

5.71 TAVERN KEEPERS SERVING MINORS AND INTOXICATED PERSONS (3/10)

NOTE TO JUDGE

These instructions are designed for cases arising under the *Licensed Server Liability Act, N.J.S.A. 2A:22A-1 et seq.* (“Act”). The instructions in Sections A-D should be used for the ordinary case where there is no issue of apportionment of liability.

The instructions in E-I address those cases where there is an issue of apportionment of liability based on either: (1) a claim of plaintiff’s comparative negligence; or (2) a claim of plaintiff’s injury was caused by another tortfeasor. Section E (General Introductory Instruction) and I (General Concluding Instruction) should be given in all cases where there is an issue of apportionment of liability. Section F should be given when the comparative negligence claim is based on plaintiff’s negligence as a visibly intoxicated driver, and Section G should be given when that claim is based on plaintiff’s negligence as a visibly intoxicated passenger. Section H is designed for those cases where the licensed alcoholic beverage server claims that plaintiff’s injury was caused by the assaultive behavior of a patron.

A. Negligence of Licensed Alcoholic Beverage Server (LABS)

In this case the plaintiff claims that the [*name of licensed alcoholic beverage server*] (and his/her employee)¹ was (were) negligent by serving alcoholic beverages to [*name*] while he/she was visibly intoxicated (or, was known or reasonably should have known to be a minor). The plaintiff maintains that the negligence proximately caused (or, was a substantial factor in causing) an [*event*] in which plaintiff was

¹ Instructions on *respondeat superior* should be given if conduct of an employee is involved.

injured. Plaintiff contends that at the time the alcoholic beverage was served, the (person) was visibly intoxicated (or, was known or reasonably should have been known to be a minor).

"Visibly intoxicated" means a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication (and an "apparent minor" is a person under the age of 21 or an individual who under the circumstances was known or reasonably should have been known to be a minor).

If you find that the *[name of licensed alcoholic beverage server]* served, or permitted to be served, alcoholic beverages to a person when visibly intoxicated (or was known or reasonably should have been known to be a minor) then you must find the licensed alcoholic beverage server negligent. If you find that the *[name of licensed alcoholic beverage server]* did not serve alcoholic beverages to a visibly intoxicated person, then the *[name of licensed alcoholic beverage server]* was not negligent.

Cases:

Lee v. Kiku Restaurant, 127 N.J. 170 (1992); *Rappaport v. Nichols*, 31 N.J. 188 (1959); *Geherty v. Moore*, 238 N.J. Super. 463 (App. Div. 1990); *Aliulis v. Tunnel Hill Corp.*, 114 N.J. Super. 205 (App. Div.), *aff'd*, 59 N.J. 508 (1971).

See also Fisch v. Bellshot, 135 N.J. 374, 382-386 (1994) (*Licensed Server Liability Act* provides exclusive definition of an alcoholic beverage server's negligence for all causes of action arising under Act,

and jury should not be instructed that violation of administrative regulations is evidence of a defendant's negligence.)

NOTE TO JUDGE

- (1) In the case of a sale to an apparent minor, *see Rappaport v. Nichols*, 31 N.J. 188, 201 (1959) for the concept of selling the first drink which does "its share of the work" (citing *Taylor v. Wright*, 17 A. 677, 678 (1889)).
- (2) In cases where licensed alcoholic beverage server hosts a party that permits the self-service of alcohol, *see Mazzcano v. Estate of Kinnerman*, 197 N.J. 307 (2009) for the concept that self-service constitutes service of alcohol under the *Licensed Alcoholic Beverage Server Fair Liability Act* (the "Dram Shop Act"), N.J.S.A. 2A:22A-1 to -7.

Statute:

N.J.S.A. 2A:22A-1 *et seq.*

Cross-reference:

See negligence charges.

