Garden State CLE Presents:

Finding Responsible Defendants in a DWI Lawsuit

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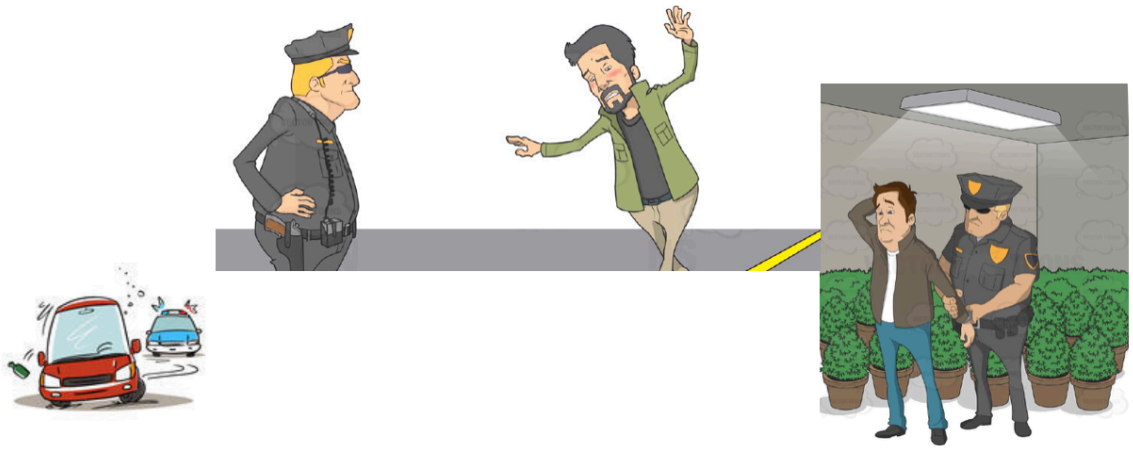
Lesson Plan

Introduction

The representation of an injured plaintiff in a drunk-driving case is often complicated by a labyrinth of criminal statutes, motor vehicle laws, arcane legislative enactments and the New Jersey common law. It is the function of the plaintiff's attorney to wade through the facts and law and locate as many defendants as possible who have been rendered as potentially liable under New Jersey law. The following materials will help plaintiffs perform this vital function.



Part I – Social Host Liability

a.) Introduction – Early case law

1.) Rappaport v. Nichols, 31 NJ 188 (1959)

Taverns: Service to minors & intoxicate people

Six decades ago, in Rappaport v. Nichols, 31 NJ 188 (1959) the New Jersey Supreme Court recognized a common law cause of action against licensed tavern owners who knowingly serve alcohol to minors or intoxicated patrons who then negligently drive vehicles causing injury to third-party victims. In that case, several licensed taverns served alcohol to a young adult, just eighteen years old who left the last tavern intoxicated, drove negligently, and killed another driver.

New Jersey's statutory and regulatory scheme barred taverns from serving alcohol to minors and those "apparently" intoxicated. The Court imposed a common law duty on taverns to refrain from serving alcohol to minors and intoxicated patrons and allowed innocent third-party victims to sue taverns breaching that duty to "afford a fairer measure of justice" and to "strengthen and give greater force to the enlightened statutory and regulatory precautions." The Court concluded that placing on taverns the burden of exercising due care was justifiable given the "frightening consequences" of drunk driving.

2.) Linn v. Rand, 140 NJ Super. 212 (App. Div. 1976)

Social host: Service to visibly intoxicated, underage guest

The Appellate Division expanded the rationale of *Rappaport* in Linn v. Rand, 140 NJ Super. 212 (App. Div. 1976). In that case, the homeowner allegedly served alcohol to an underage guest and permitted her to drive home intoxicated. The intoxicated underage guest negligently drove her vehicle, striking and seriously injuring a pedestrian child. In reversing the summary judgment order, which dismissed the case against the homeowner, the Appellate Division stated that it would make little sense to impose a duty to exercise care on the licensee in *Rappaport* but not the "social host who may be guilty of the same wrongful conduct." The *Linn* court held that the social host could be held liable in negligence for the injuries suffered by the child if the host served alcohol to a visibly intoxicated underage guest, knowing that the guest was unfit and about to drive and that an accident was reasonably foreseeable. The need to impose that new duty, according to the court, was "devastatingly apparent in view of the ever-increasing incidence of serious automobile accidents resulting from drunken driving."

