

OREGON LAW UPDATE

MVA Claims for Liquor Liability May Not Require Foreseeability

case in point...

From the desk of Jeff Eberhard: : Insurers should be aware that the Court of Appeals has for the first time interpreted ORS 471.565 to allow a statutory cause of action against alcohol providers who serve alcohol to visibly intoxicated guests or patrons who later injure a third party in a motor vehicle accident.

Claims Pointer: In the context of liquor liability claims, Oregon courts have generally interpreted Oregon's Dram Shop Act (ORS 471.565) as imposing conditions and limitations on negligence claims brought against tavern owners and social hosts. The Court of Appeals' recognition of an additional "statutory liability" claim against tavern owners in favor of Plaintiffs injured by intoxicated drivers removes the requirement that Plaintiffs prove foreseeability in automobile cases. This means that even if a server knows that a guest is going to walk home – or that a hotel bar patron is staying at the hotel – the foreseeability that the patron or guest would drive would be irrelevant. We strongly believe that this decision is wrong and should be reversed. A petition for review has been filed with the Oregon Supreme Court.

Deckard v. Bunch, in the Oregon Court of Appeals, 267 Or. App. 41 (2014).

Casey Deckard, was driving on Highway 101, when a highly intoxicated driver, Diana Bunch, crossed into his lane and collided head-on with his car. Shortly before the accident, Bunch had consumed a number of alcoholic drinks at the home of Roland King.

Deckard brought an action against Bunch and King alleging common law negligence against both Bunch and King, alleging statutory liability against King under ORS 471.565 for serving or providing alcohol to a visibly intoxicated guest. The trial court dismissed the statutory tort claim against King for failure to state a claim. At trial, the jury found Bunch negligent but returned a defense verdict for King. Plaintiff appealed and argued that the trial court erred in dismissing the statutory liability claim.

The only two issues on appeal were (1) whether ORS 471.565 creates a statutory cause of action and (2) whether the jury instructions were sufficient to render the trial court's ruling harmless.

First, the court examined legislative history to determine whether the legislature intended to create statutory liability for serving visibly intoxicated persons that harm third parties. Relying heavily on a 1985 case, Chartrand, the court determined that the original Dram Shop Statute "left no doubt that [it] gave rise to statutory liability of a commercial or social host who serves alcohol to a visibly intoxicated person." The court also looked to recent amendments to ORS 471.565 and found no evidence that the legislature's changes undermined the reasoning in Chartrand. The court of appeals held that in its view, the legislative history, context, and text of ORS 471.565 demonstrate the legislature's intent to create statutory liability.

We firmly believe the court's analysis on this point is flawed and incorrect. It relied almost in whole on dicta, legal speak for "oh by the way, we decided this case already, but here is a quick thought." The

dicta in Chartrand is flawed in many ways: the issue of statutory liability was not briefed by the parties, it ignored prior case law, and its analysis of legislative history relied almost exclusively on an article written by a second-year law student. We believe Chartrand steered the Court of Appeals down the wrong road and admitting their mistake is easier than turning around. Our office has succeeded in motions to dismiss statutory claims dozens of times and we intend to submit an amicus brief to the Oregon Supreme Court.

Second, the court analyzed whether the trial court's dismissal of the statutory court claim caused harm to the plaintiff, or in other words, whether the negligence standard in the jury instructions was sufficient to meet the statutory standards. After reviewing the jury instructions, the court found that they did not provide a cause of action distinct from negligence. The court explained that a statutory claim requires no proof of negligence or foreseeability that the guest would drive and the jury instructions spoke in those terms. The court held that the error was not harmless, reversed the trial court, and remanded the case for a new trial.

It is important to note that the court of appeals did not decide whether ORS 471.565 applied to common law negligence actions. In a footnote, the court stated that because Deckard failed to raise the issue on appeal, it would "express no opinion whether the standard of clear and convincing evidence properly applied to plaintiff's common-law negligence claim against King." In our opinion this and all other conditions of the Dram Shop Act clearly apply to negligence claims, although we suspect some plaintiffs may attempt to argue otherwise.

King filed a petition for review with the Oregon Supreme Court, which has discretion whether or not to accept the appeal. If the Supreme Court accepts the case, it will likely take up to two more years before the court releases its opinion.



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