Supreme Court affirmed that the Superior's Court decision in *Kapres*. For discussion of the difference in the a civil case verus criminal case, see *Commonwealth of Pa vs. Lawson*, where the court noted that th although liability did not exist in a civil case, a minor could be criminally liable for furnishing alcohol to another minor.

As to defenses available to a party in cases involving minors, see discussion below concerning defenses.

#### **D. LIABILITY OF SOCIAL HOSTS (ADULTS):**

The Pennsylvania Courts have refused to extend liability under the liquor code to non licensed persons who furnish intoxicants to individuals in a state of visible intoxication. See,

Manning vs. Andy, 454 Pa. 237, 310 A.2d 75 (1973). Also, see Klein vs. Raysinger, Pa. 141 470 A.2d 507 (1983).

As to liquor liability being found against an employer, the Pennsylvania Superior Court in Burkhart vs. Brockway Glass Company, 325 Pa. Super. 204 507 A.2d 844 (1986) found that an employer is not liable for the harm that results from its furnishing of alcoholic beverages to its visibly intoxicated employee and/or its failure to warn the employee against driving or failing to prevent the employee from operating a motor vehicle. The Court found that an employer has no greater duty than any social host who furnished alcoholic beverages to an adult guest. Id. Also, see Sites vs. Cloonan, 328 Pa. Super. 481, 477 A.2d 547 (1984).

In Sites, the Court held that a non commercial organization which sponsored a private social gathering and acted strictly as a social host and gratuitously supplied liquor could not be held liable to third parties injured when struck by an automobile driven by a guest who became intoxicated at the event.

**E. DEFENSES:**

1. Minors

The Pennsylvania Supreme Court in Majors vs. Broadhead Hotel, 416 Pa. 265, 205 A.2d 878 (1965), held that defendant licensee was not entitled a charge of contributory negligence because of the patron's consumption of intoxicating liquors resulting in his jumping or falling from a ledge onto the roof of the hotel's kitchen. The Pennsylvania Supreme Court held that contributory negligence was not a bar to recovery. The Court reasoned that if the defendant's negligence consisted of a violation of a statute enacted to protect the class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery

for bodily harm caused by the violation of such a statute.

However, in claims brought by minors against social hosts for the service of intoxicating liquors, the Pennsylvania Supreme Court allowed the defense of "contributory negligence". In Congini vs. Porterville, *supra*, 470 A.2d at 518, the Pennsylvania Supreme Court while noting that it was ruling upon the dismissal of a complaint following the sustaining of preliminary objections, did hold that the social host may assert as a defense the minor's contributory negligence. The Pennsylvania Supreme Court cited with approval the fact that under Kuhns vs. Brugger, 390 Pa. 331, 135 A.2d 395 (1957) an 18 year old person such as Congini would be "presumptively capable of negligence." The Pennsylvania Supreme Court also noted that an 18 year old would be liable as an adult for the knowing consumption of alcohol as a minor, thereby being guilty of a summary offense. 18 PA. C.S. Section 6308. Also, see Matthews vs. Konieczny, *supra*, 527 A.2d at 508; Barrie vs. P.L.C.B., 1990 Pa. Dist. & Cnty. Dec. Lexis 335, 5 Pa. D & C 4<sup>th</sup> 174, 137 Pa. Cmmnwlt, 518, 517, 586 A.2d 1017, 1019 (1991). In Barrie, the Court discussed the issue of contributory negligence of a minor. The court discussed the decision of Majors vs. Broadhead Hotel and noted that this case was decided before the comparative negligence statute. Also, it noted the decisions of Matthews and Congini. Barrie vs. P.L.C.B., *supra*, 586 A.2d at 1019. The court in Barrie stated:

Thus, although we recognize that an 18 year old minor may state the cause of action against an adult social host who has knowingly served him intoxicants, the social host in turn may assert as a defense the minor's contributory negligence. Thereafter, under the comparative negligence act... it will remain for the fact finder to resolve whether the defendant's negligence was such as to allow recovery.

It should also be noted that the P.L.C.B. attempted to argue that it was not a social host. However, the court in Barrie noted that in Matthews a distinction between a social host and a

licensee was without merit.