As an adjunct to Linn, see Thomas v. Romeis, 234 NJ Super. 364 (App. Div. 1989)

The principle issue to be decided on this appeal is whether the trial judge erred when he instructed the jury that a social host is not liable for the negligent acts of his minor guest who becomes intoxicated and causes injury to a third person, unless the jury finds that the social host provided alcoholic beverages to the minor after a point in time when the minor was visibly intoxicated. We conclude that he did not err and affirm the judgment under review.

3.) Kelly v. Gwinnell, 96 NJ 538 (1984)

Common law liability

In the seminal case of Kelly v. Gwinnell, 96 NJ 584 (1984), the Court expressly approved of *Linn* and expanded the doctrine of social host liability to a private residence where an adult host "serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle." In that circumstance, the Court held, the social host will be "liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication." In writing for the Court, Chief Justice Wilentz stated that "[i]n a society where thousands of deaths are caused each year by drunken drivers, [and] where the damage caused by such deaths is regarded increasingly as intolerable, ... the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy." The Court articulated two primary goals in imposing social host liability — the "fair compensation of victims who are injured as a result of drunken driving" and the deterrence of social hosts from serving alcohol to their visibly intoxicated guests who will later drive.

b.) Legislative response to *Kelly*: The New Jersey Social Host Liability Statute and resulting case law.

NJSA 2A: 15-5.5 thru 5.8

With amendments recommended by the Governor, the Legislature largely codified Kelly in enacting the Social Host Liability Act, N.J.S.A. 2A:15-5.5 to -5.8. The Act affords a third party injured by a social host's intoxicated guest — "a person who has attained the legal age to purchase and consume alcoholic beverages" — a cause of action against the social host if:

(1) The social host willfully and knowingly provided alcoholic beverages either:

(a) To a person who was visibly intoxicated in the social host's presence; or

(b) To a person who was visibly intoxicated under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another; and

(2) The social host provided alcoholic beverages to the visibly intoxicated person under circumstances which created an unreasonable risk of foreseeable harm to the life or property of another, and the social host failed to exercise reasonable care and diligence to avoid the foreseeable risk; and

(3) The injury arose out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host.
[N.J.S.A. 2A:15-5.6(b).]

By design, the Social Host Liability Act did not address the service of alcohol to visibly intoxicated underage guests or in any way disapprove of *Linn*. The Act defines "social host," in relevant part, as a person "who legally provides alcoholic beverages to another person who has attained the legal age to purchase and consume alcoholic beverages." N.J.S.A. 2A:15-5.5. Notably, only a person over the age of twenty-one may "legally" provide alcoholic beverages to another. The Act's definition of social host also removes underage drinkers from the reach of the Act.

1.) Morella v. Machu, 235 NJ Super. 604 (App. Div. 1989)

Negligent failure to supervise: Underage drinkers

This case presented the question of whether parents who leave teenage children under poorly supervised circumstances where drinking parties are likely to occur in their absence may be liable for damages caused by an intoxicated underage partygoer who injures innocent victims while driving after the party. The Court concluded that parents may be liable under common-law principles of negligence, agency, proximate cause and foreseeability if they leave their teenagers in circumstances where improper supervision while they are absent from the home is likely to lead to social gatherings where alcohol is consumed by underage drinkers who then drive and cause injuries to innocent victims.

The Court concluded that rational development of the common law in light of this declared legislative requires parents to arrange for proper supervision of their teenagers when they are away from the home for a period of time during which spontaneous parties featuring alcoholic beverages are reasonably foreseeable. In default of the exercise of due care, they must answer in damages caused to innocent persons.

