ORAL ARGUMENT – -3-5-03
02-0381
FFP OPERATING

MCMAINS: This case involves a recovery under the dram shop act submission in the court resulting in somewhat of a $40 million plus judgment solely directed against the alcohol provider. Which the CA in our contention briefly summarized erroneously affirmed the TC's summary judgment, and its erroneous charge based on the claim of inapplicability of the Texas Comparative Responsibility statute.

O'NEILL: Let's say it applies. The TC erred in not submitting the driver's negligence. And the jury enforces the driver's negligence. Isn't the provider then still responsible for the driver's negligence?

MCMAINS: No.

O'NEILL: Now the statute says liable for the actions of their customers. How do you get around that?

MCMAINS: Because the statute also says that it does not impose any greater liability than is required by the statute, and the statute requires that there actually be a submission and determination.

O'NEILL: I understand. But to me those are two different things. There is the apportionment, which I can understand scenarios where that could make a difference in a case. But you have to admit there is some vicarious element here or direct liability here under - then what is liable for the...

MCMAINS: Not in vicarious liability.

O'NEILL: I understand not vicarious direct liability. Let's call it...

MCMAINS: There is direct liability. There is direct statutory liability under the statute. What is imputed is causation. That's what this court held in Steak & Ale v. Borneman.

O'NEILL: I'm not sure I understand. Liable for the actions of their customer means that they are not liable for the driver's negligence?

MCMAINS: You see driver's negligence is not pertinent to the actual statute. Driver's intoxication must be a proximate cause in order impute causation. But there is no requirement under the statute to submit the driver's negligence. There is a requirement to submit the specific components of the claim under the statutory dram shop provisions against the provider.

O'NEILL: But I'm confused as to what the language "that you are liable for the actions of your customer" means if it doesn't mean you're liable for their...

MCMAINS: That's just general abstract language. It can't possibly mean that it is vicariously liable. Only the idea that you can justify the nonsubmission and the limitations with regards to joint and several liability that are imposed by the comparative responsibility statute.

O'NEILL: I'm not arguing about the submission. I'm saying let's say that it needs to be submitted.

MCMAINS: Which does have an affect on the judgment.

O'NEILL: I still don't understand. Even if a certain percentage is apportioned to the driver it still seems to me the language requires that the provider pay the driver's portion.

MCMAINS: No. I don't believe that's true.

O'NEILL: Then what do you think that language means? Liable for the actions of the customer?

MCMAINS: What that means is - actually consistent with what the court had said that it means, which is that in Houston v. Love, citing §203 of the act, that this chapter is in lieu of any other law. It says this chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter. It does not expressly state that they are vicariously liable for the negligence - vicarious liability is not mentioned in the statute.

O'NEILL: I'm not asking that. I'm asking what does the language mean: liable for the actions of their customer?

MCMAINS: What it means is it is a basis through which proximate cause can be established against a provider. That basically does nothing but represent the legislative determination that establishing that the intoxication of the driver or the intoxication of the individual customer was in fact the proximate cause, is all that is necessary. It doesn't require that there be negligence even or a negligence determination on the part of the driver. It's not an imputation of liability. It's an imputation of causation only. It's designed to meet the causal nexus.

O'NEILL: Even though it says liable?

MCMAINS: Certainly. Because the entire purpose of the statute is to say this is the only liability that you can have.

O'NEILL: But another purpose of the statute is to protect people from drunk drivers and put the onus of providing that protection on the provider irrespective of the driver's negligence. One

purpose of the statute.

MCMAINS: One purpose of the statute is to protect people, including the drunk himself as this court said in Smith v. Sewell.

O'NEILL: And making the provider liable for the customer's actions would promote that purpose.

MCMAINS: Again, they are liable but only under the conditions in the statute. That is, they must have sold to an obviously intoxicated individual as a prerequisite to liability. They are not liable for all negligence that has nothing to do with their intoxication. They are only liable insofar as that aspect of the liability is submitted. There isn't even a requirement to submit the negligence of the driver and it was of course was not submitted in this case over our strenuous objection.

