

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 80/2

3690 HSTA HB 345 (FILE 2)

56

FEDERAL

28 U.S.C. §2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title (Federal Tort Claims Act, 18 U.S.C. §§2671 et seq.) relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary interests resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Case Comment

Smith v. Pena, 621 F.2d 873 (7th Cir. 1980). Plaintiffs brought suit against the U.S. Army, alleging that they were seriously injured in automobile accident caused by the drunken driving of co-defendant Army sergeant who had been served liquor at Army installation. Their theories of action were (1) liability under Federal Tort Claims Act (FTCA) due to the gross negligence of Army employees in allowing the sergeant to consume an excess amount of alcohol and drive in an intoxicated condition when they should have known of his excessive drinking habits, and (2) liability under the Illinois Dram Shop Act in serving liquor to defendant and causing his intoxication which resulted in accident. Trial court dismissed action on the ground that state Dram Shop Act provided plaintiffs' exclusive remedy against alcohol provider, and the Act's absolute liability standard could not be used against the government because the waiver of sovereign immunity under the FTCA did not extend to strict liability torts.

Seventh Circuit reversed and remanded for trial, holding that plaintiffs could invoke FTCA to redress injuries proximately caused by a government tavern operator by alleging negligence even though, were they to sue private tavern operator in state courts, their claim would be governed by the absolute liability Dram Shop Act. The court reasoned that absolute liability exists under the state law because the legislature wished, both for penal and remedial purposes, to impose liability on more tavern operators than if a negligence

standard was used. It would be incongruous, continued the court, if in circumstances where the state has broadened liability beyond the traditional negligence theory, that a government employee were automatically excused from liability even if negligence could be proved. The court concluded that if plaintiffs could prove under Illinois law that the Army employees were negligent in serving drinks to the sergeant because of his intoxication or any other reason which would negate his self-control and thus establish the causation required in a negligence action, their FTCA action can be maintained.

(NOTE: On remand, the case was settled out of court without trial.)

MEAN NUMBER OF ALCOHOL-RELATED
CONVICTIONS PER 100 DRIVERS PER YEAR

<u>PRIOR CONVICTIONS</u>	<u>DEFERRED PROSECUTION</u>	<u>ALCOHOL TREATMENT</u>	<u>AIS</u>	<u>DID NOT COMPLY</u>
First Offenders	3.8 (451)	6.1 (562)	5.0 (2021)	7.3 (2575)
Second Offenders	4.2 (346)	7.5 (165)	3.5 (62)	10.1 (526)
Third Or More	11.1 (87)	11.6 (24)	-	8.8 (153)
<u>AGE</u>				
29 Or Less	6.1 (266)	8.4 (247)	5.7 (888)	7.8 (1668)
30-49	3.8 (471)	4.4 (356)	5.1 (859)	7.8 (1287)
50 Or More	5.1 (147)	8.6 (148)	2.3 (336)	8.1 (299)
<u>SEX</u>				
Male	4.5 (741)	6.7 (626)	5.5 (1695)	8.1 (2886)
Female	5.8 (143)	5.7 (125)	2.2 (388)	5.9 (368)



State of Washington
John Spellman, Governor

Department of Licensing
Highways-Licenses Bldg.
Olympia, WA 98504

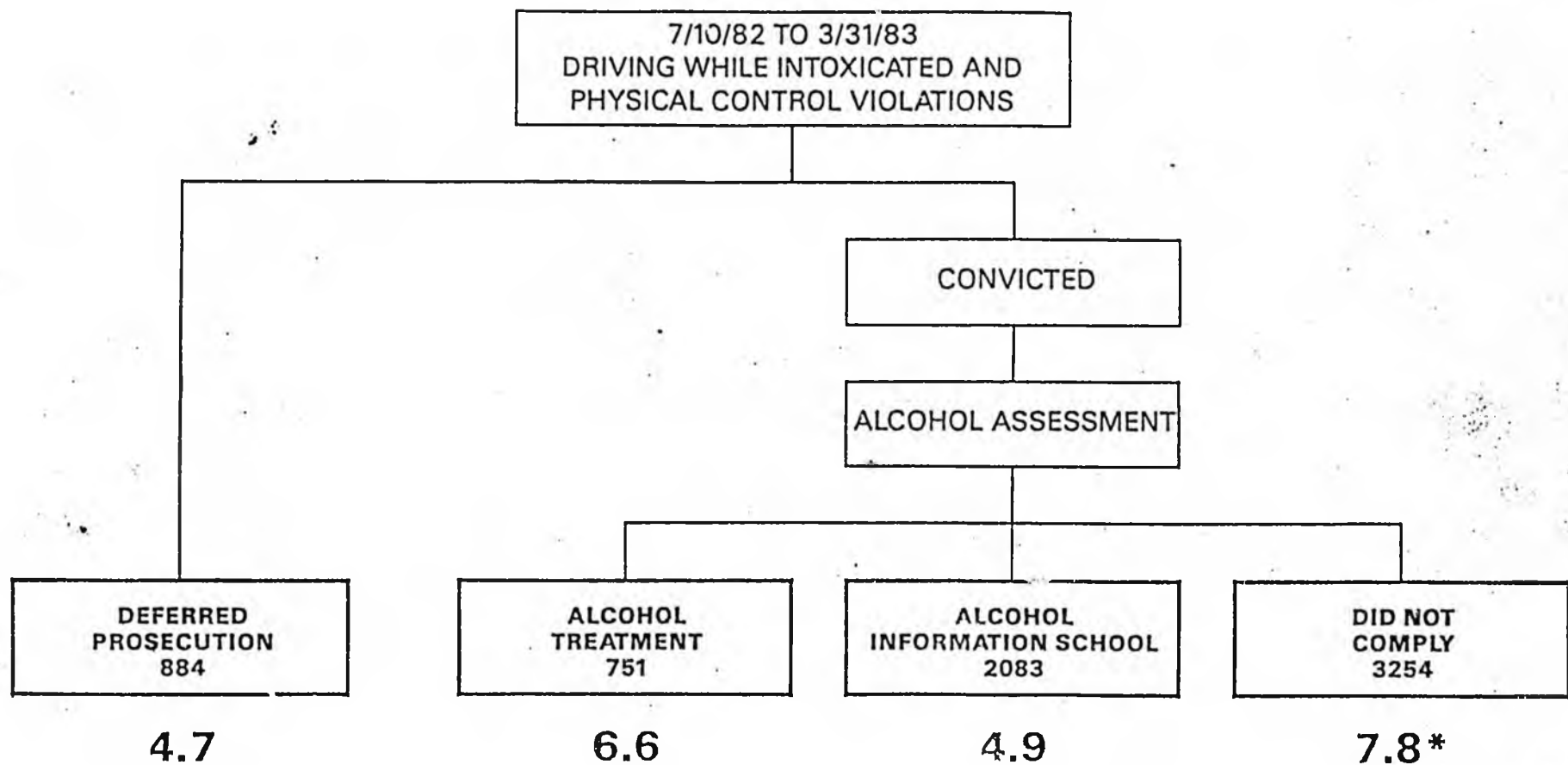
Please call if you have any questions.

Philip M. Salzberg, Ph.D.
Research Program Manager
Driver Services

(206) 753-6959

DEFERRED PROSECUTION STUDY

TRACKED UNTIL 3/31/84



*Mean number of subsequent alcohol-related convictions per 100 drivers, per 1 year period



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

July 25, 1985

MEMORANDUM

TO: Representative Katie Hurley

ATTN: Patti Macklin

FROM: Mark Torgerson *MT*
Legislative Analyst

RE: Dram Shop Liability and Alternatives for Reducing Alcohol-Related
Accidents
Research Request 85-336

You asked us to provide information on the following topics:

- history of dram shop laws, including dram shop laws in other states and foreign countries,
- citizen action groups such as Mothers Against Drunk Drivers (MADD); and
- alternatives for reducing the number of alcohol-related accidents in Alaska.

For this request, we contacted officials of other states and the federal government, representatives of the insurance industry, presidents of state and national beverage associations, citizen's advocate groups, and private research associations. In addition, we contacted representatives of Great Britain, West Germany, and the Province of Alberta. They provided the following information.

History of Dram Shop Laws

Dram shop (or liquor liability) laws were first enacted in America in the mid-1800s, an era in which there was significant public pressure to close saloons and "dram shops."¹ Early laws typically provided that tavern owners were financially responsible for the support of families of patrons who became "habitual drunkards."

¹Wisconsin passed the first liquor liability related legislation in 1849. However, this dram shop act was repealed in 1982.

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However, dram shop lawsuits were rare until the number of alcohol-related driving accidents increased after the repeal of Prohibition. During this time, some state statutes prohibited the sale of alcoholic beverages to "obviously intoxicated" persons and minors, as well as the "habitual drunkards." Furthermore, commercial liquor sellers could be held liable not only for family support but also for injuries caused by intoxicated persons. Although dram shop laws create potential liability for any type of injury "caused" by a drunk person to a third party, lawsuits from driving accidents are the most common type of litigation.

Today there are two legal means of establishing dram shop liability in the states: statutory and common law.² Some states provide for one or both of these types of liability, while other states still do not recognize a dram shop cause of action. The following section provides a brief overview of recent trends in dram shop liability laws in other states.

Overview of Dram Shop Laws

Alaska's laws provide for dram shop liability in AS 04.21.020. This statute prohibits the sale by a licensee of alcoholic beverage to a person under 21 years old or to a "drunken person." The licensee is liable only if he or she provides these beverages with "criminal negligence," which is defined in AS 04.21.080(1). This definition, when construed with the dram shop law, basically states that the licensee must serve the alcoholic beverages with "gross negligence"--instead of "ordinary negligence" which is applied by most other jurisdictions.

As applied by the courts, "gross negligence" is more difficult to prove than "ordinary negligence." In Kavorkian v. Tommy's Elbow Room, Inc., the defendant drank for approximately four hours while watching "Monday Night Football" and playing foosball with friends in a Fairbanks bar.³ While traveling between bars, a passenger later testified that the defendant drove "fast and recklessly," running stop and yield signs.

²"Common Law" refers to a court decision which bases the defendant's liability on general negligence principles rather than a specific dram shop statute. Common law liability was created in some states which did not, at the time a lawsuit was filed, have a dram shop statute. Courts can create this common law liability if the plaintiff establishes a recognized legal cause of action (such as negligence), and provided the court is willing to recognize the legal theory in absence of statute. The first common law dram shop case apparently was Pratt v. Daly, 104 P. 2d 147 (Arizona, 1940).

³694 P. 2d 160 (Alaska, 1985).

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When the defendant and his friend left the bar at 8:30 p.m., two Fairbanks policemen noticed their inebriated state and told them not to drive. As soon as the police were out of sight, they drove away. He subsequently drove through a red light and collided with another vehicle, killing two people and seriously injuring a third.

In the ensuing lawsuit, the jury returned a verdict of "not guilty" for the tavern that last served the defendant. The Alaska Supreme Court affirmed, holding that reasonable jurors could disagree on whether the tavern acted with criminal negligence. The court noted that the legislative history of AS 04.16.030 imposes an "affirmative duty" on liquor establishments to determine whether a person is "drunk." In this case, the bartender sold the drinks to the defendant's friend and did not observe the defendant until he was leaving the tavern.

Currently, 38 states and the District of Columbia have some form of dram shop liability. Twenty-three of these states provide for statutory liability while 15 states have common law liability. Dram shop liability is generally premised on the legal theory of negligence; that is, a liquor server breaches a duty of care by selling alcoholic drinks to a drunk person. The sale of the drinks is then considered the proximate cause of any harm the drunk person inflicts on third parties. When this occurs, the owner of the guilty liquor establishment is liable for the injured person's resulting damages.⁴

The states' dram shop laws differ in many ways. The factors which vary in these laws include the following: persons who can sue or be sued under the laws; the legal standards required to establish legal liability; and monetary limits on the damages that can be awarded in a dram shop injury suit. Attachment A illustrates these differences.⁵

Some of the dram shop laws have changed considerably in recent years due to increases in the number of alcohol-related traffic injuries, the resulting litigation and (frequently) large damage awards to injured third parties, and public awareness of the above factors.⁶ In addition, officials involved with dram shop legislation in other states indicated that intensive lobbying by advocates and opponents of dram shop laws has influenced these legislative changes. The trend of these changes has been toward creating and expanding the scope of dram shop liability.

⁴Conversely, the states that do not have dram shop laws assert that the server is not the proximate cause of the third party's injuries.

⁵Recent legislative enactments have been penciled in.

⁶The National Highway Traffic Safety Administration (NHTSA) and the National Safety Council estimate that 250,000 people died in alcohol-related traffic accidents in the past ten years.

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However, a few legislatures, such as California, have moved against this trend and have restricted or eliminated their dram shop laws.

In California, the state's courts had expanded the scope of potentially liable parties to include social hosts--those who serve alcoholic beverages at social functions in the home or at a business. Soon after this host liability was established, the state's legislature enacted a law (in 1979) which abrogated all prior court decisions except those cases which provide for the liability of a liquor licensee who serves alcoholic beverages to an "obviously intoxicated" minor.⁷

The 1985 legislatures in Arizona and South Dakota passed laws which affected dram shop liability. In Arizona, the state's supreme court first recognized a dram shop cause of action in a 1983 decision, Ontiveros v. Borak et. al.⁸ According to Cameron Holmes, an assistant attorney general in Arizona, the insurance and beverage industries began intensive lobbying soon after Ontiveros was decided. In a compromise move, the 1985 legislature passed a law which prohibits host liability in dram shop cases; however, the Ontiveros decision, which established common law liability of commercial liquor servers, was not abrogated.

The South Dakota Supreme Court, in the 1982 Walz decision, overturned prior case law and created a dram shop cause of action in the state.⁹ The court based its decision on legislative inaction and on the "tragic" contribution of alcohol to the state's traffic fatalities.

However, the 1985 legislature abrogated the Walz decision and eliminated all dram shop liability. The enabling law which precludes liability states "that the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted upon another by an intoxicated person."¹⁰

⁷Despite this statutory restriction, the costs to the insurance industry have been considerable for some cases involving minors. For example, the largest dram shop settlement to date--\$10.5 million--occurred in 1983 in a California lawsuit involving an injured minor.

⁸Ontiveros v. Borak et. al., 667 P. 2d 200 (1983).

⁹Walz v. City of Hudson, 327 N.W. 2d 120 (1982).

¹⁰Senate Bill 240, 1985 Legislative Assembly. A copy of the bill, and a letter written by South Dakota's Governor regarding the law, are attached as Attachment B.

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As noted, the trend in the states has been toward establishing and expanding dram shop liability.¹¹ Although seven states have passed dram shop statutes in the past five years, the states' courts have been the primary source of expanding the scope of liability.¹² This common law expansion has usually occurred in cases involving social hosts or employer's liability.¹³ The most expansive application of dram shop liability to date occurred in New Jersey. In Kelly v. Gwinell, the New Jersey Supreme Court upheld a trial court's jury award of \$9.5 million.¹⁴ The court held that the social host was liable for directly serving liquor (two to three scotch on the rocks in a one to two-hour period) to a guest, knowing that the guest was intoxicated and would thereafter be driving a vehicle.

The recent expansion of dram shop liability is not limited to lawsuits against private liquor servers. Courts have rendered decisions against municipalities for their employees' negligent acts. In one case, a municipal liquor store was held liable because one of its employees sold liquor to an obviously intoxicated person who subsequently killed an innocent third party in a collision.¹⁵ In another case, a city was liable when police failed to remove a drunk driver from the road, and the drunk driver later injured other travelers.¹⁶

Alternatives For Reducing Alcohol-Related Accidents

Dram shop laws provide one potential alternative for reducing drunk driving accidents, although the actual effectiveness of the current dram shop laws in the states has not been documented. As noted, a strong majority of states provide for some form of dram shop liability.