B. Proximate Cause — Intervening Cause — Substantial Factor

If you find that the [name of licensed alcohol beverage server] did serve alcoholic beverages to [name of intoxicated person] when he/she was visibly intoxicated, you then must determine whether or not that conduct was a proximate cause of the [event]. By proximate cause we mean a cause which naturally and probably led to the [event] and resulting injuries. Sometimes an event results from

two or more causes. Nevertheless, if a person's negligence is a substantial factor in causing an *[event]*, that negligent person is held liable to a person so injured. Therefore, you must also determine whether the service of alcoholic beverages to *[insert name of intoxicated person]* was a substantial factor in bringing about the *[event]*. It makes no difference whether any other causes intervened and contributed to the *[event]* as long as the service of alcoholic beverages to *[insert name of intoxicated person]* was a substantial factor in causing the event.

C. Negligence of Visibly Intoxicated Plaintiff

In determining whether plaintiff is entitled to recover from the *[name of licensed alcoholic beverage server]*, you must also consider whether the *[event]* was a foreseeable consequence of the negligent service of alcoholic beverages. A foreseeable consequence is a natural and probable consequence of the service of alcoholic beverages to the visibly intoxicated person (or to a person who was known or should have been known to be a minor). It is the kind of event that is susceptible of being anticipated in advance of the service of alcoholic beverages by the exercise of that degree of care which the ordinary and prudent person would exercise under the circumstances existing at the time. However, it is not necessary that the defendant *[name of licensed alcoholic beverage server]* have anticipated this specific event as

long as the event was a natural and probable consequence of the service of the alcoholic beverages.²

D. Comparative Negligence

Thus, plaintiff is entitled to recover from the *[name of licensed alcoholic beverage server]*, if plaintiff proves by the preponderance (greater weight) of evidence the following elements:

1. That defendant served alcoholic beverages to *[name]*;
2. That when the alcoholic beverage was served the person was visibly intoxicated (or, was known or reasonably should have been known to be a minor);
3. That such service of alcoholic beverages was a proximate cause of the *[event]* and injury complained of; and
4. That the injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

E. When Joint Tortfeasor

In this case, it is contended that *[insert nature of claim, e.g., plaintiff was negligent by becoming voluntarily intoxicated and/or by driving his/her car while*

² In cases of an intentional assault by a patron, the following language should be inserted: In general, assaultive behavior is considered one of the foreseeable risks of negligent service. However, you must still determine in this case whether the resulting injury to (name of plaintiff) was a foreseeable consequence of (name of licensed alcoholic beverage server) negligent service of alcoholic beverages to (name of patron who assaulted plaintiff). See *Steele v. Kerrigan*, 148 N.J. 1, 34 (1997).

intoxicated; plaintiff was at fault by becoming voluntarily intoxicated and thereafter riding as a passenger with an intoxicated driver, or by other conduct that might suggest that he/she was negligent; (name of patron who assaulted plaintiff) caused the injury by his/her assaultive conduct].

If you conclude that plaintiff has proven his/her claim against *[name of licensed alcoholic beverage server]*, you must then apportion fault between the *[name of licensed alcoholic beverage server]* and *[name of plaintiff if comparative negligence or of other defendants if joint tortfeasors]* based on the extent that each party's negligence *[or other conduct, if assault]* contributed to the event.

The general purpose of the *Licensed Servers Liability Act* is to impose on taverns financial responsibility for injuries proximately caused by the negligent service of alcoholic beverages. I will now instruct you on apportioning responsibility for the incident in this case. In allocating responsibility between *[name of licensed alcoholic beverage server]* and *[name of plaintiff if comparative negligence or of other defendants if joint tortfeasors]*, you should hold the tavern responsible for negligent service to the extent that it influenced the behavior of persons whom the tavern should not have served.³

³ *Steele v. Kerrigan, supra* at 34. Although *Steele* involved an underage patron, the discussion in the opinion is generally applicable to all patrons.