This does not impose vicarious liability. It imposes causation or imputes causation.

O'NEILL: You're saying not damages. The provider is not liable for the driver's percentage of the damages awarded?

MCMAINS: No. Because the comparative responsibility statute assuming as you started with your question applies. It says that we shall be liable, any person submitted under the comparative responsibility statute is liable only for the percentage determined by the jury unless they are for taking the position that we're going to impose joint and several liability. That would enhance the obligations of an alcohol provider directly contrary to the provisions of the statute itself in ch. 2.

O'NEILL: So if the jury found the driver was 90% negligent or apportioned 90% on the driver and 10% on the provider, the provider only has to pay the 10%.

MCMAINS: Correct.

O'NEILL: I don't see how that promotes liable for the actions of the customer. That seems to fly in the face of the plain language.

MCMAINS: What the plain language of the statute is that they shall be liable only in accordance with the statute. And the liability issues were in fact submitted in this case. They were the liability of the providers with regards to their conduct. And it's only a regulation of their conduct and what the thing actually say is that the duties owed are only as provided in this chapter. And that duty does not in anyway relate or implicate to vicarious liability. The word vicarious liability is nowhere mentioned in here. When the comparative responsibility statute was amended in 1995 it specifically had the same language with regards to the comparative responsibility provisions in it and the percentage of responsibility determinations in it. It was broadened to include all torts of any kind

universally with the exception of two that don't have any application here. One was exemplary damages and worker's compensation type cases. Other than in those two cases the comparative responsibility statute applies. Period. Liability is determined under ch. 33.0112 and .0113 based on the percentages assessed by the jury and it is an attempt to exonerate and exclude joint and several liability except in the one situation where an individual is more than 50% at fault. And in that situation then there is joint and several liability imposed. And there are a couple of others in relation to toxic torts which have no application here.

Apart from that there is in fact no basis whatsoever for imposing joint and several liability. That would expand the liability of the provider beyond the specific limitations of ch. 2, which say that you can't expand it any further. That this is all the duty that is owed. The only real issue and the - that's just an isolated segment of the statute. The actual applicable part of the statute is this is what the statute said in §2.01, etc. The statute says that he shall not provide alcohol to a person, customer, or whatever, a licensee under the statute, who is obviously intoxicated. Those elements have to be submitted. The basis of liability are established by this court in Borneman. And their responsibility shall not be expanded beyond those duties. It is the issue of duty that is dealt with here, not any kind of imposition of vicarious liability. And there is no justification for holding that.

It's not conceivably consistent with Smith v. Sewell. Because if in fact the liability that were imposed were "purely vicarious", there could never be a recovery by the individual who is intoxicated. Principals of circuitous indemnity would preclude it because we would be entitled to under - in fact the CA's expressed determination while it attempted to distinguish Smith v. Sewell on a rather strange basis. If in fact the interpretation were to be applied uniformly that is argued by the plaintiffs in this case, then in fact it would make Smith v. Sewell wrongly decided.

Smith v. Sewell specifically held as a matter of fact not limited as we argue. But rather to the contrary indicated that it was in fact universally applicable. The concluding part of the CA's opinion in Smith v. Sewell is because ch. 2 clearly establishes a legal standard and creates a cause of action for conduct violative of that legal standard, and it's the legal standard that we were talking about, that definition of percentage of responsibility provides additional support for our determination that the comparative responsibility act is applicable to ch. 2, causes of action. Period. Not ch. 2, causes of action brought by the drunk itself only. This arbitrary attempt to distinguish between first party and third party type claims is silly on the face of the statute. It cannot be reconciled with the plain language of the statute. It violates virtually every conceivable statutory construction principle imaginable. They have to rewrite the statute to accomplish that result.

Indemnity cannot be a justifiable basis for failing to submit the percentage responsibility issue. In this case there cannot be an entitlement to indemnity. That in fact would militate against the principles that were intended by the statute which was to make the providers potentially liable.

