ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3691 HSTA HB 345 (FILE 2)

567

To place total liability for harmful acts on those who are injured by the drugged individual, and/or the individuals that have reached their drugged condition under the supervision of a state licensed vendor, seems contrary to logic. Not only the threat of regulatory sanction, but a knowledge of possible liability to those who may be injured, must force licensed vendors to dispense alcohol in a prudent manner and to permissible classes of individuals. In addition, the possible liability must not be placed beyond reach of the harmed public by an unreasonable level of proof requirement.

When drinking problems are analyzed from a contextual or environmental standpoint, and not merely as manifestations of alcoholism or alcohol abuse, it becomes clear that the particular harms that result are preventable without focusing on the individual drinking behavior itself. In fact the structural, environmental, systems manipulation offers more promise of prevention than concentrating on drugged individual motivations that are unresponsive to reason. Punitive efforts focused on changing the drunk drivers habits are an example of the limited effect of individual approaches to preventing alcohol related accidents or fatalities.

Many, if not most, drunk driving accidents injure more than the drunk driver. "Motivated" intervention before an incident occurs, offers a obvious prevention strategy. This intervention has inherent conflict with financial incentives found in commercial vending establishments. If the licensees are aware that the level of negligent proof is so difficult that recourse by the injured public is not generally expected, the financial incentives for serving liquor more easily override the other incentives to intervene. As a prevention strategy, "dram shop" legislation becomes much more effective when this balance is maintained. The change would merely expose liquor vendors to the same standards of responsibility that are applied to almost all other commercial and, for that matter, non-commercial activities.

There is a wealth of data showing a distinct correlation between per capita consumption and a host of health and social ills. In a contemporary social structure where nearly everyone drives or rides in an automobile, the most obvious result of drinking and driving is death and injury from accidents. No one change in legislation should be considered an all encompassing solution. Nevertheless, HB 345 brings the statute back into balance in a historically reasonable approach to the problem of injuries and deaths attributed to alcohol abuse.

Recommended by: _____
Matthew C. Felix
Coordinator
Office of Alcoholism/
Drug Abuse

Date: 4/12/85

Approved by: _____
John R. Pugh
Commissioner
Dept. of Health &
Social Services

Date: 4/12/85

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 345

Title: "An Act returning the standard civil liability of vendors of alcoholic beverages*

Sponsor: Governor Bill Sheffield

Requestor: Representative Don Clocksin

Date of Request: 4/6/85

FISCAL DETAIL

Agency Affected: Health & Social Services

Program Category Affected: Alcohol & Drug Abuse Services

BRU, Program or Subprogram(s) Affected: Alcohol Abuse

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	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
REVENUE	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

to ordinary negligence under common law; and providing for an effective date."

Prepared By: Matthew C. Felix Phone: 586-6201

Division: Alcoholism and Drug Abuse Date: 4/12/85

Approved by Commissioner: Date: 4/12/85

Agency:

jcc

Distribution (by Agency preparing fiscal note):

Legislative Finance

Legislative Sponsor

Requestor

ATTACHMENT E

ESTIMATED COSTS OF ACCIDENTS - STATEWIDE
1978-1984

YEAR	TOTAL ACCIDENT	TOTAL DEATHS	TOTAL INJURIES	TOTAL PDO ACCIDENT	TOTAL PROPERTY DAMAGE	% ALCOH IN TOTAL DEATHS	% ALCOH IN TOTAL INJURIES	% ALCOH IN PDO ACCIDENT	TOTAL ALCOHOL DEATHS	TOTAL ALCOHOL INJURIES	TOTAL ALCOHOL PDO ACC	TOTAL COST ALC DEATHS	TOTAL COST ALC INJURIES	TOTAL COST ALC PDO	TOTAL ALCOHOL COST	TOTAL ACCIDENT COST
Year	Totacc	Totdea	Totinj	TotPdoAc	Totpdo	Patd	Pati	Papdo	TotAlDe	TotAlIn	TotAlPdo	CtAlDe	CtAlIn	CtAlPdo	TotAlCt	Toacct
1978	12971	132	4822	9591	18,823,286	44.7%	21.0%	9.5%	59	1013	911	19,234,000	5,065,000	1,787,928	26,086,928	81,060,290
1979	13519	91	4560	10277	19,369,644	75.8%	21.8%	9.0%	69	994	925	22,494,000	4,970,000	1,743,400	29,207,400	67,190,597
1980	13162	88	4992	9735	20,800,929	72.7%	21.9%	10.7%	64	1093	1042	20,864,000	5,465,000	2,226,458	28,555,458	69,032,975
1981	14100	100	5783	10158	26,112,705	76.0%	24.1%	11.4%	76	1394	1158	24,776,000	6,[illegible]9,000	2,976,848	34,722,848	80,327,259
1982	16743	107	6047	12541	31,739,571	50.5%	22.6%	9.9%	54	1367	1242	17,604,000	6,833,110	3,142,218	27,579,328	88,890,873
1983	18120	150	6705	13509	36,625,614	42.7%	21.9%	9.2%	64	1468	1242	20,864,000	7,341,975	3,367,312	31,573,287	109,730,487
1984	19365	137	6840	14499	40,210,258	51.1%	15.5%	9.4%	70	1060	1364	22,820,000	5,300,000	3,782,798	31,902,798	108,968,302
TOTAL	107980	805	39,749	80,310	193,682,007	56.6%	21.1%	9.8%	456	8389	7884	148,656,000	41,945,085	19,026,961	209,628,046	605,200,783