¹¹This trend toward expansion of dram shop liability has affected liquor servers' insurance rates and insurance availability. These issues were addressed in House Research Agency Research Request 85-328, which is attached.

¹²Those states which have enacted statutes in the past five years are Alaska, California, Florida, Iowa, New Mexico, Oregon and Utah.

¹³Some courts have also expanded the liability of commercial liquor servers by allowing the intoxicated person who injures herself or himself to sue for the injuries.

¹⁴476 A. 2d 1219 (New Jersey, 1984).

¹⁵Walz v. City of Hudson, 327 N.W. 2d 120 (South Dakota, 1982).

¹⁶Irwin v. Town of Ware, 467 N.E. 2d 1292 (Massachusetts, 1984).

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In addition, the Presidential Commission on Drunk Driving (1983) and the National Highway Traffic Safety Administration of the Department of Transportation (NHTSA) have endorsed dram shop liability as a legitimate strategy for reducing drunk driving.

When imposing dram shop liability, courts have traditionally emphasized three distinct policy rationales: punishment, victim compensation and prevention. According to James Mosher, Administrative Director of the Prevention Research Group, the punishment rationale for imposing liability is not generally emphasized by modern courts, and he asserts that this rationale, (if it is the exclusive emphasis) is an inadequate reason for maintaining dram shop liability as a social policy. Furthermore, Mr. Mosher claims that the victim compensation rationale is substantially ineffective. Under this rationale, courts state that negligent licensees should pay for injuries sustained by innocent parties. These courts reason that licensees are "appropriate compensators" because they profited from the very sales that led to the injuries. (This reasoning provides courts with a basis for distinguishing licensees and social hosts: because social hosts do not profit from serving alcoholic drinks, they should not share the social costs of the injuries.) Moreover, courts assume that licensees have liability insurance coverage and therefore provide the victim with a financial "deep pocket."

While acknowledging that a "deep pocket" is needed for parties injured in dram shop scenarios, Mr. Mosher asserts that this "system" of compensation is arbitrary (only a small fraction of injured parties actually get compensation) and that the required legal process is cumbersome (lawsuits are complicated, time-consuming and expensive). Therefore, Mr. Mosher advocates a different system for validating the victim compensation rationale. He asserts that states could impose a tax on alcohol and distribute the proceeds to injured parties. He claims that the small increase in retail prices would be offset by the decrease in insurance costs and in the risk of law suits.

In any event, Mr. Mosher stated that carefully drafted dram shop laws, which emphasize a policy of prevention, may effect a reduction in drunk driving incidents. He pointed out that existing dram shop laws have created interpretative difficulties for courts, for injured parties attempting to sue under the laws, and for defendants in these actions. For example, dram shop laws usually require that injured parties prove that the person who injured them was "obviously intoxicated." As many commercial liquor sellers have argued, this standard is vague and often results in unfair hindsight judgments because some potentially drunk drivers do not show signs of intoxication despite heavy drinking. Likewise, these vague standards have discouraged many injured parties with potentially valid claims from filing suit, and encouraged insurance companies to settle questionable claims. The focus of this prevention

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rationale is "server intervention," which refers to reforms in methods of operation in commercial establishments.¹⁷ These reforms are designed to reduce the risk of serving intoxicated persons, and to provide alternate forms of transportation for intoxicated patrons.

These reforms are addressed in "The Model Dram Shop Act," drafted by Mr. Mosher's Prevention Research Group as the culmination of an eighteen-month research project undertaken to analyze current dram shop laws, determine current litigation practices, and develop an inventory of current server intervention practices. According to Mr. Mosher, the act contains model statutory language and is designed to contribute to the legislative process. The act includes a "negligence" standard for licensee's liability, and it also provides for a legal defense to those licensees who can demonstrate responsible business practices. A copy of the act is enclosed as Attachment C. The act does not address the issue of mandatory insurance for licensees, although Mr. Mosher recommends that it be considered. In addition, the act does not cover some aspects of dram shop liability because of the legislative policy decisions involved. These areas include social host liability, definition of licensees and licensed premises, mandated server training, minimum drinking age, and limits on dram shop liability awards.

Another alternative for reducing alcohol-related accidents is to increase the price of alcohol. Attachment D indicates that the price of alcoholic beverages increased modestly from 1967 to 1982 when compared to price changes of other selected items. According to the Prevention Research Group, in practical terms, alcoholic beverages decreased 27 percent during this time, primarily because federal and state governments did not index excise tax rates to inflation. The group maintains that both federal and state rates have declined relative to inflation. In a recent research paper, Mr. Mosher stated that a recent study sponsored by the National Academy of Sciences shows that a \$.25 increase in state taxes on liquor has a significant impact on rates of per capita consumption, cirrhosis and drunk driving casualties.¹⁸

Other alternatives suggested by Mr. Mosher include the following: encouraging alcohol advertisers to self-regulate their advertising content; passive restraints; increases in the gas tax; changes in

¹⁷Mosher stated that studies suggest that 50 percent of drunk drivers are traveling from retail establishments, and that many dram shop lawsuits involve accidents which occur within a two-mile radius of drinking establishments.

¹⁸"Alcohol Policy and the Presidential Commission on Drunk Driving: The Paths Not Taken".

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river age; development of alternative and improved public transportation systems. In addition, Mr. Mosher stated that further research of the policy issues involved is needed.

Two states provide examples of additional alternatives. In Hawaii, a program allows police to ask those arrested for drunk driving where they had their last drink. This information is turned over to the County Liquor Commission where investigators try to determine whether that drink was served when the driver was already intoxicated as defined by law. If the answer is yes, the Liquor Commission can fine the establishment up to \$500, or suspend or revoke its license. If the evidence is lacking in a particular case, the commission notifies the bar owners that their establishment was named in a case. The Honolulu Police state that the program's primary goal is prevention and not punishment.

In addition, other programs have been initiated in Hawaii to combat the drunk driving problem there. For example, the Honolulu Police Department uses holiday and weekend roadblocks. The Broadcasters' Association adopted the theme "Drunk Driving is Deadly" and broadcast personal service advertisements to that effect. Then, a group of restaurateurs formed "The Hawaii Committee for Responsible Beverage Service" with the objective of encouraging alcohol education, training and prevention programs.

In Oregon, the Oregon Restaurant and Beverage Association is pushing for three bills in the legislature. The first would provide for a mandatory statewide system of alcohol server training schools. All new applicants for licenses would be required to complete the program before a license would be issued. The second bill would provide tax credits for licensees who put their employees through server or education programs. This bill would also allow for tax credits for establishments that provide alternative transportation modes for patrons. The third bill would add a "responsible business practices" defense to Oregon's dram shop law. In addition to these bills, the Marion/Polk County Beverage Association is sponsoring a "Home-Free" Program funded by donations to a private nonprofit corporation. Under the program, any patron driving to an establishment will be afforded a free ride home through an agreement with a local taxi company.

You also asked for information on citizen's advocate groups such as Mothers Against Drunk Drivers (MADD). Information provided by MADD and Remove Intoxicated Drivers (RID) is attached. Information from Students Against Drunk Drivers (SADD) will be forwarded to you when it is received. You also asked for information on dram shop laws in foreign countries. Representatives of Great Britain, West Germany and the Province of Alberta have been contacted so far. Of these three countries, only West Germany provides for "partial liability" of tavern

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owners, on a case-by-case basis. Additional information on laws in other countries will be forwarded to you as it is received. Attached are previous House Research Agency requests on drunk driving laws in foreign countries.

Attachment E contains statistics on alcohol-related accidents in Alaska between 1978 and 1984. These statistics were provided by the Department of Public Safety.

I hope this information is valuable to you. Please let me know if you have additional questions.

MT

Attachments

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF REVENUE

ALCOHOLIC BEVERAGE CONTROL BOARD

550 West 7th Avenue
ANCHORAGE, ALASKA 99501

April 12, 1985

Senator Edna B. DeVries
Chairman, Community & Regional
Affairs Committee
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator DeVries:

At the March 28, 1985 meeting of your Committee Senator Vic Fischer requested that I discuss with members of the Alcoholic Beverage Control Board current problems which confront most liquor licensees in Alaska. Additionally, the Committee requested the board to render some thoughts and recommendations.

The board met in Anchorage on March 29 and discussed the request. As a result of that meeting the board directed me to develop a response for its review. Having been reviewed by the board, comments and suggestions are forwarded in this letter.

First, because of the continuing controversy about alcohol and recognizing that many persons easily become emotional, rightfully so, with exhaustive deliberations and discussion about the subject, the board must request that the contents of this communication be received not as a white paper, firm position, or policy which guides the board in exercising its responsibilities. The board fully recognizes the delicacy of the subject and certainly does not want to appear to be infringing on positions or policies of other persons, agencies or organizations. The board does not want to dilute any integrity or credibility it may presently enjoy. With these statements the board believes it is appropriate to identify itself.

Members are:

William K. Smith - chairman. Member of the board for five years and chairman for 2 1/2 years. An industry member and associated with a package store licensed business for 29 years in Anchorage.

E. L. "Red" Holloway - Twice former board member and present board member for two years. Presently retired in Juneau and former owner of the Prospector Hotel in Juneau.

Jane Perkins - Member for 1 1/2 years, retired and resident of Nome for 56 years.

James McNamee - Member designate since September 1984 from Fairbanks. Presently with a prominent insurance company and former Deputy Director with Division of Insurance, Alaska Department of Commerce.

Jack Griffin - Former member of the board from 1975 to 1978 and presently a member designate from Anchorage. Former licensee in Anchorage and presently owner of The Bayside Lounge in Homer.

At each board meeting the board reviews and decides on more than 70 agenda items for new issuance and transfer applications and other requests by licensees. Almost all licensees diligently attempt to follow the law. However, we must admit many licensees have not familiarized themselves with the law even though they may instruct employees about portions of the law which focus on responsibilities related to forbidden classes--minors and drunken persons. The board has noted many times that it is a few poor operators who create a bad climate in the public's eye. The board believes that the present record does not clearly indicate that alcohol problems, drunk driving in particular, arise from violations of law by licensees. However, the record is clear that alcohol consumption is heavy in Alaska and the source of alcoholic beverages in the state is from licensees licensed by the board.

By this letter the board is certainly not promoting enhancement of licensed business profits by suggesting that insurance expense is too high. The board is only suggesting that licensed businesses under its jurisdiction appear to be subjected to an inordinate degree of responsibility/blame/exposure for the acts/actions of the public at large and some irresponsible licensees.

The board believes that:

- 1 - Licensees, their agents and employees who violate laws which are in force to protect the public must receive swift identifiable sanctions.
- 2 - The public must be made aware that licensees are charged with operating an orderly business which distributes a controlled substance for a profit and when a licensee withholds the privilege of consuming or purchase from a customer that the licensee is enforcing a strict public policy that the public must be willing to accept.
- 3 - Licensees must also be charged without fail to:
 - a - firmly educate their people about responsibilities related to sale of alcoholic beverages.
 - b - firmly and continually educate the public that Alaska's licensed operators will not and cannot condone misuse or abuse within their premises.

These charges must of necessity be instilled in licensees by threat of loss of their licensed privilege without regard to any perceived or actual value which may have attached to the license/privilege. With this thought the board believes that with its capacity as a quasi-judicial body a specific schedule of sanctions/penalties be articulated in law. Criteria which could mitigate a prescribed penalty are suggested below. These criteria, if supported by facts before the board, are the criteria which are apparently accepted as those which could also be used to mitigate civil liability suits.

1. Formal training of employees.
2. No happy hours or reduced price drinks.
3. No advertising of alcoholic beverages.
4. Past performance policies of a licensee.
5. No rowdy house.
6. Employees consuming on duty.
7. Availability of food and non-alcoholic beverages.

Some would say that the above suggestions might place a great deal of authority/power in the board. However, the board firmly believes that the industry expects and prefers that its members who violate the law : at everyone's expense must suffer penalty.

With all due respect to and consideration for all who participate in this seemingly never ending dialogue, the board submits the following recommendations for your consideration:

1. Retain present law for determining the measure of civil liability.
2. As state policy emphatically put licensees and the public on notice that illegal use of substances will not be condoned in the State of Alaska.
3. Require for incidents involving DWI that the offending party also be subjected to tests to ascertain if other substances are present in the person's body which also may have caused intoxication.
4. When possible and appropriate require DWI incident investigating officers to determine where and when an offending person last obtained an intoxicating substance. If from a licensee, this information be provided to the board.
5. Provide that an incident involving a licensed business or premises be reported in writing by the appropriate law enforcement authority having jurisdiction. If not reported by local authorities, then refund of license fees to a municipality be terminated without fail.
6. Following the Governor's Task Force on Drunk Driving, require that a mandatory course of instruction about alcohol and alcohol laws be provided by the industry to its employees.
7. Appoint an interim committee to draft amendments to law for submission during the next session of this legislature.

April 12, 1985

Unless you prefer to substantially modify Alaska's law, present law places responsibility for alcohol on everyone from health programs, schools, law enforcement, local governments, licensees, the public and the board. It is a collective problem and a collective responsibility. -The present law is certainly not without its faults, but it works and has the ingredients for dealing with licensees who do not exercise their license in the best interest of the public.

The board would like to express one point for further discussion or clarification. When an intoxicated person causes injury to a third party and the level of intoxication is determined to be .10 BAC for the intoxicated person, and if it is intended that licensees, their agents or employees be held civilly liable, this is poor public policy and is tantamount to prohibition. Licensees who serve alcoholic beverages for consumption on the premises would be unable to operate. No licensee, agent or employee can determine a .10 BAC of a person without using some measuring device. Following service of one or two beverages at a licensed premises the public would not accept the imposition of having to submit to a form of electronic or physical test.

The board has traditionally convened a meeting in Juneau during the month of February of each year for two purposes. First, to fulfill its responsibility under AS 04.06.050, and second, to have the opportunity to meet with legislators and legislative committees during legislative sessions. However, because of present interest, concerns, and your request for the board's written comments, the board is scheduled to be in Juneau again this year on April 30, and following days if appropriate or necessary. The board and staff will be happy to provide you with any additional information which may be of help.

Sincerely,



Patrick L. Sharrock
Director

PLS:vk

cc: Senator Frank Ferguson
Senator Jack Coghil
Senator Vic Fischer
Senator Arliss Sturgulewski

Working / AB 345

BRIEFING PAPER
CALIFORNIA STATE ASSEMBLY BILL AB 2005
DRAM SHOP LIABILITY AND THE
RESPONSIBLE BUSINESS PRACTICES DEFENSE

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May 1985

DRAM SHOP LIABILITY: CURRENT TRENDS AND RATIONALE

AB 2005 refers to the potential legal liability of licensed servers of alcoholic beverages for injuries caused by their intoxicated and underaged patrons. The concept of dram shop liability has had a major resurgence in the United States since 1979 (one year after the California legislature immunized licensees from most forms of liability), concurrent with the increasing public concern and outcry over the enormous societal costs of drunk driving. Currently, thirty-nine states and the District of Columbia impose dram shop liability in some form (through statutes and state Supreme Court decisions) while other states have adopted it through lower court decisions (see attached chart for details). Numerous governmental public interest and private groups, including the Presidential Commission on Drunk Driving, support dram shop liability law as an appropriate public health approach for reducing the number of injuries and deaths caused by drunk drivers and for compensating victims.

The increased attention on the retail alcoholic beverage industry is not surprising. Research shows that 50% or more of all drunk drivers are drinking in licensed establishments just prior to the drunk driving incidents. Given the terrible costs of overconsumption and the prevalence of heavy drinking in retail establishments, the retailing of alcoholic beverages must be considered a hazardous activity, one that requires both skill and care to protect others.

