

BAR

**"IN CONSEQUENCE
OF THE INTOXICATION"**

Causation under Alabama's Dram Shop Act:

SELLER BEWARE

By Brian A. Wahl

Two guys walk into a bar...

Ryan and Jason start off their Friday evening with a pitcher of beer, wings and a few games of pool at McWhorter's Bar & Grill. A couple of hours pass by and a few more pitchers are consumed, mostly by Ryan. Jason starts drinking water after he and the bartender notice that Ryan is slurring his speech and having a bit too much fun. Recognizing that Ryan is intoxicated and increasingly belligerent, McWhorter's trusted bartender asks Jason to drive Ryan home, and Jason, responsible as always, obliges.

An hour after making their way a few miles down Highway 280, Jason and Ryan arrive at Ryan's apartment where Leila, Ryan's wife, is cooking dinner. Feeling a little feisty after having consumed a bottle of chardonnay while waiting on her dinner guests, Leila decides to spar with Ryan over some insignificant family matter. Ryan, still ornery and slurring, takes the bait and a lively verbal exchange ensues which focuses on Leila's spending proclivities. Unfortunately for Jason, Ryan's and Leila's exchange escalates into grabbing

and shouting. Attempting to separate the tussling spouses, Jason horse-collars Ryan and pulls him away from Leila. Ryan stumbles, falls and cracks his skull on the sharp glass corner of the dining room table. Despite the valiant efforts of Leila, Jason and the responding paramedics, Ryan dies.

As a pure matter of causation, does Leila have a viable dram shop claim against McWhorter's? It was just a freakish accident that was too far removed from any act or omission of the bartender, who by the way, was responsible enough to ask Jason to drive. There is no chance Leila could recover. Right?

While the lead-in fact pattern probably seems fanciful and bar exam-like to most of you, it is actually analogous to and less bizarre than a dram shop case I recently defended, and the sobering truth is that restaurants, bars and other purveyors of alcoholic beverages would be foolish to laugh off the potential for dram shop liability on non-routine facts. This article addresses "in consequence of the intoxication" liability under the Dram Shop Act and focuses specifically on the standard of causation applicable to such cases.



The formulation of Alabama’s dram shop statute allows two avenues of recovery: one for damages caused **“by any intoxicated person,”** and another for damages suffered **“in consequence of the intoxication of any person.”**

ALA. CODE § 6-5-71— THE DRAM SHOP STATUTE

Alabama’s Dram Shop Act appears at Section 6-5-71 of the *Alabama Code* (1975) and reads as follows:

- (a) Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or *in consequence of the intoxication* of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.
...
- (c) The party injured, or his legal representative, may commence a joint or separate action against the person

intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof.

Id. (emphasis added). The supreme court has held that a sale that violates the rules and regulations of the Alabama Alcoholic Beverage Control Board (“ABC Board”) constitutes selling alcohol “contrary to the provisions of law.” See *Ward v. Rhodes, Hammonds & Beck, Inc.*, 511 So.2d 159, 160 (Ala. 1987). The section of the ABC Board’s regulations relied upon by most plaintiffs reads as follows:

... No ABC Board on-premises licensee, employee or agent thereof shall serve any person alcoholic beverages if **such person appears, considering the totality of the circumstances, to be intoxicated.**

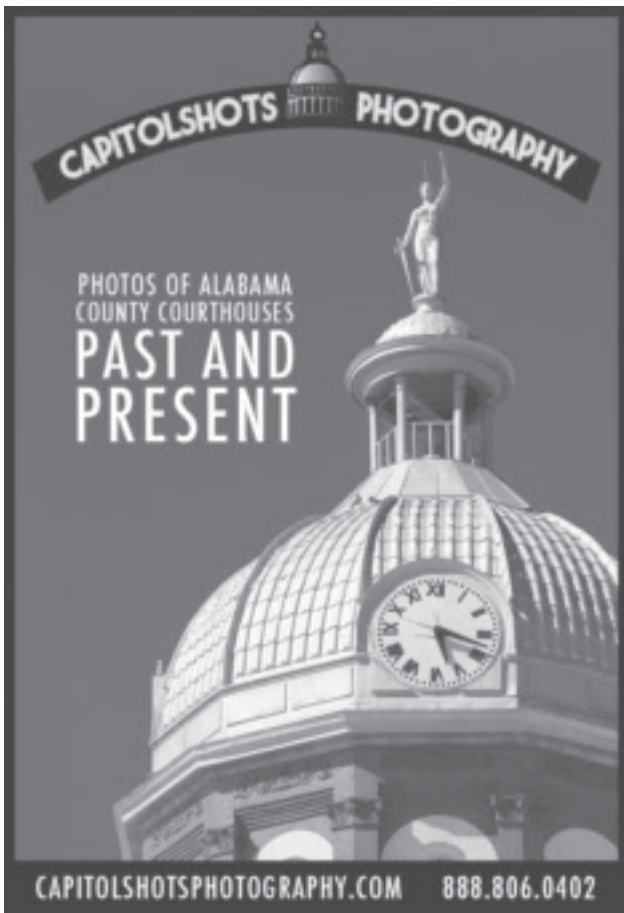
Ala. Admin. Code § 20-X-6-.02(4) (emphasis added).