PERCENT OF ALCOHOL INVOLVEMENT
IN FATAL AND INJURY ACCIDENTS
1978 - 1984

YEAR	FATAL ACCIDTS	TOTAL FATALS	INJURY ACCIDTS	TOTAL INJURY	ALC FATAL ACCIDTS	ALC FATALS	ALC INJURY ACCIDTS	ALC INJURY	% ALC FATAL ACCIDTS	% ALC INJURY ACCIDTS	% ALC FATALS	% ALC INJURY
1978	117	132	3380	4822	59	59	710	1013	50.4%	21.0%	44.7%	21.0%
1979	81	91	3242	4560	45	69	708	994	55.6%	21.8%	75.8%	21.8%
1980	79	88	3427	4992	43	64	750	1093	54.4%	21.9%	72.7%	21.9%
1981	90	100	3942	5783	50	76	949	1391	55.6%	24.1%	76.0%	24.1%
1982	98	107	4202	6047	54	54	951	1367	55.1%	22.6%	50.5%	22.6%
1983	135	150	5611	6705	53	64	1012	1468	39.3%	18.0%	42.7%	21.9%
1984	123	137	4866	6840	61	70	1020	1060	49.6%	21.0%	51.1%	15.5%

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

May 13, 1985

MEMORANDUM

TO: Representative

FROM: Mark Torgerson
Legislative Analyst

RE: ~~Expanding the Availability of Liquor Liability Insurance~~
Research Request 85-328

You asked us to investigate what other states are doing to expand the availability of liquor liability insurance. We contacted officials in 11 states, representatives of the insurance industry, members of state and national beverage associations, and independent analysts. The first part of this memorandum provides a brief overview of availability of liquor liability insurance. The second part discusses approaches in other states, and a possible integrated solution to the problem of availability.

Availability of Liquor Liability Insurance

~~Generally, liquor liability insurance is available in all states.~~ However, there is reduced availability in those states ~~where liquor servers are potentially liable for injuries caused by minors and/or intoxicated persons who are served by the insured.~~ This potential liability stems from states' so-called dram shop laws created by statute or the common law. Briefly stated, these laws hold that liquor servers are liable for third-party injuries caused by persons who became intoxicated at the liquor servers' business. In many states that have dram shop laws, including Alaska, liquor liability insurance is available through only one company. In addition, the ~~cost of the insurance, for some liquor servers, has increased by 1,600 percent during the past two years.~~

The reduced availability and the higher cost of liquor liability insurance in dram shop states are the result of at least three related factors. First, courts have recently awarded injured parties substantial damages where plaintiffs show that the liquor servers negligently sold alcoholic beverages to intoxicated individuals. These damage awards have cost insurance companies millions of dollars, and have effectively put some specialty companies (insurance companies that sell

only liquor liability insurance) out of business. The second factor--changes in states' laws--has created more potential liability for insurance companies. These changes have generally included enactment of a dram shop statute, a change to an existing statute that requires a higher standard of care for liquor servers (e.g., a change from a gross negligence standard to a simple negligence standard), and a court decision which affects the states' common law. When these changes create more potential liability, the insurance companies have either raised their rates or terminated their liquor liability line of insurance. The third factor is financial losses recently sustained by insurance companies. These losses generally occurred in two ways: 1) investment losses; and 2) policy payouts. Because of the losses, many companies have terminated financially risky lines such as liquor liability insurance.