Yet, despite the potential dangers involved, many retailers have, until recently, paid little attention to their role in the drunk driving prevention effort. Staff are often given only the most minimal training, management has often geared their policies to maximize alcohol profits, and staff incomes

are often directly tied to selling large quantities of alcohol without regard to potential consequences. Establishments are frequently understaffed, and irresponsible promotions — such as happy hours and drink and drown nights — have been used to encourage heavy drinking. These practices, which are now being reexamined and reformed both within and outside the industry, would be considered intolerable for other less hazardous business activities in our society. Thus, the increased exposure of the retail industry to dram shop liability reflects the increasing awareness that retailers do have a major, shared responsibility to prevent drunk driving and other alcohol-related problems emanating from their establishments.

AB 2005: THE MODEL RESPONSIBLE BUSINESS PRACTICES DEFENSE

AB 2005 will bring California in line with what is a national trend, and, at the same time, addresses uncertainties in current law. It establishes a "responsible business practices defense", which provides a defendant a means of protection from liability if, at the time of the service of alcoholic beverages, the drinking establishment and its employees were following responsible business policies, procedures and actions. This defense encompasses the recent efforts by the retail industry, educators, governmental organizations, and others to develop server intervention programs. Server intervention refers to reforms by retail establishments which are designed to reduce the risk of serving alcoholic beverages to intoxicated or underaged persons.

The Model Responsible Business Practices Defense was drafted as part of the Model Alcoholic Beverage Retail Licensee Liability Act of 1985 to address several problems in current dram shop law and practice. The Model Act was the culmination of an eighteen month federally-funded research

project conducted by the Prevention Research Group of the Medical Research Institute of San Francisco (now at the Prevention Research Center of the Pacific Institute for Research and Evaluation). The research project analyzed in detail the role of dram shop liability in the prevention of alcohol-related problems, particularly drunk driving, and the current status of server intervention programs. The research showed that most dram shop cases did not examine the defendant's serving and management practices, which are critical to the establishment's ability to adhere to its legal responsibilities. The noninclusive list of management policies incorporated into the Model Act reflects an evaluation of the best server intervention programs in the country and provides an explicit guide to courts and juries for evaluating an establishment's adherence to a reasonable standard of care to protect the public.

Because of the lack of service and management standards, the law provides very little guidance to defendants regarding what is expected of them to avoid liability. Many licensees have felt that law suits were inevitable. In some cases this has meant an indifferent response instead of preventive action. It has also encouraged quick settlements by insurance carriers, even if a licensee did act responsibly in the given circumstances, and often results in exorbitant insurance premiums. AB 2005, with its noninclusive list of management standards, provides a basis for evaluating a licensee's relative risk of liability and a strong incentive for a licensee to adopt more responsible practices.

CONCLUSION

AB 2005 is an important step in the development of a comprehensive public policy to prevent drunk driving and other alcohol-related problems. The bill relies on ordinary principles of negligence to impose liability on

licensees who conduct their business without due care for the safety of others. It does not constitute an unusual burden on the industry; rather, it relies on legal liability principles that affect all businesses and citizens conducting business in our society. It is a public health and safety measure that reflects community standards and expectations.

AB 2005 provides clear guidelines for defining the licensees' responsibility, acting as a strong incentive for industry-wide reform. Continued research and evaluation of server intervention programs can be expected with the passage of AB 2005 so that the business practices most conducive to prevention will become increasingly standardized. Business that can show adherence to the standards will be able to justify lower insurance premiums, an additional incentive for compliance. In short, AB 2005 will trigger appropriate action by licensees, researchers, program developers and evaluators, insurance companies, citizen's groups and others to prevent the carnage on our highways and the terrible toll alcohol plays in our society. It also provides just compensation to drunk driving victims, placing the financial burden appropriately — on the irresponsible sellers of alcoholic beverages who have profited from the injury-producing incident. AB 2005 therefore represents an important public health measure that deserves support from health and safety constituencies, concerned citizens and policymakers.

APPENDIX A

AB 2005: SUMMARY

Purpose of Act: (1) To prevent intoxicated traumatic injuries, death, and other damages; (2) To provide compensation to those suffering as a result of intoxication-related incidents.

Plaintiffs (who can sue): Any person who suffers injury.

Defendants (who can be sued): Any alcohol beverage retailer (and their employees and agents), who, at the time of furnishing of the alcohol, was required by law to hold an alcoholic beverage license. Social hosts remain exempt from civil liability.

Acts Giving Rise to Liability: The negligent service of alcoholic beverages to a minor or an intoxicated person.

Defenses: (1) Any defenses generally applicable to tort actions under California law; (2) Responsible Business Practices Defense.

AB 2005: QUESTIONS AND ANSWERS

(1) DOES AB 2005 BENEFIT THE DRUNK DRIVER?

No. Intoxicated wrongdoers are not "off the hook." They are still responsible, criminally and civilly, for the injuries that they cause. AB 2005 requires the intoxicated wrongdoer to share the fault with the negligent or reckless provider of alcohol.

(2) ISN'T AB 2005 A MAKE-WORK PROJECT FOR PLAINTIFF'S ATTORNEYS?

No. AB 2005 is designed to encourage responsible business practices by servers of alcohol in providing a defense to those licensees who can demonstrate such responsible practices.

(3) CAN UNLICENSED FURNISHERS OF ALCOHOL (SOCIAL HOSTS) BE HELD LIABLE UNDER AB 2005?

No. Only those defendants who are required to have a license can be held liable.

(4) IS THE LIABILITY OF A LICENSEE FOR SERVING MINORS OR INTOXICATED PERSONS A NEW CONCEPT IN CIVIL RESPONSIBILITY?

No. AB 2005 is based upon ordinary principles of tort law, which have been applied by numerous courts across the country to

unreasonable serving practices by retail licensees. This type of responsibility has also been recognized by criminal laws, which provide for criminal liability if licensees serve minors or intoxicated persons. Every business and private citizen has a general legal responsibility to act responsibly in preventing foreseeable harm to others.

- (5) DOES AB 2005 UNFAIRLY IMPOSE A STANDARD OF CARE FOR COMMERCIAL SERVERS OF ALCOHOL THAT IS NOT EXPECTED FROM OTHER TYPES OF RETAIL BUSINESSES?

No. AB 2005 utilizes the same tort standards that other businesses are subject to, and AB 2005 takes into account the difficulties that face licensed purveyors of alcohol. AB 2005 recognizes that the sale of alcoholic beverages requires the exercise of skill and care to protect the public due to the hazardous nature of this business activity.

- (6) WHAT ARE RESPONSIBLE BUSINESS PRACTICES?

AB 2005 lists illustrative management and server practices and policies that a jury can consider in determining the merits of a responsible business practices defense. These practices are well-recognized within the alcoholic beverage industry, and are already adhered to by many responsible licensed establishments. For example, evidence of responsible management policies, procedures, and actions would include encouraging persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises, and to promote the availability of non-alcoholic beverages and foods.

- (7) CAN THE LICENSEE AVOID LIABILITY BY ATTENDING A "CRASH COURSE" ON SERVER TRAINING, EVEN IF HE ACTS IRRESPONSIBLY AT THE TIME OF SERVICE?

No. The licensee must act responsibly at the time of the service of alcoholic beverages. The fact that a licensee attended a training course might actually be used against him if he failed to follow the procedures and practices learned in the training.

CURRENT STATUS OF SERVER LIABILITY LAWS

Statutory Liability: 23 states

Common Law Liability (court-made law): 27 states

-Lower courts only: 5 states

-Common law only: 16 states

+ District of Columbia

Total Number of States with Server Liability: 39 states

+ District of Columbia

Total Number of States without Server Liability: 11 states

OTHER FACTS

- Nine (9) states have enacted new server liability statutes since 1971, seven (7) of these in the last five (5) years.
- Six (6) states have established common law server liability in the last five (5) years.
- Since the California legislature enacted its restrictive statutes in 1978, only one other state, Florida, has curtailed server liability to any extent.

RESUME

VICTOR COLMAN, J.D.

217 Parnassus Avenue
San Francisco, California 94117
(415) 665-8733

Prevention Research Center
2532 Durant Avenue
Berkeley, California 94704
(415) 486-1111

Specialist: Dram Shop Liability Laws

Current Research Projects

- (1) Legal Research Analyst, Prevention Research Center, Pacific Institute for Research and Evaluation. Help to design, conduct and supervise original research on drug and alcohol prevention policy and the law.
- (2) Associate Director, Prevention Research Group, Medical Research Institute of San Francisco. Associate Director of 18-month federally funded study. Research included the analysis of current server intervention programs, dram shop statutes and relevant case law, and the drafting of a comprehensive model dram shop law. (Grant objectives completed, final report due September 1985.)

Book Chapters

- (1) Liquor Liability Law (Goldberg and Mosher). New York: Matthew Bender Co. (writing in progress, publication in 1986).

Journal Articles

- (1) "Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective," (co-authored with B. Krell and J. Mosher). Western State University Law Review, Volume XII, No. 2 (Spring 1985).
- (2) "Dram Shop Laws: A Prevention Tool." Paper presented at the 40th annual forum of the National Council on Alcoholism, April 11-15, 1984.

Conference Presentations on Dram Shop Liability

- (1) Seminar on Dram Shop Litigation in Massachusetts and New England States, sponsored by the Massachusetts Academy of Trial Attorneys, October 12, 1984.
- (2) Seminar on Preparation and Trial of Dram Shop Cases, sponsored by the Michigan Trial Lawyers Association, June 22, 1984.
- (3) Workshop on Dram Shop Liability and Server Intervention Programs. National Council on Alcoholism, 40th Anniversary Forum, April 12-15, 1984.

Litigation Experience

- (1) Research Assistant to Bruce E. Krell, Attorney at Law, 345 Grove Street, San Francisco, California 94102. Drafted pleadings and researched legal issues for dram shop case in 1983, which was ultimately settled for 10.5 million dollars.

DRAM SHOP LEGISLATION

The word "dram" is an old english term for a shot or glass of liquor.

Nationally, one half of all highway deaths are alcohol related. In the state of Alaska between 1978 and 1983, 386 people died in alcohol related traffic deaths and 7,329 people were injured. Dram shop laws are drafted for the purpose of reducing the number of these deaths, injuries and social costs by encouraging liquor servers to share responsibilities associated with drinking and driving. Dram shop laws do not result in any cost to the state and are self-enforcing.

DEFINITION

Dram shop laws are laws which establish the civil liability of a bar or liquor store owner who sells alcohol to an intoxicated person or minor who subsequently is involved in an accident in which a third party is injured or killed. Dram shop laws enable a victim to recover damages against a bar or liquor store owner by making them liable should they violate state laws making it illegal to serve or sell alcohol to intoxicated people.

BACKGROUND

Prior to the temperance movement in the early 1800's an alcohol server could not be held liable for any damages caused by an intoxicated customer because the server was judged too far removed from the situation to be considered responsible. Basically, the old common law rule held that only the drunk person could be held responsible for their actions. This principle of law still holds today in many states, generally prohibiting recovery of damages against the supplier even if that person knowingly served an intoxicated person or minor who later went on to injure or kill another person.

Dram shop laws were spawned from the temperance movement in the early 19th century. Throughout a number of states, the old common law has given way to a doctrine of common law liability which assumes that the server can be reasonably expected to foresee damages resulting from the actions of an intoxicated customer and that the illegal sale of alcohol can be considered a proximate cause of the damages in legal terms.

The first dram shop law was adopted in Wisconsin in 1849. Today, 38 states and the District of Columbia have some form of dram shop liability.

Alaskan Law

Alaska has provided for dram shop liability since statehood. In 1980, the alcohol beverage statute was rewritten to change the standard of civil liability of alcohol beverage vendors from ordinary negligence to criminal negligence. The criminal negligence provision requires that the server must act with "gross negligence"--instead of "ordinary negligence" which is applied in most other cases. As a result, very few vendors have actually been held liable since criminal negligence is often difficult to prove. The action by the legislature in 1980 took place in the Senate Finance committee with little or no public input. The provision itself was actually part of a larger bill.

HB 345

HB 345 was introduced by the Governor at the recommendation of his appointed Task Force on Drunk Driving chaired by Representative Clocksin. HB 345 simply returns the standard of negligence from criminal to ordinary negligence under common law, thus eliminating the necessity of proving criminal intent. Servers of alcoholic beverages would carry a greater burden of responsibility to ensure that intoxicated customers are not served if they plan to drive. Alaskan bar and liquor store owners would be forced into playing an active role in preventing injuries and deaths caused by drunk drivers. HB 345 also includes bootleggers.

Liquor Liability Insurance

An associated issue is the high cost and reduced availability of liquor liability insurance in Alaska. As in many states which have enacted dram shop laws, liquor liability in Alaska is available through only one company. In the past two years, the cost of insurance has increased significantly. However, the Governor's Office and the Division of Insurance maintain that the insurance problems facing the liquor industry are also facing many other industries and professions through out the state including fishing, health care and law practices. An insurance task force has been working during the past few months to review insurance problems in the state and recommend solutions. Liquor liability insurance problems are also a problem in states that do not have dram shop laws.

- any collateral source rule - extra part. other insurance
- judgement
- economic / noneconomic - re damage
- punitive damages
- atty's fees proportionate to judgement
- instruct juries re tax
- require structured settlement - settlements not taxable
overtime rather than lump sum

April 11, 1985

465-3603

The Honorable David Thompson
Alaska State House
Pouch V
Juneau, AK 99811

Re: Opinion request - cap on
dramshop liability awards

Dear Representative Thompson:

Bob Thomas requested legal advice concerning the ~~constitutionality of a limit upon damages recoverable in tort actions against dispensers of alcohol.~~ Following research of the law, principally as developed in challenges to medical malpractice recovery limitations statutes, ~~my conclusion is that liquor industry specific restrictions on common law tort remedies are unconstitutional unless, in exchange for common law benefits lost, tort victims are provided with a reasonably just substitute.~~

~~A ceiling on the recovery available in tort actions against liquor dispensers impacts severely injured plaintiffs. Two constitutional protections are afforded by such statutes:~~
~~Due Process - The state may not deprive a citizen of life, liberty or property without due process of law; and~~
~~Equal Protection - The state must assure equal protection under the law to all citizens. Due process emphasizes fairness between the state and the individual citizen in his contacts with the state whereas equal protection emphasizes disparity in treatment by the state between classes of individuals whose situations are arguably indistinguishable. Ross v. Moffitt, 417 U.S. 600, 609 (1974).~~
 Although most legal opinions distinguish the concepts, for brevity and because the distinction here is largely meaningless, this discussion considers the protections as merged. A similar approach has been employed by the United States Supreme Court. See Duke Power v. Carolina Environmental Study Group, 438 U.S. 59, 97 (1978).

The intensity of judicial review of legislation is proportional to the individual rights threatened. Lynden Transport v. State, 532 P.2d 700 (Alaska 1975). When a statute threatens a fundamental right it is subjected to "strict scrutiny" and ruled unconstitutional unless a "compelling state interest" justifying the law is demonstrated. Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1967). Where a fundamental right is not involved, the standard of review is a lesser one requiring a showing that the legislature's means are rationally related to the acknowledged goals. Dandridge v. Williams, 397 U.S. 471 (1970). Identification of a right as "fundamental" is often outcome determinative. In White v. State, 661 P.2d 1272 (Mont. 1983), employing a strict scrutiny analysis, the court held that a \$300,000 tort damages limitation against the state was an unconstitutional infringement of a fundamental right, but in Liefeld v. Johnson, 659 P.2d 111 (Idaho 1983), applying a "rational basis" analysis, the court found a \$100,000 limitation on tort damages against the state to be rationally related means to protect the public treasury.

