



Attorney Discusses the Michigan Dram Shop Act - Episode # 112

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Hosted by: John Czuba, Managing Editor

Guest Attorney: Doug Moseley of [Secrest Wardle](#)

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John Czuba: Welcome to the Insurance Law Podcast, a broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Directory of Recommended Insurance Attorneys*. We're pleased to have with us today attorney Doug Moseley partner in the law firm [Secrest Wardle](#), which is headquartered in Troy, Michigan with additional offices in Grand Rapids and Lansing.

The firm recently celebrated its 103rd anniversary and specializes in defense litigation and counsel for insurance, municipal, and commercial clients. Doug Moseley has a long history of insurance defense work, he has tried numerous cases in circuit courts throughout the state of Michigan, as well as in Federal District Court.

He's focused in the defense of automobile claims, premises liability matters, construction cases, and dram shop litigation. Today's podcast is on the Michigan Dram Shop Act, and Doug can you begin for us today by defining what exactly what this is?

Doug Moseley: Yes, the Michigan Dram Shop Act was the statute that provides a civil cost of action against the holder of a liquor license. A bar, a restaurant, a retailer, when a person gets injured by an adult who was served while visibly intoxicated there, or a minor who was served alcohol and then causes injury.

A less legalistic explanation is a person who was injured by an intoxicated person can in some fashion, and can in circumstances sue the bar or restaurant that sold the alcohol to the alleged drunk person. Lots of other states have similar statutes, and the purpose is to compensate someone who was injured as the result of the over service of alcohol.

John: Doug, who can bring a dram shop case against the seller of the alcohol?

Doug: Anyone who's injured in some fashion by a person who was illegally sold alcohol, and that's in parentheses, the act defines that. It has to be a case brought against a holder of a liquor license. There are a couple of restrictions, one you've got to be deemed a non innocent party, and a non innocent party is someone who contributes to the intoxication of the tortfeasor.

You can't sit in a bar and buy drinks for your best friend Johnny at a bar or restaurant, and get into Johnny's car and then sue the bar after Johnny runs off the road and hits the tree, you contributed to the cause of action, so you can't collect. The statute also prevents family members of the intoxicated person from financial or emotional damages when the drunk becomes injured.

The previous versions of the act allowed that, and it caused major problems because basically the drunk dads of Michigan figured out what to say to secure financial recovery. I tried a couple of those cases years ago, and the drunk dads would stand up there and tell the jury how drunk they were, and the bartender continued to serve them so that their family should be compensated.

The act was amended and that was one of the first things thrown out, and the defense bar danced and sang, and so did the insurance carriers for the various bars and restaurants in Michigan. Also, you can't sue for your own intoxication, you're limited by the recovery in the act, and that precludes someone who is injured because they become intoxicated from suing the bar.

We've fought many cases for people who fell down stairs, shot themselves, started a fight, lost a fight, or got into an automobile accident and then tried to sue the bar on a negligence theory. We've been able to stop all of those, but they still keep coming, and they're always extremely inventive cases. So it's a cause of action I thought would have been gone away a long time ago, but by gosh it keeps rising it's ugly head over and over again.

John: Doug, who can be sued under the Dram Shop Act?

Doug: You've got to sue the holder of the liquor license. So the state has issued the license, and to get a license that holder, that individual, that entity, has to accept the exposure that's created by the dram shop act. You can't sue an employee, or a DBA, or any other entities. On a side note, Michigan does not allow individuals who supply alcohol to adults to be sued when they behave in a negligent fashion afterwards, but Michigan law does allow an individual who serves alcohol to a minor to be sued if a minor causes an injury.

John: What kinds of infraction areas result in dram shop claims being filed against a liquor license holder?

Doug: John, the vast majority of the cases arise out of automobile accidents. Drunk driving cases are the most prominent source of dram shop litigation as you would expect, putting an intoxicated person in a car can always cause problems. But we've also seen many cases where fights occur after people have been drinking, and it's pretty much a guarantee that the loser of the fight will sue the winner, and then name the bar where he or she was drinking under the Dram Shop Act.

My partners and I have seen cases where there's pushing, hair pulling, punching, bottles being thrown, causing an injury. Pool cues, and pool balls frequently come into the equation, and they cause very serious injuries. So any scenario that involves any type of mayhem or carnage where alcohol can be a factor, you're likely to see a dram shop case.

John: Doug are there specific requirements a plaintiff must follow to perfect under the Dram Shop Act?

Doug: Yeah, in 1998 the act was amended because there was the liquor insurance industry was hurting. They couldn't afford to provide the defenses because it was just an open door to the plaintiff's bar. So at that time, the legislature created a notice provision, a plaintiff's attorney has to give notice to any bars or restaurants within 120 days after being retained, and it adopted a two year statute of limitations, which is shorter than the normal statute in Michigan.

The purpose of both of these provisions was to try and put the bar on notice of a potential claim. The wait staff, and the customers, and the industry come and go very quickly, and this has given the bars and their insurance companies in particular, and their investigators, a chance to find out who's who, what happened in the bar, and who can be used as a witness. One of the major things that the legislature required was the name and retain provision.