## 2. Adults

As noted above, the decision of Majors v. Broadhead would appear to eliminate the defense of contributory negligence. However, the subsequent decisions involving minors questioned how the defense of contributory negligence could not be raised in a case involving an adult when such a defense was permitted in a case involving a minor. This issue was raised and addressed in Miller vs. The Brass Rail Tavern, 1997 Pa. Super. \_\_\_, 702 A.2d 1072 (1997).

In Miller vs. The Brass Rail Tavern, the adult decedent with a group of friends had consumed numerous alcoholic beverages throughout the course of the afternoon of July 8, 1989 before arriving at the Brass Rail Tavern early that evening where they stayed until "last call". Thereafter, the decedent was involved in a one car accident a number of hours after he had left the Brass Rail Tavern.

The trial court in Miller declined the bar establishment's request to apply the Pennsylvania Comparative Negligence Act. However, the Pennsylvania Supreme Court remanded the case back to the Court of Common Pleas " to allow the trial court to evaluate whether decedent's negligence, if any, bars recovery". The Court in so holding noted the following:

It makes no sense to permit a defendant to raise the contributory or comparative negligence of an intoxicated minor and yet prohibit a defendant from raising the contributory or comparative negligence of an adult especially when minors are presumed by our legislature to be incompetent to handle alcohol. Congini at 161, 470 A.2d 517; 18 Pa.C.S.A. Section 6308 (prohibiting the purchase, possession and consumption of alcohol by minors). In the present case, however, the trial court found that 'any notion of contributory negligence ... on the part of [decedent] [is] so interwoven with the improper serving of alcoholic beverages that any negligence ... by [decedent] would hardly be the product of his own volition." This finding misinterprets existing caselaw by failing to hold decedent accountable for any acts

of negligence on his part. Moreover, it was erroneous since it effectively prohibited the Brass Rail from raising and establishing the contributory negligence of decedent, an adult.

In Miller, the Pennsylvania Superior Court also addressed the issue of assumption of risk. The Superior Court in Miller discussed the doctrine of assumption of risk and found that the bar establishment could not utilize an assumption of the risk defense. The Court found that under either theory of assumption of risk, the bar could not establish such defenses. The bar establishment did note the case of Herr vs. Booten, 398 Pa. Super. 166, 580 A.2d 1115 (1990) appealed dismissed, 532 PA. 211, 615 A.2d 338 (1992). However, the Superior Court distinguished the Herr case.

The Pennsylvania Superior Court again addressed the issue of comparative negligence in the case of the estate of Stefancin vs. Kitchen, 2001 Pa. Super. , 781 A.2d 1201 (2001). The Court in this case rejected the affirmative defense of the assumption of risk and instead applied the Pennsylvania Comparative Negligence Act to the conduct of both the intoxicated passenger and operator both of whom were killed in a one vehicle accident. The trial court had found the plaintiff contributory negligent as the court had found said passenger was subjectively aware that the decedent operator was too intoxicated to drive when the passenger agreed to ride with the decedent operator. In that case, the trial court, sitting non-jury, assessed liability on the part of the decedent operator of 20%, the decedent passenger 20% and the defendant licensee 60%.

Accordingly, the defendant should be able to successfully request a charge on comparative negligence although it is very questionable that any court would allow for an assumption of risk charge to be given.

## **F. INVESTIGATION AND DISCOVERY:**

From a defense perspective, full investigation, if possible, can be beneficial. However, at times, plaintiff may not put the bar establishment on notice until well after the event. Consequently, employees may no longer work at the establishment or the employees may simply have no recollection of a given night or any given patrons that were allegedly present on a given night.

No matter when notice is received of any alleged claim against a bar, one should still be able to secure from the bar establishment what their general policy and procedures are concerning service of alcohol.

Several inquiries should be made of the owners, managers and employees of the bar. First you will want to determine if the owner, manager and/or employees have received any training concerning service of alcohol and the effects of alcohol.

A determination should be made if certification has been received concerning TIPS and/or RAMP. Also, even if certification has not been secured, you need to determine what training has been received by the owner, manager and/or employee who was serving alcoholic beverages. Also, a determination as to the method of "carding" individuals should be made, including determining the use of "We ID" and driver's license books. Also, inquiries should be made as to how drinks are served.

