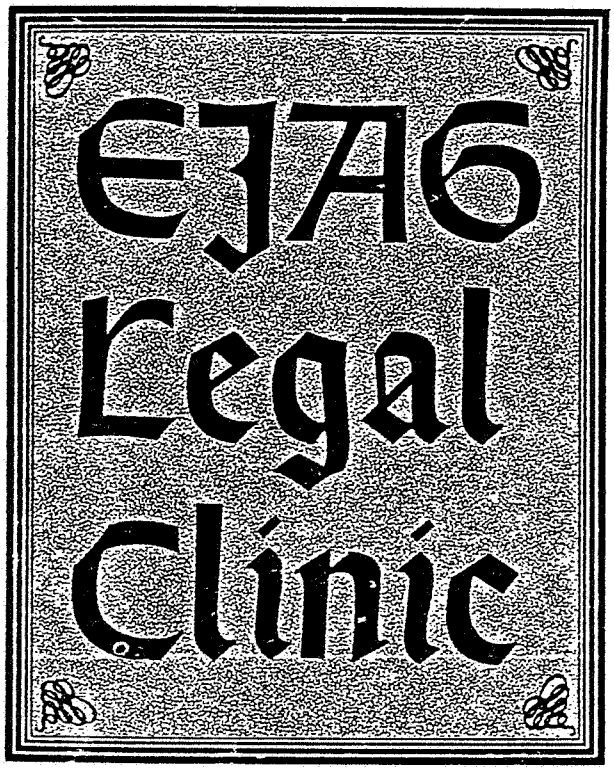

DRUNK DRIVING: RECENT DEVELOPMENTS

by LAWRENCE E. SAVELL

Although scientists and engineers have only relatively recently succeeded in making it feasible for forms of alcohol to be added to the gas tank of a mass-production automobile, it is a long-established and tragic fact that alcohol has been a frequent addition to the driver's seat.

Recent decisions by the highest courts of several states regarding drunk driving have explored some new avenues in this area. Although the reader of this magazine may honestly believe that he or she would never operate a motor vehicle while intoxicated, he or she may be surprised to discover how broadly some courts have interpreted such terms as "operation" or "control." Moreover, even a sober driver runs the risk of encountering another driver whose sense of responsibility is not as acute, and thus of becoming involved in litigation dealing with this area of the law. In addition, several courts have ruled that persons who are neither "drunk" nor "drivers" can face liability under certain circumstances.

Let Sleeping Drunks Go?

When the average driver thinks of terms such as "drunk driving," "driving under the influence," or "operating under the influence," he or she presumably pictures a scene wherein an intoxicated driver attempts to control a meandering automobile down a non-meandering road. In actuality, the courts of several states have ruled that "actual physical control," even without any movement of the vehicle, may sufficiently establish the offense.

A decision of the Michigan Supreme Court, People v. Fulcher, most recently dealt with this question. Although the court in that case ruled that "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while asleep," the court's vote was by the smallest possible margin, 4-3. The courts of at least four other states - - Missouri, Montana, North Dakota, and Oklahoma - - have found that such movement was not a necessary element of the requisite "actual physical control."

The Fulcher case actually involved two separate individuals and two separate convictions. Jessie Fulcher was found intoxicated and asleep behind the wheel of his car, which was discovered partly in a ditch with its transmission in the "drive" position. James Pomeroy was likewise found drunk and asleep behind the wheel of an automobile, but the car was his friend's, it was legally parked in front of a bar, the transmission was in the "neutral" position, and Mr. Pomeroy's head was leaning against the sounding horn while his legs cradled a beer can.

The relevant Michigan statute made it a crime for a person to "operate" a motor vehicle while impaired. The law defined an "operator" as a person in "actual physical control" of the vehicle. At their respective trials, both men were found guilty.

On September 18, the Michigan Supreme Court overturned both convictions. According to Justice Thomas Kavanagh, who wrote the opinion for the majority, the statutory requirement of "operat[ing] a motor vehicle" could not be met by a sleeping person. In the judge's view, "[a] sleeping person is seldom operating anything." The opinion emphasized, however, that the court's ruling of innocence would apply only where, as here, both elements - - a sleeping driver and a motionless vehicle - - were present. As Justice Kavanagh noted, "if the car had been in motion, the person in the driver's seat might have been found to be operating it even though he asserted that he was asleep." Similarly, "if the person in the driver's seat had been awake, he might have to be found to have been in such physical control of the car as to support a conclusion that he was operating it even if the car was motionless."

Ideally, drivers who sense they have overdone their imbibing would never get behind the wheel of their cars at all. The Fulcher case and others dealing with this issue should prompt those drivers who do choose to get in their automobiles and then realize their error to get off the road, turn off their engines, and, if possible and safe to do so, leave their cars. [The final measure may be impractical under certain highway conditions, or, as apparently was the situation facing Mr. Pomeroy, where the owners of the available shelter (the bar)

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would not allow him in to sleep and weather conditions necessitated keeping the car's engine running to operate the heater.] Besides helping to avoid a potential prosecution, such measures should serve to reduce drunk driving accidents as well as the risk of carbon monoxide poisoning.