OWEN: Is it possible that Smith was wrong? Hard cases make bad law.

MCMAINS: I don't believe so. Because Smith was based on two things. One, is, that the standard that we're talking about is that there must be some objectively, verifiable that the person is obviously intoxicated such as to present a danger to himself or others. The statute was clearly designed to protect the drunk as well. The comparative responsibility statute language that existed in 1995 is the same language that was interpreted by the court in Smith v. Sewell. In terms of whether the percentage of responsibility shall be submitted.

So it's the same language. It's the same basis for the holding.

PHILLIPS: My question is, is there a possibility that Smith - you say you can't draw a distinction between Smith and this case on the language of the statute. But might Smith have been wrong and the plaintiff here that...

MCMAINS: We don't believe that Smith was wrong. It certainly could not be wrong in the context of trying to in some way allow when this legislature changed in 1995 the comparative responsibility statute to specifically authorize the bringing of responsible third party actions. The sole question is does the drunk have any potential liability to the plaintiffs in this case because who caused the accident? Yes, he does. If he does, he's a responsible third party under the statute.

ENOCH: The argument by MADD is that one of the primary purposes of the dram shop act was to provide deterrence meaning that they wanted to deter dram shops from serving alcoholic beverages to people who go out and drive while they are drunk. Is there some basis to determine that ch. 2.02 that creates the cause of action was designed to impose liability on the dram shop as a deterrent greater than tort actions generally provide a deterrent in that it requires the actor to pay for the damages they've caused if they commit the _____?

MCMAINS: We don't believe that there is. We think that actually the deterrence notion is the real thing that the passage of the act and its application in terms of the specific requirements on causation. What it does do is to basically say it doesn't matter that there is no proof as in ordinary cases, that your additional intoxication or additional beverages necessarily enhanced the likelihood of there being an accident. So there is actually an expansion of liability to the dram shop defendant that would not ordinarily be applicable in ordinary cases based on the imputation of causation that is provided in the statute.

But that in no way and no place could the alcoholic beverage code provisions in ch. 2 or otherwise support the notion that the statute was designed to insulate drunks from potential liability, or to require the entire risk shifting to the drunk from the dram shop defendant, which is what would be required in an indemnity context as held by the CA. There remains liability on the part of the dram shop provider assuming that the findings are made by the jury.

O'NEILL: Let's say I would agree with you that the indemnity piece doesn't quite fit here. But to me not calling it vicarious liability which gives you indemnity, but calling it direct liability that needs to be submitted sort of fits very neatly within what appears to be the purpose of

the statute. And that is, if the driver's negligence is supposed to be submitted to the jury and the jury finds say 30% negligence on the driver, and the dram shop is responsible for the driver's 30%, the dram shop can go get the driver for contribution but not indemnity. So that seems to further the purpose of the statute and that is not to let the dram shop off the hook, but still to require the driver if he can pay to shoulder some of the responsibility, but if he can't the dram shop seems to have put the onus on the dram shop to take over that liability.

MCMAINS: Based on your hypothetical, the 70/30 split imposes joint and several liability anyway.

O'NEILL: I understand that. And that's what I'm saying. It seems to me that if you go under that construct that it must be submitted under the comparative statute, but the dram shop is still directly liable and could get contribution from the driver, if that is the construct that would apply here, then what the TC did in this case would be harmless error.

MCMAINS: No. Absolutely not. They granted summary judgment that the comparative responsibility statute did not apply. We are entitled to the attempt to defend against joint and several liability. The 95 statute specifically says that we are entitled to that. And there is no legitimate basis whatsoever to interpret ch. 33 any other way. Dram shop actions are not excluded from its application. Limitations on joint and several liability that are part and parcel of the 1995 tort reform amendments to the comparative responsibility statute do not authorize the imposition of joint and several liability further than the statute applies generally, which is what in essence your honors argue that it should.

