

## Dram Shop Litigation from a Toxicology POV

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*This blog explains the complexity and considerations required when it comes to Dram Shop litigation*

Serving, drinking, and enjoying alcohol is very much a part of our national culture. In some respects, it's embedded into Western society, an over-familiarity that feeds into national stereotypes; the French with their love of wine, the British with their love of beer, the Irish and their whiskey, for example. The same cannot be said of any other drug.

With its omnipresence in our society, and the ability to affect our behavior, our choices and our decision-making processes, it is little surprise that alcohol is the cause of thousands of legal cases a year. In the US, one of the more complex legal disputes regarding alcohol is Dram Shop litigation.

Dram Shop or liquor liability concerns the responsibility of an establishment that sells alcoholic beverages and the duty of care that it has to ensure that its patrons are not visually intoxicated. Incidentally, the term dram is still used within the common vernacular in Scotland as a term for an (undisclosed) measurement of drinking – having a 'wee dram' can mean simply a shot of whiskey or an entire evening's drinking session.

Dram Shop liability refers in general to two main aspects; the first one is pretty straight forward – a bar or bartender can be held responsible if they serve an alcoholic beverage to anyone who is under the legal age limit, who then causes damage, injury or death.

Where it becomes more complex, not least because every state has specific regulations regarding liability, definitions and a person's own negligence, is where an establishment or server can be held liable if they are found to have served alcohol to someone who is or appears to be visibly or obviously intoxicated, who then causes damage, injury or death.

This second aspect raises several challenges for an attorney. The first is knowing the amount of alcohol consumed and more importantly the impact of this consumption. The second challenge is that the drug in question is so familiar.

Whether for the defense or the plaintiff, the attorneys on the case will have a jury full of 'experts.' Drinking alcohol is ingrained in our society. Most people have either sampled alcohol, been intoxicated or have witnessed someone else's intoxication. It's up to the savvy attorney to use this to their advantage, capitalize

on the familiarity and use the application of experts in the courtroom to make their case.

For example, a toxicology expert must deliver an unbiased, accurate account of the amount of alcohol consumed and the predicted consequences of a certain level of intoxication as well as how these factors pertain to the case. Whatever the outcome of the toxicology report, it means the attorney can then plan the legal strategy accordingly.

With such familiarity with the drug and the impact it can have on our behavior, it's the job of the toxicologist to help the jury understand the technology and evidence from a scientific standpoint. The toxicologist may have to reorient the jury away from misconceptions concerning their own beliefs and personal understanding to that of science and evidence.

Central to this understanding is the fundamental principles of toxicology: Absorption, Distribution, Metabolism, and Elimination (ADME) and can be applied to many drugs and chemicals. The information gleaned from huge numbers of detailed studies on alcohol can be used to reliably predict the Blood Alcohol Concentration (BAC) vs. time profiles in forensic circumstances to help juries decide on the outcome in many Dram Shop cases.

It sounds complicated, but it's about one simple fact. The more alcohol you drink the drunker you will become. Obvious right? Essentially, ADME can be described as what was the exposure (how much has that person had to drink), and what was the effect (how impaired have they become).

And that's where the grey areas start to appear from a legal standpoint. How impaired was the person when they were served alcohol – maybe they didn't appear intoxicated at the time, but became so afterward? And how do we define visible intoxication? After all, everyone knows a 'lightweight' and we all know those people who are still holding a decent conversation after 8 cans of beer.

This is where using BAC – i.e. measuring someone's blood alcohol concentration – can help. It is generally accepted that when the BAC is greater than 0.150% most social drinkers will be showing signs of visible intoxication. This can include slurring words, stumbling and swaying.

However, experienced drinkers may display functional tolerance – the more alcohol a person is exposed to, a biological adaptation kicks in and they may not present visible signs of intoxication. So, while for the majority of social drinkers' people a BAC of 0.150% is enough for them to be visibly drunk, for others it might take as much as 0.200% or more.

The science allows toxicologists to establish the truth – knowing the size, age, timeline and number of drinks mean a toxicologist can establish the approximate

BAC of an individual, and therefore how likely that person is to have been displaying signs of intoxication. Alternatively, knowing the BAC, timeline, and size of an individual allows a toxicologist to calculate the total number of drinks someone has consumed within a prescribed time period.

However, in some cases there may be an outlier and that's where the toxicologist's own expertise and experience are essential. Maybe the bartender was pouring very strong drinks – there's a big difference between a standard beer and a Long Island Iced Tea, maybe the person in question is a 'weekend warrior' and has a particularly high alcohol tolerance so was not showing signs of visible intoxication.

Alternatively, where does personal responsibility begin and end? For an individual to be ordering a Long Island Iced Tea they should, it could be argued, already know the strength of the beverage. But alcohol impairs decision-making and judgment, so how much should this be taken into consideration? This is where evidence, experience, and science combine to give us a true picture of intoxication and therefore liability.

In Dram Shop cases, the argument for where liability should occur is often a complex combination of explaining to a jury the in-depth scientific processes alongside the environmental factors concerning the exposure and effect of alcohol on the body and mind. And it's the real-world application of forensic evidence and deep toxicological experience, that plays a vital role in helping an attorney and a jury use the evidence, the applied knowledge of the toxicologist, and the over-familiarity of alcohol to deliver a successful outcome.