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FORUM

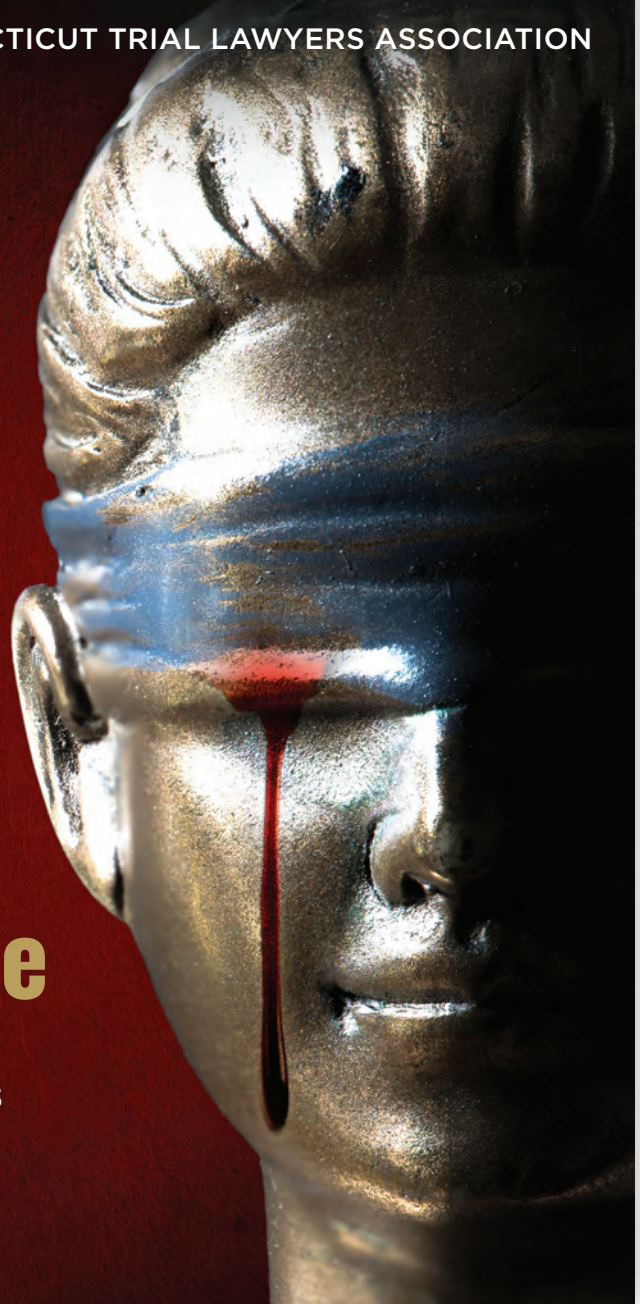
A PUBLICATION OF THE CONNECTICUT TRIAL LAWYERS ASSOCIATION

The Demands of Jurisprudence

States as Protectors of Individual Rights

The Jurisprudence of Stare Decisis

Judicial Preferences in Legal Writing



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A NOVEL APPROACH TO PROXIMATE CAUSE

One summer night, three teenagers went for a joy ride. The driver, a 17-year-old girl, had spent the evening drinking alcohol, smoking marijuana and using Xanax. As the car was traveling along a lonely backroad, the driver lost control and struck a pile of logs on the side of the road. The car flipped over and a female passenger, age 19, was killed.

By RYAN SULLIVAN and JULIANNE LOMBARDO KLAASSEN, *RisCassi & Davis, P.C.*

Negligent service established

An investigation by the police found that the driver had purchased alcohol (specifically, a bottle of Jägermeister) from a local package store on two separate occasions the day before the accident. Surveillance footage from the store revealed that she purchased the alcohol without being asked to show any form of identification. The liquor store owner was arrested and later pled guilty to selling alcohol to a minor. Notably, further investigation by the police found that the liquor store had been selling alcohol to the 17-year-old driver for several months prior to the accident. According to the driver's

testimony, she started going to the store shortly after her seventeenth birthday, was never asked to show identification, and typically made four to five alcohol purchases a week. On these facts, there was no question that the liquor store was negligent – indeed, it was arguably reckless in repeatedly providing alcohol to a 17-year-old girl without even attempting to ascertain her age. However, there was one serious problem when it came to the civil case against the liquor store: the blood-alcohol test of the driver, taken an hour after the crash, did not detect any alcohol in her system.