Solutions to the Problem of Availability

State legislatures are approaching the problem of availability of liquor liability insurance in a number of ways. Some states have enacted statutes which are intended in part to encourage companies to write the insurance in their states. For example, California's legislature has amended its dram shop statute so that liquor servers are liable only if they sell alcoholic beverages to "obviously intoxicated" minors. Prior to this change, liquor servers could be liable for selling to any intoxicated person. South Dakota provides another example. There, the 1985 legislature passed a law which basically states that the consumption of alcoholic beverages, rather than the serving or selling, is the cause of any alcohol-related accident. This law (which effectively precludes liquor servers' liability) was passed in response to a state supreme court case which created dram shop liability in the state, and the resulting difficulty of purchasing liquor liability insurance.

Another attempted approach to the problem of availability is the "insurance pool" law enacted in Minnesota. This law requires all insurance companies that write any line of liability insurance in the state to make liquor liability insurance available for all applicants. The law effectively forces insurance companies to take bad-risk clients along with the good risks.

A third approach is placing dollar limits on the amount of damages that can be collected in any single accident. These limits range from $20,000 in Connecticut to $500,000 in North Carolina. According to Jerry Murphey, President of the National Licensed Beverage Association, these limits discourage lawsuits and encourage settlements when lawsuits are filed. In addition, the limits provide more financial certainty for insurance companies. Mr. Murphey stated that insurance companies are more willing to write policies in states where dollar limits are in effect.

James Peters, Executive Director of Intermission, Ltd., a study group for the hospitality industry, suggests an integrated approach to the problem of availability of liquor liability insurance. Mr. Peters asserts that the lack of availability of insurance is a symptom of the larger problem of excessive drinking and alcohol-related accidents. He argues that state legislatures must provide the liquor-serving industry with economic incentives so that liquor servers will respond to the underlying public health and safety issue. He advocates a concept which combines the insurance pool approach and the dollar limit approach with a dram shop law which not only punishes bad liquor serving practices, but also rewards good serving practices. Under this law, a liquor server who is sued would be allowed to use a documented record of reasonable serving practices as a defense in court. Documentation would include adequate training of bartenders, thorough identification checks, and lack of police complaints. In addition to this legal defense, another reward for good serving practices would be a graduated license fee structure. This structure would base servers' license fees on their past record of serving practices.

Mr. Peters advocates the enactment of a dram shop law closely tailored after a model law recently drafted by James Mosher, author of a number of articles on problems of dram shop liability and insurance. I have requested a copy of this law and will send you a copy when it is received.

I hope that this information is valuable to you. Please call me if you need additional information.

MT

THE MODEL ALCOHOLIC BEVERAGE RETAIL LICENSEE LIABILITY ACT OF 1985

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WESTERN STATE LAW REVIEW
Volume 12, Number 2, Spring 1985

APPENDIX A

The Model Alcoholic Beverage Retail Licensee Liability Act of 1985*

(Model Provisions and Commentaries)

TABLE OF CONTENTS

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

** Reprinted with permission of Matthew Bender Co. Tables will appear in a forthcoming treatise entitled LIQUOR LIABILITY LAW to be published by Matthew Bender Co.

INTRODUCTION

Background and Purpose

The Model Dram Shop Act (officially entitled the "Alcoholic Beverage Retail Licensee Liability Act") represents the culmination of an 18-month research project on dram shop liability law conducted by the Prevention Research Group (PRG) and funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA). It is designed as a resource tool for legislators, policymakers, court officials, attorneys and others interested in the prevention of alcohol-related problems who seek to develop a comprehensive approach to this rapidly-changing area of law.