2.) Dower v. Gamba, 276 N Super. 319 (App. Div. 1994)
Let's party! Service of alcoholic beverages by a social host

In Dower v. Gamba, 276 NJ Super. 319 (App. Div. 1994), the Appellate Division determined that, in a party setting, a host does not have to directly serve alcohol to a guest for the purpose of providing alcohol within the meaning of the Social Host Liability Act. In that case, based on the summary judgment record, twenty to thirty-five persons attended a party thrown by the four Gamba brothers. Some of the persons attending the party brought beer to the Gamba house and placed the beer in a "kiddie pool," which the Gambas stocked with ice.. Sheila Dower stated that one of the Gamba brothers provided "a good amount of the beer" at the party. Guests helped themselves to beer from the kiddie pool. Mathew Kohaut, who was of age to drink, arrived with two six-packs of beer, which he put in the kiddie pool. He remained at the party for six hours. According to Theresa Dower, Kohaut was "chugging entire cans of beer" and "was obviously and visibly intoxicated."

Shortly before 1:00 a.m., the underage Dower sisters were passengers in Kohaut's car when he crashed into a tree, injuring the sisters. Kohaut's BAC was .17%. Based on the summary judgment record, the trial judge dismissed the Dower sisters' social host liability lawsuit against the Gamba brothers because they failed to prove that the brothers "actually served beer to Kohaut." In the trial judge's view, "[i]f the beer is on the table, there is no service" and no "social guest problem."

The Appellate Division reversed the grant of summary judgment, concluding that "the Legislature did not require that a plaintiff show that the social host directly served the visibly intoxicated driver who negligently injures another." According to the Appellate Division, "[t]he focus of N.J.S.A. 2A:15-5.6(b) is not on the means used to provide the alcoholic beverage to the potential operator of a vehicle." It rejected "[t]he proposition that the Legislature intended that a social host may escape responsibility for the negligent provision of alcoholic beverages to an obviously intoxicated person merely by `placing the booze on a table' and walking away." The Appellate Division held that it was for the jury to determine "whether the Gambas willfully and knowingly provided alcoholic beverages to Kohaut, while he was visibly intoxicated, under circumstances which created an unreasonable risk of foreseeable harm to the life or property of another." (citing N.J.S.A. 2A:15-5.6).

3.) Estate of Narleski v. Gomes, 244 NJ 199 (2020)

Liability of an adult host under age 21

Under our statutes and case law, a social host over the age of twenty-one has a duty not to serve alcohol to a visibly intoxicated guest, either an adult or a minor, if it is reasonably foreseeable the guest is about to drive. This case presents a variation on that theme. Does a young adult, over the age of eighteen but under the age of twenty-one — an adult under the lawful drinking age — have a duty not to facilitate the service of alcohol to a visibly intoxicated underage guest in his home if the guest is expected to operate a motor vehicle?

In this wrongful death case, nineteen-year-old Mark Zwierzynski — a third-party defendant — permitted underage adult friends to bring into his home alcoholic beverages, which they consumed while his parents were not there. Based on the summary judgment record before us, two of Zwierzynski's friends, nineteen-year-old Brandon Tyler Narleski and twenty-year-old Nicholas Gomes, left the home severely intoxicated and got into Gomes's car. Gomes drove away and, shortly afterwards, lost control of the vehicle and crashed into a concrete road divider. Narleski was ejected from the vehicle and died at the scene.

The trial court determined that Zwierzynski — despite providing his home as a drinking venue and arguably facilitating the excessive use of alcohol — owed no legal duty to Narleski because of Gomes's intoxication. Accordingly, the trial court dismissed the third-party action against Zwierzynski.

The Appellate Division affirmed the dismissal of the complaint against Zwierzynski. It nevertheless declared that, going forward, an underage adult "shall owe a common law duty to injured parties to desist from facilitating the drinking of alcohol by underage adults in his place of residence, regardless of whether he owns, rents, or manages the premises."

