

OPENING STATEMENT

An intoxicated woman wanders out onto a parkway and is struck by a motor vehicle. Should she be able to recover damages for her injuries from the bar that served her? New York Courts have historically refused to allow individuals injured by reason of their own intoxication to recover under New York's Dram Shop Act, reasoning that intoxicated individuals should not benefit from their own irresponsible conduct. Despite this historical prohibition, a recent decision suggests that sellers of alcohol (and their insurers) may ultimately end up compensating—albeit indirectly—plaintiffs injured by reason of their own voluntary intoxication.

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Appellate Division Opens the Way for Contribution for Dram Shop Act Claims:

O'Gara v. Alacci, et al.

by Jessica F. Napoli

Provisions of New York's Alcohol Beverage Control Law and General Obligations Law, commonly known as the Dram Shop Act, make it illegal for bars, restaurants or other sellers of alcohol to serve alcohol to a "visibly intoxicated person", and allow a person injured by such an intoxicated person to sue the seller. Similar statutes prohibit the unlawful sale of alcohol to minors, and provide a similar cause of action.

The stated legislative purpose of the Dram Shop Act is twofold—to compensate victims of injuries caused or contributed to by intoxicated individuals and to deter bars and restaurants from serving alcohol to intoxicated patrons. Courts have held that, because the Dram Shop Act creates a liability not previously existing in the common law, the Act must be narrowly construed. The Courts have held that the Act does not create a cause of action in favor of those injured by reason of their own voluntary intoxication. This serves the purpose of withholding reward from the individual injured by reason of her own irresponsible conduct. A recent decision by the Appellate Division, Second Department, O'Gara v. Alacci, et al., 887 N.Y.S.2d 106 (September 22, 2009), seemingly expands the scope of the Act by holding that where an intoxicated plaintiff is injured by a tortfeasor, and the circumstances support a finding that an accident was caused, in part, by the provision of alcohol to the plaintiff in violation of the Dram Shop Act, the tortfeasor may obtain contribution from the provider of the alcohol based upon this violation. The decision finds a duty on the

part of alcohol servers to protect "the public" from liability in damages to an intoxicated plaintiff. The holding implies that a tortfeasor's liability in damages is an "injury" contemplated by the Act and enlarges the type of damages recoverable under the Act to include damages paid by a tortfeasor to a plaintiff injured as a result of his own intoxication. The decision also raises questions about the rules of contribution, or apportioning liability among tortfeasors.

The facts underlying the O'Gara decision are straightforward. At 5:30 a.m., on the morning of October 29, 2006, Matthew Alacci was driving on a parkway in Westchester County when his vehicle struck and injured Kathleen O'Gara, who was attempting to cross the parkway on foot for unknown reasons. Later, O'Gara could not recall how she got there, but she was able to recall that prior to the accident she had taken the medication Percocet and consumed copious amounts of alcohol at the Katonah Bar & Grill.

O'Gara brought suit against the driver for injuries she sustained as a result of the accident, alleging that he was negligent in operating his vehicle. After answering plaintiff's complaint, the driver commenced a third-party action for contribution against the Katonah Bar & Grill, alleging that the bar had been actively negligent in serving alcohol to plaintiff for so long and in such quantities that its employees knew or should have known she was intoxicated. Generally, the rules of contribution enable a tortfeasor who has paid more than his equitable share of damages to a plaintiff to recover the excess from another tortfeasor where both tortfeasors are "subject to liability for damages for the same personal injury". The driver thus claimed that the accident

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was caused, at least in part, as a result of the bar negligently allowing O'Gara to become intoxicated.

The bar moved to dismiss for failure to state a cause of action, arguing that there is no such thing, under the common law, as a cause of action for "negligent intoxication." The driver countered that the contribution claim was based upon the Dram Shop Act. The Supreme Court, Westchester County, agreed with the bar and dismissed the third-party action. The driver appealed.