Also, in evaluating a case, determination must be made as to whether or not there are any witnesses. If there are witnesses, then one must determine the knowledge of the witness, such as what observations were made, when said observations were made, etc. The Pennsylvania Courts have allowed introduction of circumstantial evidence as to the issue of intoxication. Therefore, one must determine if there exists any circumstantial evidence and if so, what the evidence is and how reliable the evidence is and if there is any basis to preclude its introduction into evidence. Also, time

of service of alcohol and amount and type of alcohol is important. Therefore, you should attempt to establish a time line as to where the patron had been, how long the patron had been at the establishment, how much time elapsed between each establishment and the size/amount, type and contents of the drinks. Also, you need to determine if any food was ingested at any time and how much as well as whether or not any drugs, legal or illegal were ingested.

Also, a determination of the patron's weight, height, and other physical aspects should be made as well as any history alcohol use. Also, if there is any history of the patron as to the use of alcohol, this may be important. There has been used of experts to establish that a patron may have such a high tolerance level that an unknown patron maybe able to mask his level of intoxication which would prevent the bar tender from realizing his level of intoxication and not perceive the patron to be "visibly" intoxicated.

Also, the status of the claimant, is important. Juries will have different views depending on the status of the claimant. If the claimant is the intoxicated person, then there can always be of an issue of comparative negligence. See discussion above, concerning defenses. If the claimant is "an innocent" victim, then the jury may be sympathetic to the innocent victim and be more willing to find against a bar establishment, assuming the issue goes to the jury. However, as noted above, there may be an issue of the passenger being negligent if in fact the passenger was a aware of the intoxicated level of the driver and knowingly and voluntarily took a ride from the intoxicated driver. Again, investigation as to all facts surrounding the claimant and the other parties involved is very important.

## **G. OTHER ISSUES INVOLVING ALCOHOL**

In addition to issues involved in dram shop cases, there are issues as to the **admission of intoxication**. In a dram shop case, as visible intoxication is a required element (except in the case of a minor), then defendant bar establishment should, wherever possible, move to preclude any evidence of intoxication, including a criminal conviction of DUI. The defense should argue while evidence of blood alcohol level may be relevant to a showing that a person was under the influence" of alcohol, such evidence is not relevant to, nor proof of, visible intoxication under Pennsylvania Law. See Suskey vs. Loyal Order of Mousse Lodge No. 86, 325 Pa. Super 94, 472 A.2d 663 (1984). In some cases, where the plaintiff has sued parties other than the bar establishment, the other parties may wish to introduce evidence of intoxication. For example, evidence of intoxication of the plaintiff may assist a codefendant (another driver) in which it would be beneficial to argue that the plaintiff/intoxicated driver was intoxicated and was the cause of the accident as opposed to the other driver. Also, where the claimant is an innocent victim and claims that a defendant driver was intoxicated and that the bar establishment served the intoxicated driver while visibly intoxicated, may attempt to introduce a DUI conviction. However, the bar establishment would want to attempt to preclude any such conviction as a DUI conviction can be established without any evidence of visible intoxication in the criminal action. Also, the bar establishment would argue that evidence of intoxication is highly prejudicial and would unjustifiably affect the liability of the bar establishment.

In a case where a bar establishment is not a party, then either the plaintiff or the defendant may attempt to introduce evidence of intoxication. From a defense perspective, the defendant may want to introduce evidence of intoxication on the part of the plaintiff so that argument can be made that the plaintiff was contributorily/comparatively negligent and, therefore, the plaintiff can not

recover at all or plaintiff's damages would be significantly reduced in light of the comparative negligence. On the other hand, a plaintiff may want to introduce evidence of intoxication on the part of the defendant to either establish the issue of liability or to increase the percentage of liability of a defendant. Also, a plaintiff may attempt to introduce evidence of the defendant's intoxication to establish outrageous conduct or reckless indifference such as to provide a basis for punitive damages.

Clearly, introduction of evidence of intoxication on either party can influence a jury.

