Kevin Boyle

Robert Glassman

The "obviously intoxicated minors" statute

When an intoxicated minor gets served, it serves up liability for the bar. An exception to California's dram shop laws

It came into our office as a simple drunk driving, personal-injury case. Drunk minor gets behind the wheel of his father's car and crashes into the back of our client who is on his way to work. Minor gets arrested for driving under the influence and causing injury. We sue the minor for negligence and his father for negligent supervision. In the early stages of discovery we learn that prior to causing the collision the defendant minor had been bar-hopping in the South Bay area. During the deposition of the minor's sister, who was with him the night of the collision, we learn that the minor had been served alcohol at a series of bars throughout the night even after he was plainly and obviously intoxicated. It was time to amend the complaint. And shortly thereafter, *Doe v. Bar Defendants* commenced.

Although California bars and restaurants cannot be held civilly liable for serving alcohol to an intoxicated adult patron who later injures someone in a motor-vehicle accident, they can be liable if the patron is a minor and the minor was "obviously intoxicated" when served alcohol by the establishment. This article explores the law establishing the basis for that liability and some strategies for successfully litigating such a case.

Liability under Business and Professions Code section 25602.1

Pursuant to Business and Professions Code section 25602.1, "a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed, pursuant to Section 23300, . . . who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage . . . to any *obviously intoxicated minor* (emphasis added) where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person." (Bus. & Prof. Code, § 25602.1.) A supplier of alcohol must use reasonable care to ensure the person receiving the alcoholic beverage is not an obviously intoxicated minor. (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1141.) For the purposes of section 25602.1, the term "minor" refers to persons under the age of 21. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1004.) "As for limiting the class of protected consumers to minors, the Legislature might reasonably have deemed such persons more in need of safeguarding from intoxication than adults, because of the comparative inexperience of minors in both drinking and driving." (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 441.) Moreover, "[i]t is indeed foreseeable that the furnishing of liquor to an intoxicated minor will result in his increased or continued inebriation, which may result in damage to someone else." (*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 603.)

An establishment is liable under section 25602.1 when it serves a minor affected by the commonly known outward manifestations of liquor intoxication, whether by failing to observe what was plain and easily seen or discovered or, having observed, by ignoring what was apparent. (*Schaffield*, *supra*, 15 Cal.App.4th at 1140.) "[A] duty is placed upon the seller, before serving the intended purchaser, to use his powers of observation to such extent as to see that which is easily seen and to hear that which is easily heard . . ." (*Id*. at 1141.) The standard for determining obvious intoxication is measured by that

See Boyle & Glassman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2012 Issue

of a reasonable person having normal powers of observation. (*Id.* at 1140.) A reason that liquor licensees are required to abide by section 25602.1 is that they "can more readily detect signs of intoxication among their patrons and are probably in a better position to defray the costs of liability through insurance . . ." (*Cory*, *supra*, 29 Cal.3d at 440-441.)

Three key strategies

In *Doe*, we successfully recovered a seven-figure award for our client due, in large part, to three key strategies that may be applied when litigating a section 25602.1 case.

(1) Retain a qualified toxicologist early in the case

The first expert you should retain in a section 25602.1 case is a qualified toxicologist. Expert toxicologists are routinely used in these types of cases. (See e.g. *Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133.) Immediately secure evidence regarding the minor's preliminary alcohol screening (PAS) results and/or the blood alcohol testing results so that information can be provided to the expert. Consider obtaining authorizations executed by the minor or sending California Public Records Act requests to the prosecuting agency that handled the minor's DUI case for this information. With it, your toxicologist should be able to testify to the outward manifestations of intoxication that the minor was exhibiting at the critical moment of being served alcohol at the bar.

To gauge the viability of your case, have your toxicologist: (1) determine the minor's BAC at and prior to arriving at the bar by utilizing either forward or retrograde extrapolation; (2) research the drinking frequency of the minor to evaluate whether or not the minor is more susceptible to the effects of alcohol when consumed at an abnormal dose and rate; and (3) determine if the minor demonstrated outward manifestations of obvious intoxication consistent with the CACI 422 jury instruction at and prior to arriving at the bar. If your toxicologist finds that the minor was obviously intoxicated at and prior to arriving at the bar, consider using the following opinion in the expert's report or declaration: "When entering [the bar], and while ordering and being served alcohol at [the bar], [the minor] more likely than not to a reasonable degree of forensic certainty would have been demonstrating symptoms of obvious intoxication from alcohol."

(2) Hire a bartending standard-of-care professional

In our case, the defense argued that their clients' bartenders were justified in serving the minor on the night in question because the minor presented a very good false identification card (fake ID). Indeed, it was the real California driver's license of a 21-year-old man who looked very similar to the minor. For a trial exhibit, the defense even produced a giant blow up of the ID and juxtaposed it next to a video still photograph taken of the minor at his deposition.

Although the defendants were asserting that "defense," they nonetheless tried to keep out any evidence of what their bartenders did or did not do at the time they served the minor on the grounds that any such evidence was not relevant to prove liability under section 25602.1. They also argued that such evidence was inadmissible under the holding set forth in *Diaz v. Carcamo* (2011) 51 Cal.4th 1148. In particular, defendants admitted that if the bartenders did indeed serve alcohol to the minor while he was obviously intoxicated, they would be found vicariously liable. Accordingly, they argued, we could not introduce evidence to the jury about the bars' deficient policies and procedures with respect to serving alcohol to minors and to obviously intoxicated minors as any such evidence would constitute a claim of negligent hiring, training or supervision and would be inadmissible under *Diaz*.