In recent years, a "means oriented" scrutiny has developed in which courts closely examine the actual social and economic justifications for specific laws. For example, in American Bank and Trust Company v. Community Hospital of Los Gatos-Saratoga, 660 P.2d 829 (Cal. 1983), the California Supreme Court struck a medical malpractice recovery limitation statute because victims of malpractice derived no reasonably just substitute to compensate for disadvantages imposed by the statute. There, the assumption underlying the statute that there existed a relationship between containment of rising medical costs and limitation of damages recoverable was found to be false. Where substantive "means scrutiny" is not employed, in the medical malpractice litigations, the reasonably just substitute argument - that the loss of recovery potential to some malpractice victims is offset by lower insurance premiums and lower medical care cost - generally results in a finding of constitutionality of the law. See, for example, Strykowski v. Wilke, 261 N.W.2d 434 (Wis. 1978). On the other hand, where a "means scrutiny" is employed, whether explicitly or implicitly, the recovery limitation is usually ruled unconstitutional. See American Bank and Trust Company v. Community Hospital of Los Gatos-Saratoga, 660 P.2d 829 (Cal. 1983); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Wright v. Central DuPage Hospital Association, 347 N.E.2d 73 (Ill. 1976); Jones v. State Board of Medicine, 555 P.2d 399 (Idaho 1976).

Assuming that an "insurance crises" faces the liquor industry, the industry is unable to offer an equivalent, reasonably just substitute as is arguably offered by the medical

profession which serves an indispensable societal need. Accordingly, regardless of the type of judicial scrutiny employed, a court is likely to uphold damages recovery limitations which protect the liquor industry unless a substantial reasonable substitute is provided in exchange for the benefit conferred on the industry. One such benefit which readily comes to mind is the adoption of strict liability as the quid pro quo for a reasonable limitation on damages. Such legislation would be theoretic and functionally similar to worker's compensation schemes: recognizing that as long as alcohol continues to be a publicly consumed beverage that it will continue to be the cause of serious injuries, in exchange for the uncertainty of recovery of an injury proximately resulting from negligent dispensation of alcohol, the plaintiff would have an absolute right to recover against the dispenser upon proof that alcohol ingestion caused the injury.

Of course, although the dispenser of alcohol is exposed to strict liability, he is protected from large awards by a damages recovery limitation. The amount of the limitation would, of course, have to be legislatively set and itself would be subject to a means-end analysis ^{*/} however, a legislative scheme of this type is likely to pass constitutional challenge.

In summary, a legislatively set damages limitation on injuries resulting from negligent sales of alcohol would be constitutional without a "reasonably just substitute" when curtailed common-law benefits would be replaced by statutorily created benefits. A legislative "finding" that there exist insurance crises would not be a sufficient substitute because of the lack of continuing accuracy of such a finding and, more importantly, because of the inherent lack of a reasonable just substitute when dealing with a service not essential to the public at large. Reasonably just substitute trade-offs have been approved by the United States Supreme Court. See Duke v. Carolina Environmental Study Group, 438 U.S. 59; Crowell v. Benson, 285 U.S. 22 (1932); New York Central Railroad

^{*/} The statutory limit must be substantial enough to provide fair compensation in most situations. In Crowell v. Benson, 285 U.S. 22, 41 (1931), rejecting a constitutional challenge to a worker's compensation act the Court stated: "In view of the difficulties which inhere in the ascertainment of actual damages the Congress was entitled to provide for the payment of a sum which would reasonably approximate the probable damages."

The Honorable David Thompson
Alaska State House

April 11, 1968
Page

Company v. White, 243 U.S. 188 (1917). Imposition of strict liability in exchange for a reasonable limitation on damages is one, and possibly the only type of legislation that could pass constitutional attack.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:

William G. Mellow
William G. Mellow
Assistant Attorney General

/WGM:jal



Alaska State Legislature

House

Official Business

Victor J. Colman, J.D.
Prevention Research Center
2532 Durant Avenue
Berkeley, Ca 94704

SEPT. 10
~~August 28, 1985~~

Pouch V
State Capitol
Juneau, Alaska 99811

Dear Mr. Colman:

This letter is to confirm conversations you have had with my staff Patti Macklin regarding your testifying on the Model Dram Shop Act before the House State Affairs Committee. Enclosed is a copy of the legislation that the committee will be hearing, House Bill 345 relating to Alcohol Server Licensee Liability. The Committee will be meeting September 10, 1985 from 9-11:30 am and 1:30 - 4:30 pm at the Legislative Information Office located at 1024 West Sixth in Anchorage.

Enclosed please also find a roundtrip ticket from San Francisco to Anchorage, leaving San Francisco the evening of the 17th and leaving Anchorage the morning after the meeting on September 19th. You have reservations for the evenings of September 17th and 18th at the Captain Cook Hotel downtown Anchorage, one block from the meeting place. The Hotel has been pre-paid and I will be sending you money to cover your other expenses.

Patti Macklin will be at the airport to pick you up on September 17th. I look forward to meeting you and hope you enjoy your visit to Alaska.

Sincerely,

A handwritten signature in cursive script that reads "Katie Hurley".

Katie Hurley, Chair
House State Affairs Committee

Working

DEPARTMENT OF PUBLIC SAFETY
POSITION PAPER - HB 345

FEBRUARY 3, 1986

"An Act returning the standard for civil liability of vendors of alcoholic beverages to ordinary negligence under common law; and providing for an effective date."

The Department of Public Safety supports this legislation.

ANALYSIS

This legislation would return the standard of negligence to ordinary negligence under common law, thus eliminating the necessity of proving criminal intent. Enactment of this legislation would place a greater burden of responsibility upon the servers of alcoholic beverages to ensure that persons who show signs of intoxication are no longer served drinks if they plan to drive. The real benefit of this legislation is that alcohol beverage servers will be forced to play an active role in the prevention of alcohol-related highway deaths and injuries.

PURPOSE

During calendar years 1978 through 1984, there were 456 persons killed and 8,389 persons injured in alcohol related traffic accidents. The estimated cost of alcohol related accidents during this time period was a conservative 209.6 million dollars. The purpose of this legislation is to reduce the number of alcohol related traffic deaths, injuries and societal costs in Alaska by encouraging the servers of alcoholic beverages to share in the responsibilities related to the consumption of alcohol and driving. The servers will not suffer from the enactment of this legislation, if they take prudent action by providing server training and becoming involved with other proven programs directed at reducing the incidence of drunk driving.

RECOMMENDED BY: T. Michael Lewis
T. Michael Lewis, Program Director
Alaska Highway Safety Planning Agency

DATE: February 3, 1986

APPROVED BY: Robert J. Sundberg
Robert J. Sundberg
Commissioner
Department of Public Safety

DATE: 3/4/86

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : HB 345
 Title : An act to return the standard for civil liability of vendors of alcoholic beverages
 Sponsor : Rules Committee
 Requestor : Governor
 Date of Request : 4/1/85

FISCAL DETAIL

Agency Affected : Public Safety
 BRU : Highway Safety Planning Agency
 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS :

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by: T. Michael Lewis *TM* Phone: 465-4371
 Division: Highway Safety Planning Agency Date: 2/3/86
 Approved by Commissioner: [Signature] Date: 2/5/86
 Agency: Public Safety

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)



PREVENTION RESEARCH CENTER

2532 Durant Avenue
Berkeley, California 94704
(415) 486-1111

FEB 11 1986

To: Representative Katie Hurley
Pouch V
Juneau, Alaska 99801

From: Victor Colman, Legal Research Analyst
Prevention Research Center
2532 Durant Avenue
Berkeley, California 94704

Date: February 7, 1986

Re: HB 345

Dear Rep. Hurley:

Thank you for letting me testify yesterday at the State Affairs Committee on HB 345. As a co-drafter of the Model Dram Shop Act it is always a pleasure to be included in the dialogue at the state legislative level.

I also wanted to convey to you a few additional thoughts regarding HB 345; mostly in reponse to the testimony given at the February 5 hearing.

(1) Legislative Trends:

A representative from the insurance industry said that current dram shop legislative efforts are cutting back on liability. This is only partially true. Although some states have restricted their dram shop statutes, many other states are simply clarifying their laws, with much consideration being given to the Responsible Business Practices Defense, found in the Model Act. Additionally, numerous states have changed their common law to include commercial server liability. On balance, then, I would say that if a trend exists, it is toward the imposition of server liability.

(2) Drinker as Defendant:

Several witnesses kept referring to the proposed dram shop statute as one which substitutes the fault of the commercial server. This is wholly untrue. The burden of responsibility is one which is shared by both the drinker and the server; and most courts still characterize the drinker as a primary tortfeasor.

(3) Social Host Liability:

Several witnesses emphasized the alleged discriminatory practice of not including social hosts within the proposed dram shop statute. This complaint implies that social hosts are immunized from civil liability suits. This assumption is clearly wrong. Social hosts can be sued under a common law theory of recovery. As I mentioned in my testimony, because social hosts and licensed sellers of alcohol cannot be expected to have parallel duties it would be inappropriate to place them together in the same statute. Furthermore, the concept of responsible business practices has, in its present form, little to do with the social host.

Thus, it is again recommended that social hosts be excluded from HB 345. Other bills can be formulated to statutorily mandate such suits, or the common law can continue to provide that avenue of recovery.

(4) Responsible Business Practices

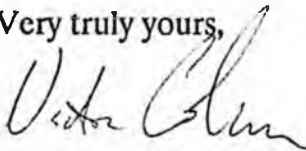
One witness was concerned that the addition of this subsection might lead to superficial portrayals of responsible business practices. This was a criticism that was aired when the initial draft of the Model Act was disseminated. The drafters then changed the section to read that the defense would not apply unless responsible business practices were adhered to at time of service. So, all the certificates in the world will not constitute a defense if the licensee was irresponsible at time of service.

(5) Public Support of Dram Shop Liability:

One witness mentioned a poll where 72% of the 1402 respondents said bartenders should not be legally responsible for drunken driving accidents caused by their customers. Any polls should be viewed with some skepticism, as the phrasing of language can be crucial. Thus, note the existence of a Field Institute poll taken in May, 1985 where 62% of the 1,006 polled either favored somewhat or strongly the notion of dram shop liability. Thus, public consensus for one side or another cannot yet be established.

I hope these comments are helpful in your deliberations on the HB 345. Please feel free to call on me for future technical assistance.

Very truly yours,



Victor Colman, J.D.
Legal Research Analyst

APR 18 1985

DEPARTMENT OF PUBLIC SAFETY
POSITION PAPER - HB 345

APRIL 16, 1985

"An Act returning the standard for civil liability of vendors of alcoholic beverages to ordinary negligence under the common law; and providing for an effective date."

The Department of Public Safety supports this legislation.

ANALYSIS

This legislation would return the standard of negligence to ordinary negligence under common law, thus eliminating the necessity of proving criminal intent. Enactment of this legislation would place a greater burden of responsibility upon the servers of alcoholic beverages to ensure that persons who show signs of intoxication are no longer served drinks if they plan to drive. The real benefit of this legislation is that alcohol beverage servers will be forced to play an active role in the prevention of alcohol-related highway deaths and injuries.

PURPOSE

During calendar years 1978 through 1983, there were 386 persons killed and 7,329 persons injured in alcohol related traffic accidents. The estimated cost of alcohol related accidents during this time period was a conservative 163.8 million dollars. The purpose of this legislation is to reduce the number of alcohol related traffic deaths, injuries and societal costs in Alaska by encouraging the servers of alcoholic beverages to share in the responsibilities related to the consumption of alcohol and driving. The servers will not suffer from the enactment of this legislation, if they take prudent action by providing server training and becoming involved with other proven programs directed at reducing the incidence of drunk driving.

RECOMMENDED BY: T. Michael Lewis
T. Michael Lewis
Program Director
Alaska Highway Safety Planning Agency

DATE: April 17, 1985

APPROVED BY: Robert J. Sundberg
Robert J. Sundberg
Commissioner
Department of Public Safety

DATE: 4/17/85

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 345
 Title: "An Act...returning...civil liability...to ordinary negligence..."
 Sponsor: By Request of the Governor
 Requestor: Office of the Gov./OMB
 Date of Request: March 19, 1985

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: General Government
 BRU, Program or Subprogram(s) Affected: Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill returns the standard for civil liability of vendors of alcoholic beverages to ordinary negligence under the common law. Civil liability is a matter between private parties. In this case, it is between vendors of alcoholic beverages and their customers. Consequently, the bill will not have a fiscal impact on the Department of Law.

Richard I. Pegues

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: 3/19/85

Approved by Commissioner: Richard I. Pegues / ROR Date: 3/19/85
Norman C. Gorsuch
 Agency: Department of Law

Distribution (by Agency preparing fiscal note):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

7/1/84

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CLA 1949, § 2
197, SLA 1959;
, ch. 129, SLA

§ 04.21.010

ALCOHOLIC BEVERAGES

§ 04.21.020

Chapter 21. General Provisions.

Section

- 10. Municipal regulation
- 20. Civil liability of persons providing alcoholic beverages
- 30. Responsibility of licensees, agents and employees

Section

- 40. Sales on federal reservations
- 50. Proof of age
- 60. Warehousing of alcoholic beverages
- 70. Enforcement
- 80. Definitions

Sec. 04.21.010. Municipal regulation. (a) A municipality may adopt ordinances governing the barter, sale, and consumption of alcoholic beverages within the municipality as necessary for the orderly conduct of the business of selling alcoholic beverages within the municipality. An ordinance adopted under this section may not be inconsistent with this title or regulations adopted under this title.

(b) If, as a result of an election held in accordance with AS 04.11.502 in a municipality, the board is prohibited from issuing, renewing, or transferring a license between holders or locations or if the importation of alcoholic beverages is prohibited in the municipality, the municipality may adopt an ordinance making the sale or importation of alcoholic beverages a misdemeanor. The ordinance may not be inconsistent with this title or the regulations adopted under this title.

(c) A municipality may not impose taxes on alcoholic beverages except (1) property taxes on alcoholic beverage inventories and (2) sales taxes on alcoholic beverage sales. (§ 4 ch 131 SLA 1980)

Am. Jur. 2d and C.J.S. references. —
45 Am. Jur. 2d Intoxicating Liquors § 27.
48 C.J.S. Intoxicating Liquors § 193.

Sec. 04.21.020. Civil liability of persons providing alcoholic beverages. A person who provides alcoholic beverages to another person may not be held civilly liable for injuries resulting from the intoxication of that person unless the person who provides the alcoholic beverages holds a license authorized under AS 04.11.080 — 04.11.220, or is an agent or employee of such a licensee and

(1) the alcoholic beverages are provided to a person under the age of
* 19 years in violation of AS 04.16.051, unless the licensee, agent, or employee secures in good faith from the person a signed statement, liquor identification card, or driver's license meeting the requirements of AS 04.21.050(a) and 04.21.050(b), which indicates that the person is 19 years of age or older; or

(2) the alcoholic beverages are provided to a drunken person in violation of AS 04.16.030. (§ 5 ch 131 SLA 1980)

Revisor's note. — This section was slightly rearranged by the revisor of statutes, pursuant to AS 01.05.031(b), for clarity.

Cross references. — As to responsibility of licensee for violations, see AS 04.16.150. As to responsibility of licensees, agents and employees, see AS 04.21.030.

Editor's note. — The cases cited in the note below were decided under former AS 04.10.180 and 04.15.020.

Civil liability under former law. — The common-law rule as to the non-liability of the vendor of intoxicating liquor for torts committed by the drinker of liquor while the latter was intoxicated, without more, generally prevailed. *Cherbonnier v. Rafalovich*, 12 Alaska 634, 88 F. Supp. 900 (D. Alas. 1950). See *Vance v. United States*, 355 F. Supp. 756 (D. Alas. 1973).