The formulation of Alabama’s dram shop statute allows two avenues of recovery: one for damages caused “by any intoxicated person,” and another for damages suffered “in consequence of the intoxication of any person.” See *Ala. Code* § 6-5-71(a). On our facts, Leila would be seeking means of support damages she suffered “in consequence of the intoxication of ... [Ryan].” *Id.*

PLAINTIFFS’ BURDEN OF PROOF: CAUSATION

Traditional Proximate Causation

While the “in consequence of the intoxication” language of section 6-5-71 obviously requires a causal nexus between the intoxication and the injury complained of, neither the statute nor the case law specifically defines the statutory language. Many reported opinions appear to presume that the traditional tort standard of proximate cause applies.¹ See, e.g., *Ward v. Rhodes, Hammonds, and Beck, Inc.*, 511 So. 2d 159, 164 (Ala. 1987) (discussing Alabama’s original and current dram shop acts in terms of proximate causation); *Parker v. Miller Brewing Co.*, 560 So. 2d 1030 (Ala. 1990) (defining the category of potential claimants under the dram shop act as being as “broad as proof of proximate cause will permit.”); *McGough v. G&A, Inc.*, No. 2060145, --- So. 2d ---, 2007 WL 2333028 at * 10, (Ala. Civ. App. Aug. 17, 2007) (“By the plain terms of the statute ... the ... [claimants] ... have a right to jury trial on their dram-shop claim if substantial evidence shows that the appellees sold, gave or disposed of alcoholic beverages to ... [their son] ... and that his intoxication from such alcoholic beverages proximately caused his accident.”).



“Relaxed” Causation

Other Alabama dram shop cases, which grew out of *dicta* in a 1951 court of civil appeals opinion, suggest, with little explanation, that dram shop claimants are “not held to the usual standards of proof of causal connection between the illegal sale of the beverages and the injury.” *Phillips v. Derrick*, 54 So. 2d 320, 321 (Ala. Civ. App. 1951) (citing *Bistline v. Ney Bros.*, 111 N.W. 422 (Iowa 1907) for this proposition). The *Phillips* causation language was picked up by the Alabama Supreme Court in 1989 when it decided *Laymon v. Braddock*, 544 So. 2d 900 (Ala. 1989). *Laymon* involved a challenge to jury instructions used in the trial court involving the standard of causation in a dram shop claim. Those jury instructions read as follows:

...Before there could be a verdict in favor of ... [the dram shop claimants] ... and against ... the defendants ... the damages complained of must again be *in consequence of* the intoxication of the person ... Now, this term ‘*in consequence of the intoxication of a person*’ is not a phrase that is used often in the law... [N]ormally, liability will be imposed only when the wrong is the proximate cause of an injury. That’s not the terminology or the language that we have in this statute. *Our statute says there shall be a right of action for the particular persons when in consequence of the intoxication of any person one is wrongfully or contrary to law so disposed or given alcoholic beverages, and caused the intoxication of such person to the damage of the person who can sue.... A person selling alcoholic beverages is not responsible for all remote or possible consequences which may result from such a sale.* And before there could be a verdict in favor of the plaintiffs and against the defendant, *the damages complained of must again be in consequence of the intoxication of the person....*

Id. at 903. In upholding the charge, the Alabama Supreme Court did not adopt the reasoning of *Phillips*, it merely found that the charge “sufficiently complied” with the proposition of law espoused in *Phillips*. *Id.*

