High Risk Parties and the Social Host after Proposition 64

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On November 8, 2016, Californians voted to legalize non-medical, or recreational, marijuana use, with about 56% of the vote favoring legalization. Under the Control, Regulate, and Tax Adult Use of Marijuana Act, No. 15-0103 (the "Adult Use of Marijuana Act" or the "Act"), presented on the ballot as Proposition 64, it is now legal for adults over the age of 21 to smoke or ingest marijuana products and to possess up to 28.5 grams of marijuana, excluding concentrated cannabis. (Of course, marijuana remains illegal under federal law, and it remains to be seen whether the incoming administration will be as tolerant of recreational marijuana as the Obama administration has been.)

Unfortunately, there is a significant gap in the law that could lead to increased tort liability for those who furnish marijuana to others – in a private or a public setting. Individuals and commercial establishments should strongly consider refraining from providing marijuana to guests or customers until the courts settle whether or not social hosts and commercial establishments have a duty of care to protect third parties against torts caused by individuals to whom they furnished marijuana.

Under the Adult Use of Marijuana Act, adults will be able to smoke or ingest marijuana similarly to the ways that adults now consume alcohol. The Act permits adults to smoke or ingest marijuana in non-public places (Health & Safety Code § 11362.1, subd. (a)(4); *id.,* § 11362.3, subd. (a)(1)), as well as in licensed commercial establishments founded for just that purpose (sometimes referred to as "cannabis cafes"; many will likely be similar to Amsterdam's "coffee shops") (Bus & Prof. Code, § 26070, subds. (a)(1), (b), (c).) From a consumer standpoint, the Act imposes relatively few requirements on the licensing and operation of these cannabis cafes; however, Cannabis cafes cannot also serve alcohol or tobacco products (Bus. & Prof. Code, § 26054, subd. (a)), and may not be located within certain distances of schools or similar institutions (*id.,* § 26054, subd. (b)). The Act does not impose any requirements for what hours cannabis cafes may stay open or how much marijuana may be served to an individual customer, though localities will likely be able to impose such requirements as they see fit. (Bus. & Prof, Code, § 26200.)

Because permissible use of marijuana under the Act mimics how adults now consume alcohol – either in their homes or in licensed public establishments – many Californians will likely assume that the rest of the laws surrounding the consumption of alcoholic beverages also will apply to smoking and ingesting marijuana products. But in one key respect, they are wrong. Under the Adult Use of Marijuana Act, it is very likely that social hosts and cannabis cafes who provide marijuana to their guests and customers will be liable to third parties for torts committed by their guests and customers as a result of their intoxication.

California has a regime of strict immunities from liability to third parties for social hosts or commercial establishments that provide alcoholic beverages to guests or customers, set forth in the Civil Code and the Business and Professions Code.

Prior to the 1970s, social hosts and commercial establishments had no duty to protect third parties from injuries caused by the intoxication of a guest or customer to whom the social host or commercial establishment served alcohol. Commercial establishments could, however, be guilty of a misdemeanor for providing alcoholic beverages to "a habitual or common drunkard or to any obviously intoxicated person." (Bus. & Prof. Code, § 25602.) But in 1971, the California Supreme Court changed the law when it decided *Vesely v. Singer* (1971) 5 Cal.3d 153 (*Vesley*), which held that "civil liability results when a vendor furnishes alcoholic beverages to a customer in violation of Business and Professions Code section 25602." (*Vesley, supra,* 5 Cal.3d, p. 157.) Vesley reasoned that Business and Professions Code section 25602 created a class of persons which a commercial establishment had a duty to protect – third parties who might be injured by an obviously intoxicated person – and

continued on page 14

that civil liability could therefore attach when a commercial establishment violated that statute and a third party was injured as a result. (*Vesley, supra,* 5 Cal.3d, pp. 165-166.) *Vesley's* holding regarding commercial establishment liability was affirmed in *Berhnard v. Harrah's Club* (1976) 16 Cal.3d 313, and then extended to private social hosts in *Coulter v. Superior Court* (1978) 21 Cal.3d 144 (*Coulter*): "We conclude that a social host who furnishes alcoholic beverages to an obviously intoxicated person, under circumstances which create a reasonably foreseeable risk of harm to others, may be held legally accountable to those third persons who are injured when that harm occurs." (*Coulter, supra,* 21 Cal.3d, p. 145.)

Coulter was a bridge too far for the Legislature. In 1978, the Legislature amended Civil Code section 1714 to expressly reject social host liability:

> It is the intent of the Legislature to abrogate the holdings in cases such as *Vesely v. Sager* (1971) 5 Cal.3d 153, *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, and *Coulter v. Superior Court* (1978) 21 Cal.3d 144 and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

(Civ. Code, § 1714, subd. (b).) The same legislation also amended Business and Professions Code section 25602 to reject *Vesley* and its progeny and return to the prior state of the law:

> The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 Cal.3d 153), *Bernhard v. Harrah's Club* (16 Cal.3d 313) and Coulter v. Superior Court (_____ Cal.3d _____)1 be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

(Bus. & Prof. Code, § 25602, subd. (c).)

