

SERVING THE OBVIOUSLY INTOXICATED

Can You Be Sued for Serving that Drunk?

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In California, by statute, ABC licensees enjoy limited protection from liability after serving an obviously intoxicated person who injures a third party while intoxicated. Social hosts' protection from that type of liability is even more complete. ABC licensees are not liable for third party injuries after serving an obviously intoxicated person who injures someone only if the obviously intoxicated person is 21 years old or older. Social hosts are protected even where the obviously intoxicated person is under 21.

Both words "obviously" and "intoxicated" are crucial. The intoxication must be obvious. A customer with an astronomical blood alcohol level who is not exhibiting objective symptoms might not come within the statutory scope. What are some objective symptoms? Typically the intoxicated person has coordination problems leading to swaying, staggering, stumbling, falling, difficulty finding money and even holding that drink. He or she may be loud, incoherent, and obnoxious. Exercising good judgment is difficult. Clothing may be disheveled. Sometimes unconsciousness is an objective symptom. Watch for bloodshot watery eyes and flushed face. The strong smell of alcohol is a standard. Vomiting may be a symptom as well.

It isn't important to the law where this person became intoxicated, only that you (or your employee) served him or her while that customer was obviously intoxicated. In the following scenario, Fred enters your licensed premises while exhibiting many of these objective symptoms. He is served by you or your employee and then he leaves. Fred somehow figures out how to get into his car, manages to get the key into the ignition and start the engine. His luck changes while driving southbound in the northbound lane when he collides head on with a van carrying three people. Elizabeth and John are killed; Rodney will be paralyzed forever. Fred forgot to get a driver's license and had no insurance. On the way to the hospital, Rodney retains the Personal Injury law firm Sorkem Hard & Howe. Time to worry?

Yes and no. The Alcoholic Beverage Control will file an accusation and seek a substantial penalty, perhaps even revocation. You can worry about that. Your bartender (or sales clerk) will be cited or arrested and prosecuted in the criminal justice system for serving an obviously intoxicated person and perhaps for felonies related to the death and injury (e.g. manslaughter or even murder). He or she can worry about that. But will you be sued for the deaths of Elizabeth and John and the injuries sustained by Rodney? As a licensee you may be immune from civil liability for death or injury to a third party

injured by a patron or customer who was served an alcoholic beverage while obviously intoxicated. Further inquiry is needed.

California statute explicitly protects any “person who sells, furnishes, gives, or causes to be sold, furnished or given away, any alcoholic beverage” from civil liability “to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.” The statutes at issue conclude it is “the consumption of alcoholic beverages rather than the serving of alcoholic beverages that is the proximate cause of the injuries inflicted upon another by the intoxicated person.”

In other words, the drinker may be liable. The seller, furnisher, or giver is not liable. This applies to licensees and social hosts as well. However, if Fred is under 21, the civil liability immunity provided by that statute is silent as to obviously intoxicated minors, and the legislature adopted a different statute that directly applies. The legislature did therein explicitly allow for liability against a licensee who sells, furnishes or gives away (or causes these acts) if the obviously intoxicated person is a minor.

In 1978, in reaction to three California Supreme Court decisions dealing with liability of those who provide alcohol to obviously intoxicated persons, the legislature amended Business and Professions Code Section 25602, added Section 25602.1 and amended Civil Code Section 1714 to create an immunity umbrella under various circumstances. Section 25602 creates civil immunity for licensees who sell to obviously intoxicated persons, but is silent as to obviously intoxicated minors. Section 25602.1 creates liability against licensees (or those who are required to be licensed) who sell, give away or furnish alcoholic beverages to an obviously intoxicated minor. Section 1714 creates immunity stating that furnishing alcohol is not the “proximate cause” of injuries resulting from intoxication, using identical language to 25602, and then concludes: “No social host who furnishes alcoholic beverages to any person shall be held liable accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages.”

Another scenario: at a raging party at your house, you serve your guests an extraordinary amount of liquor. There are minors present and adults, and everyone is over consuming to bacchanalian excess. Mary, a 17 year old, is semi-comatose from drinking and injures someone with her car while driving home. Later that night, Benson falls into a drunken sleep holding a lit cigarette in his mouth. He sleeps soundly on the couch where he fell, and the ensuing fire severely burns Benson, his friend Hilda asleep on the same couch, and a few others less severely. Now do you worry?

As social host, you most likely do not face civil liability for any of this debacle. By statute, as social host you are not liable in civil litigation for injuries (Mary’s or others) caused by young Mary’s accident. You aren’t even liable for burns sustained by Benson, Hilda and others.

What the Court of Appeal did in *Biles v. Richter* (1988) was to note that sober folks probably are more careful smokers than drunk folks, but regardless of how clever the injured guests' lawyers were, liability would necessarily be based on consumption of alcohol, and the statutes disallowed this. The Court imagined a fictitious Marx Brothers movie where the brothers stand guard over drunken smokers:

“The danger associated with smoking on living room furniture is ordinarily appreciated by adults who are sober. To be sure, accidents repeatedly happen when, for example, a person falls asleep on a couch or in bed. But sober adults are ordinarily alert to the danger and are able to take steps to minimize or avoid it. We do not believe sober adult smokers pose so great a risk that a social host can fulfill his or her duty to a sleeping guest only by being present beside other guests who smoke to supervise them. As a practical matter, a contrary conclusion would require the hosts of large parties to station smoker-watchers next to large potted plants, where they could ever-so-discreetly keep tabs on guests who smoked. While this scene might have played well in a Marx Brothers movie,[footnote omitted] we do not think contemporary life should imitate art in this instance.”

The Court in this case determined no liability could be found against the host.

Beware: there may be a few instances where liability could still be found. If a licensee or an employee creates some extra duty to a patron, the court could conceivably find liability not directly related to the service of alcohol to that patron who may be an obviously intoxicated person. This summer the California Supreme Court signaled a potential erosion of more general immunity to licensees. In *Delgado v. Trax Bar & Grill* (August 2003), the Court of Appeal reversed a jury award for damages to a patron who had been lured out of a bar by a gang to a parking lot where he was severely beaten (without respect to the anyone's state of sobriety). The Court of Appeal stated, “The unforeseeable criminal acts of third persons do not impose a duty on premises owners to prevent such acts.” The Court quoted a 1993 Supreme Court case. The Supreme Court granted a hearing in *Delgado* and may reverse a ten year trend that had protected bar and restaurant owners.

Social hosts, bar or restaurant owners and owners of markets are all protected by statute from civil liability where a “guest” or patron is served while obviously intoxicated and then injures a third party. Licensees and those required to be licensed are not immune from liability if the third party is injured by a patron who was an obviously intoxicated minor to whom your employee served alcohol. In that instance, the ABC files an accusation, the selling employee gets prosecuted, and you get sued. Time to worry? Time to call your lawyer.

Solomon, Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Use Permits, Variances, Police and Fire permits, Entertainment law, and Gambling Law; as well as Business and Personal Injury litigation. Solomon, Saltsman & Jamieson can be reached at 800 405 4222."