"Dram shop liability" is a term of art referring to the potential legal liability of servers of alcoholic beverages for the injuries caused by their intoxicated and underaged patrons. Originally established in several states in the nineteenth century, dram shop statutes fell into disuse during and immediately following Prohibition.[1] The concept reappeared in the legal community during the late 1940's and 1950's and has had a major resurgence since 1979, concurrent with the recent wave of concern for the societal costs of drunk driving. Legislatures and courts in several states have expanded the liability of commercial servers of alcoholic beverages in an effort to prevent drunk driving and as a means to compensate victims.[2]

This trend has become increasingly apparent and represents a national phenomena. Currently, 37 states and the District of Columbia impose dram shop liability in some form as a matter of state law (either through statutes or State Supreme Court opinions) and several additional states have adopted it de facto, through lower court cases.[3] Many cases are settled out of court, even in states where liability in the particular circumstances is debatable, because of the possibility that courts will reverse previous decisions. In addition, the number of governmental, public interest and private groups supporting the imposition of dram shop liability is expanding, with the Presidential Commission on Drunk Driving being perhaps the most notable group to do so in the recent past.[4]

The PRG research project was conducted over an 18 month period

1. "Dram Shops" were establishments in the nineteenth century which sold alcoholic beverages by the "dram", a unit of measure. For a discussion of the history of dram shop laws, *see* Mosher, J., "Dram shop law and the prevention of alcohol-related problems," 40 J. OF STUDIES ON ALCOHOL, 773 (1979).

2. See Mosher, J., "Legal Liabilities of Licensed Alcoholic Beverage Establishments: Recent Developments in the United States," paper presented at "Public Drinking and Public Policy: A Symposium on Observational Studies" Banff, Alberta, Canada (Apr. 1984).

3. *Id.*

4. Presidential Commission on Drunk Driving, *Final Report* (1983).

(beginning in October 1983) and included three data components. In the first phase, all state appellate and supreme court dram shop cases were systematically reviewed and analyzed with the aid of a specially-designed computer program. The second phase consisted of detailed interviews with practicing attorneys for both plaintiffs and defendants primarily in three case-study states (Massachusetts, California and Michigan). The interviews were designed to determine how dram shop cases are currently being litigated, with particular attention to the role, if any, of server intervention programs and to the process of settling claims. Finally, an inventory of current server intervention programs was developed. During this final phase, program components and training topics were examined, which provided the data from which the model "responsible server defense" was developed (see below)[5]

The research established several key findings. The case law review revealed that the legal system was not establishing clear guidelines for applying dram shop liability provisions or concepts. The states vary widely in the type and extent of liability that is being imposed and, frequently, there is great uncertainty as to when liability will apply. Even in states where the legislature has acted to establish statutory guidelines, cases have reached conflicting interpretations of the provisions. This uncertainty has had a major impact on the litigation strategy of the parties, encouraging settlements of questionable claims, high insurance costs, and considerable debate and uncertainty in the legal community.

The research also found that courts and attorneys have ignored the recent efforts by the retail industry, educators, and others to develop server intervention programs as a means for the industry to meet its responsibility to the public safety. "Server intervention" refers to reforms in the mode of operation by retail establishments designed to reduce the risk of serving alcoholic beverages to intoxicated or underaged patrons and to promote alternative forms of transportation (other than drunk driving) for patrons who do become intoxicated. Such programs are be-

5. Detailed findings of the research are reported in the following: Mosher, *supra* n.2; Mosher, J., "Server Intervention: Present Status and Future Prospects," paper presented at the Research Workshops on Alcohol and the Drinking Driver sponsored by the National Institute on Alcohol Abuse and Alcoholism and the National Highway Traffic Safety Administration, Bethesda, Maryland, (May 1984); Mosher, J., "Server Intervention: A Guide to Implementing Local and State Programs," paper presented at a conference entitled "Control Issues in Alcohol Abuse Prevention II: Impacting Communities," Charleston, South Carolina, sponsored by the South Carolina Commission on Alcohol and Drug Abuse and other organizations, (Oct. 1984). Colman, V., Krelll, B., and Mosher, J., "Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective," *W.S.U. L. Rev.* (forthcoming); Colman, V., "Dram Shop Laws: A Prevention Tool," paper presented at the 40th Annual Conference on the National Council on Alcoholism, Detroit, Michigan, (Apr. 1984); Harrington, C., "Illustrative Dram Shop Settlement and Jury Verdict Cases: Further Evidence that Server Liability Is Expanding?" Prevention Research Group, (Dec. 1984).

ing instituted throughout the country and consist of two types of trainings. Serving staff (e.g., bartenders and cocktail waitresses) are trained to recognize intoxicated persons and minors, and to intervene effectively. Management personnel are trained to adopt procedures to support the server intervention process, by promoting alternative nonalcoholic beverages and foods, alternative transportation programs and other business reforms. Efforts to formalize the training curricula are now in process.[6]

This industry response to public pressure represents a first step toward establishing a definition of negligent service of alcoholic beverages within a dram shop context. Current law rests primarily on whether a patron was served while "obviously intoxicated," a subjective standard that has led to uncertainty in practice. By focusing the issues so narrowly, the courts have left out an evaluation of the management and server practices which led to the service in question. These practices can be evaluated by a fact-finder to determine whether a reasonable person in like circumstances could have acted more prudently, the classic definition of negligent behavior.