Although it was true that policy embodied in former AS 04.10.180 could also be enforced by criminal and administrative sanctions, there was no

reason for giving that statute a narrow interpretation that would preclude a private right of action for unlawful conduct. *Alesna v. Legrue*, Sup. Ct. Op. No. 2148 (File No. 4406), P.2d (1980), overruling *Barton v. Lund*, Sup. Ct. Op. No. 1423 (File No. 2726), 563 P.2d 875 (1977).

It is not unfair to hold a licensee responsible for the establishment's operation even though the licensee does not have actual control of the day-to-day functions. *Alesna v. Legrue*, Sup. Ct. Op. No. 2148 (File No. 4406), P.2d (1980).

For construction of former AS 04.15.020(a) as setting a minimum standard of care for purposes of the common-law cause of action based upon ordinary negligence, see *Vance v. United States*, 355 F. Supp. 756 (D. Alas. 1973).

Am. Jur. 2d and C.J.S. references. — 45 Am. Jur. 2d Intoxicating Liquors §§ 553 — 614.

48 C.J.S. Intoxicating Liquors §§ 430 — 485.

Sec. 04.21.030. Responsibility of licensees, agents and employees. The licensee has a duty to exercise that degree of care which a reasonable person would observe to insure that a business under his control is lawfully conducted. This duty of the licensee includes, but is not limited

(1) to insuring the compliance by agents or employees with this title and regulations adopted under this title, including acting with reasonable diligence to determine that his agents or employees are advised of the provisions of this title and the regulations adopted under this title, either by securing the agent's or employee's written acknowledgement of posted instructions or otherwise; and

(2) to insuring the compliance of the premises with public health, fire, and safety codes and ordinances of the state or municipality having jurisdiction. (§ 4 ch 131 SLA 1980)

Cross reference. — As to responsibility of licensee for violations, see AS 04.16.150.

Sec. 04.21.040. Sales on federal reservations. (a) A wholesaler of alcoholic beverages may sell alcoholic beverages to a person who does not have a license under this title who has a fixed place of business on land in the state maintained by the United States government as a military or naval reservation, a national park, or other federal reservation. A sale may be made under this section only if the purchaser is a ship's service store, officers club, officers mess, post exchange, or similar organization. The wholesaler may deliver

Sec. 04.16.020. Solicitation of alcoholic beverages. (a) A person may not pay or receive from another a salary, percentage or commission to solicit or encourage a patron of licensed premises to purchase alcoholic or other beverages for consumption by a person other than the patron.

(b) A licensee, his agent, or employee may not knowingly permit a person to loiter within or about premises licensed under this title for the purpose of begging or soliciting a patron or visitor to purchase alcoholic or other beverages for the person who is begging or soliciting. (§ 3 ch 131 SLA 1980)

Former law construed. — See Alaska Am. Jur. 2d and C.J.S. references. —
Alcoholic Beverage Control Bd. v. 45 Am. Jur. 2d Intoxicating Liquor §§ 297,
Malcolm, Inc., Sup. Ct. Op. No. 208 (File 298.
No. 363), 391 P.2d 441 (1964). 48 C.J.S. Intoxicating Liquors § 267.

Sec. 04.16.030. Sale or disposition of alcoholic beverages to drunken persons. A licensee, his agent, or employee may not with criminal negligence

- (1) sell, give, or barter alcoholic beverages to a drunken person;
- (2) allow another person to sell, give, or barter an alcoholic beverage to a drunken person within licensed premises;
- (3) allow a drunken person to enter and remain within licensed premises or to consume an alcoholic beverage within licensed premises;
- (4) permit a drunken person to sell or serve alcoholic beverages. (§ 3 ch 131 SLA 1980)

Am. Jur. 2d and C.J.S. references. — 48 C.J.S. Intoxicating Liquors §§ 257,
45 Am. Jur. 2d Intoxicating Liquors 258.
§§ 265, 266.

Sec. 04.16.040. Access of drunken persons to licensed premises. A drunken person may not knowingly enter or remain on premises licensed under this title. (§ 3 ch 131 SLA 1980)

Sec. 04.16.045. Obligation to enforce restrictions in licensed premises. A licensee, his agent or employee may not permit the consumption of alcoholic beverages by any person within licensed premises unless it is permitted by the license. (§ 3 ch 131 SLA 1980)

Revisor's note. — This section was originally enacted as AS 04.16.041 but was renumbered by the revisor of statutes.
Cross reference. — As to responsibility of licensee for violations, see AS 04.16.150.

Title 5
Amusements and Sports

DEPARTMENT OF PUBLIC SAFETY
POSITION PAPER - HB 345

FEBRUARY 3, 1986

"An Act returning the standard for civil liability of vendors of alcoholic beverages to ordinary negligence under common law; and providing for an effective date."

The Department of Public Safety supports this legislation.

ANALYSIS

This legislation would return the standard of negligence to ordinary negligence under common law, thus eliminating the necessity of proving criminal intent. Enactment of this legislation would place a greater burden of responsibility upon the servers of alcoholic beverages to ensure that persons who show signs of intoxication are no longer served drinks if they plan to drive. The real benefit of this legislation is that alcohol beverage servers will be forced to play an active role in the prevention of alcohol-related highway deaths and injuries.

PURPOSE

During calendar years 1978 through 1984, there were 456 persons killed and 8,389 persons injured in alcohol related traffic accidents. The estimated cost of alcohol related accidents during this time period was a conservative 209.6 million dollars. The purpose of this legislation is to reduce the number of alcohol related traffic deaths, injuries and societal costs in Alaska by encouraging the servers of alcoholic beverages to share in the responsibilities related to the consumption of alcohol and driving. The servers will not suffer from the enactment of this legislation, if they take prudent action by providing server training and becoming involved with other proven programs directed at reducing the incidence of drunk driving.

RECOMMENDED BY: T. Michael Lewis
T. Michael Lewis, Program Director
Alaska Highway Safety Planning Agency

DATE: February 3, 1986

APPROVED BY: Robert J. Sundberg
Robert J. Sundberg
Commissioner
Department of Public Safety

DATE: 2/4/86

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : HB 345
 Title : An act to return the standard for civil liability of vendors of alcoholic beverages
 Sponsor : Rules Committee
 Requestor : Governor
 Date of Request : 4/1/85

FISCAL DETAIL

Agency Affected : Public Safety
 BRU : Highway Safety Planning Agency
 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS :

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : T. Michael Lewis
 Division : Highway Safety Planning Agency

Phone : 465-4371
 Date : 2/3/86

Approved by Commissioner : _____
 Agency : Public Safety

Date : 2/5/86

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY
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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HISA 4-18-85 3pm



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

July 25, 1985

MEMORANDUM

TO: Representative Katie Hurley

ATTN: Patti Macklin

FROM: Mark Torgerson *MT*
Legislative Analyst

RE: Dram Shop Liability and Alternatives for Reducing Alcohol-Related
Accidents
Research Request 85-336

You asked us to provide information on the following topics:

- history of dram shop laws, including dram shop laws in other states and foreign countries;
- citizen action groups such as Mothers Against Drunk Drivers (MADD); and
- alternatives for reducing the number of alcohol-related accidents in Alaska.

For this request, we contacted officials of other states and the federal government, representatives of the insurance industry, presidents of state and national beverage associations, citizen's advocate groups, and private research associations. In addition, we contacted representatives of Great Britain, West Germany, and the Province of Alberta. They provided the following information.

History of Dram Shop Laws

Dram shop (or liquor liability) laws were first enacted in America in the mid-1800s, an era in which there was significant public pressure to close saloons and "dram shops."¹ Early laws typically provided that tavern owners were financially responsible for the support of families of patrons who became "habitual drunkards."

¹Wisconsin passed the first liquor liability related legislation in 1849. However, this dram shop act was repealed in 1982.

However, dram shop lawsuits were rare until the number of alcohol-related driving accidents increased after the repeal of Prohibition. During this time, some state statutes prohibited the sale of alcoholic beverages to "obviously intoxicated" persons and minors, as well as the "habitual drunkards." Furthermore, commercial liquor sellers could be held liable not only for family support but also for injuries caused by intoxicated persons. Although dram shop laws create potential liability for any type of injury "caused" by a drunk person to a third party, lawsuits from driving accidents are the most common type of litigation.

Today there are two legal means of establishing dram shop liability in the states: statutory and common law.² Some states provide for one or both of these types of liability, while other states still do not recognize a dram shop cause of action. The following section provides a brief overview of recent trends in dram shop liability laws in other states.

Overview of Dram Shop Laws

Alaska's laws provide for dram shop liability in AS 04.21.020. This statute prohibits the sale by a licensee of alcoholic beverage to a person under 21 years old or to a "drunken person." The licensee is liable only if he or she provides these beverages with "criminal negligence," which is defined in AS 04.21.080(1). This definition, when construed with the dram shop law, basically states that the licensee must serve the alcoholic beverages with "gross negligence"--instead of "ordinary negligence" which is applied by most other jurisdictions.

As applied by the courts, "gross negligence" is more difficult to prove than "ordinary negligence." In Kavorkian v. Tommy's Elbow Room, Inc., the defendant drank for approximately four hours while watching "Monday Night Football" and playing foosball with friends in a Fairbanks bar.³ While traveling between bars, a passenger later testified that the defendant drove "fast and recklessly," running stop and yield signs.

²"Common Law" refers to a court decision which bases the defendant's liability on general negligence principles rather than a specific dram shop statute. Common law liability was created in some states which did not, at the time a lawsuit was filed, have a dram shop statute. Courts can create this common law liability if the plaintiff establishes a recognized legal cause of action (such as negligence), and provided the court is willing to recognize the legal theory in absence of statute. The first common law dram shop case apparently was Pratt v. Daly, 104 P. 2d 147 (Arizona, 1940).

³694 P. 2d 160 (Alaska, 1985).

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When the defendant and his friend left the bar at 8:30 p.m., two Fairbanks policemen noticed their inebriated state and told them not to drive. As soon as the police were out of sight, they drove away. He subsequently drove through a red light and collided with another vehicle, killing two people and seriously injuring a third.

In the ensuing lawsuit, the jury returned a verdict of "not guilty" for the tavern that last served the defendant. The Alaska Supreme Court affirmed, holding that reasonable jurors could disagree on whether the tavern acted with criminal negligence. The court noted that the legislative history of AS 04.16.030 imposes an "affirmative duty" on liquor establishments to determine whether a person is "drunk." In this case, the bartender sold the drinks to the defendant's friend and did not observe the defendant until he was leaving the tavern.

Currently, 38 states and the District of Columbia have some form of dram shop liability. Twenty-three of these states provide for statutory liability while 15 states have common law liability. Dram shop liability is generally premised on the legal theory of negligence; that is, a liquor server breaches a duty of care by selling alcoholic drinks to a drunk person. The sale of the drinks is then considered the proximate cause of any harm the drunk person inflicts on third parties. When this occurs, the owner of the guilty liquor establishment is liable for the injured person's resulting damages.⁴

The states' dram shop laws differ in many ways. The factors which vary in these laws include the following: persons who can sue or be sued under the laws; the legal standards required to establish legal liability; and monetary limits on the damages that can be awarded in a dram shop injury suit. Attachment A illustrates these differences.⁵

Some of the dram shop laws have changed considerably in recent years due to increases in the number of alcohol-related traffic injuries, the resulting litigation and (frequently) large damage awards to injured third parties, and public awareness of the above factors.⁶ In addition, officials involved with dram shop legislation in other states indicated that intensive lobbying by advocates and opponents of dram shop laws has influenced these legislative changes. The trend of these changes has been toward creating and expanding the scope of dram shop liability.

⁴Conversely, the states that do not have dram shop laws assert that the server is not the proximate cause of the third party's injuries.

⁵Recent legislative enactments have been penciled in.

⁶The National Highway Traffic Safety Administration (NHTSA) and the National Safety Council estimate that 250,000 people died in alcohol-related traffic accidents in the past ten years.

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However, a few legislatures, such as California, have moved against this trend and have restricted or eliminated their dram shop laws.

In California, the state's courts had expanded the scope of potentially liable parties to include social hosts--those who serve alcoholic beverages at social functions in the home or at a business. Soon after this host liability was established, the state's legislature enacted a law (in 1979) which abrogated all prior court decisions except those cases which provide for the liability of a liquor licensee who serves alcoholic beverages to an "obviously intoxicated" minor.⁷

The 1985 legislatures in Arizona and South Dakota passed laws which affected dram shop liability. In Arizona, the state's supreme court first recognized a dram shop cause of action in a 1983 decision, Ontiveros v. Borak et. al.⁸ According to Cameron Holmes, an assistant attorney general in Arizona, the insurance and beverage industries began intensive lobbying soon after Ontiveros was decided. In a compromise move, the 1985 legislature passed a law which prohibits host liability in dram shop cases; however, the Ontiveros decision, which established common law liability of commercial liquor servers, was not abrogated.

The South Dakota Supreme Court, in the 1982 Walz decision, overturned prior case law and created a dram shop cause of action in the state.⁹ The court based its decision on legislative inaction and on the "tragic" contribution of alcohol to the state's traffic fatalities.

However, the 1985 legislature abrogated the Walz decision and eliminated all dram shop liability. The enabling law which precludes liability states "that the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted upon another by an intoxicated person."¹⁰

⁷Despite this statutory restriction, the costs to the insurance industry have been considerable for some cases involving minors. For example, the largest dram shop settlement to date--\$10.5 million--occurred in 1983 in a California lawsuit involving an injured minor.

⁸Ontiveros v. Borak et. al., 667 P. 2d 200 (1983).

⁹Walz v. City of Hudson, 327 N.W. 2d 120 (1982).

¹⁰Senate Bill 240, 1985 Legislative Assembly. A copy of the bill, and a letter written by South Dakota's Governor regarding the law, are attached as Attachment B.

As noted, the trend in the states has been toward establishing and expanding dram shop liability.¹¹ Although seven states have passed dram shop statutes in the past five years, the states' courts have been the primary source of expanding the scope of liability.¹² This common law expansion has usually occurred in cases involving social hosts or employer's liability.¹³ The most expansive application of dram shop liability to date occurred in New Jersey. In Kelly v. Gwinnell, the New Jersey Supreme Court upheld a trial court's jury award of \$9.5 million.¹⁴ The court held that the social host was liable for directly serving liquor (two to three scotch on the rocks in a one to two-hour period) to a guest, knowing that the guest was intoxicated and would thereafter be driving a vehicle.

The recent expansion of dram shop liability is not limited to lawsuits against private liquor servers. Courts have rendered decisions against municipalities for their employees' negligent acts. In one case, a municipal liquor store was held liable because one of its employees sold liquor to an obviously intoxicated person who subsequently killed an innocent third party in a collision.¹⁵ In another case, a city was liable when police failed to remove a drunk driver from the road, and the drunk driver later injured other travelers.¹⁶

Alternatives For Reducing Alcohol-Related Accidents

Dram shop laws provide one potential alternative for reducing drunk driving accidents, although the actual effectiveness of the current dram shop laws in the states has not been documented. As noted, a strong majority of states provide for some form of dram shop liability.

¹¹This trend toward expansion of dram shop liability has affected liquor servers' insurance rates and insurance availability. These issues were addressed in House Research Agency Research Request 85-328, which is attached.

¹²Those states which have enacted statutes in the past five years are Alaska, California, Florida, Iowa, New Mexico, Oregon and Utah.

¹³Some courts have also expanded the liability of commercial liquor servers by allowing the intoxicated person who injures herself or himself to sue for the injuries.

¹⁴476 A. 2d 1219 (New Jersey, 1984).

¹⁵Walz v. City of Hudson, 327 N.W. 2d 120 (South Dakota, 1982).

¹⁶Irwin v. Town of Ware, 467 N.E. 2d 1292 (Massachusetts, 1984).

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In addition, the Presidential Commission on Drunk Driving (1983) and the National Highway Traffic Safety Administration of the Department of Transportation (NHTSA) have endorsed dram shop liability as a legitimate strategy for reducing drunk driving.

