

# Chapter 1

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## Traditional Common Law Immunity and the Origins of Texas Dram Shop Liability

### 1-1 TRADITIONAL IMMUNITY

At common law, there existed no liability for the over-service of alcoholic beverages to a customer, whether the aggrieved party was an innocent third party or the recipient himself.<sup>1</sup> Common law courts were reluctant until the latter part of the 20th Century to impose liability upon the owners of dram shops, primarily for two reasons:

1. The consumption, rather than the sale or service, of alcohol was seen as the sole proximate cause of the patron's intoxication and the resulting injuries to a third party. Accordingly, adults were deemed to be responsible for their own actions even while under the influence of alcohol; and
2. Even if the sale or service of alcohol to a patron were an actual cause of injuries, these injuries were beyond the scope of foreseeability and therefore not a proximate cause.<sup>2</sup>

These notions, which seem rather quaint and outdated, actually originated in early English common law at a time when the manner

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<sup>1</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987).

<sup>2</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987).

of transportation generally involved the horse and buggy. As a result, intoxication did not carry the deadly consequences of operating a motor vehicle while impaired due to intoxication.

The term “dram shop” is derived from the English measurement of alcohol, representing 1/8th of a liquid ounce.<sup>3</sup> Texas first regulated dram shops in 1895, by passing the first dram shop act, which was revised in 1911<sup>4</sup> and then repealed by revision and omission in 1919. The potential for the reestablishment of dram shop liability then came back into focus in 1987 when a pair of cases tested the “immunity” of dram shops at the trial court level.<sup>5</sup> In *El Chico*,<sup>6</sup> a patron of the El Chico Restaurant in Houston became highly intoxicated after consuming alcohol for about three hours at the restaurant, “blacked out” and ran a red light, killing another motorist. In the companion case, a customer of Bandy’s, in Corpus Christi, killed a motorcyclist after drinking alcohol for many hours at the bar.<sup>7</sup> In both cases, the trial courts relied upon the lack of a recognized common law cause of action in Texas and the lack of a statutory cause of action, despite the existence of the Alcoholic Beverage Code that regulated the sale of alcoholic beverages in Texas.<sup>8</sup> *El Chico* obtained a summary judgment and the *Joleemo* trial court dismissed the case upon special exceptions for failure to state a cause of action.<sup>9</sup>

## 1-2 *EL CHICO V. POOLE*

The case that changed everything in regard to dram shop liability in Texas is commonly referred to as *El Chico v. Poole*, but the Supreme Court decided *El Chico* and *Joleemo, Inc. v. Evans* together in one opinion.<sup>10</sup> The issue presented to the Supreme Court was stated as follows:

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<sup>3</sup> *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981).

<sup>4</sup> Tex. Rev. Civ. Stat. art. 3380 (1895), amended and recodified at Tex. Rev. Civ. Stat. art. 7452 (1911).

<sup>5</sup> *Poole v. El Chico Corp.*, 713 S.W.2d 955 (Tex. App.—Houston [14th Dist.] 1986); *Evans v. Joleemo, Inc.*, 714 S.W.2d 394 (Tex. App.—Corpus Christi 1986).

<sup>6</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 308 (Tex. 1987).

<sup>7</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987).

<sup>8</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987).

<sup>9</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 308 (Tex. 1987).

<sup>10</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 307 (Tex. 1987).

*These two wrongful death and survival actions were submitted together to determine whether a person injured by an intoxicated driver may recover from the alcoholic beverage licensee who allegedly sold intoxicants to that intoxicated driver in violation of the Texas Alcoholic Beverage Code.*<sup>11</sup>

The Court cited the statutory and common law of other jurisdictions and noted that 41 states recognized either a common law cause of action, a statutory cause of action or both.<sup>12</sup> Setting the groundwork for the capability to recognize a common law cause of action where none had previously existed, the Court stated, “the common law is not frozen or stagnant, but evolving and it is the duty of this court to recognize the evolution.”<sup>13</sup>

The previous immunity of purveyors of alcohol rested on the idea that the subsequent conduct of an intoxicated person was not reasonably foreseeable and therefore not a proximate cause.<sup>14</sup> The Court graphically dispelled and dispensed of that notion in the modern age: “The risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee knows will probably drive a car is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall.”<sup>15</sup>

The Court established and *recognized* a common law cause of action against bars, restaurants and night clubs who over-serve.