In *Attalla Golf & Country Club, Inc. v. Harris*, 601 So. 2d 965 (Ala. 1992), the supreme court approvingly referenced both *Laymon* and *Phillips* and stated that liability under the Dram Shop Act is imposed when the injury is “in consequence” of the illegal sale. *Id.* at 970. Significantly, the *Attalla* opinion reiterated that “a person selling alcoholic beverages is not responsible for all remote consequences that may result from an illegal sale.” *Id.*

Other Jurisdictions

The seeming disparity in causation standards between the lines of Alabama cases could be reasonably reconciled by referencing case law from other jurisdictions. States with similar dram shop statutes often allow a less stringent standard of causation in cases where claimants seek to recover for damages caused “by” the intoxicated individual. *See, e.g., King v. Partridge*, 157 N.W. 2d 417 (Mich. 1968); *McDonald v. Risch*, 242 N.E. 2d 245 (Ill. 1968). This is so because the damages covered by this portion of the dram shop statute are, by definition, sustained as a result of the direct, affirmative actions of the intoxicated person.

By contrast, many jurisdictions allow for recovery of damages suffered “in consequence of” or “resulting from” the intoxication of any person, only upon proof of proximate causation. *See, e.g., Pierce v. Albanese*, 129 A.2d 606 (Conn. 1957); *Shugart v. Egan*, 83 Ill. 56 (Ill. 1876). The application of the normal standard of proximate cause² for damages suffered “in consequence of the intoxication” is logical because the statutory language itself relaxes the relationship required between the damages alleged and the intoxicated person. Applying this line of authority, a claimant such as Leila, who was not directly harmed by the intoxicated person, would be required to show that her injury was proximately related to the intoxication of some person, here Ryan, as she would be proceeding under the “in consequence of the intoxication” prong of the Alabama statute. Such an interpretation of the Alabama statute would be consistent with *Phillip* and its progeny because all of those cases involved allegations of damages caused by the intoxicated person. *See Phillip*, 54 So. 2d at 321 (car damaged by intoxicated person); *Laymon*, 544 So. 2d at 900-01 (plaintiffs’ decedent killed while driving intoxicated); *Attalla*, 601 So. 2d at 967 (passenger injured by intoxicated driver). Nevertheless, the standard of causation in “in consequence of the intoxication” dram shop cases in Alabama remains unclear.

Current State of the Law

Plaintiffs argue for “relaxed” causation and defendants argue for proximate causation. Both sides have valid arguments, and both sides will have strengths and weaknesses. The most substantial problem with what I have called “relaxed” causation is

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that it is ill-defined by the courts and the legislature; we only know that it is more forgiving to claimants than proximate causation, but that it will not allow for the imposition of dram shop liability against a defendant for "...all remote consequences that may result from an illegal sale." *Attalla*, 601 So. 2d at 970. Presumably, "relaxed" causation would allow for the imposition of liability for *some* remote consequences, but we have no meaningful guidance as to how to distinguish between the remote consequences that are actionable and those that are not. This absence of guidance also supports a construction of "in consequence of the intoxication" causation based on standard principles of proximate causation for which there is a substantial body of settled case law.

NON-VEHICULAR DRAM SHOP CASES

The vast majority of reported Alabama dram shop cases involve injuries relating to vehicular accidents. *See, e.g., Liao v. Harry's Bar*, 574 So. 2d 775, 776-77 (Ala. 1990) (parent of an automobile accident victim sued bar that served alcohol to the at-fault driver). Causation is fairly straightforward in such cases where the driver is shown to be impaired as a result of his or her consumption of alcohol. The few reported dram shop cases not involving vehicular accidents instead involve criminal acts and assaults. In *Duckett v. Wilson Hotel Mgmt. Co.*, 669 So. 2d 977 (Ala. Civ. App. 1995), plaintiff's decedent was shot and killed outside a Birmingham lounge. *Id.* at 978. The plaintiff sued the owners of the lounge under the Dram Shop Act where there was evidence that the gunman had been served while visibly intoxicated. *Id.* The court of civil appeals concluded that the criminal conduct of the intoxicated gunman was "conduct that the Dram Shop Act was designed to protect against..." *Id.* at 989-90. In *Ward v. Rhodes, Hammonds, & Beck, Inc.*, 511 So. 2d 159 (Ala. 1987), the plaintiff was at defendant's bar when he was struck in the face by another patron who was allegedly intoxicated. *Id.* at 160. The court allowed the plaintiff to pursue his dram shop claim because (1) he was a member of the class of persons the Dram Shop Act was designed to protect; (2) he was injured in person; (3) by an intoxicated person; and (4) his injury was allegedly the result of an illegal sale by the defendant bar. *Id.* at 164.