In Critzer vs. Donovan, 289 Pa. 381, 137A.2d 665 (1927) the Pennsylvania Supreme Court ruled upon the use of evidence of a party's consumption of alcohol. In said case, the Pennsylvania Supreme Court held that because of the odor of liquor on the driver's breath was an insufficient basis to conclude that he was intoxicated, admitting this evidence alone, without other facts to support the allegation of intoxication would have been error on the part of the trial court. Id. at 665. Decisions after Critzer have found that where recklessness or carelessness is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is unfairly prejudicial, unless it reasonably establishes intoxication. Cusatis vs. Reichert, 267 Pa. Super. 247, 249 - 50, 406 A.2d 787, 788 - 789 (1979). Also, see Swords vs. Bucher, 57 Pa. D & C 4<sup>th</sup> 258, 2002, Pa. D & C Lexis 42 (CCP, Adams County 5/29/02). Moreover, such evidence of intoxication must reasonably establish a degree of intoxication which proves unfitness to drive where reckless driving is the matter at issue. Id. The Pennsylvania Courts are well aware that the mention of the consumption of the intoxicating beverages is extremely prejudicial and unless, in the court's opinion, the evidence is sufficient to permit the jury to make a finding of fact on the issue of intoxication, no mention of intoxication should go before the jury. Couts vs. Ghion, 281 Pa. Super. 135, 421 A.2d 1184 (1980).

The mere fact that a person was in a bar is not sufficient evidence of intoxication and should be excluded as it is unfairly prejudicial. Also, the mere consumption of alcohol is not admissible. In order for evidence of alcohol consumption and evidence of being in a bar to be admissible, reasonably establishes a degree of intoxication which proves unfitness to drive. See Morreal vs. Prince, 436 Pa. 51, 258 A.2d 508 (1969).

An issue in many cases involving alcohol is the use of a **blood alcohol test** result. The general rule is that a blood alcohol test result, standing alone, is insufficient to establish a degree of intoxication which proves unfitness to drive and, therefore, is inadmissible. Ackerman vs. Delcomico, 336 Pa. Super. 569, 486 A.2d 410 (1984). It should be noted that although the Pennsylvania Legislature has determined when a person's blood alcohol content exceeds .10% he is presumptively unfit to drive, 75 Pa. CSA Section 1547(d)(3), the "presumption" of unfitness to drive is inapplicable to civil cases and a jury may not be instructed regarding the presumption. See, Locke vs. Claypool, 426 Pa. Super 528, 627 A.2d 801 (1993). (Please note that Pennsylvania most recently changed the level to .08).

In Locke, plaintiff, a bicyclist, was struck by defendant's vehicle. At trial, defendant presented the following evidence:

- (1) An Officer's testimony that he smelled the odor of beer on plaintiff's breath;
- (2) Plaintiff's alcohol content of .06 percent and an expert toxicologist who extrapolated the blood test results and was of the opinion that because plaintiff was a minor, he would have had an aggravated reaction to this consumption of alcohol.

Id. at 803.

On the other hand, plaintiff contended that these factors indicated only that he had consumed

alcohol and not that he was unfit to operate this bicycle. The Superior Court agreed with the plaintiff and ruled that the trial court erred in admitting evidence of plaintiff's intoxication. Id. at 804. Also, in Locke, the Court questioned the defendant's expert and his findings. The Court noted, as indicated above, that the Pennsylvania Courts have held that due to the complexity of "Relation Back" testimony it is to be used guardedly. See Connor vs. Duffy, supra, 652 A.2d at 375.

In Robert Lock vs. City of Philadelphia, et. al. , No. 1637 C.D. 2005, 2006 Pa. Commw. (Lexis 137, 895 A.2d 660 (2006)), the Commonwealth Court noted that:

Our appellate courts have previously considered the admissibility of evidence of a driver's alcohol consumption and blood alcohol content in civil litigation involving issues of contributory negligence. The well-settled rule that has been established by these cases is that [HN5] "where recklessness [\*666] or carelessness is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is inadmissible as unfairly prejudicial, unless it reasonably establishes intoxication". Whyte vs. Robinson, 421 Pa. Super. 33, 617 A.2d 380, 383 (Pa. Super. 1992). Blood alcohol content alone may not be admitted for the purpose of proving intoxication; there must be other evidence showing the actor's conduct suggests intoxication. Locke vs. Claypool, 426 Pa. Super. 528, 627 A.2d 801, 804 (Pa. Super. 1993). See also Karchner vs. Flaim, 661 A.2d 928, 930 (Pa. Cmwlth. 1995) (citing *Whyte* and *Locke* and upholding admission of evidence of blood alcohol content and alcohol consumption where corroborated by independent evidence of intoxication)

In reviewing the facts in Locke, the Commonwealth Court found:

In the instant case, the record contains substantial independent evidence corroborating the City's [\*\*14] allegation that Locke was intoxicated at the time of the accident. Most compelling was Locke's own admission that he had consumed four or five beers during the previous evening. Lock's accident reconstruction expert also acknowledged that his blood alcohol content was 0.134%. Officer Lindenmuth testified that when he arrived at the hospital approximately two hours after the accident, he detected a strong odor of alcoholic beverage on Locke's breath and observed that his eyes were glassy and his speech impaired. In light of these indicia of intoxication, we conclude that the trial court properly admitted

evidence of Locke's alcohol consumption and his blood alcohol content.

In a product's liability case, evidence of plaintiff's intoxication may be relevant and admissible. However, it will only be admissible where intoxication is offered to prove that the accident was caused solely by the plaintiff's conduct as opposed to a product defect. Madonna vs. Harley Davidson Inc., 1998 Pa. Super. 708, A.2d 507 (1978). In Madonna, the Court, in affirming the Superior Court's ruling admitting evidence of plaintiff's intoxication, noted that negligence concepts are not to be introduced into a strict liability case. However, the plaintiff's conduct in products liability case is not always irrelevant or inadmissible. The plaintiff's use of a product may be relevant as it relates to causation. See, also, Suroweic vs. General Motors Corp., 448 Pa. Super. 510, 672 A.2d 333 (1996). In said case, the Superior Court held that expert testimony of the driver's intoxication as well as other evidence was admissible "to establish the intoxication of the driver to a degree that intoxication was a cause of the accident." Id.

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degree that intoxication was a cause of the accident.” Id.

Lastly, defendant may want to introduce **evidence of drug and/or alcohol abuse**. Such evidence is admissible concerning the issue of life expectancy. See Swift vs. Northeastern Hospital, 456 Pa. Super 330, 690 A.2d 719 (1997). Also, see Krauss vs. Taylor, 1998 Pa. Super \_\_\_, 710 A.2d 1142 (1998). In Krauss vs. Taylor, the Pennsylvania Superior Court affirmed the trial’s court’s ruling admitting evidence of plaintiff’s chronic drug and alcohol abuse for purposes of evaluating plaintiff’s life expectancy. The court in Krauss noted "evidence of (plaintiff’s) chronic drug and alcohol abuse strongly suggest that his life expectancy deviates from the average. However, also, see Capan vs. Divine Providence Hospital, 270 Pa. Super. 127, 410 A.2d 1282.

Most recently, the Pennsylvania Superior Court in Pulliam III vs. Fannie, et. al., 2004 Pa. Super 116, 2004 Pa. Super. Lexis 616 (April 14, 2004), rules that admission of a plaintiff’s juvenile drug rehabilitation records was proper. The Superior Court in Pulliam cited the case of Kraus vs. Taylor, supra, and noted that in Kraus that the Superior Court found that by filing a lawsuit for permanent personal injury, the plaintiff impliedly waives, among other things, statutory privileges relating to confidentiality of drug and alcohol treatment records. The court in Pulliam further noted that in this dram shop liability case, the evidence of drug and alcohol abuse history as well as his DUI conviction and the fac that his urine tested positive for marijuana and cocaine were highly probative of the issues raised in the this Dram Shop liability case and, therefore, this evidence was not unfairly prejudicial. Moreover, the Superior Court in Pulliam noted that the trial court had found that this evidence was highly probative of the life expectancy of the claimant and his tolerance to intoxicants. Accordingly, the holding in Pulliam will assist the defense regarding the issues of causation regarding liability and damages concerning life expectancy.