When imposing dram shop liability, courts have traditionally emphasized three distinct policy rationales: punishment, victim compensation and prevention. According to James Mosher, Administrative Director of the Prevention Research Group, the punishment rationale for imposing liability is not generally emphasized by modern courts, and he asserts that this rationale, (if it is the exclusive emphasis) is an inadequate reason for maintaining dram shop liability as a social policy. Furthermore, Mr. Mosher claims that the victim compensation rationale is substantially ineffective. Under this rationale, courts state that negligent licensees should pay for injuries sustained by innocent parties. These courts reason that licensees are "appropriate compensators" because they profited from the very sales that led to the injuries. (This reasoning provides courts with a basis for distinguishing licensees and social hosts: because social hosts do not profit from serving alcoholic drinks, they should not share the social costs of the injuries.) Moreover, courts assume that licensees have liability insurance coverage and therefore provide the victim with a financial "deep pocket."

While acknowledging that a "deep pocket" is needed for parties injured in dram shop scenarios, Mr. Mosher asserts that this "system" of compensation is arbitrary (only a small fraction of injured parties actually get compensation) and that the required legal process is cumbersome (lawsuits are complicated, time-consuming and expensive). Therefore, Mr. Mosher advocates a different system for validating the victim compensation rationale. He asserts that states could impose a tax on alcohol and distribute the proceeds to injured parties. He claims that the small increase in retail prices would be offset by the decrease in insurance costs and in the risk of law suits.

In any event, Mr. Mosher stated that carefully drafted dram shop laws, which emphasize a policy of prevention, may effect a reduction in drunk driving incidents. He pointed out that existing dram shop laws have created interpretative difficulties for courts, for injured parties attempting to sue under the laws, and for defendants in these actions. For example, dram shop laws usually require that injured parties prove that the person who injured them was "obviously intoxicated." As many commercial liquor sellers have argued, this standard is vague and often results in unfair hindsight judgments because some potentially drunk drivers do not show signs of intoxication despite heavy drinking. Likewise, these vague standards have discouraged many injured parties with potentially valid claims from filing suit, and encouraged insurance companies to settle questionable claims. The focus of this prevention

rationale is "server intervention," which refers to reforms in methods of operation in commercial establishments.¹⁷ These reforms are designed to reduce the risk of serving intoxicated persons, and to provide alternate forms of transportation for intoxicated patrons.

These reforms are addressed in "The Model Dram Shop Act," drafted by Mr. Mosher's Prevention Research Group as the culmination of an eighteen-month research project undertaken to analyze current dram shop laws, determine current litigation practices, and develop an inventory of current server intervention practices. According to Mr. Mosher, the act contains model statutory language and is designed to contribute to the legislative process. The act includes a "negligence" standard for licensee's liability, and it also provides for a legal defense to those licensees who can demonstrate responsible business practices. A copy of the act is enclosed as Attachment C. The act does not address the issue of mandatory insurance for licensees, although Mr. Mosher recommends that it be considered. In addition, the act does not cover some aspects of dram shop liability because of the legislative policy decisions involved. These areas include social host liability, definition of licensees and licensed premises, mandated server training, minimum drinking age, and limits on dram shop liability awards.

Another alternative for reducing alcohol-related accidents is to increase the price of alcohol. Attachment D indicates that the price of alcoholic beverages increased modestly from 1967 to 1982 when compared to price changes of other selected items. According to the Prevention Research Group, in practical terms, alcoholic beverages decreased 27 percent during this time, primarily because federal and state governments did not index excise tax rates to inflation. The group maintains that both federal and state rates have declined relative to inflation. In a recent research paper, Mr. Mosher stated that a recent study sponsored by the National Academy of Sciences shows that a \$.25 increase in state taxes on liquor has a significant impact on rates of per capita consumption, cirrhosis and drunk driving casualties.¹⁸

Other alternatives suggested by Mr. Mosher include the following: encouraging alcohol advertisers to self-regulate their advertising content; passive restraints; increases in the gas tax; changes in

¹⁷Mosher stated that studies suggest that 50 percent of drunk drivers are traveling from retail establishments, and that many dram shop lawsuits involve accidents which occur within a two-mile radius of drinking establishments.

¹⁸"Alcohol Policy and the Presidential Commission on Drunk Driving: The Paths Not Taken".

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driver age; development of alternative and improved public transportation systems. In addition, Mr. Mosher stated that further research of the policy issues involved is needed.

Two states provide examples of additional alternatives. In Hawaii, a program allows police to ask those arrested for drunk driving where they had their last drink. This information is turned over to the County Liquor Commission where investigators try to determine whether that drink was served when the driver was already intoxicated as defined by law. If the answer is yes, the Liquor Commission can fine the establishment up to \$500, or suspend or revoke its license. If the evidence is lacking in a particular case, the commission notifies the bar owners that their establishment was named in a case. The Honolulu Police state that the program's primary goal is prevention and not punishment.

In addition, other programs have been initiated in Hawaii to combat the drunk driving problem there. For example, the Honolulu Police Department uses holiday and weekend roadblocks. The Broadcasters' Association adopted the theme "Drunk Driving is Deadly" and broadcast personal service advertisements to that effect. Then, a group of restaurateurs formed "The Hawaii Committee for Responsible Beverage Service" with the objective of encouraging alcohol education, training and prevention programs.

In Oregon, the Oregon Restaurant and Beverage Association is pushing for three bills in the legislature. The first would provide for a mandatory statewide system of alcohol server training schools. All new applicants for licenses would be required to complete the program before a license would be issued. The second bill would provide tax credits for licensees who put their employees through server or education programs. This bill would also allow for tax credits for establishments that provide alternative transportation modes for patrons. The third bill would add a "responsible business practices" defense to Oregon's dram shop law. In addition to these bills, the Marion/Polk County Beverage Association is sponsoring a "Home-Free" Program funded by donations to a private nonprofit corporation. Under the program, any patron driving to an establishment will be afforded a free ride home through an agreement with a local taxi company.

You also asked for information on citizen's advocate groups such as Mothers Against Drunk Drivers (MADD). Information provided by MADD and Remove Intoxicated Drivers (RID) is attached. Information from Students Against Drunk Drivers (SADD) will be forwarded to you when it is received. You also asked for information on dram shop laws in foreign countries. Representatives of Great Britain, West Germany and the Province of Alberta have been contacted so far. Of these three countries, only West Germany provides for "partial liability" of tavern

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owners, on a case-by-case basis. Additional information on laws in other countries will be forwarded to you as it is received. Attached are previous House Research Agency requests on drunk driving laws in foreign countries.

Attachment E contains statistics on alcohol-related accidents in Alaska between 1978 and 1984. These statistics were provided by the Department of Public Safety.

I hope this information is valuable to you. Please let me know if you have additional questions.

MT

Attachments

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Georgia		yes 51-1-18		only parent may bring cause of action		
Hawaii					Onc v Applegate 612 P2d 533 (1980)* negligence per se	
Idaho						Alegria v Payonk 619 P2d 135 (1980)* negligence
Illinois	yes 43-135		yes 43-135	\$15000 limit for injury; \$20000 limit loss of support, lessor also liable; 1 year S of L		
Indiana						Elder v Fisher 217 NE2d 847 (1966)* negligence per se
Iowa	yes 123.92 123.93			written notice to server in 6 months		Haafke v. Mitchell 347 NW2d 381 (1984)* negligence per se
Kentucky						Pike v. George 434 SW2d 626 (1968)* negligence per se
Louisiana						Chausse v. Southland 400 So2d 1199 (1981)* negligence

* State Supreme Court Case
Appellate Level Case

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Maine	yes 2002	yes 2002		actual and exemplary damages, lessor also liable		
Massachusetts					Adamian v Three Sons Inc. 233 NE2d 18 (1967)* negligence per se	
Michigan	yes (visibly intoxicated) 436.22			min = \$50, 2 yr S of L	Jones v. Bourria 128 NW2d 236 (1963)* negligence per se	Longstreth v. Fitzgibbon 335 NW2d 677 (1983)# negligence
Minnesota	yes 340.95, 340.95i			written notice within 120 days, 2 yr S of L		Holmquist v. Miller 352 NW2d 47 (1984)# negligence
Mississippi						Munford Inc v Peterson 368 So2d 213 (1979)* negligence per se
Missouri					Carver v. Schafer 647 SW2d 570 (1983)# negligence	Sampson v. W.F. Enterprises 611 SW2d 333 (1981)# negligence per se
New Hampshire					Ramsey v. Anctil 211 A2d 988 (1965)* negligence	
New Jersey					Kelly v. Gwinnett 476 A2d 1219 (1984)* negligence	Rappaport v Nichols 156 A2d 1 (1959)* negligence per se

* State Supreme Court Case
Appellate Level Case

STATES WITHOUT ESTABLISHED
DRAM SHOP LIABILITY

STATE	CASE LAW DENYING LIABILITY		NO APPELLATE CASES DECIDING ISSUE
	STATE SUPREME COURT DECISIONS AGAINST	STATE LOWER COURT DECISIONS AGAINST	
Arkansas	Carr v. Turner 385 SW2d 656 (1965) no negl per se/ Intoxicated person		
Delaware	Wright v. Moffitt 437 A2d 554 (1981) no negl or negl per se Intoxicated person		
Kansas			no cases
Maryland	Felder v. Butler 438 A2d 494 (1981) no negligence Intoxicated person		
Montana	Runge v. Watts 589 P2d 145 (1979) no negligence for social host/ Intoxicated person		
Nebraska	Holmes v. Circo 244 NW2d 65 (1976) no negl per se/ Intoxicated person		
Nevada	Hamm v. Carson City Nugget 450 P2d 358 (1969) no negl per se/ Intoxicated person Yoscovlitch v. Wasson 645 P2d 975 (1982) no negl per se/minor		

*1985 Legislature passed law which
precludes dram shop liability.*

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Georgia		yes 51-1-18		only parent may bring cause of action		
Hawaii					Ono v Applegate 612 P2d 533 (1980)* negligence per se	
Idaho						Alegria v Payonk 619 P2d 135 (1980)* negligence
Illinois	yes 43-135		yes 43-135	\$15000 limit for injury; \$20000 limit loss of support, lessor also liable; 1 year S of L		
Indiana						Elder v Fisher 217 NE2d 847 (1966)* negligence per se
Iowa	yes 123.92 123.93			written notice to server in 6 months		Haafke v. Mitchell 347 NW2d 381 (1984)* negligence per se
Kentucky						Pike v. George 434 SW2d 626 (1968)* negligence per se
Louisiana						Chausse v. Southland 400 So2d 1199 (1981)* negligence

* State Supreme Court Case
 † Appellate Level Case

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Alabama	yes 6-5-71	yes 6-5-70 6-5-71		only parent or guardian may bring suit under 6-5-70		
Alaska	yes (drunken) 04.21.020:2	yes, if no id 04.21.020:1		licensees only	Nazareno v. Urie 638 P2d 671 (1981)* negligence per se	
Arizona					Brannigan v Raybuck 667 P2d 213 (1983)* negligence	Ontiveros v Borak 667 P2d 200 (1983)* negligence
California		yes, if obviously intoxicated B&P 25602.1				
Colorado			yes, prior notice required 13-21-103		Kerby v. Flamingo Club 532 P2d 975 (1974)* negligence	
Connecticut	yes 30-102			\$50000 limit, written notice within 60 days, 1 year S of L.		
D. C.					Marusa v Dist of Columbia 484 F2d 828 (1973)* negligence	
Florida		yes, if willful and unlawful 768.125	yes, if knowingly 768.125			

* State Supreme Court Case
Appellate level Case

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Maine	yes 2002	yes 2002		actual and exemplary damages, lessor also liable		
Massachusetts					Adamian v Three Sons Inc. 233 NE2d 18 (1967)* negligence per se	
Michigan	yes (visibly intoxicated) 436.22			min = \$50, 2 yr S of L	Jones v. Bourrie 128 NW2d 236 (1963)* negligence per se	Longstreth v. Fitzgibbon 335 NW2d 677 (1983)# negligence
Minnesota	yes 340.95, 340.951			written notice within 120 days, 2 yr S of L		Holmquist v. Miller 352 NW2d 47 (1984)# negligence
Mississippi						Munford Inc v Peterson 368 So2d 213 (1979)* negligence per se
Missouri					Carver v. Schafer 647 SW2d 570 (1983)# negligence	Sampson v. W.F. Enterprises 611 SW2d 333 (1981)# negligence per se
New Hampshire					Ramsey v. Anctil 211 A2d 988 (1965)* negligence	
New Jersey					Kelly v. Gwinnett 476 A2d 1219 (1984)* negligence	Rappaport v Nichols 156 A2d 1 (1959)* negligence per se

* State Supreme Court Case
Appellate Level Case

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
New Mexico	yes, if reasonably apparent 41-11-1	yes 41-11-1-E			Lopez v Maez 651 P2d 1269 (1982)* negligence	MRC Prop. v. Gries 652 P2d 732 (1982)* negligence
New York	yes Gen Obi 11-101	yes Gen Obi 11-101			Berkeley v Park 262 NYS2d 290 (1965)# negligence	
North Carolina		yes, if driving negligently 18B-120 etc.		\$500,000 limit to recovery	Hutchens v. Hankins 303 SE2d 584 (1983)# negligence	
North Dakota	yes 5-01-06	yes 5-01-06				
Ohio	yes, notice required 4399.01		yes, notice required 4399.01	owner and lessee liable	Mason v Roberts 294 NE2d 884 (1973)* negligence	
Oregon	yes (visibly intoxicated) 30.950				Campbell v Carpenter 566 P2d 893 (1977)* negligence	
Pennsylvania	yes (visibly intoxicated) 47-4-497				Jardine v Upper Darby Lodge 198 A2d 550 (1964)* negligence per se	
Rhode Island	yes 3-11-1	yes 3-11-1	yes, notice required 3-11-2			

* State Supreme Court Case
Appellate Level Case

STATES WITHOUT ESTABLISHED
DRAM SHOP LIABILITY

STATE	CASE LAW DENYING LIABILITY		NO APPELLATE CASES DECIDING ISSUE
	STATE SUPREME COURT DECISIONS AGAINST	STATE LOWER COURT DECISIONS AGAINST	
Arkansas	Carr v. Turner 385 SW2d 656 (1965) no negl per se/ intoxicated person		
Delaware	Wright v. Moffitt 437 A2d 554 (1981) no negl or negl per se intoxicated person		
Kansas			no cases
Maryland	Felder v. Butler 438 A2d 494 (1981) no negligence intoxicated person		
Montana	Runge v. Watts 589 P2d 145 (1979) no negligence for social host/ intoxicated person		
Nebraska	Holmes v. Circo 244 NW2d 65 (1976) no negl per se/ intoxicated person		
Nevada	Hamm v. Carson City Nugget 450 P2d 358 (1969) no negl per se/ intoxicated person Yoscovitch v. Wasson 645 P2d 975 (1982) no negl per se/minor		

*1985 Legislature passed law which
precludes dram shop liability.*

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
South Dakota				1985 law: 35-4-78 Abrogated dram shop liability	Walz v City of Hudson 372 NW2d 120 (1982)* negligence per se	
Tennessee					Mitchell v. Ketner 393 SW2d 755 (1964)# negligence per se	
Utah	yes 32-11-1	yes 32-11-1	yes 32-11-1	state immune from liability		
Vermont	yes 7-501	yes 7-501				
Virginia						Corrigan v. United States 595 FSupp 1847 (1984)** negligence
Washington						Young v Caravan Corp 663 P2d 834 (1983)* negligence per se
Wisconsin						Sorenson v. Jarvis 350 NW2d 108 (1984)* negligence per se
Wyoming	1985 law: 12-8-301 licensee only	yes 12-5-502	yes 12-5-502	written notice required		McClellan v Tottenhoff 666 P2d 408 (1983)* negligence

* State Supreme Court Case
Appellate Level Case
** Trial Court Case

STATES WITHOUT ESTABLISHED
DRAM SHOP LIABILITY

STATE	CASE LAW DENYING LIABILITY		NO APPELLATE CASES DECIDING ISSUE
	STATE SUPREME COURT DECISIONS AGAINST	STATE LOWER COURT DECISIONS AGAINST	
Oklahoma			no cases
South Carolina			no cases
Texas			no cases
West Virginia			no cases



ATTACHMENT B

STATE OF SOUTH DAKOTA

EXECUTIVE OFFICE

WILLIAM J JANKLOW
GOVERNOR

March 13, 1985

Dear Fellow South Dakotan:

As you probably already know by now, I signed the dram shop bill into law today.