[Additional Language When Patron Is Underage]

You should also be aware that taverns have a heightened duty to underage patrons under the *Licensed Servers Liability Act*. The Act deems the licensed server negligent if it serves a person it knew or should have known was underage, regardless of that person's visible level of intoxication. This heightened duty was imposed because of the Legislature's recognition that minors as a class are less likely than adults to drink responsibly and more likely to become intoxicated and pose a danger of harm to others⁴

F. Comparative Negligence: When Plaintiff Is Visibly Intoxicated Driver⁵

As I just mentioned, it is contended that plaintiff was negligent by becoming voluntarily intoxicated and/or by driving his/her car while intoxicated.⁶

⁴ *Ibid.*

⁵ These charges assume that the intoxicated person is the plaintiff driver or passenger. The charges should be appropriately adjusted if the intoxicated person is a defendant, third party plaintiff or cross-claimant.

⁶ The typical principles of comparative negligence will apply to joint tortfeasors in ordinary dram-shop actions as they apply in all other negligence cases involving joint tortfeasors. *Lee, supra*, 127 *N.J.* at 183-84. Accordingly, in the ordinary case the judge should not instruct the jury to determine the extent to which the person had retained some capacity to appreciate the risk of engaging in the activities that led to the incident. Instead, as the instructions in the text provide, there is a presumption that the intoxicated person lacked the capacity to evaluate the ensuing risks. However, there may be exceptional cases that require appropriate modifications of these instructions (*see* note 7 below).

It should also be recognized that there are types of conduct other than driving that may be the basis of the claimed liability or comparative negligence. Although the charge is modeled on a driving case, appropriate substitutions must be considered in those cases.

The *[name of licensed alcoholic beverage server]* is responsible for its conduct in serving alcoholic beverages to a visibly intoxicated person.⁷ An intoxicated person generally lacks the capacity to adequately evaluate his ability to drive. As a result, the tavern *[or insert other appropriate word to refer to type of licensed alcoholic beverage server]* is ordinarily responsible for the driver's decision to drive an intoxicated state. The defendant driver is, however, responsible for his/her conduct in drinking to the point of intoxication.⁸

You are to consider the negligence of *[name of intoxicated driver]* in becoming voluntarily intoxicated, the negligence of the *[name of licensed alcoholic beverage*

⁷ In *Fisch v. Bellshot*, 135 N.J. at 391, the Supreme Court held that the *Lee* presumption set forth in note 6, *supra.*, is inapplicable where “exceptional circumstances” exist. In those cases, a jury should be instructed to consider the extent to which the person retained some capacity to appreciate the risk of engaging in the activity that led to the accident. *Ibid.* In *Fisch*, the Court found exceptional circumstances when the decedent was the tavern’s bartender; she served herself despite the obligation not to drink while on duty; and her training and experience equipped her with an increased ability to assess the progression of intoxication and to understand the debilitating effects of excessive drinking. The question of whether “exceptional circumstances” exist is an issue of law for the trial judge. *Id.* at 392.

⁸ The Supreme Court in *Lee* noted a single exception to this rule. The Court stated:
[H]owever, under some circumstances an alcoholic may be a person who, in becoming intoxicated, could be excused from a failure to exercise reasonable care. (Citations omitted). 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. (*Lee, supra* at 185).

If there is a defense raised that the plaintiff is an alcoholic and that the tavern knew it, the charge should be amended to reflect this holding. If the plaintiff were to establish this defense, the licensed alcoholic beverage server would be strictly liable for serving a visibly intoxicated person or minor.

server] in serving a visibly intoxicated person and the nature and circumstances of the negligent operation of the vehicle. Based on all the relevant evidence you must allocate the responsibility for the negligent operation of that vehicle between [*name of intoxicated driver*] and [*name of licensed alcoholic beverage server*].

Cases:

The contributory negligence of the person served is not a bar to recovery under the statute or the pre-statute dram shop rule, although the plaintiff may be found to have been comparatively negligent. *See N.J.S.A. 2A:22A-6(a); Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582 (1966); *Lee v. Kiku Restaurant*, 127 N.J. 170 (1992). As to the effect on recovery of the negligence on an injured third party, *Aliulis v. Tunnel Hill Corp.*, 59 N.J. 508 (1971) held that, in the circumstances of that case (*i.e.*, the injured third party had no real choice but to ride with the intoxicated driver in order to get home), the injured third party's negligence was not a bar.