On appeal, the Appellate Division, Second Department, reversed the trial Court's decision, holding that the driver could properly seek contribution from the bar under the Dram Shop Act. The Court recognized that, "the Dram Shop Act does not give the consumer a cause of action against the seller to recover damages for injuries the consumer suffered as a result of a Dram Shop violation." There is an exception to the rules of contribution, however, whereby "a party's liability for contribution can also flow from a breach of an independent duty owed to the defendant, provided that the breach of this duty played a part in causing or augmenting the injury for which the defendant seeks contribution." The issue then was whether the bar could have breached any independent duty owed to the driver. The Court said yes, and reasoned that if the bar had violated the Dram Shop Act by serving alcohol to plaintiff while she was visibly intoxicated, the bar would have breached a duty it owed to the driver as "a member of the public" to protect him from his liability in tort to O'Gara. In support of its decision, the Court posited that other Courts have "implicitly recognized" that a breach of a bar's duty to the public can support a claim for contribution: "The Dram Shop Act, intended to, among other things, protect the community from the dangers intoxicated people pose, imposes a duty upon sellers of alcohol to protect the public from such dangers." The Court found that the lower Court had erred by failing to recognize the bar's duty to the public.

The Court observed that permitting contribution made the bar answerable to the alleged tortfeasor (the driver) and not to the intoxicated plaintiff. Its holding, then, would motivate "sellers of alcohol to exercise greater care in their sales." The O'Gara Court maintained that it was not the voluntarily intoxicated plaintiff who was being compensated, but the defendant.

You may be asking yourself, even if the bar does not owe a duty to the plaintiff, don't the bar's funds in some way compensate the plaintiff for her injuries? New York Courts have prohibited recovery for injuries caused by a plaintiff's own intoxication under the theory that bars and restaurants have no duty to protect patrons from themselves. Yet, in O'Gara, the Appellate Division seems to hold that it is permissible for the bar to compensate the plaintiff for her injuries, as long as the compensation flows in the form of contribution to a third-party plaintiff and not directly to plaintiff.

Other aspects of this decision are troubling and potentially far reaching. First, the O'Gara decision seems to redefine key statutory terms. The Dram Shop Act creates a cause of action in favor of "any person...injured in person, property, means of support or otherwise" who has been injured by an intoxicated person.

Courts have traditionally construed the terms "person" and

"injury" narrowly. By holding that the driver has standing to bring a Dram Shop cause of action against the bar, the O'Gara Court appears to have expanded the definition of a injured "person" to include negligent parties seeking to offset their liability in damages from those who owe no independent duty to plaintiff.

Similarly, the decision also expands the definition of "damages" recoverable under the Dram Shop Act to include liability for others damages. New York courts have historically allowed recovery of only a circumscribed measure of "damages" under the Act. For instance, alleged damages for mental distress, loss of consortium, maintenance, care, nurture, love, guidance, training and education are not recoverable; damages for "means of support" are recoverable only where the plaintiff can demonstrate that the deceased or injured individual contributed to the plaintiff's support or had a legal duty to do so; and funeral expenses are recoverable only where the plaintiff can show that he has been reduced to a state of dependence.

Also, the decision creates what is arguably a new duty under the Dram Shop Act—a duty on the part of sellers of alcohol, owed to the public at large, to use care in serving alcohol to patrons, so as to avoid the possibility that the public will injure the intoxicated person. This seems to invent the traditional duties and protections created under the Dram Shop Act. In addition to protecting the public from injury caused by an intoxicated individual, the decision protects the public from injuring an intoxicated individual.