Last year, I vetoed a very similar bill. That's why I'm writing to you now. I changed my mind because many of you and the Legislature convinced me that the liquor dispensers of this great state could be responsible and could be leaders in the effort to stop drunks from driving.

This new law is not meant to be a blanket of protection to allow irresponsibility. The old adage will apply--"What you abuse, you will lose." In other words, if liquor dispensers do not aggressively police themselves, I'm certain that future legislators and a future Governor will repeal this new law much more quickly than it was passed.

Philosophically, I don't like to see the government involved with private business through increased regulation. But, this is a problem that is at the very core of why civilized people form governments--public safety. People want to be protected from the death and destruction caused by drunk drivers. You and all of the other people who work in the liquor business are in the best position to stop that death and destruction. If you don't, there will probably be efforts made to repeal this new law and stricter regulations applied to the liquor business.

I believe that this new law is presenting to you a new opportunity for you to show all of South Dakota that you can be a much more positive force in stopping the drunk driver. The Legislature, my office and the people of South Dakota are telling you that they are willing to trust you to do a better job of protecting them from danger. I sincerely hope that one year from now we can look back and say that the trust was well deserved.

Sincerely,

State of South Dakota

SIXTIETH SESSION
 LEGISLATIVE ASSEMBLY, 1985

*Senate
 Judiciary
 Senate floor
 House Judiciary
 Smoke*

SENATE		S. J. Page	Aye	Nay
Assigned to Committee on:				
Senate				
Committee Report:				
Do Pass Amend Table				
Legislative Action on Amendments:				
Adopted Not Adopted				
Second Reading and Final Passage:				
Pass Fail				
HOUSE		H. J. Page	Aye	Nay
Assigned to Committee on:				
House				
Committee Report:				
Do Pass Amend Table				
Legislative Action on Amendments:				
Adopted Not Adopted				
Second Reading and Final Passage:				
Pass Fail				

718J364

SENATE BILL NO. **240**

Introduced by: Senator Krueger and Representatives Warkentien, Debra Anderson, Bender, Cerny, Chicoine, Eidy, Elwood, Emery, Gabriel, Gleason, Hagen, Krautschun, Krogman, Lewis, Matthew, McKillop, Oien, Porch, Sears, Sieh, Vanderlinde, Weber, Wiese, Wishard, Wofford, Wood and Zabel

1 FOR AN ACT ENTITLED, An Act to define civil liability with regard to
 2 injuries caused by intoxicated persons.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. The Legislature finds that the consumption of alcoholic
 5 beverages, rather than the serving of alcoholic beverages, is the
 6 proximate cause of any injury inflicted upon another by an intoxicated
 7 person. Therefore, the rule in Walz v. city of Hudson, 327 N.W. 2nd
 8 120 (S.D. 1982) is hereby abrogated.

9 Section 2. That § 35-4-78 be amended to read as follows:

10 35-4-78. No licensee shall may sell any alcoholic beverage, except
 11 low-point beer:

12 (1) To any person under the age of twenty-one years;

13 (2) To any person who is obviously intoxicated at the time, or who
 14 is known to the seller to be an habitual drunkard.

15 A violation of this section is a Class 1 misdemeanor.

16 (However, no licensee is civilly liable to any injured person or)

Insertions into existing statutes are indicated by underscores.
 Deletions from existing statutes are indicated by overstrikes.

1 his estate for any injury suffered, including any action for wrongful
2 death, or property damage suffered because of the intoxication of any
3 person due to the sale of any alcoholic beverage in violation of the
4 provisions of this section.

5 Section 3. No social host who furnishes any alcoholic beverage is
6 civilly liable to any injured person or his estate for any injury suf-
7- fered, including any action for wrongful death, or property damage
8 suffered because of the intoxication of any person due to the consump-
9 tion of such alcoholic beverage.

10 Section 4. That § 35-6-27 be amended to read as follows:

11 35-6-27. No licensee under this chapter may sell or give any
12 low-point beer to any person who is less than nineteen years old or to
13 any person to whom the sale of other alcoholic beverages is prohibited
14 under the provisions of subdivision (2) of § 35-4-78. However, no li-
15 cencee is civilly liable to any injured person or his estate for any
16 injury suffered, including any action for wrongful death, or property
17 damage suffered because of the intoxication of any persor due to the
18 sale or gift of any low-point beer in violation of the provisions of
19 this section.

FINAL DRAFT
Supersedes Preliminary Draft

APPENDIX A

MODEL ALCOHOLIC BEVERAGES RETAIL LICENSEE LIABILITY ACT OF
1985

(Model Provisions Only)

Prevention Research Group
Medical Research Institute
of San Francisco
2532 Durant Avenue
Berkeley, CA 94704

Preparation was supported by Grant # RO1 AA0621-01 (Prevention Research: Server Intervention and the Law) to the Medical Research Institute of San Francisco.

SECTION 1: SHORT TITLE

This Act shall be entitled the [State] Alcoholic Beverage Retail Licensee Liability Act of [year].

SECTION 2: PURPOSE

(a) The primary legislative purpose of the Act is to prevent intoxication-related traumatic injuries, deaths and other damages, as specified in Section 8, among [State]'s population.

(b) The secondary legislative purpose is to establish a legal basis for obtaining compensation to those suffering damages as a result of intoxication-related incidents in accordance with the provisions of this Act.

SECTION 3: DEFINITIONS

(a) Adult means any person of legal age to purchase alcoholic beverages, as defined by [state statutory provision].

(b) Alcoholic beverages means [definition used in state Alcoholic Beverage Control (ABC) Act].

(c) Intoxicated person means an individual who is in a state of intoxication as defined by this Act.

(d) Intoxication means an impairment of a person's mental or physical faculties as a result of drug or alcoholic beverage use so as to diminish that person's ability to think and act in a manner in which an ordinary prudent and cautious person, in full possession of his or her faculties and using reasonable care, would act under like circumstances.

(e) Licensee means any person who is required to be licensed to serve alcoholic beverages [including any governmental entity permitted by law to serve alcoholic beverages] pursuant to [state ABC Act].

(f) Minor means any person under the legal age to purchase alcoholic beverages as defined by [state statutory provision].

(g) Person means any individual, governmental body, corporation or other legal entity.

(h) Premises means [definition used in state ABC act]

(i) Service of Alcoholic Beverage; Service means any sale, gift or other furnishing of alcoholic beverages.

SECTION 4: PLAINTIFF

(a) Any person who suffers damage, as provided in Section 8, may bring an action pursuant to this Act subject to the limitation found in subsection (b) of this Section.

(b) A [person/adult] who becomes intoxicated may not bring an action pursuant to Section 6 of this Act (negligent service of alcoholic beverages) against a defendant for serving alcoholic beverages to such person.

SECTION 5: DEFENDANTS

The following persons who commit an act giving rise to liability, as provided in Section 6 and 7, may be made a defendant to a claim under the provisions of this Act:

(a) an alcoholic beverage retail licensee, and any employee or agent of such a licensee;

(b) any person who, at the time of such act, was required by law to have had an alcoholic beverage retail license under the provisions of [State ABC Act], and any employee or agent of such person.

SECTION 6: NEGLIGENT SERVICE OF ALCOHOLIC BEVERAGES

(a) A defendant, as defined in Section 5, who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this Act.

(b) Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances adhering to responsible business practices as defined in Section 10 would know that the person being served is a minor or is intoxicated.

(c) Proof of service of alcoholic beverages to a minor without request for identification shall form a rebuttable presumption of negligence.

(d) Service of alcoholic beverages by a defendant to an adult person who subsequently serves a minor off the premises [or who is legally permitted to serve a minor] does not constitute service to the minor unless a reasonably prudent person in like circumstances would know that such subsequent service is reasonably likely to occur [and is illegal].

(e) A defendant does not have a duty to investigate whether a person being served alcoholic beverages intends to serve the alcoholic beverages to other persons off the premises.

(f) A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises unless the

person's appearance and behavior, or other facts known to defendant, would put a reasonably prudent person on notice of such consumption.

(g) A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

SECTION 7: RECKLESS SERVICE OF ALCOHOLIC BEVERAGES

(a) The service of alcoholic beverages is reckless when a defendant, as defined in Section 5, intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

(b) A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

(c) Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(1) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages;

(2) Service of alcoholic beverages to a person, sixteen years old or under, when the server has actual or constructive knowledge of the patron's age;

(3) Service of alcoholic beverages to a patron that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning;

(4) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle.

SECTION 8: DAMAGES

(a) Damages may be awarded for all injuries recognized under [State] common law (or codified common law provisions).

(b) Punitive damages may be awarded in all actions based on reckless conduct, as defined in Section 7. Punitive damages may not be awarded for actions based on negligent conduct, as defined in Section 6.

(c) Damages may be recovered under [wrongful death statute] and [survival statute] as in other tort actions.

SECTION 9: COMMON LAW DEFENSES

Defenses applicable to tort actions based on negligence and recklessness in [state] may be asserted in defending actions brought pursuant to this Act.

SECTION 10: RESPONSIBLE BUSINESS PRACTICES DEFENSE

(a) A defendant's service of alcoholic beverages is not negligent or reckless if the defendant, at the time of the service, is adhering to responsible business practices. Responsible business practices are those business policies, procedures and actions which an ordinarily prudent person would follow in like circumstances.

(b) The service of alcoholic beverages to a person with actual or constructive knowledge that such person is intoxicated or a minor constitutes an unreasonable business practice. Evidence of responsible business practices pursuant to this section is relevant to determining whether a defendant who does not have actual knowledge should have known of the person's intoxicated condition or age.

(c) Evidence of responsible business practices may include, but is not limited to, comprehensive training of defendant and defendant's employees and agents who are present at the time of service of alcoholic beverages and responsible management policies, procedures and actions which are in effect at the time of such service.

(d) For the purposes of service to intoxicated persons, evidence of comprehensive training includes, but is not limited to, the development of knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. Such training shall be appropriate to the level, kind, and type of responsibility for each employee and agent to be trained.

(e) For the purposes of service to intoxicated persons, evidence of responsible management policies, procedures, and actions may include, but is not limited to, those policies, procedures and actions which are implemented at time of service and which:

- (1) encourage persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises;
- (2) promote availability of nonalcoholic beverages and food;
- (3) promote safe transportation alternatives other than driving while intoxicated;
- (4) prohibit employees and agents of defendant from consuming alcoholic beverages while acting in their capacity as employee or agent;
- (5) establish promotions and marketing efforts which publicize responsible business practices to the defendant's customers and community;
- (6) implement comprehensive training procedures; and
- (7) maintain an adequate, trained number of employees and agents for the type and size of defendant's business;

- (8) are written in a policy and procedures handbook, or similar format, and made available to employees;
- (9) establish a standardized method for hiring qualified employees;
- (10) reprimand employees who violate employer policies and procedures.

(f) For the purposes of service to minors, evidence of responsible business practices may include, but is not limited to those listed in subsection (e) and the following:

- (1) management policies which are implemented at the time of service and which insure the examination of proof of identification [as established by state law] for all persons seeking service of alcoholic beverages who may reasonably be suspected to be minors;
- (2) comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

(g) Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and the defendant's previous contacts with the intoxicated person or minor who is served. Proof of the existence or omission of one or more elements of responsible business practices does not constitute the proof or disproof of the responsible business practices defense.

SECTION 11: STATUTE OF LIMITATIONS

Any action under this Act against a defendant alleging negligent conduct shall be brought within _____ year(s) of the conduct complained of. Any action under this Act against a defendant alleging reckless conduct shall be brought within _____ year(s) of the conduct complained of.

SECTION 12: PRIVILEGES

(a) No defendant, as provided in Section 5, may be held civilly liable for damages resulting from a good faith refusal to serve alcoholic beverages to any person who:

- (1) fails to show proper identification of age; or
- (2) reasonably appears to be a minor; or
- (3) is refused service of alcoholic beverages by defendant in a good faith effort to prevent excessive consumption of alcohol by a person.

(b) No defendant, as provided in Section 5, may be held civilly liable for holding a person's identification documents presented to defendant as proof of the person's age for the purposes of receiving alcoholic beverages provided:

- (1) such holding is for a reasonable length of time in a good faith effort to determine whether the person is of legal age or to summon law enforcement officers; and
- (2) the person whose identification is being held is informed of the reason for defendant's action.

(c) No defendant, as provided in Section 5, may be held civilly liable for using reasonable force to detain for a reasonable period of time necessary to summon law enforcement officers a person who, in the defendant's presence, is committing or has committed a breach of the peace or felony or is attempting to operate a motor vehicle while intoxicated.

(d) This section does not limit a defendant's right to assert any other defense to a civil liability claim otherwise provided by law.

SECTION 13: SETTLEMENT; RELEASE; CONTRIBUTION; INDEMNITY

(a) A plaintiff's settlement and proper release of either the intoxicated tortfeasor or a defendant, as defined in Section 5, will not bar potential claims against any other defendant(s).

(b) The amount paid to a plaintiff in consideration for the settlement and proper release of any defendant will be offset against all other subsequent judgments received by plaintiff.

(c) The liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages, shall be joint and several.

(d) In cases of negligent conduct, the liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages shall have a right of contribution and not a right of indemnification.

(e) In cases of reckless conduct, nonreckless defendants have a right of either indemnification or contribution from any reckless defendants.

SECTION 14: EXCLUSIVE REMEDY

This Act is the exclusive remedy against defendants, as defined in Section 5, for claims by those suffering damages based on the defendants' service of alcoholic beverages.

SECTION 15: EVALUATION

The Alcoholic Beverage Control Agency shall conduct an evaluation of the impact of this Act, to be completed within two years of its enactment. Evaluation topics to be addressed include but are not limited to initiation of, extent of, or changes in:

- (1) the number and type of server and manager training programs in the state;
- (2) the curricula of such programs;
- (3) the management policies, procedures and actions of licensees regarding the service of alcoholic beverages;
- (4) the number of actions filed, settled, and litigated pursuant to the Act and the number and amounts of recoveries;
- (5) the number of successful defenses based on Section 10 of this Act;
- (6) the legal interpretations of the provisions of this Act, particularly as compared to other state court interpretations;
- (7) the incidence of driving while intoxicated offenses, injuries and deaths;
- (8) the incidence of other alcohol-related problems;
- (9) the incidence of sales to minors and intoxicated persons.

SECTION 16: OPTIONAL NOTICE PROVISION

NOTICE TO DEFENDANT

Every plaintiff seeking damages under this Act shall give written notice to all defendants within 120 days of the date of entering an attorney-client relationship for the purpose of pursuing a claim under this Act. In the case of claims for contributions and indemnity, notice shall be given within 120 days of receiving written notice under this Act. The notice shall specify the time, place and circumstances of the defendant's conduct complained of, and the time, place and circumstances of any resulting damages. No error or omission in the notice shall void the effect of the notice, if otherwise valid, unless the error or omission is of substantially material nature. Failure to give written notice within the time specified shall be grounds for dismissal of a claim, and may only be waived by the court upon a showing of exceptional circumstances. Actual notice of sufficient facts to reasonably put a defendant on notice of a possible claim shall be construed to comply with the notice requirement herein.