However, later cases have clarified these decisions by requiring that the jury be instructed on principles of comparative negligence *Buckley v. Estate of Pirolo*, 101 N.J. 68 (1985); *Lee v. Kiku Restaurant*, 127 N.J. 170 (1992).

This continues to be the state of the law under the statute. *See N.J.S.A. 2A:15-5 et seq.* (eliminating contributory negligence as a bar to recovery and applying comparative negligence to determine damages) and *N.J.S.A. 2A:15-5.2* (finding of facts regarding comparative negligence) should apply in all court actions under this Act. *Buckley* and *Lee* provide guidance on the specific elements of comparative negligence that should be charged under the statute.

G. Comparative Negligence: When Plaintiff Is Passenger

As I just mentioned, it is contended that plaintiff was at fault by becoming voluntarily intoxicated and thereafter riding as a passenger with an intoxicated driver, or by other conduct which might suggest that he/she was negligent.

The *[name of licensed alcoholic beverage server]* is responsible for his/her conduct in serving alcoholic beverages to a visibly intoxicated person. An intoxicated person generally lacks the capacity to assess adequately the risk of riding with an intoxicated driver. As a result, a tavern *[or insert other appropriate word to refer to type of licensed alcoholic beverage server in case]* ordinarily is responsible for the intoxicated passenger's decision to ride with the driver. The intoxicated passenger is, however, responsible for his/her conduct in drinking to the point of intoxication.

You are to consider the negligence of *[name of intoxicated passenger]* in becoming voluntarily intoxicated the negligence of the (name of licensed alcoholic beverage server) in serving a visibly intoxicated person, and the nature and circumstances of the negligent operation of the vehicle. Based on all of the relevant evidence, you must allocate the responsibility for plaintiff riding in the car driven by an intoxicated driver between the *[name of licensed alcoholic beverage server]* and *[name of intoxicated passenger]*.

H. Apportionment of Fault: When Plaintiff Is Victim of Assaultive

Behavior

NOTE TO JUDGE

The *Lee* presumption in the ordinary case under the *Licensed Server Liability Act* (see note 6, *supra*) is not applicable to the case of an assaultive patron. *Steele v. Kerrigan, supra* at 33. Instead, as the following instruction indicates, the jury should be instructed to consider the assaultive patron's capacity to initiate or refrain from volitional assaultive conduct, as well as other relevant evidence.

As I just mentioned, it is contended that the actions of *[name of patron who assaulted plaintiff]* caused the plaintiff's injuries. In this case, you must decide the extent to which *[name of licensed alcoholic beverage server]'s* negligence in serving alcohol to *[name of the patron who assaulted plaintiff]* contributed to the incident. You should apportion fault between *[name of licensed alcoholic beverage server]* and *[name of the patron who assaulted plaintiff]* on the basis of all the evidence, including the evidence of *[name of licensed alcoholic beverage server]* negligence in both commencing and continuing to serve *[name of the patron who assaulted plaintiff]*, evidence of *[name of the patron who assaulted plaintiff]* fault in deciding to consume the alcohol, evidence concerning *[name of the patron who assaulted plaintiff]'s* actual degree of intoxication and his/her capacity to determine whether to refrain from or initiate assaultive behavior, and any evidence of *[name of the patron who assaulted plaintiff]'s* predisposition to violence or other factors contributing to

the incident. In sum, you are to apportion fault between *[names of parties]* based on all of the evidence pertaining to each party's role in the incident.⁹

I. Apportioning Fault Where Claim of Comparative Negligence or Joint Tortfeasors (General Concluding Instruction)

Based on these instructions, if you find the plaintiff was negligent (or if you find that *[name of licensed alcoholic beverage server]* and *[name of other party]* to be jointly liable for plaintiff's injuries), then the licensed alcoholic beverage server (and other party, where joint tortfeasors) shall be responsible for no more than that percentage share of the total damages that is equal to the percentage share of negligence attributable to each of them.

⁹ *Steele v. Kerrigan, supra* at 34-35. Although *Steele* involved an underage patron, the discussion in the opinion is generally applicable to all patrons.