Ward and *Duckett* both involve facts where there is a direct causal connection between the claimant's injury and the criminal act of the intoxicated patron. Both cases also involve criminal acts that took place at or near the alcohol purveyor's place of business. In *Duckett*, the intoxicated patron shot the plaintiff's decedent outside the lounge, and in *Ward*, the allegedly intoxicated patron assaulted another patron at the bar.

EX PARTE WILD WILD WEST

There are no reported Alabama dram shop cases which involve facts analogous to those outlined at the beginning of this article, but one case, *Ex parte Wild Wild West Social Club, Inc.*,

is instructive. In *Wild Wild West*, 806 So. 2d 1235 (Ala. 2001), the plaintiff brought a personal injury claim against a bar where he had been drinking. *Id.* The plaintiff alleged he was thrown out of the bar and then assaulted by an independent security guard in the parking lot outside of the bar. *Id.* at 1237-38. The evidence was that the plaintiff pushed the security guard and made a comment to him before the security guard struck the plaintiff. *Id.* at 1238. The plaintiff's theory was that his ultimate injury should be attributed to the bar because the bar ejected the plaintiff leading to the events occurring thereafter. *Id.* at 1240. A jury verdict was entered in favor of the plaintiff. *Id.* The verdict was reversed and rendered on appeal. *Id.* at 1242.

In finding for the defendant, the supreme court stated that "in order to recover against a defendant for harm caused by the criminal actions of a third party, the plaintiff must establish that the defendant knew or had reason to know of a probability of conduct by third persons that would endanger the plaintiff." *Id.* at 1240 (citation omitted). The supreme court also relied upon the following language from the *Restatement of the Law of Torts*, quoted in one of its prior opinions:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created and that a third person might avail himself of the opportunity to commit such a tort or crime.

Id. (citing *Restatement of the Law of Torts* § 448 (1934)) (quotation marks and citation to case law omitted). Framing its discussion in terms of foreseeability, the supreme court concluded that the bar in *Wild Wild West* could not have known that an ejected bar patron might be attacked by an independent security guard off of the premises. As a matter of law, the security guard's attack on the ejected patron was deemed to be unforeseeable. *Id.* at 1241.

ANALOGOUS FOREIGN CASES

Reported cases from other jurisdictions have addressed similar factual allegations under other dram shop acts and have frequently denied recovery against the purveyor of alcohol where the injury in question was caused by the act of a third person who was not shown to have been intoxicated. These cases uniformly discuss this issue in terms of proximate causation, foreseeability and intervening/superseding causation.

In *Shugart v. Egan*, 83 Ill. 56 (Ill. 1876), it was claimed that the plaintiff's husband, while in a state of intoxication caused by the illegal service of the dram shop, insulted or menaced another individual, who thereafter stabbed and killed the husband. *Id.* In reversing the lower court's opinion in favor of the widow, the



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Illinois Supreme Court found that the husband's death did not result from intoxication, but "solely from the direct and willful act of ...[the assailant]..." even though he had been provoked by the husband. *Id.* The *Shugart* opinion, written over 130 years ago, provides this useful guidance:

It cannot be said that ...[the dram shop owner]...should have foreseen that his letting the deceased have liquor would lead to his death or bodily harm, at the hands of ...[the assailant]..., or by violence from any source, because this was an exceptional and not a natural or probable consequence. It is a natural and probable consequence of letting a drunkard have liquor that he shall become intoxicated, and, by reason thereof, suffer mental and physical impairment, waste his means, and do violent, absurd and silly acts, for experience proves that these results, in general, in greater or lesser degree follow. But it is the exception that a drunkard is slain or violently assaulted, while in a state of intoxication, for words spoken or acts done by him while in that condition....

