

PENNSYLVANIA LEGAL UPDATE

FALL 2005 ISSUE

INJURED SKIER ALLOWED TO SUE SKI RESORT

An experienced skier who was injured when he was struck from behind by a snowboarder has won the right to sue a Pennsylvania ski resort. Pennsylvania law strictly limits the rights of skiers to sue ski resorts. The Pennsylvania Skier's Responsibility Act protects ski resorts from lawsuits, notes that skiing is an "inherently dangerous" sport, and holds that all skiers assume all risks associated with skiing. This "assumption of the risk" makes it almost impossible for skiers to sue a resort for a ski-related injury. Any time a skier is injured by an event that is an "inherent risk" of skiing, he or she has no claim against the resort.

In this case, the injured skier avoided the liability limits of the Act by focusing on the snowboarder's alcohol consumption. The skier claimed that the snowboarder was part of a high school group whose drinking in the parking lot and on the slopes was obvious and should have been controlled or prevented by the resort. Moreover, the injured skier maintained that the resort was generally aware of alcohol abuse by high school groups at the resort.

The Pennsylvania court agreed that the injured skier was entitled to his day in court. The court ruled that intoxicated snowboarders are not an inherent risk of downhill skiing. At trial, the injured skier will have to prove that the resort had reason to know that patrons were consuming alcohol while using the resort's ski facilities, and that the resort was careless in responding to the problem.

WORKERS' COMPENSATION UPDATE

Injured Workers Must Undergo Medical Exams

Employees who file workers' compensation claims must cooperate in medical examinations requested by their employers. Pennsylvania law entitles employers to send their injured employees for a "physical examination" or "expert interview" by health-care providers or other experts. Sometimes called "independent medical exams" or "IMEs," these examinations are often conducted by health-care providers or other experts who regularly contract with the insurance companies who are paying benefits to injured employees.

Employers and insurance carriers understandably want to know the precise status of an injured employee's condition. However, an injured employee often feels that the IME is not truly independent since the examiner is being paid by the insurance company. Some medical providers' sole source of income comes from conducting IMEs for workers' compensation insurance companies.

Recently, a nurse who suffered a shoulder injury refused to undergo further diagnostic testing as part of her employer-requested physical examination. The IME doctor concluded that the nurse was fabricating symptoms and he requested additional diagnostic testing to permit him to complete his evaluation. The nurse, who already had undergone two surgeries, MRI testing, and a bone scan, refused to undergo the additional MRI and bone scan requested by the IME physician.

The Pennsylvania Supreme Court ruled against her. The court found that the Workers' Compensation Act does not really define what a "physical examination" is, and that the medical community has generally defined it to mean a personal examination, not a diagnostic test. But the court also found that the availability of modern diagnostic testing cannot be ignored by the courts. The court decided that where an IME physician makes a reasonable request for a necessary test, an injured worker must cooperate or risk losing his or her benefits. Whether testing is reasonable or necessary is "inextricably related to the risk, intrusiveness and scope of the examination." Thus, a risky or painful diagnostic test may be one the employer may not demand.

While the court did not list what it considered to be reasonable and unreasonable

procedures, it did identify X-rays as noninvasive and observed that biopsies are considerably more intrusive. The court also noted that since injections are given in schools and in the workplace, an injection is not necessarily invasive. Likewise, blood testing, often performed in a physician's office by a technician, is neither invasive nor risky. The court found that an MRI and a bone scan are not intrusive or risky.

Physicians who regularly conduct medical examinations of injured workers for insurance carriers now know that they can request additional diagnostic testing as long as the testing is reasonable. Before challenging the obligation to cooperate, injured workers should seek legal advice and must appreciate that they may lose their entitlement to benefits if their refusal is not upheld in court.

ARE YOU LEGALLY LIABLE FOR SERVING ALCOHOL TO GUESTS?

What is your legal liability when you serve alcoholic beverages to your guests?

Pennsylvania law provides that social hosts have no legal liability to adults to whom they serve alcohol. Nor do social hosts have any legal liability to persons injured by an intoxicated adult guest. This freedom from liability exists even if it can be proved that the host had some reason to believe that his or her guest was intoxicated or that an intoxicated guest might drive. The Pennsylvania courts have explained that "the great weight of authority supports the view that in the case of an ordinary able-bodied man it is the consumption of alcohol, rather than the furnishing of the alcohol, which is the proximate cause of any subsequent occurrence."

What Is a "Social Host"?

"Social hosts" include both private individuals and companies that hold parties or social events. If a company holds a holiday party for its employees or serves alcohol at a business meeting, it is not responsible to the employees or third parties for any injuries that may result due

to intoxication. Likewise, where friends or family gather in private homes, the hosts are not responsible for the drinking of other adults.

Social hosts *are* legally liable to persons under the age of 21 to whom they knowingly serve alcohol, and they are also legally liable to anyone injured as a direct result of the underage drinker's intoxicated conduct. A social host is not solely liable for the consequences of an underage drinker's intoxication. Instead, the underage drinker's "contributory negligence" must also be considered in the litigation of any claims by the underage drinker or third parties.