O'Gara also bends, and possibly, breaks the rules of contribution. Contribution enables a tortfeasor who has paid more than his equitable share of damages to a plaintiff to recover the excess from another tortfeasor. Ordinarily, both tortfeasors have breached a duty owed to the plaintiff. CPLR 1401 provides, in pertinent part, that "two or more persons who are subject to liability for damages for the same personal injury...may claim contribution among them". The O'Gara Court acknowledged that the Dram Shop Act does not create a cause of action in favor of an intoxicated individual. However, the Court posited that other Courts have "implicitly recognized that a breach of a bar's duty to the public can support a claim for contribution" and cited to four prior cases. In those cases, it is true that the Court held that a breach of a bar's duty under the Dram Shop Act could support a claim for contribution. But in those cases, the plaintiffs were of the class of people the Dram Shop Act was specifically designed to protect (i.e., individuals who had been injured by intoxicated people); and the defendants among whom contribution was sought each owed a direct duty to the plaintiff. In all four cases cited by the O'Gara Court, the parties from whom contribution was sought could have been direct defendants, as they owed a duty to plaintiff. This was not the case in O'Gara, where the driver owed a duty to plaintiff in tort for negligent driving but the bar did not. Thus, the Court seems not to differentiate between contribution among tortfeasors each of whom owe a direct duty to plaintiff and contribution between a tortfeasor who owes a duty to plaintiff and one who owes no duty at all.

On its face, the O'Gara decision simply holds that a third-party plaintiff's action for contribution under the Dram Shop Act against the bar or restaurant that served the intoxicated

plaintiff can survive a CPLR 3211(a)(7) motion to dismiss. However, the practical results of this decision run potentially deeper. One consequence may be that sellers of alcohol will, as a matter of course, be brought into lawsuits commenced by their intoxicated patrons. After all, O’Gara appears to apply whenever a member of the public has injured an intoxicated individual where there may be a violation of the Dram Shop Act. Suppose, for example, an intoxicated baseball fan slips and falls on debris on the way to his seat at a baseball game and sues the stadium for negligence; under O’Gara, presumably, the stadium would be permitted to bring a third-party action against the bar plaintiff drank at immediately prior to arriving at the stadium. Indeed, O’Gara could turn many cases involving alcohol into Dram Shop Act cases. One day a pedestrian returns home from the liquor store, where she was “visibly intoxicated”. She trips and falls on a sidewalk crack and fractures her hip. She sues the building owner for failing to maintain the sidewalk. The building owner might choose to bring a third-party action against the neighborhood liquor store for contribution, based upon the store’s breach of a duty to the building owner as a member of the general public. Or, for example, an intoxicated individual batters his spouse; she defends herself, injuring the batterer in the process, who then sues her for assault. Might the bar where the batterer drank to excess before the domestic altercation owe contribution to the battered spouse for the batterer’s injuries?

In fact, it is conceivable that in every case where a plaintiff has consumed alcohol prior to the resulting injury, the bar or restaurant that served him could become a target of a third-party action by the tortfeasor, even where the plaintiff has no direct action against the bar. In any case involving an intoxicated plaintiff, defense counsel for the active tortfeasor may even have an ethical obligation to commence a third-party action against any seller that served alcohol to the plaintiff prior to the injury.

Plaintiffs may also find it to their benefit to allege excessive consumption of alcohol, if it results in the impleader of additional “deep pockets” (i.e., liability insurers of sellers of alcohol) from which to recover. Further, those insurers, when faced with the cost of defending their insureds through trial, may be persuaded to resolve defensible cases for economic reasons. A third-party defendant bar might be required to participate in litigation at least until the close of discovery, when a motion for summary judgment might succeed. If such third-party actions became routine, they could increase the risk of insuring bars and consequently lead to rising premiums for the bars they insure.

It is worth considering that in O’Gara the doctrine of comparative negligence might have been sufficient to protect the driver. Here, assuming that the Katonah Bar & Grill served alcohol to O’Gara while she was visibly intoxicated, it is conceivable that a jury might find that her intoxication was a proximate cause of her wandering out onto the parkway and, consequently, the accident. If that is so, the driver should not be made to pay for the bar’s wrongdoing of serving O’Gara while she was visibly intoxicated. However, O’Gara’s comparative negligence would reduce her recovery (and, consequently, the driver’s exposure) by her percentage

of fault. In that way, O’Gara would suffer the consequences of her own voluntary intoxication by having her award reduced.