Id.; see also *State ex rel. Brough v. Terheide*, 78 N.E. 195 (Ind. 1906) (sustaining dismissal where illegally served patron was assaulted by a third party where no connection between the unlawful sale of liquor and the injury sustained as a result of the assault was alleged and where there was no allegation that the assailant was intoxicated as a result of an illegal sale); *Schulte v. Schleeper*, 71 N.E. 325 (Ill. 1904) ("Where the disability ...[of]... an intoxicated person results, not from the intoxication, or from anything consequent upon that intoxication, but from the independent act of a third party, which is the direct and immediate cause of that disability there can be no recovery against the dram shop.").

Other reported opinions follow similar logic and reach similar conclusions. See, e.g., *Shea v. Slezak*, 129 A.2d 233 (Conn. Super. 1956) (denying plaintiff's motion to set aside defense verdict where plaintiff's decedent, who was served while visibly intoxicated, was shot and killed by an individual who had not been served by the defendant); *Gage v. Harvey*, 48 S.W. 898 (Ark. 1898) (individual whose money was stolen while he was in a drunken stupor cannot maintain an action against the saloon-keeper as the theft was an intervening act of a third person); *Rogalski v. Tavernier*, 527 N.W. 2d 73 (Mich. Ct. App. 1995) (summary disposition for defendants affirmed on social host liability claim where a minor was stabbed and killed after he and his assailant were illegally served at a private birthday party); *Hebert v. Club 37 Bar*, 701 P.2d 847 (Ariz. App 1985) (even assuming that the bar owners and bartenders were negligent, the murder of the plaintiff's decedent in the bar's parking lot by a bar patron was unforeseeable and extraordinary, and patron's act in murdering victim was a superseding, intervening cause as a matter of law, which relieved bar owner's and bartender of any

liability). There are reported cases to the contrary, see, e.g., *Healey v. Cady*, 161 A. 151 (Vt. 1932) and *Bedore v. Newton*, 54 N.H. 117 (N.H. 1873).

"RELAXED" CAUSATION VS. PROXIMATE CAUSATION: LEILA V. MCWHORTER'S BAR & GRILL

In many cases it would not matter what standard of causation was applied to a plaintiff's claim for "in consequence of the intoxication" liability under the Dram Shop Act. For example, if Ryan had driven home instead of Jason and had struck a pedestrian in McWhorter's parking lot, the facts would support liability under either theory of causation because a clear causal chain would exist between the over-service of Ryan and the consequential injury to the pedestrian. Establishing dram shop causation in our hypothetical accidental death case is more difficult,

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however. Indeed, it is possible if not probable that the application of standard proximate causation principles would support summary judgment for McWhorter's while application of the "relaxed" causation standard would not.

Proximate Causation— Summary Judgment for McWhorter's

Relying on the concept of foreseeability discussed in *Wild Wild West* and elsewhere, as well as intervening/superseding cause and remoteness jurisprudence, McWhorter's counsel should be able to convincingly argue that the bartender's original negligence was simply too far removed from Leila's injury (i.e., Ryan's death).

Purveyors of alcoholic beverages are not responsible for all remote consequences which might result from illegal sales. *Attalla Golf & Country Club, Inc. v. Harris*, 601 So. 2d 965, 970 (Ala. 1992). "A well established principle of Alabama law is that, to recover in tort, a plaintiff must establish that the defendant's misconduct was the 'proximate cause'—and not just the 'remote cause' of the plaintiff's injuries." *United Food & Comm. Workers Union Employers Health & Welfare fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1273 (11th Cir. 2000) (collecting cases). The Alabama Supreme Court has explained:

The law cannot undertake to trace back the chain of causation indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom—in fact,

infinite in their scope. It therefore stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury. The general rule is that the damage to be recovered must be the natural and proximate consequence of the act complained of. It is not enough if it be the natural consequence; it must be both natural and proximate.

Birmingham Ry., Light & Power Co. v. Ely, 62 So. 816, 819 (Ala. 1913) (citations omitted). Regardless of McWhorter's culpability vis-à-vis service to Ryan, it can credibly maintain that it is due summary judgment because Ryan's, Jason's and Leila's subsequent unforeseeable acts caused or resulted in Ryan's death. McWhorter's original negligence was too remote to be a cause of Leila's injury.