In response, we argued that *Diaz* was inapplicable since we did not sue the defendants for negligent hiring and also did not name the bartenders as individual defendants in the case. Additionally, we maintained that because the defendants were alleging that they were justified to serve alcohol to the minor, we should be allowed to argue that if the bars had better policies and procedures with respect to its bartenders assessing whether or not a drunk minor tries to order a drink at their establishments, the minor would not have been served.

While the language in the CACI 422 jury instruction and in the section 25602.1 statute does not discuss or refer to negligence principles, hiring an expert to discuss safe and responsible bartending customs and practices to establish what the bartender did wrong is important in order to shift the focus of fault away from the minor and onto the bar. Using an expert in these types of cases to testify about such matters is also supported by the holding in *Schaffield*, *supra*. In particular, in *Schaffield*, the court found that the plaintiff is not relieved from proving the bartender's conduct fell below the standard of care expected of a reasonable person in the same or similar circumstances. (*Schaffield, supra,* 15 Cal.App.4th at 1140.) A bartender must use "reasonable care" to make sure the person receiving the alcoholic beverage is not an obviously intoxicated minor and that a "duty" is placed onto the bartender to ensure the same. (*Id.* at 1141.)

If the defendant argues the fake ID defense, retaining an expert to testify regarding industry customs and practices becomes even more necessary. Rather than attempting to keep out the fake ID defense, we allowed the defense to argue it so that we could use the testimony from our bartending expert to rebut it and, at the same time, highlight the deficiencies of the bar's policies and procedures.

The California Alcoholic Beverage Control is a helpful resource to find bartending experts and is also a good source to find out about previous or existing disciplinary actions, violations and/or complaints involving the bar or restaurant that you are suing. To find out such information, send your request to publicrecordsrequest@abc.ca.gov.

(3) Bar the door to Prop 51

Since Proposition 51's enactment in 1986, the courts have made clear that the statute limits liability for noneconomic

See Boyle & Glassman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2012 Issue

damages to several *only* when liability is based upon comparative fault (see e.g. *Miller v. Stouffer* (1992) 9 Cal.App.4th 70, *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, *Galvis v. Petito* (1993) 13 Cal.App.4th 551, *Srithong v. Total Investment Company* (1994) 23 Cal.App.4th 721).

That begs the question, what other types of cases would or should be immune from the application of Proposition 51? We believed we found the answer in *Doe*. Thus, as we were gearing up for trial, we sought to prevent the application of Prop 51, a feat for which there was no published precedent.

We argued at trial that the defendants' anticipated argument that the minor's negligence comparatively reduces the percentage of any fault attributable to defendants fails because the minor's intoxication and unsafe speed were caused by the defendants, and flow from the furnishing of the alcohol. In the case of an obviously intoxicated minor, it is the furnishing of the alcoholic beverage that is the proximate cause of injuries resulting from intoxication, not the consumption of the alcohol. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1001.) By permitting third-party liability suits against restaurants and bars for serving obviously intoxicated minors that cause injury, the Legislature strictly provided that the furnishing of alcohol creates liability, not the consumption. Therefore, we argued, comparative negligence standards do not apply when determining the liability of an offending restaurant and the minor.

This is akin to a dog-bite case wherein the dog owner must be held liable, not the dog. We maintained that, based on the Legislature's intent when creating this limited exception to the sweeping prohibition of dram shop liability claims in California and the holdings of the cases set forth above, the licensed provider of alcohol has no liability separate and apart from the liability of the obviously intoxicated minor. They are coextensive and there is no basis for comparison or apportionment. No basis for the bars' liability existed apart from the negligence or fault of the obviously intoxicated minor. For the purposes of Proposition 51, they are a single tortfeasor. And our judge agreed.

Further, for our proposed verdict form, we submitted the Judicial Council of California-approved CACI instruction governing the "obviously intoxicated minor." This was critical. Because CACI No. VF-406 has no fault line for the minor, we argued that the Judicial Council committee, knowing that each one of these cases necessarily involved a minor, explicitly and consciously found that the comparative fault of the minor, if any, should not be contemplated by the jury. The judge found this persuasive. Additionally, in the "Directions for Use," the Judicial Council contemplates the issue of comparative fault, but only with respect to the plaintiff – "If the comparative fault of the plaintiff is an issue, this form should be modified." In our case, the bar defendants did not file a cross-complaint against the plaintiff and the plaintiff's comparative fault was not at issue.

Comparative fault is out and the settlement door opens

Shortly after the judge made his ruling excluding any finding of comparative fault of the minor, the case settled for a mid-seven-figures dollar amount. Until that time, liability was hotly contested and the defense had estimated the plaintiff's total economic damages at $15,981. Had we not argued successfully against Proposition 51, the case likely would not have settled for multi-million dollars, if at all, and the jury would have put at least 90 percent of fault, if not all, on the judgment-proof drunk minor – denying plaintiff fair and reasonable noneconomic damages.

Kevin Boyle is a partner at Panish Shea & Boyle LLP *and specializes in resolving large, high-profile plaintiff's cases by trial or settlement. He represents clients in a wide range of matters – from catastrophic personal injuries to mass transit disasters to intellectual property infringement to major breach of contract claims. He studied law at the University of Arizona and went on to serve as a law clerk to the late Chief Justice William H. Rehnquist of the United States Supreme Court.*

Robert Glassman is an associate at Panish Shea & Boyle LLP *and focuses his practice on litigating large and complex personal injury, wrongful death and product defect cases on behalf of plaintiffs. He attended Southwestern Law School where he served as president of the student body, and was a member of the Trial Advocacy Honors Program.*