The Model Dram Shop Act is designed to address these problems. It provides a structured, comprehensive guide for drafting a dram shop law or deciding a dram shop case and addresses the uncertainties in current law that have been identified in the course of the research project. It also establishes a "responsible practices" defense as a means to coordinate the legal handling of dram shop cases and the recent development of server intervention programs. As such, it is a resource tool, based on systematic and thorough research, for those developing a comprehensive dram shop liability policy once a decision that such a policy is appropriate in a given state or court. Thus, it is not meant as a vehicle for advocating the imposition of liability but rather as a means to maximize its beneficial public health impact once the decision to impose liability has been made.

A first draft of the Model Act was circulated for comment in January 1985 to over 150 interested persons, including representatives of industry, citizen leaders, trial attorneys, health professionals, and government officials. Twenty responses were received, many of which offered detailed critiques and suggestions. The Act was revised based on the critiques and further study, and a final version of the Act was com-

6. *See*, Mosher, *supra* n.5; Peters, J. (ed.), *Proceedings of the First Northeast Conference on Alcohol-Server Liability*, January 12-13 1984, Boston, Mass. (Northampton, MA: Intermission Ltd., 1984). Intermission Ltd., a non-profit organization, is the leading institute developing such trainings and coordinating the efforts of all training programs. Services include consultations, the newsletter *Responsible Beverage Service*, trainings and a resource library. For further information, contact Intermission, Ltd., 56 Main Street, Northampton, MA 01060.

pleted in March 1985.[7]

Design and Structure

The Model Act is divided into 14 sections covering all major aspects of the tort liability of commercial alcoholic beverage retail outlets subject to the limitations defined in Section 14. Each section provides model statutory language and is followed by a detailed commentary discussing the section's background, rationale, and relationship to other provisions and other state laws. For convenience, Appendix A includes the model provisions without the commentaries. Support materials are found in Appendices B and C.

All states have enacted comprehensive legislation regulating the commercial sale of alcoholic beverages (Alcoholic Beverage Control (ABC) Acts) administered by a separate state agency (referred to here as ABC Agencies, although various names and administrative structures have been created). The Model Act is designed to be included in the state ABC Act and made part of the ABC state structure generally. Several model sections refer specifically to related ABC statutes. In some cases, amendments to existing ABC provisions may be necessary in order to implement an effective dram shop act.

Although the Model Act is conceived of an integral unit, it may nevertheless be advisable or necessary to modify various sections or to adopt only a limited number of sections, depending on the perceived needs and circumstances of a particular state. Several sections specify these limitations in their Commentary and discuss options that are available. Thus, the Model Act should be viewed as a guide for legislative drafting, but each state should evaluate the appropriateness of each section and its exact working. Current ABC Agency practices, the structure of the state retail industry, current law and court decisions, practices of the state insurance industry, and the availability of server intervention programs may all affect the application of the Model Act. It remains important, however, to carefully review all of the topics raised in the model provisions to insure that clear guidelines are established and that uncertainties regarding when and how liability is imposed do not remain.

In addition, various topics generic to negligence actions are not covered by the Act, e.g., issues involving causation. It is anticipated that such issues will be resolved by reference to common law or statutory

7. Summaries of the responses and the resulting revisions are available on request from the Prevention Research Center, 2532 Durant Avenue, Berkeley, CA 94704.

provisions applicable to all negligence claims and that special provisions applicable only to dram shop claims are not necessary.

The Model Act is designed to contribute to the legislative process and therefore does not address many of the issues that arise in applying dram shop liability in particular court cases. Because courts must adopt dram shop principles only within factual situations based on existing state legislation and previous court decisions, they may be unable to adopt the Model Act provisions as such. Nevertheless, several sections may provide a basis for court decisions, and both the specific statutory language and the commentaries may prove to be useful in litigating and deciding particular dram shop cases. The model "Responsible Business Practices" defense (Section 10) may be of particular interest as a means to maximize the preventive potential of the dram shop liability concept.