Under Connecticut law, a purveyor of alcohol may be held liable for injuries that result from that purveyor's negligent service of alcohol to a minor.¹ In order to prove this claim, the plaintiff need only show that the defendant knew, or should have known, that it was providing alcohol to an individual under the age of twenty-one. Unlike a dram shop claim, there is no requirement that the plaintiff prove the tortfeasor was visibly impaired at the time of service. However, to succeed in a negligence action, the plaintiff still has the burden to prove proximate cause. In other words, the plaintiff must demonstrate that the alcohol provided to the minor played a role in the resulting harm from which the case arises.²

For the estate of the deceased passenger, proving proximate cause was a significant hurdle because, although the driver's toxicology report revealed the presence of marijuana and alprazolam (Xanax), it was negative for alcohol. While the driver admitted that she had consumed alcohol sold to her by the defendant at some time before the crash, her recollection was unreliable and inconsistent. Testimony from the other occupant was equally unhelpful. Absent a direct link between the alcohol purchased illegally at the liquor store and the subsequent crash – an elevated blood alcohol concentration on the part of the driver, for instance – the plaintiff was likely to lose a motion for summary judgment or face a directed verdict at trial.

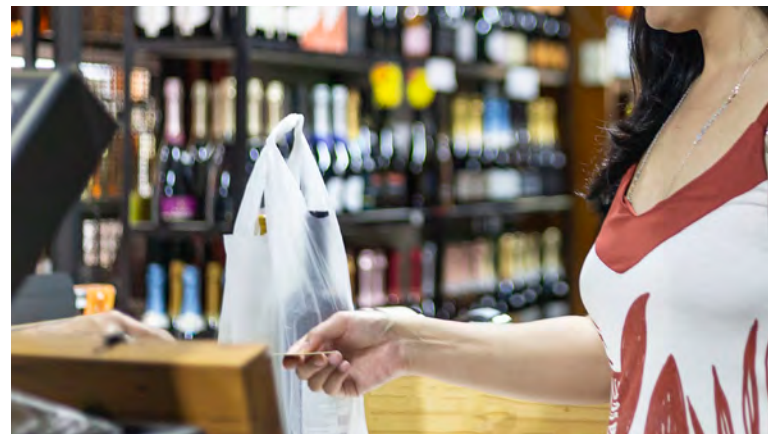
A novel theory is presented

In order to substantiate proximate cause, the estate sought the assistance of experts in toxicology and pediatric psychiatry. Plaintiff's counsel presented the experts with a new, but very commonsense, theory: the liquor store's conduct in repeatedly selling alcohol to a minor allowed that minor to poison her developing brain and damage her cognitive function. As a result of the minor's excessive alcohol use, as enabled by the defendant liquor store, she suffered from diminished judgment and an increased likelihood of making poor decisions.

After reviewing the evidence, the pediatric psychiatrist agreed. The doctor diagnosed the driver with Severe Alcohol Use Disorder (i.e., alcoholism) and attributed her condition directly to the defendant's conduct. The diagnosis was based in part on the driver's testimony concerning the effect alcohol had on her life

in the months preceding the accident. The psychiatrist opined that the driver satisfied multiple criteria for Severe Alcohol Use Disorder, including (1) an increased tolerance to the effects of alcohol, requiring her to drink more in order to reach a desired level intoxication; (2) her life revolving around alcohol use and being intoxicated; (3) using alcohol as a form of self-medication; and (4) having social and professional relationships suffer as a result of addiction. The expert further opined that the driver's alcohol use disorder dramatically increased her susceptibility to risk-taking behaviors and impaired her ability to make good decisions – such as knowing not to mix alcohol with other drugs and subsequently drive a car. Finally, in the expert's opinion, the liquor store was responsible because it allowed the minor to damage her adolescent brain through excessive alcohol use and, thus, render herself incapable of appreciating the risks of her behavior.