While an appellate-level decision is seldom the last word on important and far reaching issues, the O’Gara decision raises many implications that warrant serious consideration.

Recent Decisions of Interest

Member Irwin D. Miller defended the Manhattan restaurant and event space, Battery Gardens, in a 10-day jury trial in Supreme Court, New York County, before Judge Nicholas Figueroa. The 60-year-old plaintiff alleged that she slipped and fell on ice and/or liquid on the dance floor while dancing the “Electric Slide” at a holiday party. At the conclusion of trial, Mr. Miller argued for dismissal on grounds that Battery Gardens did not create the alleged slippery condition nor did it have notice of a dangerous condition. After deliberating for approximately three hours, the jury returned a unanimous defense verdict, finding that any negligence on the part of Battery Gardens was not a proximate cause of the accident. Dolfi v. Battery Wave, LLC, October 15, 2009.

Associate Dennis J. Monaco defended Allstate’s insured, the driver of a motor vehicle, in a two-week jury trial before Judge Edgar Walker in Supreme Court, Bronx County. The plaintiff alleged that the defendant’s vehicle ran a stop sign and collided with the vehicle plaintiff was driving. During Monaco’s cross-examination plaintiff’s radiologist admitted that the diagnostic films did not reveal a tear to plaintiff’s shoulder. The jury returned a unanimous defense verdict, finding that plaintiff’s injuries did not meet the “serious injury” threshold of New York Insurance Law §5102(d), in that plaintiff had no permanent consequential limitations and no significant limitation of the use of his shoulder. Medina v. Pujols, October 13, 2009.

Associate James Kimmel represented plaintiff-respondent QBE Insurance Corporation in the Appellate Division, Second Department, on appeal from a Supreme Court decision which awarded summary judgment to QBE in a declaratory judgment action. QBE had disclaimed coverage to its insured based on its three year delay in providing QBE with notice of a serious injury involving the employee of a sub-contractor who fell from a ladder at a construction site. The Appellate Division unanimously upheld the Supreme Court decision finding that an individual serving as the general contractor’s president, vice-president, secretary and sole shareholder and officer was contemporaneously aware of the worker’s accident and the severity of his injuries. The decision established a new precedent in holding that, notwithstanding an endorsement that notice of an occurrence was not triggered until the “Corporate Risk Manager” was aware of the incident, the insured’s “Corporate Risk Manager” was aware of the incident, the fact that the insured’s sole officer, shareholder and “Executive Officer” (under the policy) was aware of the incident is sufficient to impute knowledge of the occurrence to the company. The fact that the insured knew that the injured worker had been removed from the scene by ambulance triggered the strict liability provisions of New York’s Labor Law, negated any reasonable belief of non-liability that the insured may have had. QBE v. DGangi Contracting Corp., 29, 2009.

Member Chris Christofides successfully represented defendant-appellant in the Appellate Division, Second Department. Plaintiff alleged that he was assaulted by three unknown assailants at a bar owned by the defendant-appellant. The plaintiff testified at his deposition that one of the three assailants pushed him, causing him to trip and fall over a step leading into the bar, and that the three assailants then kicked him when he tried to get up. Plaintiff testified that he was injured when he tripped and fell over the step and that he did not think that the step was defective. The defendants-appellants established that the evidence was insufficient to support a finding that a dangerous or defective condition caused the plaintiff's accident. Further, the Court held that the plaintiff was injured as a result of a sudden and unexpected assault by unidentified assailants which the bar could not have reasonably anticipated or prevented. The Appellate Division reversed the decision of the lower Court, granted summary judgment to the bar and awarded costs to the defendant-appellant. Katekis v. Naut, Inc., et al., March 17, 2009.