*Based on both common law negligence principles and a violation of Section 101.63(a), we hold an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated. A licensee who violates that duty by serving alcoholic beverages to an intoxicated person is negligent as a matter of law. Whether a licensee breached his duty and whether that breach*

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<sup>11.</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 308 (Tex. 1987).

<sup>12.</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987).

<sup>13.</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987).

<sup>14.</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987).

<sup>15.</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

*proximately caused a plaintiff's injuries are issues of fact for the jury to resolve.*<sup>16</sup>

The Court went on to state that it was aware that the legislature had finally acted to create a statutory cause of action. “In recognizing the cause of action announced today, we are mindful that the legislature has this week enacted a statute creating a civil remedy for persons injured by a licensee’s intoxicated patron.”<sup>17</sup>

### 1-3 THE STATUTE

In 1987, the Texas House and Senate adopted a conference committee report establishing a statutory civil remedy in dram shop cases. The dram shop bill was approved by vote of 171 to 2 with one abstention. The bill took almost immediate effect on June 11, 1987, under the emergency provision. The effect and the significance of the time of the legislative creation of statutory dram shop liability that took effect eight days after the recognition of a common law dram shop cause of action by the Texas Supreme Court will be discussed in the chapters that follow.

The statutory civil cause of action against sellers, servers or providers of alcoholic beverages was codified in Section 2.02 of the Texas Alcoholic Beverage Code:

#### Section 2.02. *Causes of Action*

(a) This chapter does not affect the right of any person to bring a common law cause of action against any individual whose consumption of an alcoholic beverage allegedly resulted in causing the person bringing the suit to suffer personal injury or property damage.

(b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under Section 6.01(b) of this code upon proof that:

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<sup>16</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987).

<sup>17</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987).

- (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and
  - (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.
- (c) An adult 21 years of age or older is liable for damages proximately caused by the intoxication of a minor under the age of 18 if:
- (1) the adult is not:
    - (A) the minor's parent, guardian, or spouse; or
    - (B) an adult in whose custody the minor has been committed by a court; and
  - (2) the adult knowingly:
    - (A) served or provided to the minor any of the alcoholic beverages that contributed to the minor's intoxication; or
    - (B) allowed the minor to be served or provided any of the alcoholic beverages that contributed to the minor's intoxication on the premises owned or leased by the adult.

The legislature went on to emphasize that the civil cause of action "created" by Section 2.02 of the Texas Alcoholic Beverage Code was the only cause of action available to anyone injured, damaged or harmed by the provision of alcohol by the creation of the "exclusive remedy provision" contained in Section 2.03 of the Texas Alcoholic Beverage Code.

Section 2.03. *Exclusivity of Statutory Remedy*

- (a) The liability of providers under this chapter for the actions of their employees, customers, members, or guests who are or become intoxicated is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages.

- (b) This chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter.
- (c) This chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older.

Also created out of whole cloth by the legislature in 1987 was the affirmative safe harbor defense codified in Texas Alcoholic Beverage Code Section 106.14. An establishment which proved all three requirements of the statutory defense will prevail in a civil action despite a violation of Section 2.02 of the code.

Section 106.14. *Actions of Employee*

- (a) For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing, or delivery of alcoholic beverages to a person who is not a member of a private club on the club premises, a minor, or an intoxicated person or the consumption of alcoholic beverages by a person who is not a member of a private club on the club premises, a minor, or an intoxicated person, the actions of an employee shall not be attributable to the employer if:
  - (1) the employer requires its employees to attend a commission-approved seller training program;
  - (2) the employee has actually attended such a training program; and
  - (3) the employer has not directly or indirectly encouraged the employee to violate such law.