With narrow exceptions for the provision of alcoholic beverages to minors, social host/commercial establishment liability for acts caused by the provision of alcoholic beverages remains the law of the state. Civil Code section 1714 was amended in 2010 to include a narrow exception to permit social host liability where adults knowingly furnish alcoholic beverages to minors at the adults' residences. (Civ. Code, § 1714, subd. (d).) This amendment was enacted in response to public outcry after a 17-year-old girl died after consuming alcohol that was provided by her friend's parents for a sleepover, and the parents were held to be not civilly liable for the girl's death because there was no exception for the provision of alcoholic beverages to minors at the time. (*Allen v. Liberman* (2014) 227 Cal.App.4th 46.) Similarly, the Business and Professions Code permits a cause of action to be brought against a commercial establishment that sold or furnished alcoholic beverages to an "obviously intoxicated minor." (Bus. & Prof. Code, § 25602.1.) Both of these exceptions are narrow and still require an injured third party to show that the social host or commercial establishment was negligent in providing the alcoholic beverages to the minor.

Because of these broad immunities, social hosts in California do not have to babysit their guests, and commercial establishments do not have to strictly monitor their customers' alcohol intake, in order to escape civil liability for harm caused by intoxicated guest or patrons. But the Adult Use of Marijuana Act *does not extend these immunities to encompass liability for injuries caused by marijuana consumption:* The Act does not modify the existing immunity statutes to include consumption of marijuana, nor does it add sections to the relevant Codes granting immunity to hosts or cannabis cafes for the torts committed by their intoxicated guests and customers.

As a result of this gap, individuals and businesses who plan to serve marijuana to guests and customers should be aware that they could be liable for torts committed by those guests and customers who become intoxicated as a result of their consumption of marijuana. Although we cannot predict whether the courts will hold that social hosts and cannabis cafes have a duty to protect third parties from torts committed by their intoxicated guests and customers, it is very possible that, in the absence of statutory immunity, courts could adopt the rationale of the Supreme Court's decisions in *Vesley, Berhnard,* and *Coulter,* and hold that injuries resulting from the acts of a person who became intoxicated due to marijuana consumption are a foreseeable consequence of furnishing marijuana to a guest or customer, and that the furnisher therefore has a duty to protect against those injuries.

The risk of liability to social hosts and cannabis cafes is arguably more pronounced in light of marijuana's (relative) novelty as a recreational intoxicant. According to the most recent National Survey on Drug Use and Health, more than four million Californians had used marijuana within

continued on page 15

the prior year, compared with more than 16 million Californians who had used alcohol within the prior month. (2013-2013 National Surveys on Drug Use and Health: Model-Based Estimated Totals, Tables 2 and 9, available at *www.samhsa.gov/data/sites/default/files/NSDUHsaeTotals2014.pdf*.) It is therefore probable that, following the legalization of recreational marijuana use, we will see an influx of first-time or irregular marijuana users who will be unfamiliar with the effects of marijuana intoxication, will not realize if and when they have become intoxicated or impaired, and will not know how long their intoxication or impairment will last. This risk is particularly acute in light of the legalization of edible marijuana products. The intoxicating effects of marijuana are more severe, and longer-lasting, when marijuana is eaten than when it is smoked, but it takes longer for the intoxicating effects of digested marijuana to set in. Social guests or customers at a cannabis cafe might not be prepared for the longer set-in period or the stronger intoxication effects, and as a result might not take the proper precautions to prevent themselves from driving while impaired or undertaking other negligent acts that harm others.

Social hosts and commercial establishments likely face a high risk of liability for injuries caused by individuals "driving while high." The Adult Use of Marijuana Act did not alter the criminal prohibition on driving under the influence of marijuana. (Health and Safety Code, § 11362.3, subd. (a)(7).) However, the Adult Use of Marijuana Act did not impose any mandatory waiting periods between consuming marijuana – for example, a mandatory four-hour wait between smoking and driving, and an eight-hour wait between eating and driving – that would assist marijuana users in determining when a sufficient period of time has passed to resume driving. Furthermore, there is currently no commercially available device, comparable to a breathalyzer, to determine whether an individual has objectively ingested too much marijuana to drive. As a result, in the absence of state guidelines on what is a proper period of time between ingesting marijuana and driving, users will simply use their own (impaired) judgment to determine whether or not they are too intoxicated to drive – or to rely on their social hosts or cannabis café employees to take away their keys. Given that it is entirely foreseeable that intoxicated persons will overestimate their ability to drive safely, there is a decent chance that the courts will conclude that social hosts and cannabis cafes have a duty to prevent their guests or customers from driving while intoxicated from marijuana the hosts/cafes provided.

The provisions of the Adult Use of Marijuana Act allowing ingestion of marijuana in private places took effect immediately upon the passage of Proposition 64. It will take longer for cannabis cafes to be licensed and established: Under the Act, licensing authorities are scheduled to begin issuing licenses to retail marijuana establishments by January 1, 2018. (Bus. & Prof. Code, § 26012, subd. (c).) We can therefore expect that plaintiffs will begin suing the social hosts who provided a tortfeasor with marijuana soon, and that lawsuits against cannabis cafes will soon follow. It could be years, however, before the courts (or perhaps the Legislature) resolve whether the social host and dram shop immunities for torts caused by alcohol intoxication also apply to torts caused by marijuana intoxication. Attorneys should therefore be prepared for this onslaught of litigation and craft strategies for handling the uncertain legal issues; for those considering entering the burgeoning field of marijuana law, be sure to advise your cannabis café customers on their potential liability (and the likely hefty insurance costs that will come with it).

Finally, if you plan to partake in marijuana at your home, it is advisable to do so without guests present. And if you are invited to someone else's home for the same purpose, consider bringing something other than marijuana – like snacks.

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Allison Meredith's appellate practice at Horvitz & Levy includes defending clients in cases alleging personal injury and vicarious liability.