ATTACHMENT D

TABLE I

Consumer Price Indexes for Alcoholic Beverages
and Other Selected Items
1970-1982
(1967 = 100)

	1970	1975	1980	1982
All items	116.3	161.2	246.8	287.1
Alcoholic beverages	112.3	142.1	186.3	208.0
Nonalcoholic beverages	117.4	178.9	395.8	425.6
Food and beverages	114.7	172.1	248.0	278.1
Housing	118.2	164.5	263.3	313.8
Fuel and other utilities	107.6	167.8	278.6	345.4
Transportation	112.7	150.6	249.7	285.6
Medical care	120.6	184.7	265.9	323.8

SOURCE: U.S. Bureau of Labor Statistics, Monthly Labor Review.

ALCOHOL INVOLVEMENT IN FATAL ACCIDENTS

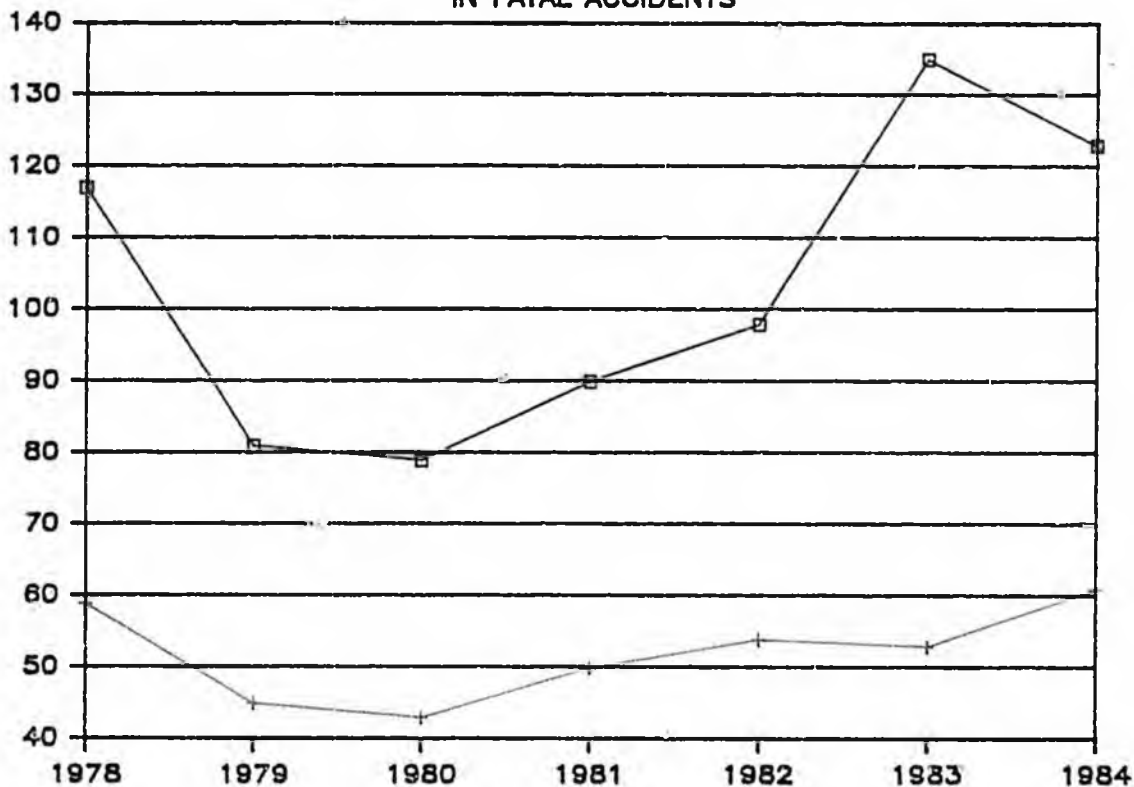


CHART 13

PERCENT OF ALCOHOL INVOLVEMENT IN FATAL ACCIDENTS AND FATALITIES

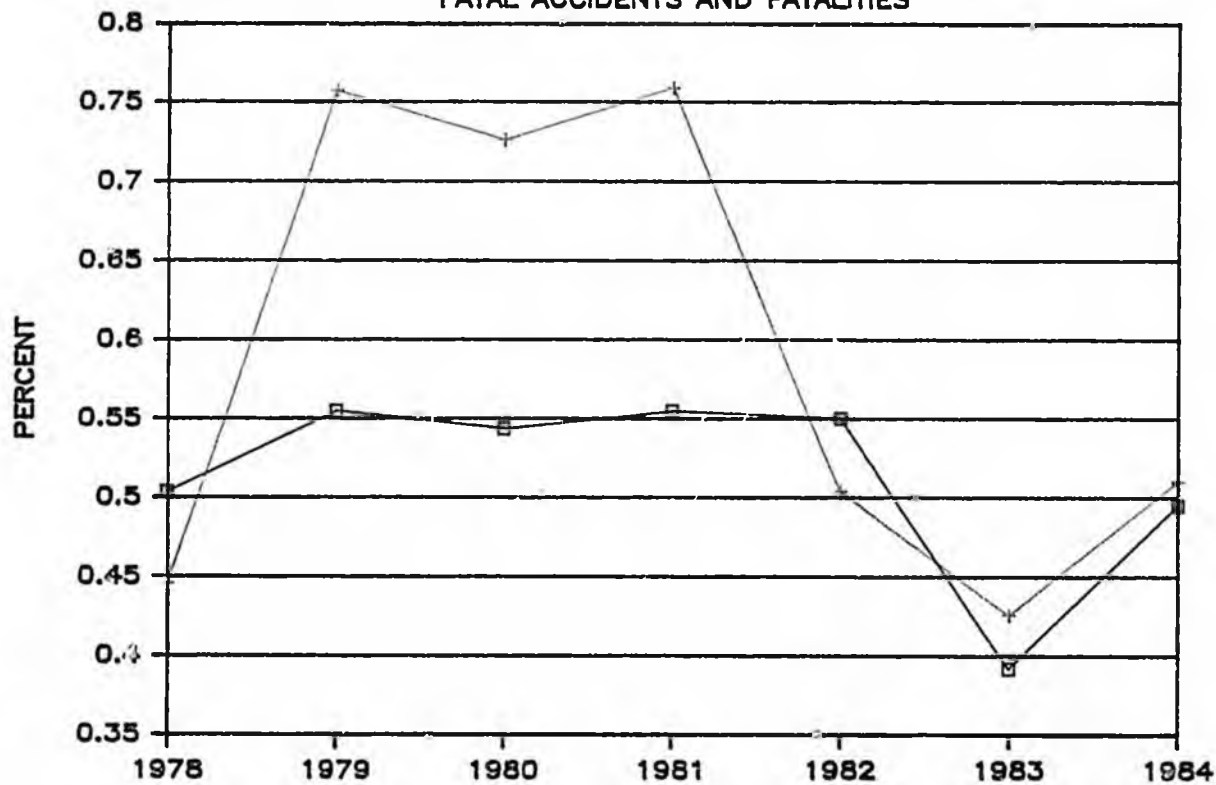
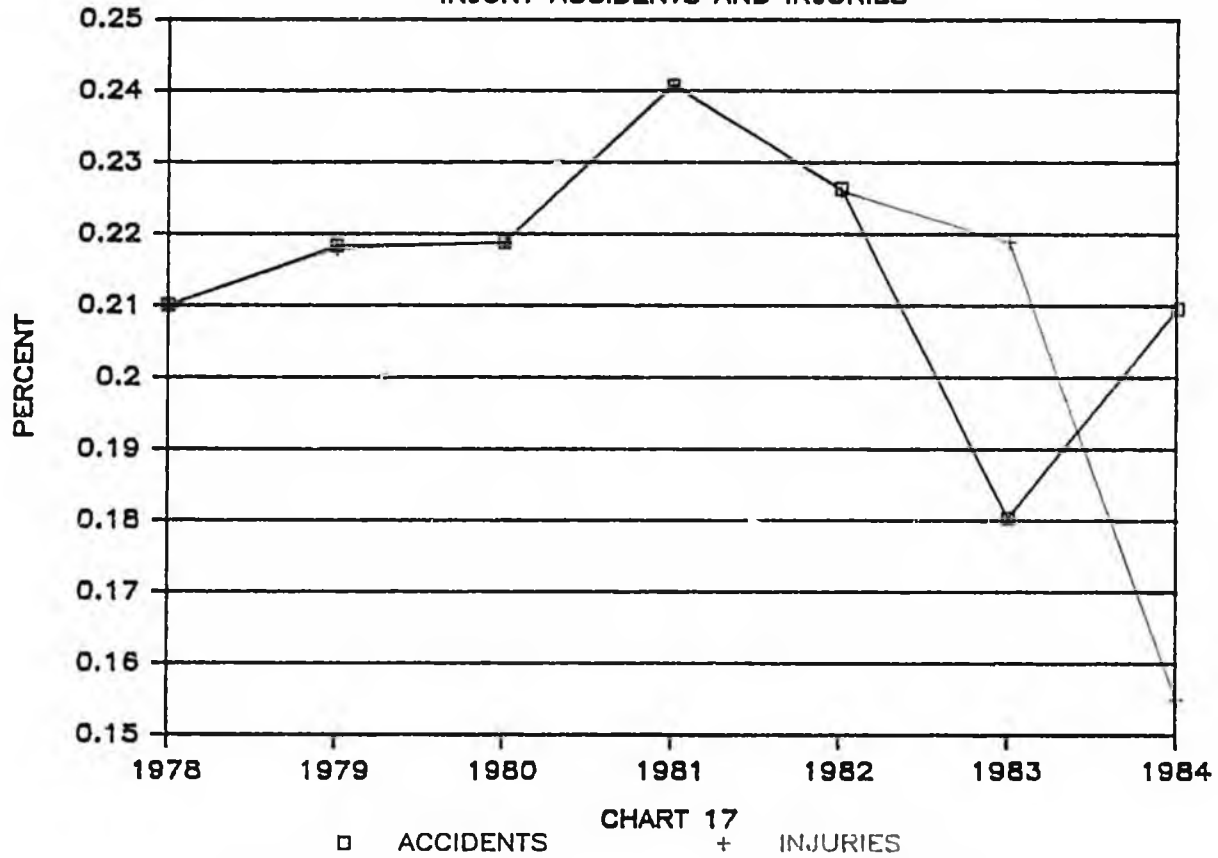
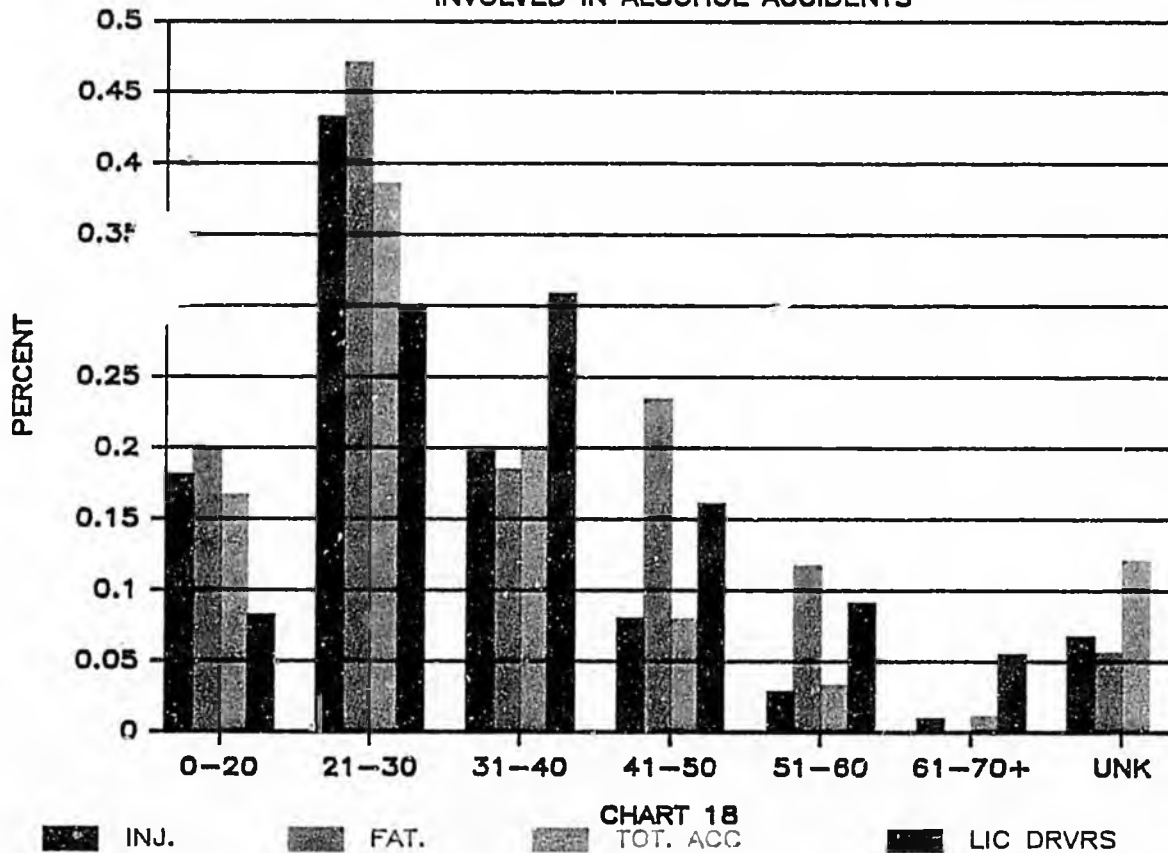


CHART 14

PERCENT OF ALCOHOL INVOLVEMENT IN INJURY ACCIDENTS AND INJURIES



PERCENT OF DRIVER BY AGE GROUP INVOLVED IN ALCOHOL ACCIDENTS



POSITION PAPER

HOUSE BILL 345

"An Act returning the standard for civil liability of vendors of alcoholic beverages to ordinary negligence under common law; and providing for an effective date."

The Department of Health and Social Services supports this legislation.

Analysis

The Standard of negligence would be returned to ordinary negligence under common law, by a court decision with this legislation. This standard would bring Alaska in alignment with nineteen (19) other states and return the Alaska statute to its original intent prior to 1980. The civil liability under this legislation is well established in law as early as the mid 1700's. The ordinary negligence standard for alcohol dispensation was also well established in Alaskan law, before the 1980 changes.

Reasonable and responsible vending of alcoholic beverages by licensees must be encouraged by statute, regulation, and public policies to insure the health, and welfare of the general population. The application and subsequent issuance of a license to dispense alcohol assumes awareness by the licensee of the effects of the drug alcohol. Furthermore, the designated vendor must realize the systemic relationship of alcohol consumption, over-consumption and the drinker's subsequent action, especially as it applies to potential criminal acts. This awareness and understanding must be reinforced by consistent knowledge of possible civil liability for the results of unreasonably dangerous acts of the licensee. The level of a licensee's liability for unreasonable failure to control over consumption on the licensee's premises must be commensurate with the level of liability that other businesses face for unreasonably dangerous activity.

Purpose

It is accepted medical knowledge that individuals under the influence of central nervous system depressant drugs (alcohol) may not use reasonable judgment under ordinary environmental conditions. Furthermore, this class of drug effects the motor skills that become increasingly more critical as society becomes more technically advanced. Several recent research studies have suggested that alcohol abuse prevention policy requires the development of many complimentary strategies that do not focus exclusively on individual drinking behavior. The present law embodies a policy of encouragement rather than prevention. There is a possibility, under present statute, that a vendor may perceive a higher level of protection from liable action. This perception may undermine the intent of regulations and statutes that recognize special duties for alcohol dispensing. Under these circumstances, prevention through the proper operation of an establishment is less likely.