In addition to the expert opinions surrounding the driver's alcohol addiction, the plaintiff's toxicologist argued that the driver was experiencing a hangover and post-intoxication dysphoria as a result of earlier excessive alcohol use. There have been numerous scientific studies in recent years documenting the dangers of driving while hungover.³ Indeed, one study concluded that hungover drivers performed similarly to drivers who had consumed two to three drinks within an hour of operating a vehicle. This same study observed that hungover drivers exhibited impaired perception, poorer reaction time, and decreased cognitive functioning, placing them at increased risk of being involved in a motor vehicle accident. Similarly, the expert opined that post-intoxication dysphoria would have caused the driver to feel more irritable and less focused on the operation of her vehicle.



Mediation resulted in a resolution

Despite the plaintiff's nuanced approach to the issue of proximate causation, the defendant moved for summary judgment on the basis that the resulting crash was too attenuated from the negligent conduct at issue (i.e., selling alcohol to a minor). While the motion was pending, the parties agreed to mediate the case. Unsurprisingly, the primary focus of the mediation was the legal liability of the defendant with respect to the crash. The mediator commended plaintiff's counsel for their novel approach to causation in light of the driver's toxicology report and noted that buttressing their argument with expert opinions lent it more credibility. It was acknowledged, however, that these legal theories still stretched the bounds of proximate cause and could easily be rejected by a judge or the jury. Nevertheless, the mediator could not ignore the egregious nature of the defendant's conduct in providing a 17-year-old with unrestricted access to alcohol for several months. Given these conflicting considerations, the parties were able to reach an amicable resolution and avoid the risks presented to each side by the prospect of trial.



the defendant liquor store. Supported by expert testimony, plaintiff's counsel relied on the commonsense theory that the liquor store should bear some responsibility for the loss of life in this case. The store's continued sales of hard liquor to the 17-year-old driver damaged her brain, leading her to make a horrible decision with catastrophic consequences. Although the causation was indirect and, admittedly, stretched the limits of proximate cause, it nonetheless raised the specter of liability and facilitated a favorable resolution for the estate. ●

Complicated, creative and commonsense

Proximate cause is a complicated legal doctrine. However, it is important to keep in mind that proximate cause does not necessarily mean direct cause. "The essential question is whether the harm which has been suffered is 'justly attachable' to the defendant's conduct."⁴ In this case, the plaintiff's attorneys took a creative approach to demonstrate proximate cause to justly attach liability to

1 See Conn. Gen. Stat. § 30-86.

2 *Ely v. Murphy*, 207 Conn. 88, 97, 540 A.2d 54 (1988); see also *Hayes v. Caspers, Ltd.*, 90 Conn. App. 781, 803, 881 A.2d 428 (2005) ("our case law holds that a tavern can be held liable if its negligent service of alcohol... plays a role in a minor's negligent operation of his car so as to injure himself or others").

3 Chris Alford et al., *The Impact of Alcohol Hangover on Simulated Driving Performance during a 'Commute to Work' – Zero and Residual Alcohol Effects Compared*, 9 J. CLINICAL MED. 1435 (2020); Joris C. Verster, et al., *Effects of alcohol hangover on simulated highway driving performance*, *Psychopharmacology* (2014).

4 W. Keeton et al., *Prosser and Keeton on the Law of Torts* (5th Ed. 1984) § 42.



Since 1982, the Brain Injury Alliance of Connecticut (BIAC) has been Connecticut's resource for brain injury awareness, education, resources and support.

BIAC's primary objective is to support individuals with brain injuries, their families, caregivers and brain injury professionals while increasing awareness of brain injury and its prevention. The BIAC thanks the members of CTLA who generously donated to our recent fundraiser.