Who is Liable? - - a Broadening Trend

A "drunk driver" is not the only person who may be liable for injuries or damage caused by an intoxicant-related accident. Several recent decisions have expanded the legal remedies available to victims of accidents caused by drunk drivers by expanding the range of possible defendants.

Let the Seller Beware

Wisconsin has recently added its name to the growing list of states that have either eliminated or modified the immunity traditionally granted to dealers of liquor whose intoxicated patrons injure third parties. In the June 28 decision in Sorensen v. Jarvis, the Wisconsin Supreme Court ruled that where a retailer negligently sold liquor to a person he knew or should have known was under the legal drinking age and would be driving while in such an intoxicated condition, and where such sale was a "substantial factor" in the intoxicated minor driver's injuring a third party, the vendor may be liable to that third party for such injuries.

The Sorensen court based its decision in part on its interpretation of a statute which provided a cause of action to those injured by an intoxicated minor or "habitual drunkard" against one who, after receiving notice or being requested not to sell or give such intoxicants, knowingly does so. The court emphasized that two requirements had to be met before liability would be found. First, the sale to the underaged person had to be negligent (thus allowing the defendant vendor to raise such defenses as lack of notice of underage, etc.). Second, the sale had to be a cause of the eventual injury to the third party (that is, sale of the alcoholic beverage was a "substantial factor" causing the injury). If both requirements were met, the rules of comparative negligence would come into play, rendering the vendor liable to the extent that his or her negligent sale (as opposed, for example, to the driver's negligence) caused the injury or accident.

Guess Who's Driving From Dinner?

In a groundbreaking decision dramatically expanding the scope of civil liability for drunk driving, the New Jersey Supreme Court ruled on June 27 that social hosts can be sued by victims of auto accidents caused by drunk guests to whom the hosts have served drinks. In Kelly v. Gwinnell, the court, in an opinion by Justice Robert Wilentz, concluded that a reasonable person in a host's position could have foreseen that the continued providing of alcohol to his intoxicated social guest was making it increasingly likely that the guest would be un-

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able to operate his car (which provided his means of getting home) with sufficient care. Consequently, the host could have foreseen that, unless the drinks were stopped, the guest was likely to injure a third party through the negligent operation of the guest's car.

The key obstacle to liability, according to the court, had been the question of the host's duty to prevent such a risk of injury. Drawing upon public policy considerations for support, the court cited: (1) the thousands of alcohol-related automobile fatalities annually; (2) society's disgust at that statistic; (3) the fact that liquor licensees are prohibited from serving intoxicated adults; and (4) the fact that long-standing criminal penalties for drunk driving have been recently strengthened. Consequently, the court concluded, the imposition of such a duty on those hosts who serve such intoxicated drivers is both consistent with and supportive of the societal goal of reducing drunk driving while, at the same time, assuring just compensation to the victims of such offenses.

Thus, the court ruled that a host who serves liquor to an adult social guest and who knows (1) that the guest is intoxicated, and (2) that the guest will thereafter be operating a motor vehicle, will be liable for injury to a third party as a result of the intoxicated guest's negligent operation of his or her automobile. The court expressly limited such liability to situations where (1) the host directly served the guest, and (2) the injury resulted from the guest's drunk driving.

The Kelly case is, at this point in time, unique in its extension of liability to situations involving private uncompensated social drinking among adults. Indeed, as the dissent in the case noted, the creation of such an unanticipated cause of action, which could have been accomplished legislatively, may have a major effect on homeowners' insurance rates as well as social customs. [Interestingly, although the majority opinion rejected these arguments, it did refuse to apply such a novel decision retroactively.] The courts of several states (for example, Minnesota) have rejected the social host theory on grounds including the absence of compensation for dispensing and the freedom of choice of adult drinkers, while in other states (for example, California and Oregon) legislatures have restricted or abolished the cause of action where it had earlier been accepted by the courts. Whether the Kelly case, which today is the exception, signals an increasing receptiveness of the judiciary to such claims by plaintiffs in drunk driving cases remains to be seen.

Stop and Go

A recent decision by the Massachusetts Supreme Judicial Court further suggests that the courts are becoming more receptive to the broadening claims of the victims of drunk driving. In its August 15 opinion in Irwin v. Town of Ware, the court ruled that municipalities may be held liable for injuries to members of the general public caused by a drunk driver whom the police had earlier stopped but negligently failed to take off the road and into protective custody.

The key to the establishment of liability on the town, according to the court, was the duty of reasonable care owed by the police to enforce the laws regarding drunk driving. Specifically, the court stated, municipalities and their police have a "special relationship" with persons injured by drunk drivers whom police have not taken off the roads, based upon the foreseeable immediate threat of serious physical injury to the public.

The court rejected the argument that such liability would cause the town to suffer intolerable economic hardship and to face numerous damage claims, particularly in light of the presence of a statute which provided for (and limited) certain types of municipal liabilities.

Ideally, the Irwin case would have the effect of making local police take greater care in their assessment of potentially drunk drivers they have stopped; there is, however, the danger that the fear of municipal liability may unfortunately lead to the reduction or elimination of driver stoppages by police officers in situations where such officers merely suspect that an operator is impaired.

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