The Supreme Court held that an underage adult defendant may be held civilly liable to a third-party drunk driving victim if the defendant facilitated the use of alcohol by making his home available as a venue for underage drinking, regardless of whether he is a leaseholder or titleholder of the property; if the guest causing the crash became visibly intoxicated in the defendant's home; and if it was reasonably foreseeable that the visibly intoxicated guest would leave the residence to operate a motor vehicle and cause injury to another. An underage adult, by law, may sue and be sued, may drive a motor vehicle, and has the same civil obligations as any other citizen. He too is bound by the social compact. His age does not make him immune from legal responsibility for the violation of an established duty that is intended to protect others from foreseeable harm.

4.) *Narleski* cause of action elements: defined

Accordingly, a plaintiff injured by an intoxicated underage social guest may succeed in a cause of action against an underage social host if the plaintiff can prove by a preponderance of the evidence the following:

(1) The social host knowingly permitted and facilitated the consumption of alcoholic beverages to underage guests in a residence under his control. This element does not require that the social host be a leaseholder or titleholder to the property. It is enough that the social host has the ability and apparent authority to give others access to the property;

(2) The social host knowingly provided alcohol to a visibly intoxicated underage guest or knowingly permitted the visibly intoxicated underage guest to serve himself or be served by others. It is no defense that the underage guests bought and brought the alcoholic beverages that they or others consumed;

(3) The social host knew or reasonably should have known that the visibly intoxicated social guest would leave the premises and operate a motor vehicle and therefore would foreseeably endanger the lives and property of others;

(4) The social host did not take any reasonable steps to prevent the intoxicated guest from getting behind the wheel of the vehicle; and

(5) The social guest, as a result of intoxication facilitated by the social host, negligently operated a vehicle and proximately caused injury to a third party.

Part II – Vicarious Liability

1.) Podias v. Mairs, 394 NJ Super. 338 (App. Div. 2007)

Duty to render aid to a person injured by a drunk-driver

The Court ruled that the summary judgment record admits of sufficient facts from which a reasonable jury could find defendants breached a duty which proximately caused the victim's death. In the first place, the risk of harm, even death, to the injured victim lying helpless in the middle of a roadway, from the failure of defendants to summon help or take other precautionary measures was readily and clearly foreseeable. Not only were defendant passengers aware of the risk of harm created by their own inaction, but were in a unique position to know of the risk of harm posed by the intoxicated driver, Mairs' own omission in that regard, as well as Mairs' earlier precipatory conduct in driving after having consumed alcohol. Even absent any encouragement on their part, defendants had special reason to know that Mairs would not himself summon help, but instead illegally depart the scene of a hit-and-run accident, either intentionally or because of an inability to fulfill a duty directly owed the victim, thereby further endangering the decedent's safety.

Juxtaposed against the obvious foreseeability of harm is the relative ease with which it could have been prevented. All three individuals had cell phones and in fact used them immediately before and after the accident for their own purposes, rather than to call for emergency assistance for another in need. The ultimate consequence wrought by the harm in this case — death — came at the expense of failing to take simple precautions at little if any cost or inconvenience to defendants. Indeed, in contrast to Mairs' questionable ability to appreciate the seriousness of the situation, defendants appeared lucid enough to comprehend the severity of the risk and sufficiently in control to help avoid further harm to the victim. In other words, defendants had both the opportunity and ability to help prevent an obviously foreseeable risk of severe and potentially fatal consequence.