* * * * * * * * * *

RESPONDENT

GRIFFIN: You have before you the three authorities that govern this appeal. And J. O'Neill's question to my opposing counsel is what is the meaning of the authority that's on the left hand of the handout, which is §2.03 of the Texas Alcoholic Beverage Code is very important.

ENOCH: Is 2.03 the statute we look to determine the nature of the cause of action against the dram shop?

GRIFFIN: It's the legislature's own description of that. So yes.

ENOCH: The description says that the liability under the chapter. So my question is, is 2.03 the provision that establishes the cause of action against the dram shop?

GRIFFIN: The elements, no. That is the term the legislature used in describing its own scheme for governing providers of alcohol.

ENOCH: So you would agree that the provision that creates the cause of action against

the dram shop is actually 2.02?

GRIFFIN: It is.

ENOCH: Section 2.03 is simply a description by the legislature of what 2.02 - was just a description of what they were doing in 2.02?

GRIFFIN: Precisely.

ENOCH: So if we are to find that the dram shop was to be liable for the conduct of the drunk, then it has to appear in 2.02, because 2.03 said that there is no other claims against the dram shop except what was established by 2.02?

GRIFFIN: Section 2.02 does no more and no less than tell the elements. The first element they sell to an obviously intoxicated person to the extent they are dangerous.

ENOCH: But section 2.02 said you have a cause of action through these elements?

GRIFFIN: Precisely. Those are the two elements.

ENOCH: And 2.03 said you have no other cause of action except what's established in 2.02?

GRIFFIN: You are. But you're ignoring the legislature's description of what those two elements mean.

ENOCH: But the description is limited by the very cause of action that's created by 2.02 isn't it?

GRIFFIN: There's only two elements. And their descriptions of those elements, and one of the elements don't have a cause in fact element between the sale and the crash. The elements are an illegal sale, and then the intoxication of the customer causes the crash. They are liable for that. They admit in their brief, on page 6 of their reply brief, we need innocent members of the public like the Duenez family who don't have to show that the sale was a cause, a but for cause or a proximate cause of the crash.

So all 2.03 does is recognize precisely what ch. 33 says, that they are liable for the acts of their customer because the dram shop has not caused the crash. Under the common law the drinking of alcohol was always the cause of the crash and not the sale of that alcohol. The legislature with MADD's help enacted a statute making the dram shop liable for the actions of its customers by leaving out a cause in fact element. And at least twice on page 6 of their reply brief they concede that. On page 5 they concede we need not show that the sale was a proximate cause of the wreck. And on page 6 they admit we need not show that it even was a cause in fact.

ENOCH: Your argument is by looking to 2.02 that's a clear expression by the legislature that this was not to be considered in conjunction with the proportionate responsibility statute?

GRIFFIN: Exactly. Because the middle statute on the handout, ch. 33, tells us which parties are submitted in apportionment. And there's a big disconnect that we've had with Mr. McMains. He's wasted half his brief on the argument that apportionment applies in dram shop cases. It certainly does. It will apply every time there is more than one cause of the crash. Here there is but one cause of the crash. That's the intoxication of the patron. And if we look very carefully at art. 33.011, the definition that the legislature has provided to us for a percentage of responsibility is this: how much a person has caused or contributed to cause the harm for which damages are sought. We don't submit and ask juries to submit people who are not the cause of the crash.

HECHT: The same argument could be made in Smith v. Sewell.

GRIFFIN: The parties didn't do the court any favors in Smith v. Sewell by citing the court to the language "causing or contributing to" cause; and more importantly, the court never discussed and nobody asked the question, if the legislature has made providers liable for the actions of their customers, the obvious question is liable to who. The answer is innocent third parties.

HECHT: But it seems to me you have to argue that Smith v. Sewell was wrong.

GRIFFIN: Oh heavens no. In Smith v. Sewell, the court - I take disagreement with my opposing counsel in calling the distinction silly between innocent third parties and intoxicated people. I say that because this court in the final paragraph of that opinion did just that.