Associate Thomas Maeglin won summary judgment for the defendant, Seneca Insurance Company, in a recent decision by the New York County Civil Court. Plaintiff had hired the co-defendant to install a new water cooler in its offices. During the night after the installation, the water line leading to the cooler failed, resulting in flooding and property damage. Plaintiff notified its insured, Seneca, which denied coverage on the ground that the damage was not caused by any "covered cause of loss" enumerated in the policy. Plaintiff argued that the water line failure could have been caused by vandalism—a covered cause of loss. In opposition to the motion, the co-defendant submitted a report of an insurance adjuster, opining that the leak may have resulted from vandalism. Yet the plaintiff's own surveillance video revealed that no vandalism had occurred. The Court found no evidence of vandalism and awarded summary judgment to Seneca. The New York Open Center, Inc. v. Empire Water Holdings, LLC and Seneca Insurance Company, October 30, 2009.

Member Michael Gorelick won summary judgment for the defendant, QBE Insurance Corporation, in Queens County Supreme Court. An employee of QBE's insured was injured while working at a department store. The injured employee filed a Workers' Compensation claim against the insured and then commenced suit against the building owner, the contractor and the department store. The insured claimed that it first learned of the suit when received notice from the department store which was seeking indemnification and notified QBE, three and one-half years after the accident. QBE denied coverage on the ground of late notice. The Court held that, based on the facts, the insured could glean a reasonable possibility of the policy's involvement and should have given notice to QBE sooner. Accordingly, the Court granted QBE's motion for summary judgment and awarded costs to the defendant. Bigman Brothers, Inc. v. QBE Insurance Corporation, February 23, 2009.

Members Barry Jacobs and Steven DiSiervi won a motion to dismiss for their client in a legal malpractice case in New York Supreme Court arising out of various legal, real estate and landlord/tenant matters which their client, the defendant law firm, performed. The Court held that plaintiff's negligence, breach of fiduciary duty and fraudulent misrepresentation claims were redundant of the legal malpractice claims. More importantly, the Court found that the plaintiff had failed to state a cause of action for legal malpractice as the complaint did not allege that "but for" the defendants' negligence, the defendants would have either prevailed on the legal matter at issue or would not have sustained ascertainable damages. The Court also held that plaintiff's breach of fiduciary duty and fraud claims were not pleaded with sufficient particularity. Cayuga Capital Management, LLC v. Borah, Goldstein, Altschuler, September 15, 2009.

Member Glenn A. Jacobson and Associate Jessica F. Napoli successfully represented Seneca Insurance Company before the United States Court of Appeals, Second Circuit, which affirmed the decision of the United States District Court, District of Connecticut granting summary judgment. At issue was the question of whether the insured was entitled to coverage for a loss in light of a breach of a policy condition known as the protective safeguards warranty. The Court of Appeals agreed with the District Court that Seneca had not waived the policy condition and that its denial of coverage was effective. Jem, Inc./Paragon Builders of Connecticut, Inc. v. Seneca Insurance Company, February 13, 2009.

AGF&J DEVELOPMENTS

Member Glenn A. Jacobson was installed as President of the Jewish Lawyers Guild on October 20, 2009, in a ceremony at the Angel Orensanz Center on the Lower East Side. The Jewish Lawyers Guild is a bar association whose membership consists of jurists, attorneys and law students. It sponsors several programs each year including a holiday toy drive to benefit pediatric patients at New York University Medical Center and the Rusk Institute for Rehabilitation; a Holocaust memorial ceremony at the New York County State Supreme Court building; and an annual dinner at which the Jewish Lawyers Guild presents the Benjamin N. Cardozo award and Golda Meir award to jurist honorees.

AGF&J is pleased to announce that Alexis Fershing has joined the firm as an associate. Alexis earned her J.D. from American University Washington College of Law, in 2008; and a B.S. from Cornell University in 2005. She clerked for Judge Mary Costello, Superior Court of New Jersey, Hudson Vicinage and is admitted practice law in New York and New Jersey. Her practice will focus on primarily General Liability and Professional Liability Defense.

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