In our view, given the circumstances, the imposition of a duty upon defendants does not offend notions of fairness and common decency and is in accord with public policy. As evidenced by the grant of legislative immunity to volunteers afforded by the

Good Samaritan Act, *N.J.S.A.* 2A:62A-1, public policy encourages gratuitous assistance by those who have no legal obligation to render it. Simply and obviously, defendants here were far more than innocent bystanders or strangers to the event. On the contrary, the instrumentality of injury in this case was operated for a common purpose and the mutual benefit of defendants, and driven by someone they knew to be exhibiting signs of intoxication. Although Mairs clearly created the initial risk, at the very least the evidence reasonably suggests defendants acquiesced in the conditions that may have helped create it and subsequently in those conditions that further endangered the victim's safety. Defendants therefore bear some relationship not only to the primary wrongdoer but to the incident itself. It is this nexus which distinguishes this case from those defined by mere presence on the scene without more, and therefore implicates policy considerations simply not pertinent to the latter.

See immunity granted under the New Jersey Good Samaritan Act, *N.J.S.A.* 2A:62A-1. Public policy encourages gratuitous assistance by those who have no legal obligation to render it.

2.) Other exceptions to vicarious liability – Champion v. Dunfee, 398 NJ Super. 112 (App. Div. 2008) – No duty by a passenger to warn other passengers that the driver is intoxicated in the absence of either a special relationship between passengers (e.g. husband-wife, parent-child) or if the passenger aided in the drinking conduct of the intoxicated driver.

3.) Franco v. Fairleigh Dickinson University, 467 NJ Super. 8 (App. Div. 2021)

Duty of care owed to an under-age adult

This appeal raises questions concerning the scope of the duty owed to an adult who is not old enough to drink legally but who nonetheless drinks alcohol to excess and injures himself in a motor-vehicle accident. The issues on this appeal are governed by the common law and related public policies. The Social Host Liability Act (SH Act), N.J.S.A. 2A:15-5.5 to -5.8, does not apply because it governs liability for third-party injuries resulting from the service of alcohol to an of-age adult.

In September 2014, Kenneth Franco, a twenty-year-old college student, attended a social gathering in a suite in a residential hall at Fairleigh Dickinson University (FDU or the University). Franco had informed the suitemates and his parents that he planned to spend the night in the suite. In addition to bringing an overnight bag, Franco brought and consumed alcohol. He became visibly intoxicated and then fell asleep on a couch in the suite. Sometime later, the suitemates and remaining guests either left or went to sleep. At approximately 5 a.m., Franco awoke, left the suite, and forty-seven minutes later was severely injured when his car went off the road, struck an unoccupied parked vehicle, and flipped over.

The resolution of these issues turns on an undisputed fact and policy considerations. The undisputed fact is that Franco had planned to spend the night and not drive. The policy issues are whether tort duties and social host liability should apply when an under-aged adult voluntarily drinks to excess and thereafter injures himself. We hold that certain defendants had no duty, while the duty of other defendants, and a related causation issue, present questions of fact for a jury to resolve. The three student guests had no duty to monitor the actions of Franco. Any duty of the Suitemates ended when Franco fell asleep with the previously-arranged plan to spend the night in the suite.

See also New Jersey Charitable immunity Act, NJSA 2A:53A-7 thru 11.

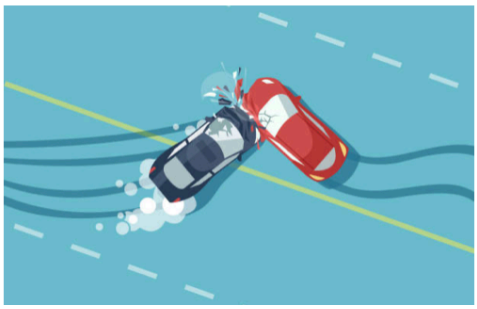
3.) Diaz v. Reynoso, 468 NJ Super. 73 (App. Div. 2021)

Promise made to police to care for an intoxicated driver

The issues concern whether a volunteer who assures police officers at a roadside stop of an apparently inebriated driver that he will take the driver and his car safely to a residence—but thereafter relinquishes the car to the driver before reaching that destination—can be civilly liable as a joint tortfeasor if the driver then collides with and injures another motorist.