Underage Drinking

Anyone under 21 years of age commits a criminal offense if he or she attempts to purchase, purchases, consumes, possesses, or transports any alcohol, liquor, or malt or brewed beverage, and an adult who furnishes any assistance is also criminally liable. A person commits a crime by serving any alcohol to a minor; it is not necessary that the minor have been served an amount sufficient to intoxicate him or her. Any person who serves minors "near beer" or mildly alcoholic beverages marketed as nonalcoholic is criminally liable. Most social hosts probably assume that furnishing beverages with just a trace of alcohol to minors is perfectly legal, but doing so is banned by the Pennsylvania Liquor Code.

Social hosts are not liable for serving underage drinkers unless they actually physically serve the underage drinkers or take substantial steps to assist someone else in organizing or providing liquor. It is only where social hosts know that minors are drinking or are "affirmatively negligent" that they are legally responsible. Social hosts can protect themselves by openly discouraging underage drinking, by clearly announcing that only adults may drink alcoholic beverages, and by stepping in and stopping any minor from drinking. Where a social host discovers that a minor has been drinking alcoholic beverages, the host should prevent the minor from driving. Dismissing a minor from a social event for drinking is risky, since his or her intoxication may not be apparent and sending the minor away may increase his or her exposure to danger.

Owners of property where alcohol is provided to minors are not legally liable if they had no actual knowledge that alcohol was being served and if there is no evidence that they were aware of, or had any involvement with, the party or event at which the minors were served. However, a social host who knowingly and intentionally allows premises over which he or she has control to be used for the purpose of consumption of alcohol by minors has created an unreasonable risk of intoxication of the minor guests. The social host may be liable for the minor guests' injuries or those caused to third parties if the use of the premises is a "substantial factor" in bringing about the intoxication of the minor guests.

A minor is considered incompetent under the law to handle alcohol and cannot be held liable as a social host for furnishing alcohol to another minor. Thus, where the social host is underage, he or she has no civil liability to anyone who is subsequently injured as a result of someone's underage drinking.

Finally, liquor license holders and their employees are not treated the same as social hosts. Licensees and their employees must refrain from selling liquor to any visibly intoxicated individual. Where a liquor license holder is found responsible for serving an intoxicated customer, he or she can be sued both by the intoxicated customer and by anyone injured by the intoxicated customer's negligence.

KNOW YOUR NEIGHBORS

The Pennsylvania State Police operate a Megan's Law website at www.pameganslaw.state.pa.us. You can enter your county or zip code in the website's search feature and view the names and photographs of individuals who reside in your area who are convicted sex offenders subject to Megan's Law registration.

The website also explains the history of Megan's Law. The dangers to children from sexual offenders are of ever-increasing national concern. Pennsylvania's Megan's Law website

can help you and your children know more about potential dangers in your own neighborhood.

RESERVISTS ARE ENTITLED TO VETERANS' PREFERENCES

Veterans are entitled to certain advantages when they apply for jobs that require Civil Service exams. Pennsylvania's Veterans' Preference Act provides that veterans who take any tests for employment or for promotion in public service jobs are entitled to the addition of 10 extra points to their test scores. The Act also requires that if the pool of applicants or employees who pass the test and are eligible for hire or promotion includes a veteran, the veteran must be chosen or promoted over the other candidates.

A reservist who was called to active duty following the September 11, 2001 terrorist attacks recently was granted an award of a veterans' preference and was hired as a police officer, only to face a challenge from another applicant. The unsuccessful applicant maintained that the reservist did not qualify as a veteran because he had not actually completed his reserve service and was not yet honorably discharged. The reservist *was* discharged from active duty but remained obliged to complete several years of his reserve commitment. The Pennsylvania court ruled that reservists who complete a period of active duty and are discharged from that active duty qualify as "soldiers" under Pennsylvania's veterans' laws and are entitled to veterans' preferences even if they still have reserve duty to complete.

If you or any members of your family served on active duty due to a reserve call-up, be sure you know about the veterans' preference laws. The laws are designed to reward veterans "for the discipline and experience represented by military training and for the loyalty and public spirit demonstrated by service for the preservation of the country." In recent years, many reservists have ably fulfilled their military obligations, and Pennsylvania public service employers must give them their well-deserved veterans' preferences.

AUTOMOBILE INSURANCE

“Cars for Hire” Exclusion

A Pennsylvania mother who was injured when a pizza delivery employee backed into her and her infant daughter was frustrated to learn that the pizza driver’s insurance company could deny coverage for the accident.

Pennsylvania automobile insurance policies include an exclusion commonly called the “cars for hire” exclusion. When a driver is using his or her car to transport people or property for a fee, the personal insurance policy on the car does not cover the driver for any negligence. If you use your car to deliver products or materials for your employer, or if you accept money from others to drive them to their destination, your insurance company can refuse to pay the damages that may result from your unintended careless driving.

Be sure that your employer has complete coverage for you and your vehicle before you use your own car to make work-related deliveries. Do not operate a private taxi service with your car—doing so not only violates the terms of your insurance policy but violates Pennsylvania’s laws that govern taxi services. If a friend occasionally needs a ride, do not accept any money for the favor. Any time you are paid to drive someone, you put your insurance coverage at serious risk, and using your car regularly to transport people for pay is a summary crime if you are not licensed to operate a taxi service.