

"DRAM SHOP" LIABILITY--STATUTORY--SALE OR FURNISHING OF ALCOHOLIC BEVERAGE TO UNDERAGE PERSON.¹ G.S. 18B-121.

This (*state number*) issue reads:

"Was the plaintiff [injured] [damaged] as a result of the defendant's sale of an alcoholic beverage to an underage person?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, six things:

First, that the defendant [sold] [furnished] (*specify alcoholic beverage*) to (*name underage person*).²

Second, that at the time of the [sale] [furnishing] (*name underage person*) was under the age of 21 years.

Third, that, in [selling] [furnishing] the alcoholic beverage to (*name underage person*), the defendant failed to exercise that degree of care which a reasonable person would have

¹G.S. § 18B-121(1) creates a statutory right of action only against "permittees" and local "Alcohol Beverage Control Boards" and their agents and employees. G.S. §18B-121 does not confer a right of action against every permittee. Holders of brown bagging permits, special occasion permits, limited occasion permits and one-time permits, among others, are exempted. G.S. §18B-125. However, for social host liability, see N.C.P.I.--Civil Volume 102.83. The plaintiff may also rely upon any common law claim for relief he may have. See *Freeman v. Finney*, 65 N.C. App. 526 (1983), *disc. rev. denied*, 310 N.C. 744 (1984). Because G.S. §18B-128 makes clear that all common law rights of action survive the passage of the dram shop law, a plaintiff may rely upon such common law rights in order to avoid the limitation on recovery contained in G.S. §18B-123. For a common law claim, see N.C.P.I.--Civil Volume 102.81.

²Note that it is apparently not necessary that the underage person to whom the alcoholic beverage was sold be the same underage person whose impaired driving causes the injury. Compare G.S. §18B-121(1) with §18B-121(2).

"DRAM SHOP" LIABILITY--STATUTORY--SALE OR FURNISHING OF ALCOHOLIC BEVERAGE TO UNDERAGE PERSON. G.S. 18B-121. (Continued.)

exercised under the same or similar circumstances. In determining whether the defendant failed to exercise the degree of care required, you may consider

[whether the defendant [sold] [furnished] (*specify alcoholic beverage*) to (*name underage person*) without requesting identification]

[whether (*name underage person*) misrepresented *his* age]

[whether the [sale] [furnishing] was made under duress]

[whether the defendant took reasonable precautions³ to avoid [selling] [furnishing] alcoholic beverages to an underage person]

Fourth, that (*name underage person*) became subject to an impairing substance.

[A person is under the influence of an impairing substance when *he* has consumed a sufficient quantity of an impairing substance to cause *him* to lose the normal control of *his* physical or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.

³So-called "good practices" include, but are not limited to, "instruction of employees as to laws regarding the sale of alcoholic beverages, training of employees, enforcement techniques, admonishment to patrons concerning laws regarding the purchase or furnishing of alcoholic beverages, or detention of a person's identification documents in accordance with G.S. §18B-129 and inquiry about the age or degree of intoxication of the person." G.S. §18B-122.

"DRAM SHOP" LIABILITY--STATUTORY--SALE OR FURNISHING OF ALCOHOLIC BEVERAGE TO UNDERAGE PERSON. G.S. 18B-121. (Continued.)

(*Name impairing substance*) is an impairing substance.⁴

[A person is (also) impaired when he has consumed a sufficient quantity of alcohol that at any relevant time after the driving he has an alcohol concentration of 0.08 or more grams of alcohol per [210 liters of breath] [100 milliliters of blood]. A relevant time is any time after the driving in which the operator still has in *his* body alcohol consumed before or during the driving.]⁵

Fifth, that such impairment was caused or contributed to by consumption of the (*specify alcoholic beverage*) that defendant [sold] [furnished] to (*name underage person*).

And Sixth, that, while so impaired, (*name underage person*) was negligent in the operation of a (*describe vehicle*), and that such negligence was a proximate cause of plaintiff's [injury]

⁴An impairing substance includes alcohol, a controlled substance under Chapter 90 of the General Statutes, or any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances. G.S. §20-4.01(14a).

⁵It should be noted that a person charged with driving while impaired cannot plead as a defense that he was legally entitled to use the impairing substance (e.g., "my doctor prescribed this medicine"). See G.S. §20-138.1(b).

"DRAM SHOP" LIABILITY--STATUTORY--SALE OR FURNISHING OF ALCOHOLIC BEVERAGE TO UNDERAGE PERSON. G.S. 18B-121. (Continued.)

[damage].⁶

[(Here instruct on negligence and proximate cause if not already defined. See N.C.P.I.--Motor Vehicle 102.10, 102.20, 102.35, and other applicable motor vehicle negligence instructions.)]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the plaintiff has proven each of the six things on which you have just been instructed, it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.⁷

⁶G.S. §18B-120 makes clear that damages for death are to be determined under wrongful death provisions of G.S. §28A-18-2(b). See N.C.P.I.--Civil (Motor Vehicle) 106.40. Note, however, that the underage person cannot recover for his own injuries, nor may the personal representative of the underage person recover for his death. G.S. §18B-120. The definition of "aggrieved party" excludes the underage person. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 649, 423 S.E.2d 72, 74 (1992); *Clark v. Inn W.*, 324 N.C. 415, 419, 379 S.E.2d 23, 25 (1989).

However, the parents of an underage person who dies from injuries proximately resulting from his operation of a motor vehicle while impaired after consuming alcoholic beverages sold or furnished to him in violation of the Dram Shop Act may be "aggrieved parties" within the meaning of the Act. *Storch v. Winn-Dixie Charlotte*, 149 N.C. App. 478, 560 S.E.2d 881, disc. rev. denied, 355 N.C. 757, 566 S.E.2d 482 (2002).

⁷For provisions limiting damages, relating to contribution and indemnification, and exempting certain permittees from the dram shop law, see G.S. §18B-123, -124, and -125.