

## **Does *F.F.P. Operating Partners, L.P. v. Duenez* Effectively Kill Third Party Dram Shop Liability?**

By Andy Payne<sup>1</sup>

In 1987, the Texas Supreme Court in *El Chico v. Poole*,<sup>2</sup> first imposed a duty on alcohol providers to not serve persons “it knows or should know are intoxicated.” In addition, the *Poole* court relaxed proximate causation requirements, thereby making dram shop claims viable for the first time.

Only one week after the Court’s decision in *Poole*, the Legislature’s Dram Shop Act became effective.<sup>3</sup> The Legislature made the Dram Shop Act an exclusive remedy for dram shop claims. The Act increased the plaintiff’s burden on liability by requiring proof of “obvious intoxication” and proof that the drunk was a “clear danger.” The Act also afforded the defendant a safe harbor. Finally and significantly, the Dram Shop Act tied proximate causation, not to the dram shop’s conduct, but to the drunk’s intoxication.

The Dram Shop Act’s treatment of causation was significant because as Justice O’Neill’s dissent in the most recent *Duenez* opinion, other courts and the common sense of any trial lawyer concludes, when apportioning fault among the conduct of the parties, “juries are likely to assign most, if not all, of the responsibility...to the intoxicated patron” rather than the dram shop.<sup>4</sup> But by tying proximate causation to intoxication instead of the dram shop’s conduct, the thinking—until the Supreme Court’s recent decision—was that the dram shop was liable to third parties for the drunk’s intoxicated actions, which caused injuries. As a practical matter, tying causation to intoxication, rather than to the dram shop’s conduct, continued the viability of third party dram shop claims.

On September 3, 2004, the Texas Supreme Court issued its first opinion in *Duenez*.<sup>5</sup> In that opinion, the court held that the Chapter 33 Proportionate Responsibility Statute applied to dram shop claims such that the jury should allocate fault as between the drunk and the dram shop.<sup>6</sup> However, this first opinion allowed the plaintiff to recover

---

<sup>1</sup> Andy Payne is Board Certified in Personal Injury Trial Law and is the founder of Payne Law Group. Andy’s plaintiff’s personal injury practice is focused on product liability, aviation and other catastrophic personal injury cases. Andy also is an instructor of Products Liability at SMU Dedman School of Law and a frequent author and lecturer.

<sup>2</sup> 732 S.W.2d 306, 314 (Tex. 1987).

<sup>3</sup> See TEX. ALCO. BEV. CODE § 2.02.

<sup>4</sup> *F.F.P. Operating Partners, L.P. v. Duenez*, No. 02-0381, 2006 WL 3110426 (Tex. Nov. 3, 2006), at \*19 (hereinafter “*Duenez II*”).

<sup>5</sup> *F.F.P. Operating Partners, L.P. v. Duenez*, No. 02-0381, 2004 WL 1966008 (Tex. Sep. 3, 2004), at \*1 (hereinafter “*Duenez I*”).

<sup>6</sup> *Duenez II* at \*19

from the dram shop both the percentage of fault assigned to the dram shop and the percentage of fault assigned to the drunk. The rationale for this holding was that the Dram Shop Act imposed liability on the dram shop not only for its own actions but also “for the actions of their customers...who become intoxicated.”<sup>7</sup> This holding was also consistent with the Dram Shop Act’s tying of proximate causation to intoxication rather than to the dram shop’s conduct. Finally, the first *Duenez* opinion points out that the legislative purpose of the Dram Shop Act would be eliminated if it were read to not make the dram shop liable for the drunk’s intoxicated actions.<sup>8</sup>

But, the defendant in *Duenez* filed a motion for rehearing, which as Justine O’Neill points out in dissent “raised no new issues; every point was thoroughly considered by the Court” in its first opinion.<sup>9</sup> While the motion for rehearing was pending, the legislature convened but took no action to disturb the first *Duenez* opinion’s interpretation of the Dram Shop Act. The only thing that did change was the makeup of the Texas Supreme Court. Between the time the first opinion was issued and the time rehearing was granted, three members of the five member majority in the first *Duenez* opinion left the Court. The new Texas Supreme Court withdrew the first opinion, reached the opposite result, and in the words of Justice O’Neill’s dissent “accomplished judicially what the legislature itself declined to do.”<sup>10</sup>

On November 3, 2006 the Texas Supreme Court withdrew its prior *Duenez* opinion and issued a new opinion regarding the interplay between the Dram Shop Act and the Proportionate Responsibility Statute.<sup>11</sup> A synopsis of the facts and holding of this latest opinion are set forth below.

Robert Ruiz consumed a case and a half of beer before making a beer run to a convenience store owned by the Defendant. The assistant manager of the defendant’s store, Carol Solis, sold Mr. Ruiz a twelve pack of beer. With a freshly opened beer between his legs, Mr. Ruiz drove a short distance before crashing head-on into the Duenez family vehicle. The entire Duenez family of five was injured. Mr. Duenez suffered permanent brain damage and nine year old Ashley Duenez will require round-the-clock care for the rest of her life due to the severity of the injuries she sustained. The first *Duenez* opinion affirmed the jury verdict awarding the Duenez family \$35 million dollars. The second *Duenez* opinion reversed the judgment and remanded the case.<sup>12</sup>

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*30.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*1.

<sup>12</sup> *Id.* at \*12.

The majority's rationale is that imposing liability on the dram shop for the conduct of the drunk conflicts with the Proportionate Responsibility Statute. The Court points out that a dram shop should only be held jointly and severally responsible if it is greater than 50 percent responsible.<sup>13</sup> Further, the court notes that a fundamental tenet of tort law rests on the premise that liability stems only from one's own conduct. Finally, the court reasons that the Dram Shop Act's intent to deter providers from serving obviously intoxicated individuals is still being accomplished because, among other reasons, the provider is still subject to having its license to serve alcohol revoked.

The author believes that the majority wholly failed to adequately explain how the Dram Shop Act requires a dram shop's exposure be limited to the proportionate share of injuries its conduct causes, when the statute itself specifically ties causation not to the dram shop's conduct, but to the "intoxication." This author's opinion is that Chief Justice Jefferson's dissent provides the better reasoned analysis.

Whether you agree with the majority's legal rationale or logic, the practical impact of the opinion cannot seriously be debated. When the jury is called upon to make an apportionment between the drunk (Mr. Ruiz who drank more than a case and a half of beer, pleaded guilty to intoxication assault, and is in jail) and a convenience store clerk (Carol Solis), the almost certain result will be the apportionment of most, if not 100% on Mr. Ruiz. This same apportionment is the most likely result in any case where the plaintiff can prove (as it is required to do) that the patron is "obviously intoxicated." Without the dram shop being responsible to pay for damages caused by "intoxication," but only being responsible to pay the percentage assigned to their conduct that caused injury, plaintiffs now have no real recourse against dram shops. Why are jury trials in Texas diminishing? For dram shop cases, the answer is now easy: *Duenez* has effectively killed third party dram shop liability in Texas.

---

<sup>13</sup> *Id* at \*6-10.