



**Drunks on the Highway.
Who pays?**

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Introduction

Every day victims and their families pay with their lives, well-being, and property for the poor driving and judgment of drunk drivers. But who pays the victims and their families? Certainly the drunk drivers themselves, but there are others upon whom liability falls under certain circumstances.

This paper explores who pays in West Virginia and under what circumstances, beginning with the impaired driver.

PUNITIVE DAMAGES AGAINST A DRUNK DRIVER

Rule: Punitive damages may be awarded against an at-fault drunk driver, because driving drunk is definitively reckless conduct. *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *Hensley v. The Eric Ins. Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981), *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982).

Rule: Proof of intoxication for the purpose of allowing punitive damages against a driver in a civil action does not require proof of blood alcohol content in excess of the statutory minimum required for proof of a criminal driving while intoxicated charge. *Wilt v. Buracker, supra*.

Rule: There is no public policy in West Virginia which prevents liability insurance coverage of an award of punitive damages against a drunk driver. *Hensley, supra*.

Caveat: There is no coverage for punitive damages if the liability insurance policy unambiguously excludes coverage of punitive damages. *Hensley, supra*.

Caveat to the caveat: If a liability carrier refuses to settle within the limits of its coverage when given a reasonable opportunity to do so, and punitive damages are awarded, the carrier might be required to pay the punitive damage award even if the policy unambiguously excludes coverage of punitive damages. See *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 776 (W.Va. 1990) in conjunction with *Carpenter v. Automobile Club Interinsurance Exchange*, 58 F.3d 1296 (8th Cir. 1995).

PASSENGER'S LIABILITY

Rule: Ordinarily a passenger is not responsible for harm to others caused by the drunk driving of the operator of the vehicle in which the passenger is riding. *Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987).

Exception: A passenger is liable for harm to others caused by the drunk driving of the operator of the vehicle in which the passenger is riding if the passenger's conduct substantially encouraged or assisted the driver in becoming drunk. *Price, supra, Wheeler v. Murphy*, 192 W.Va. 325, 452 S.E.2d 416 (1994).

Note: A passenger's encouragement or assistance to the driver can under certain circumstances be a "use" of the driver's vehicle which will trigger the availability of liability coverage from the passenger's automobile policy to the person injured by the drunk driver. *Johnson v. State Farm Mut. Auto Ins. Co.*, 190 W.Va. 526, 438 S.E.2d 869 (1993).

PASSENGER'S COMPARATIVE FAULT

Rule: In an action by a passenger against the drunk driver of the vehicle in which the passenger was riding, any comparative negligence of the passenger in voluntarily riding or continuing to ride in the drunk's car may be considered. *Price v. Halstead, supra*.

Caveat: There are instances where ascribing comparative fault to a passenger is contrary to logic and public policy. For instance, a designated driver is selected to stay sober. The others in the group get drunk and unknown to them so does the designated driver. By the time the others pile into the designated driver's car, they're too drunk to realize the designated driver is himself smashed.

SOCIAL HOST

Rule: Generally a social host has no liability for harm caused by an adult guest to him or herself or to an innocent third party, where alcohol is furnished gratuitously. *Overbaugh v. McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990).

Possible exceptions: A social host might be liable for harm to third parties if the host encouraged or assisted the guest to get drunk then drive. *Overbaugh, supra, Price, supra*. A social host might be liable for harm resulting from gratuitously supplying alcohol to a minor. See *Anderson v. Moulder, infra*.

EMPLOYER HOST

Rule: Generally an employer, as a social host, has no civil liability for harm caused by an adult employee to him or herself or to an innocent third party, where alcohol is furnished gratuitously. *Overbaugh v. McCutcheon, supra*.

Possible exceptions: An employer, as a social party host, might be liable to third parties if the employer encouraged or assisted the employee to get drunk, *Overbaugh, supra, Price, supra*; or the employer committed some other affirmative act toward putting the drunk employee on the road. *Robertson v. Lemaster*, 301 S.E.2d 563 (W.Va. 1983). An employer might also be liable for harm resulting from gratuitously supplying alcohol to a minor. See *Anderson v. Moulder, infra*.

Note: An employer, as a social host, might have workers' compensation liability to an employee who is injured while driving drunk after the social function.

PROVIDING ALCOHOL TO MINORS

Rule: The sale of alcohol to a person under age 21 provides a cause of action against the seller to the purchaser and/or a third party injured as a result of the sale. *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).

Caveat: The comparative negligence of a minor may be considered in an action by the minor against the seller. *Anderson v. Moulder, supra*.

SALE OF ALCOHOL TO THE INTOXICATED OR TO THE MENTALLY INCOMPETENT

Rule: The sale of alcohol to a person who is incapacitated by drinking or to a person who is mentally incompetent provides a cause of action against the seller to the purchaser and/or a third party injured as a result of the sale. *Bailey v. Black*, 183 W.Va. 74, 394 S.E.2d 58 (1990).

Caveat: The comparative negligence of an intoxicated purchaser may be considered in an action by the purchaser against the seller. *Bailey v. Black, supra*.

JOINT VENTURE, JOINT ENTERPRISE & COMPLICITY

Definition: A **joint venture** (joint adventure) is a contractual association of two or more people formed to carry out a single **business enterprise for profit** for which they combine property, money, skill, and knowledge. *Johnson v. State Farm Mut. Auto. Ins. Co., supra, Price v. Halstead, supra*.

Definition: A **joint enterprise** is an association of two or more people formed to carry out a single purpose which **is not a business enterprise for profit**. *Johnson, supra, Price, supra*.

Definition: **Complicity** is a doctrine which precludes a person who actively contributes to the intoxication of another from recovering from the intoxicated person for harm caused by the intoxicated person. *Anderson v. Moulder, supra*.

Rule: An agreement to travel together to a common destination or for a common social purpose is

insufficient to create a joint enterprise. There must be a common right to control the vehicle before a joint enterprise can exist. *Price, supra, Johnson, supra.*

Rule: Complicity is a doctrine tied to dram shop statutes. West Virginia does not have a dram shop statute. Therefore **the doctrine of complicity is inapplicable in West Virginia.** *Anderson v. Moulder, supra.*

Caveat: The comparative fault of a person who actively contributes to the intoxication of another may be considered in an action by the person who contributed against the intoxicated person. *Anderson v. Moulder, supra.*