McWhorter's should also argue that Jason's intervention into the marital dispute between Ryan and Leila was an intervening cause as was Leila's assertiveness and intoxication. An intervening cause is one which occurs after an act committed by a tortfeasor and which relieves it of its liability by breaking the chain of causation between its act and the resulting injury. *Gilmore v. Shell Oil Co.*, 613 So. 2d 1272, 1275 (Ala. 1993). To be an intervening cause, the act or event must occur between the time of the negligence of the defendant and the injury's occurrence. *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1195 (Ala. 1985). Not all acts or events occurring after the negligence of the defendant are intervening causes. To be an intervening cause the act or event "must have been unforeseeable and must have been sufficient in and of itself to have been the sole 'cause in fact' of the injury." *Id.*

To summarize, the *Leila v. McWhorter's Bar & Grill* facts raise a host of proximate cause issues for Leila, and McWhorter's counsel is likely to obtain a summary judgment for his client under the traditional causation standard if he puts as much distance as possible between the bartender's negligence and Ryan's death. This can be done by focusing on the following undisputed facts: (1) Ryan was safely driven home by Jason; (2) the accident occurred in Ryan's apartment over one hour after he left McWhorter's; (3) the fight was instigated by Leila who was intoxicated and who was not served by McWhorter's; and (4) Ryan's death was the result of a bizarre accident which was caused by Jason's intervention into a marital dispute.

"Relaxed" Causation— A Jury Question for Leila

The "relaxed" causation standard, on the other hand, probably gets Leila to the jury for several reasons. First, the *Attalla*, *Laymon* and *Phillips* cases provide plaintiffs' counsel with strong grist for the mill and contain language explicitly stating that dram shop claimants are not to be held to usual standards of causal proof. Second, there is very little judicial gloss on the "in consequence of the intoxication" language in the Dram Shop Act, and a trial court is going to be more likely to leave that determination of what that language means to the fact-finder, especially when several of the reported cases and the pattern jury instructions clearly are placing a thumb on the plaintiffs' side of the causation scale. Finally, plaintiffs can argue that defenses based upon intervening/superseding causation, remoteness and foreseeability are not properly raised in response to an "in consequence of the intoxication" claim because it does not

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require proof of proximate causation. In *Leila v. McWhorter Bar & Grill*, these defenses are very persuasive as a legal matter, and the argument that they don't apply to "relaxed" causation analysis, which is difficult to refute in the absence of authority, increases the likelihood that Leila will get her case to the jury.

CONCLUSION

The purpose of this article is to raise awareness of the competing case law and argument supporting two different theories of causation under the "in consequence of the intoxication" provision of Alabama's Dram Shop Act. The issue is significant, especially in dram shop cases involving non-routine facts, because the "relaxed" causation standard espoused by plaintiffs' counsel explicitly allows proof of causation beyond the normal boundaries of proximate causation. How far beyond, we do not know, but the *Attalla* opinion states that what I have described herein as "relaxed" causation could extend to some, but not all, remote causes.


If "relaxed" causation is the proper standard, we can only hope for greater clarity in future legislation or from the supreme court. In the meantime, proprietors should be mindful that dram shop liability extends further, and perhaps much further, than they would prefer. ▲▼▲

Endnotes


1. Several Alabama Dram Shop Act cases discuss the issue of standing in terms of proximate causation. I do not mean to confuse or conflate the separate subjects of standing and causation. However, the use of proximate cause terminology by the supreme court in discussing the zone of potential claimants for purpose of standing tends to support the argument that a traditional proximate cause standard should be applied to causation analysis, at least in cases involving "in consequence of the intoxication" causation.
2. The Alabama doctrine of proximate cause requires "an act or omission that in a natural and continuous sequence, unbroken by any new and independent causes, produces the injury and without which the injury would not have occurred." 1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 1.03 (4th ed. 2004). The proximate cause of an injury is "the direct cause" of the injury. *Hicks v. Vulcan Eng'g Co.*, 749 So. 2d 417, 424 (Ala. 1999). To show proximate cause, the plaintiff must establish both factual causation and foreseeability. *Springer v. Jefferson County*, 595 So. 2d 1381, 1383 (Ala. 1992).



Brian A. Wahl is a partner in the Birmingham office of *Bradley Arant Boult Cummings LLP*, where his general litigation practice involves the representation of corporate defendants. Prior to entering private practice, he was a law clerk for the Honorable William Harold Albritton, III, U.S. District Court Judge for the Middle District of Alabama. Wahl is a graduate of Georgetown University and the University of Texas School of Law.



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