HECHT: Of course there are differences. But there are no differences in 2.02 or 2.03. You can see an obvious difference in that. If you are writing a statute you might say, oh yes this will treat this one differently.

GRIFFIN: No argument there. The statutes have not been changed. But unfortunately no help to the court the parties were. They didn't brief nor did the court discuss what 2.03 means as it relates to the nature of the liability.

HECHT: We can blame them. They are not here. If 2.03 means what you say it does in this case doesn't it mean the same thing in Smith v. Sewell?

GRIFFIN: Sure. Had the court had the benefit of the briefing and been able to address §2.03, which it didn't in that first party case, as CJ Phillips said, sometimes bad facts can make bad law. It's a disservice to the court to say that the court was attempting to construe this statute for innocent third parties when the court in the first paragraph of the opinion states that it's limited to its facts. Second in the opinion it notes that its holding is limited to the unique circumstances present in the case. And then of course the last paragraph which we think clearly makes it clear that the

Smith court was not trying to interpret statutes not before it, and arguments that were not before it when it says the statute was passed to deter the disastrous consequences of alcohol permit holders selling to people who are already intoxicated. But then the court goes around and says, but when it is the intoxicated patrons suing his own provider, we think by gosh he ought to be responsible.

O'NEILL: What's wrong with requiring of comparative submission? The statute as you read it does provide direct liability for the customer's actions. What's wrong with submitting the customer's percentage of responsibility so that the dram shop can then go back and collect from the customers if they are a deep pocket?

GRIFFIN: The first impediment we have to that is the statute. Before a party can be submitted they have to have caused or contributed to cause the crash. The dram shop under this statute is not a cause.

OWEN: It's your position if he had put the beer in his truck and didn't ever open a can of it, and he had driven on the bridge, the fast food place would still be liable?

GRIFFIN: It's our position and there's. They conceded that. That's exactly what it means. The legislature intended to draw a line. It says to an alcohol permit holder, when you sell to someone who is obviously intoxicated to the extent he's dangerous, we're not going to try to unscramble the egg and make an innocent member of the public show that that obviously dangerous person got even drunker by the additional alcohol. That would render the statute virtually meaningless. Because the drunk is already so dangerous under the strict standard in 2.02, that it would be virtually impossible to ever get any answer other than the drunk caused the crash. Because he did.

O'NEILL: Presume that we say that the comparative responsibility statute does apply, that we disagree with your premise. What would be wrong with that in this context? What would be wrong if we have a deep pocket drunk driver, who the jury finds is 80% responsible, putting the liability on the provider but allowing them to get contribution from the drunk driver? What's wrong with that construct?

GRIFFIN: The statute number 1, because the statute only permits people to be submitted who are a cause of the crash.

O'NEILL: The premise of my question is if we don't buy your argument on that, that we say the comparative responsibility still applies in terms of that. What's wrong with the result? Why doesn't that fit every need? It allows some responsibility on the driver's part. Under your reading, the dram shop would be liable and could get nothing from the driver is that right?

GRIFFIN: I do not agree with that. Chapter 32 of the Civ Pract & Rem Code has a contribution scheme that perhaps might allow the dram shop who paid a judgment to us to go get paid...

O'NEILL: I guess what I'm saying is, if you don't do the indemnity paradigm that vicarious liability produces, if you just did direct liability with contribution in this context, why doesn't that serve all purposes? Because then the provider is still liable for their own percentage of responsibility which addresses the dram shop - the statute is concerned, the driver is responsible for their percentage of responsibility, the dram shop has to take over that piece of the responsibility if the driver can't pay it. But if the driver can they bear the cost of their own negligence. So why doesn't it fit perfectly and it includes joint and several liability in certain - based on the percentages. I don't see why that would not be a reasonable construct.

GRIFFIN: I think it is a reasonable construct. Your question involves solely the relationship between the drunk and his own provider? Am I right?

O'NEILL: Yes.