That means that the tortfeasor, the guy that causes the damage, or the woman who causes the car accident must also be named in the complaint and served with a summons and complaint, must be a viable party. Then the tortfeasor must be retained throughout the suit, and the purpose of this is, is to prevent the drunk from rolling over or cutting a deal with the plaintiff's attorney.

Having done this for many, many years, I practiced before this amendment, and we'd see cases where the drunk would cut a deal with the plaintiff's attorney for a minimal settlement, or just be dismissed out of the case, and he'd provide testimony such as, "I was a drunk as a skunk in the DewDrop, Betsy the bartender kept pouring me beer, I fell off my chair, she poured me another beer. I then drove home and got in an accident." And of course he would blame Betsy for all of the problems.

By coming up with the name and retain provision, and there's also indemnification provision in the act, the drunk can't roll over on the bar as easily. There's financial consequences, so that's provided a big protection to the industry as a whole.

John: What does a claimant have to do to win a dram shop case?

Doug: There's two separate standards, one is for a minor, and if you serve someone who's under 21 that's considered an unlawful sale, or an illegal sale. In that situation all there has to be is service to the minor who then causes an injury, and proof that the intoxication was a proximate cause.

When you get into adults there is a different standard, because one, it's legal to serve alcohol to an adult, and so the legislature after trying many times to get the right mix, finally did in my opinion, and that requires there must be proof that the adult tortfeasor was served alcohol while he was displaying signs of visible intoxication. The Michigan jury instructions define visible intoxication as intoxication which is obvious to an ordinary observer.

What this does John, is bring in an objective requirement to the burden of proof. You can't just say that the alleged intoxicated was slammed, or buzzed, or blasted, you've got to have actual proof that the tortfeasor, the person who causes the injury, behaved in an intoxicated fashion, or that his behavior, his or her behavior was effected by the consumption of alcohol.

So you looked to slurred speech, coordination problems, balance, loud talking, use of profanities, the list goes on and on. But when the legislature changed the act, but giving us this objective standard it helped the defense of the cases immensely.

John: Doug, what defenses does the bar, restaurant, or retail store have in a dram shop case?

Doug: Once again when the act was amended, several important defenses were created, but the most recent good luck for the liquor industry in Michigan and their insurance companies, with the Supreme Court case of *Reed v. Breton*, and in that case the Supreme Court, that came down in 2006 in the Supreme Court said that in order for the plaintiff to prevail and even get the case to a jury, there must be evidence that the person displayed objective manifestations that he was effected by the consumption of alcohol.

Prior to this, John, when we would try these cases, the plaintiff's bar and the defense bar all used circumstantial evidence to prove or disprove the case. That would involve the number of drinks, the time the alleged intoxicated person was in the bar, prior drinking, and behavior after leaving the bar. The most popular type of evidence was the blood alcohol test results in an automobile accident case.

I paid numerous toxicologists a great deal of money to testify as to how the tortfeasor would behave with a given blood alcohol level, and the plaintiff's bar would pay their toxicologist to say the same thing, both of us coming down on the same side. In the *Reed* case there was a battle between toxicologists, and the Supreme Court said, "Nope, we're not going to allow this."

It held that there must be evidence, someone who will testify, that the intoxicated person, the tortfeasor, actually displayed signs of intoxication prior to the service. The key is objective manifestations of intoxication, and without those, you can't get the case to the jury. I've prepared a fairly comprehensive list of cases, court of appeals cases after *Reed*, they go both ways, but the burden of proof is much harder now.

The *Reed* case has helped the bar industry and the insurance industry quite a bit. The act also provides that the license holder can assert all defenses available to the alleged intoxicated person. That means that the bars get the same defenses as the tortfeasor. So in Michigan which has a no fault act, it has a threshold from recovery, we can use that. That act also precludes claims for damages for wage loss, and medical expenses, and replacement service against the tortfeasor.

We can use that, and that's been a big help to the industry. This also means we can use the comparative fault of the plaintiff in an auto case, or the Michigan Sudden Emergency Doctrine which provides that when, particularly in the case of Michigan when you get a lot of ice and snow, that there is a defense if it's unexpected situations. So that's been helpful. In the fight cases, we can assert comparative fault, mutual affray, or self-defense.

Mutual affray means that a person consented to fight, and those cases are always interesting to prove. John, I think that pretty much gives you some idea of the act, it's been an interesting act, it's been around for a long time, and after it's been revised it has been a great boon to both the liquor industry in Michigan and their insurance companies.

John: Doug, thank you so much for joining us today.

Doug: John, thanks for having me. I appreciate it, and thanks for anyone who was listening.

John: That was Doug Moseley, partner in the law firm of [Secrest Wardle](#) with offices throughout the state of Michigan. Special thanks to today's producer John Weber. Thank you all for joining us for the *Insurance Law Podcast*. To subscribe to this audio program visit podcast.insuranceattorneysearch.com, or go to online directories such as iTunes or Google, or Yahoo's podcast directory. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now this message.

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