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## **CASE ALERT** March 27, 2008

### ***APPELLATE DIVISION PERMITS IMPOSITION OF LIABILITY AGAINST TAVERN FOR DRUNK DRIVING OF PATRON WHO WAS NOT SERVED ALCOHOL***

Last week a unanimous three judge appellate panel ruled in Bauer v. Nesbitt that a tavern has a common law obligation to prohibit an intoxicated person from driving, even if the intoxicated person does not consume alcoholic beverages at the tavern. Additionally, the court held that the victim of such an accident could pursue the tavern on the theory that the staff's failure to call a cab or otherwise secure a sober ride home was a proximate cause of the injury sustained.

Twenty-one year old Hamby went to a restaurant/tavern to drink with nineteen year old Nesbitt. Since he was underage, Nesbitt made no attempt to order alcohol. Instead he ordered soda and spiked it with alcohol that he snuck into the restaurant. He became loud and boisterous during the evening and the two young men left the tavern intoxicated in a car driven by Nesbitt. Nesbitt crashed the car, killing Hamby.

The Appellate Division first held that the restaurant had a duty to Hamby to ensure his safety by either calling him a cab or taking some other steps to make sure he was driven home by a sober driver.

More importantly, since Nesbitt was not served liquor directly, the court could not fashion a statutory remedy for Hamby based on the Dram Shop Act. However, the Appellate Division held that the Dram Shop Act did not pre-empt a common law claim of negligent supervision of Nesbitt. The court held that a jury could reasonably find that the restaurant negligently caused Hamby's death by failing to ensure that Nesbitt did not drive while intoxicated, since he had shown visible signs of intoxication while at the tavern. The fact that he was not served alcohol would not absolve the tavern of potential common law liability.

This decision is disturbing for several reasons. There is no reason to think that a court in the future will limit this rationale to bars or restaurants. There is no reason to think that a "BYOB" establishment would not be held to a similar standard. There is no reason to think that even an establishment where liquor is generally not consumed, such as a diner, would not be held to a similar standard. For example, many times patrons visit diners after nearby bars close. If the diner staff observe an intoxicated person, application of Bauer v. Nesbitt suggests an independent duty to investigate whether that person may drive a car and, if so, to prevent him or her from doing so.

Clearly, the court's rationale establishes a dangerous springboard for common law duties, which do not necessarily stop at visible signs of intoxication. The attorneys for the defendant restaurant have not yet decided whether to petition the New Jersey Supreme Court for review. We will keep you posted.