GRIFFIN: Then I think your construct is perfectly fair. I want to try to be as clear as I can. We do not disagree that apportionment, ch. 33, applies to dram shop cases, but it only applies according to its terms. Once we agree that ch. 33 applies to art. 2 of the Alcoholic Beverage code, the next question that we have to ask is, who is submitted under ch. 33? And they would like to be able to apportion between culpability, blameworthiness, egregiousness, but the legislature has defined how we are going to submit people under ch. 33. And they have recognized in their brief the reason why the innocent members of the public don't have to prove that but for the sale of alcohol this crash would have never happened is because it will be well nearly impossible to show.

HECHT: In Smith v. Sewell you say we were done a disservice. We didn't consider what we should have considered. The factual situations are totally different, but you won't say it's wrong. And you say here that ch. 33 applies. It just doesn't require anything.

GRIFFIN: I don't believe I ever said it was not wrongly decided. We believe that the court erred in finding first party liability. But that's not governing this case.

HECHT: You say ch. 33 applies. It just does not affect the case.

GRIFFIN: Ch. 33 would apply if there were more than one driver who contributed to the cause of this crash. The dram shop would only be liable for the actions of its drunken customer and not the actions of any other party who was a cause of the crash. But we don't submit, and juries can't submit. And I would ask this question of my opposing counsel how would a jury ever submit - I mean apportion...

OWEN: How can you sit here and a drunk driver is not a cause of the act?

GRIFFIN: He's the sole cause.

OWEN: But he is a cause within the meaning of this ____ language. The fact that the

dram shop is also liable does not take him out of the causation.

GRIFFIN: He's the only cause. I misspoke if I said he's not the cause. In every case the intoxication of the patron is the cause of the crash. What I'm saying is we don't submit the dram shop as a percentage...

SMITH: What if the dram shop is factually a cause that it's sale of the alcohol is the reason that puts this person over the top. He's intoxicated, so he's got some measure of control. But they sale alcohol and the customer consumes it and that's what makes him completely unable to control his actions. Then would the dram shop be submitted?

GRIFFIN: They wouldn't be liable because they would not have sold to him at a time when he was already intoxicated and obviously dangerous.

SMITH: Assume that there are distinctions that could be made. Somebody is obviously intoxicated but that person has demonstrated an ability to get down the road. But you sale and put him over 2.5 or .025 to such an extent that there is just no ability whatsoever for him to even know where he is, control in any respect. Would that be sufficient to submit the dram shop?

GRIFFIN: No. The legislature decided in its policy making perogative that Texas would enact a dram shop statute like Iowa, Alaska that did not require the plaintiff to show that the additional alcohol caused the crash. Because that would very nearly be impossible.

OWEN: Those are two different inquiries aren't they? I mean it's one thing to say you don't have to show that one drink put him over the line, or two drinks put him over the line. It's another to say you're completely substituting in the dram shop for the drunk driver.

GRIFFIN: The dram shop under our statute does not cause the crash in anyway. The plaintiff need not show that. Because they would be unscrambling an egg...

OWEN: I agree with you that you don't have to show the unscrambling of the egg. But that's a different inquiry from saying you completely substitute the liability of the driver and the dram shop totally subsumes liability of the driver.

GRIFFIN: When we talk about the language the legislature used in describing the statute, that is that they are liable for the acts of their customers, that's exactly what that means. We can use terms like direct liability. In other words the legislature has used terms in 6132, the partnership statutes having vicarious liability of the partner for the other partners. We have it in joint and several. We have in master and servant. The words the legislature used here simply says plainly that this act provides for liability of the alcohol sellers for the actions of their customers. Their argument here is plain and simple. And let's be straight here. They want to argue the opposite of that. They want to say we're only liable for our own acts and our own percentage. We are not liable for the drunk's conduct.