The Court held that a volunteer who fails to discharge his commitment to the police in such a situation and who willingly allows a visibly intoxicated motorist to resume driving can bear a portion of the civil liability for an ensuing motor vehicle accident caused by that drunk driver. The presence of such a legal duty will hinge upon whether the volunteer is advised by the police, or objectively has reason to know from the surrounding circumstances, that his or her promise is an important obligation and that failing to carry it out could result in civil financial consequences.

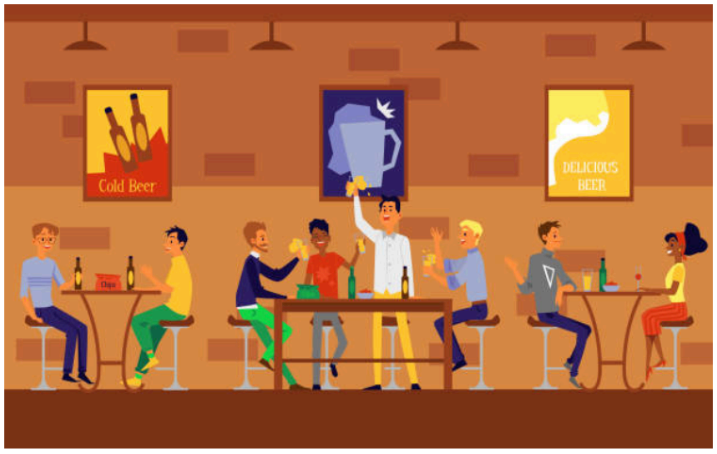
In recognizing these legal duties that may have been assumed by the volunteer, the panel did not absolve any other parties whose negligence, if proven, contributed to the harm, including the drunk driver himself, the police officials who failed to field test or arrest him, and the restaurant that served him alcohol. Their own respective shares of fault would need to be determined and allocated, based upon customary rules of proximate causation and joint tortfeasor liability.



Part III – Dram shop actions

Introduction

New Jersey was one of the later states to codify its dram shop act, which it finally enacted in 1987. The act, formally called the "New Jersey Licensed Alcoholic Beverage Server Fair Liability Act," (NJSA 2A:22A-1 *et seq.*) provides that it "shall be the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages by a licensed alcoholic beverage server." As is typical of other dram shop laws, the New Jersey law allows a person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages to recover damages from a licensed alcoholic beverage server only if the server was negligent, the injury was proximately caused by the negligent service of alcoholic beverages, and the injury was a foreseeable consequence of the negligent service. The legislature took care to define "negligent" as requiring a showing that the server served a visibly intoxicated person.42 States have tinkered with the definition of "visibly intoxicated," such as by requiring proof that the person was so obviously intoxicated that, at the time of sale, he presented a clear danger to others. [University of Cincinnati Law Review, Vol. 81, Iss. 3 [2013], Art 5.]



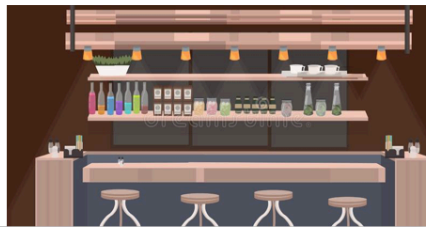
1.) Lee v. Kiku Restaurant, 127 NJ 170 (1992)

Damages – comparative negligence

The Court ruled that in dram-shop litigation a jury should apportion fault between the patron and the tavern based on the extent to which each party's negligence contributed to the plaintiff's injuries. Thus, in determining a patron's fault, a jury may consider the extent to which the plaintiff's injuries were caused by the patron's conduct in drinking to the point of intoxication. Similarly, the jury will consider the extent to which the tavern's actions in serving the patron after obvious intoxication contributed to the plaintiff's injuries. The principles of comparative negligence will apply to joint tortfeasors in dram-shop actions as they apply in all other negligence cases involving joint tortfeasors. This ruling is in accord with the Arizona Supreme Court's observation that:

[t]he interests of the public are better served by the common law principles that make most persons responsible for their conduct. Allowing the assertion of the [comparative negligence defense] further both the public policy of deterring drunk driving and the judicial policy of limiting rules of nonresponsibility for special groups. [*Del E. Webb v. Superior Court of Arizona, supra,* 726 *P.*2d at 586 (citations omitted).]