## 1-4 COMMON LAW OR STATUTORY CAUSE OF ACTION

The basic principle of the common law is that courts cannot create brand new causes of action and can only “recognize” pre-existing common law causes of action.<sup>18</sup> This is actually a legal

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<sup>18</sup> *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 356-57 (Tex. 1990).

fiction that is aided and abetted by the notion that common law “evolves.” Under this notion, the Texas Supreme Court recognized a pre-existing common law cause of action for civil liability of sellers, servers or providers of alcoholic beverages on June 3, 1987. Because this common law cause of action was “recognized” rather than created, it had an immediate prospective and retroactive effect.<sup>19</sup> In other words, an individual injured before the effective date of the dram shop statute would be then able to sue under the common law cause of action recognized in *El Chico v. Poole* rather than the dram shop statutory cause of action.<sup>20</sup> Likewise, an injured person with a legal disability such as minority or the incompetency of severe brain damage could sue under the more liberal standard of *El Chico v. Poole* for many years thereafter due to a tolling of the statute of limitations.<sup>21</sup>

Despite the obvious efforts of the Texas legislature and the lobbyists involved to “beat the Supreme Court to the punch” and create a harder, more onerous standard of liability that would be more difficult for aggrieved plaintiffs to meet, the bottom line is that the recognition of a common law cause of action occurred on June 3, 1987, effective immediately. However, the “establishment” of a statutory cause of action occurred with the adoption of the legislative bill on June 3, 1987 with an effective date of June 11, 1987. Because the judicial recognition of a pre-existing common law cause of action occurred on June 3, 1987, eight days before the effective date of a statutory cause, it is the opinion of the author that dram shop liability is a common law cause of action later codified, much like Chapter 74<sup>22</sup> of the Texas Civil Practices & Remedies Code, the long-standing common law cause of action for medical negligence. The significance of dram shop liability being a common law versus statutory cause of action will be discussed in later chapters.

## 1-5 COMMENTARY

Concerning common law versus statutory causes of actions and remedies, courts in Texas generally hold that where a statute

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<sup>19</sup> *Poe v. Holiday Inns, Inc.*, 800 F. Supp. 1439 (E.D. Tex. 1992).

<sup>20</sup> *Riojas v. Phillips Props., Inc.*, 828 S.W.2d 18, 23 (Tex. App.—Corpus Christi 1991, writ denied).

<sup>21</sup> *Poe v. Holiday Inns, Inc.*, 800 F. Supp. 1439 (E.D. Tex. 1992).

<sup>22</sup> Tex. Civ. Prac. & Rem. Code §§ 74.001 et seq.

deprives a person of a common law right, the statute will be strictly construed and will not be extended beyond its plain meaning or applied to cases not clearly within its purview.<sup>23</sup> Sometimes, the legislature creates a choice of remedies, and a plaintiff may choose between either the common law or statutory cause of action.<sup>24</sup> The crux is whether the legislature expressly declares or implies an intention to abrogate common law remedies. If the statute provides a reasonable substitute for the common law rights it abolishes, the provisions of the statute will more than likely be mandatory and exclusive, and any claims arising therefrom will be considered purely statutory.

However, courts have also held that the legislature may not take away a vested right of action that had accrued before the passage of a statute, but that a party does not have the right to preserve the common law rules that might apply to a future injury.<sup>25</sup> In a seminal case, *Middleton v. Texas Power & Light Co.*, the Court held that individuals have no legal right, enforceable in court, to prevent the legislature from changing common law rules.<sup>26</sup> Later Texas decisions held that the legislature may repeal common law rules if an adequate substitute is provided.<sup>27</sup> The Texas Supreme Court has never struck down a statute providing a substitute for common law rules where the statute provides a comprehensive and well thought-out replacement. This has often been referred to as the “adequate substitute” standard.<sup>28</sup> Courts have upheld the Dram Shop Act as giving potential plaintiffs an adequate remedy at law and have denied plaintiff’s actions seeking to raise causes of action outside the parameters of the Act.<sup>29</sup>

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<sup>23</sup> *Smith v. Sewell*, 858 S.W.2d 350, 354 (Tex. 1993).

<sup>24</sup> *Holmans v. Transource Polymers*, 914 S.W.2d 189 (Tex. App.—Fort Worth 1995).

<sup>25</sup> *Texas Workers’ Comp. Comm’n v. Garcia*, 862 S.W.2d 61, 115-16 (Tex. App.—San Antonio 1993).

<sup>26</sup> *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 559 (Tex. 1916).

<sup>27</sup> *Lucas v. U.S.*, 757 S.W.2d 687, 690 (Tex. 1988).

<sup>28</sup> *LeBohm v. City of Galveston*, 275 S.W.2d 951, 954 (Tex. 1955).

<sup>29</sup> *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 853 (Tex. App.—El Paso 1997, pet. denied).