ENOCH: Under ch. 33 what you are submitting is blanks for the jury to assess the percentage of their causation of the event. It's defined in terms of a person causing or contributing to cause. So you put a percentage in there. If the dram shop act imputes the driver's causation element, they sell the alcohol to a person they know is drunk, then ch. 2 of the dram shop act imputes the driver's causation to the dram shop for the damages they cause. It would not make sense under the proportionate responsibility statute to put two blanks for causation because by definition under the dram shop the causation of the driver's imputed to him. So it would come out 100% because you impute the causation of the driver. Because it's the causation element of the driver that's imputed to the dram shop, under the dram shop act it would not make sense to submit a proportionate responsibility question to the jury because a proportionate responsibility is supposed to be assessed on the jury's determination of the percentage of that person's act that was a cause of the injury.

GRIFFIN: Here, Mr. Ruiz, the drunken patriot that's right.

ENOCH: But ch. 33 is a very broad statute. It says you're going to be submitting blanks on proportionate responsibility even where the jury has not determined the same types of causation. It has products liability. It has negligence. It has any other activity that violates an applicable legal standard and any combination of these. And so the causation percentages in those blanks wouldn't necessarily be representative of actual causation. It might be a percentage of producing cause. It might be a percentage of proximate cause. It might be some sort of other causation standard the legislature determines. Isn't the language of ch. 33 broad enough to anticipate that the dram shop would be submitted as well even if as you say we're imputing causation, because ch. 33 isn't dependent on a similarity of causations?

GRIFFIN: The only problem I see with your question is the barrier to that is the statute. Because the statute takes the factors the jury considers in apportioning it. It's not based upon culpability or the different types of conduct. What you have said was the different types of conduct are ones that are encompassed in the statute. That doesn't help us in answering the questions that once we determine that this cause of action is under the statute, who is submitted. They carefully chose the language causing or contributing to cause, and rejected legislative language that would apply apportionment on other methods other than causation. They rejected that and stuck with causation as the definition. And I think that they have a duty to the bench and to the bar to explain to this court and to the other courts of this state how it would work to try to apportion between imputed cause, which they admit on page 7 of the brief on the merits, the causation of the drunk is imputed to them 100%, how a jury would ever apportion between the imputed cause and the real cause. The drunk's intoxication was the 100% cause of this terrible crash. And that causation in their brief is imputed to them. How would a jury ever intelligently answer a question like that in light of the legislature's definition.

OWEN: You're saying 100%. It seems like there's still a middle ground for contribution purposes. That even though the dram shop may still be liable for 100% of the damages to the injured third party as between the drunk and the dram shop there can be apportionment for contribution purposes.

GRIFFIN: Well we have to be careful because they have that cause of action pending right now in Calvin County against the drunk. That cause of action was severed. They haven't been harmed. It's sitting there. Whatever right of contribution they have they still have. What this court...

OWEN: Why is it more judicially economical to decide all in one case? It doesn't change anything. No matter what the jury puts in the blanks, the plaintiff recovers that amount in the dram shop. But as between the driver and the dram shop for contribution purposes we've got one trial, we've got one jury, they answer the blanks and we're done. What's wrong with that?

GRIFFIN: The trouble is the drunk did not take that position. The drunk did not object to severing out and let them fare it out in their fight how they want to.

OWEN: From _____ in the statutory scheme what's wrong with that view of the statute?

GRIFFIN: In some cases it may be more efficient for them to fare it out their fight in the main case. But here the drunk didn't object to it. They are not harmed. Whatever cause of action they have against the drunk, whether it be in the manner you suggested or what J. O'Neill suggested earlier, that right they have they still have today.

OWEN: You're saying the statute doesn't allow them to do that. And I'm saying if we disagree with you, forget this case. I'm talking about statutory construction. That does not prohibit a TC from doing it that way does it?

GRIFFIN: Keeping it in the main case and letting them fare it out?

OWEN: Yes.

GRIFFIN: No. Absolutely not. In fact most of the case law is that the court has some discretion in severances to determine those questions. And so I think in the abstract away from this case it certainly could have been done that way. They have not pled indemnity against their drunk here. It's not in the case at all. They never made a pleading of indemnity. They did have a pleading of contribution and they have every right they ever had still sitting in their lawsuit against Roberto Ruiz today.