This modifies the prior law in two ways. First, an intoxicated patron may no longer avoid responsibility for injuries proximately caused by his or her voluntary decision to consume alcohol to the point of intoxication. Second, once a jury determines that a tavern continued to serve drinks to a visibly-intoxicated patron, the jury should not be instructed, absent exceptional circumstances, to determine the extent to which the patron retained some capacity to appreciate the risk of engaging in the activity that led to the accident. If a tavern serves alcohol to a visibly-intoxicated patron, a court will ordinarily presume the patron's lack of capacity to evaluate the ensuing risks.



Thus, a patron who voluntarily becomes visibly intoxicated and is then served alcohol by a tavern will not be entitled to a jury charge that places all responsibility for the ensuing injuries on the tavern. A voluntarily-intoxicated dram-shop patron is distinguishable from other plaintiffs who are excused for their failure to protect themselves from harm. Thus, in the event a patron was known to the tavern's employees to be an alcoholic, the duty of the tavern to refrain from serving that patron could arise well before the patron reaches the stage of being visibly intoxicated.

Moreover, the Court’s decision does not diminish a tavern's duty to its patrons and innocent third parties. The Court emphasized its continued adherence to the principle that a tavern cannot escape all liability for its negligence in serving an intoxicated patron by blaming the patron for unreasonable conduct caused wholly or in part by the tavern's actions.

Part IV – Limitation intoxicated plaintiff's cause of action

1.) NJSA 39:6A-4.5:

a. Any person who, at the time of an automobile accident resulting in injuries to that person, is required but fails to maintain medical expense benefits coverage mandated by section 4 of P.L.1972, c.70 (C.39:6A-4), section 4 of P.L.1998, c.21 (C.39:6A-3.1) or section 45 of P.L.2003, c.89 (C.39:6A-3.3) shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident while operating an uninsured automobile.

b. Any person who is convicted of, or pleads guilty to, operating a motor vehicle in violation of R.S.39:4-50, section 2 of P.L.1981, c.512 (C.39:4-50.4a), or a similar statute from any other jurisdiction, in connection with an accident, shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident.

c. Any person acting with specific intent of causing injury to himself or others in the operation or use of an automobile shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident arising from such conduct.

See Caviglia v. Royal Tours 178 NJ 460 (2004): "We find that *N.J.S.A.* 39:6A-4.5b does not violate the due process and equal protection guarantees of the Federal and State Constitutions."

2.) Voss v. Tranquilino, 206 NJ 93 (2011)

Not applicable to Dram Shop Actions

Finally, it is no small matter in our analysis that the bar in subsection 4.5(b) can coexist with the Dram Shop Act's deterrence and liability-imposing principles. There is no incompatibility between the two provisions. An intoxicated person is deterred from driving drunk by losing the right to sue under Title 39 for insurance coverage for his injuries. On the other hand, permitting an injured drunk driver to file an action against a liquor establishment and its servers for serving a visibly intoxicated patron similarly advances the goal of deterring drunk driving. In allowing the latter form of action to proceed, rather than barring it *ab initio* by *N.J.S.A.* 39:6A-4.5(b), we can be assured that the application of established principles of comparative negligence will apportion properly responsibility for damages as between dram shop parties and the injured drunk driver. *See N.J.S.A.* 2A:22A-6; *N.J.S.A.* 2A:15-5.1.

3.) Other exceptions:

i.) Camp v. Lummino, 352 NJ Super. 414 (App. Div. 2002) – Not applicable to Social host liability

ii.) Walcott v. All State Insurance, 376 NJ Super. 384 (App. Div. 2005) – Not applicable to PIP Benefits