* * * * * * * * * *

REBUTTAL

ENOCH: The argument as I understand Mr. Griffin make, is that the apportionment responsibility statute - what you asked the jury to answer in their blanks is their assessment of the percentage of causation essentially. To each person's causing or contributing to cause you have to put a percentage as to that. If causation under the statute dram shop is imputed from the driver to the dram shop, how does a jury determine as between those two the percentages of causation?

MCMAINS: That position is fundamentally erroneous, which is what we have argued and tried to establish in the brief. What the tort reform statute did in 1987, the same time and in the same legislative session that passed dram shop statute, is they repudiated the comparative causation analysis in Duncan and substituted a comparative responsibility analysis by the terms of the statute. And the percentage of responsibility that is included in the statute is defined as including any violation of any legal standard. And they are talking about the responsibility to be assessed. Now the idea that there is going to be an all or nothing type answer is not borne out by the cases themselves. In Barnum v. Steak & Ale, the jury compared everybody's conduct. They assessed percentages on everybody's conduct.

OWEN: Let's suppose that you are an employer and the employer supplied an employee with alcohol and allowed the employee to drive home. So you have an employee, during the scope and course of work to drive to another place of business during the day, you're going to have the employer's negligence, you're going to have employee's negligence, and there's clearly vicarious liability in that situation. How does comparative responsibility work in an injury to a third person?

MCMAINS: There actually is no, I think, under this court's decision in Love, I don't believe that there is any liability for providing the alcohol unless they are licensed.

OWEN: This is clearly employee/employer during the course and scope.

MCMAINS: On a pure course and scope issue, if all the liability to the employer is imputed based on the course and scope issue, then there is not a separate percentage submission because there is by definition vicarious liability, and imputation of all of their responsibility by virtue of the steps, that is the relationship of employers/employee, agents, principal and so on. All of those things within the scope of the agency, within the scope of the master servant relationship. Those from a status standpoint are in fact vicariously determined and do in fact result in indemnity rights. It's true we didn't plea any indemnity rights, because we don't have any indemnity rights. We are by virtue of the dram shop statute a joint tort feasor. That's what the statute does. We are not entitled to indemnity. It's not a biker(?). It a liability issue. It's an imputation of causation based on the individual _____.

ENOCH: I use the word causation because I don't know how else to describe it. And I understand the statute was amended getting away from comparative causation, comparative responsibility. But that was to assure that when you had different standards of causation you could submit the comparative responsibility where you had producing cause verses proximate cause. But the statute specifically says that when you are assessing this percentage of responsibility it's with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought. So they are going to be measuring this responsibility to the extent that what they are doing is causing or contributed to cause. Now if you impute whatever the responsibility of the dram shop is, you impute to them 100% of the activity contributing to the cause how does the jury evaluate the relative responsibilities if the statute imputes the element of what caused?

MCMAINS: There is no imputation of 100%. There is an imputation of the fact of proximate cause by virtue of the statutory definition.

ENOCH: When you give this instruct to the jury you would say by statute you're not going to be asked whether or not this caused any injury. You're going to say did they serve him? Was he drunk? Now what's the proportionate responsibility ? What part of that was contributing to the accident? You would expect that to mean the jury to decide this percentage based on what part of that contributed to the accident.

MCMAINS: The percentage of responsibility issue has been decided in all of the other cases that have ever come to this court on those issues. They all were cases in which there is a percentage of responsibility both submitted and answered and there are percentages in fact assessed against everybody. It is for the jury to determine and the definition of percentage of responsibility is in fact determined in functional terms in terms of what percentage the jury writes down. And that's the limitations of liability. And the idea of limiting our rights to contribution is to impose a joint and several liability obligation in excess of what the statute on its face does in violation of ch. 2 of the Alcohol and Beverage code.