Optional Provisions

The Model Act includes one optional provision, regarding advance notice to the defendant. Strong public policy arguments can be made for and against the inclusion of a notice provision, and the Model Act takes no position in that debate. If, however, a notice provision is deemed appropriate, the Model Act section provides the best type of provision currently available.

Mandatory Liquor Liability Insurance

In recent years, general insurance liability policies for licensed establishments have excluded dram shop liability from their coverage. Defendants are thus required to purchase separate coverage, which may be very expensive. Many choose to forego coverage or to purchase inadequate coverage despite the potential risks involved either because of the cost or the perception that lawsuits are unlikely. In addition, dram shop insurance may be difficult to purchase at any price. In Minnesota, for example, the state Commerce Commissioner recently warned that unless insurance companies begin providing coverage at reasonable prices an assigned risk pool will be established in that state.[8]

These trends may deny an injured plaintiff recovery even though a valid claim has been established, thus defeating the purposes of the Model Act. To deal with this problem, states should evaluate the need for a statutory provision that requires all licensees to show proof of insurance (or equivalent bond) as a condition of doing business. If enacted, a

8. "Dramshop Insurance Sources Dry Up," Minneapolis Star and Tribune, Jan. 8, 1985, at 88, col. 1.

minimum coverage should be established, and although the Act does not specify an amount, at least $500,000 coverage is recommended. Licensees who show proof of responsible alcoholic beverage service practices (as defined in Section 10) should also be given a discount on the premium rate due to the reduced risks of acting negligently or recklessly. States should encourage voluntary reductions in premiums by the insurance industry and consider appropriate regulations if reductions are not forthcoming.

A mandatory insurance provision is not included in the Model Act for several reasons. First, a thorough legislative review may be warranted before enactment, with attention to issues or enforcement and feasibility, and a comprehensive set of provisions may be required in order to implement the mandatory insurance provision effectively. The research conducted as part of the Model Act development did not include a careful analysis of insurance practices and policies and their impact on dram shop liability claims. Thus, the development of comprehensive legislation is beyond the scope of the Model Act. Second, the mandatory insurance provision may appropriately belong in a state code other than the ABC code, an existing state law may substantially influence the type of provision to be enacted. Finally, states may wish to delay enactment of the provision until after the main body of the Act has been evaluated and the need for mandatory insurance is clearly established. Although it is not included, the issue of mandatory insurance should nevertheless be carefully considered as part of the enactment of the Model Act.

Topics Not Addressed

The Model Act does not cover several aspects of dram shop liability either because they fall beyond the law's scope and purpose or because they involve policy decisions that will vary from state to state. Those using the Model Law may decide to incorporate additional provisions in the areas outlined below, depending on the circumstances existing in a particular state.

(1) *Social Host Liability*: The Model Act does not cover the potential liability of noncommercial servers of alcoholic beverages and takes no position regarding this form of liability. See Section 5 commentary for further discussion.

(2) *Definition of Licensees and Licensed Premises*: The Act relies on existing state law regarding who is required to obtain a license to serve alcoholic beverages and what constitutes a licensed premise. Guidelines for modifications of these provisions are provided in Section 3.

(3) *Mandated Server Training*: No state now requires training as a condition of employment in a licensed premise or of obtaining a license, although at least two states are considering such legislation. The Model Act does not take a position on this topic, although it may provide a means to standardize the reasonable practices defense found in Section 10. Appendix C provides a model mandated training bill introduced (in modified form) into the Massachusetts and Hawaii state legislatures.

(4) *Minimum Legal Drinking Age*: The Model Act takes no position on what age should be established for legal consumption and possession of alcoholic beverages. This issue falls beyond the scope of the Act. See section 3(e) for further discussion.

(5) *Recovery by Intoxicated Minor for Negligent Service of Alcoholic Beverages*: The Act does not permit an intoxicated adult to recover damages from the party serving that adult for self inflicted injuries unless the server acts recklessly. The Act takes no position as to whether this rule should apply to those under the legal drinking age. See Sections 4, 6, and 7 for further discussion.

(6) *Recovery Caps*: The Model Act does not establish a limit on plaintiff's award. See Section 8 Commentary for discussion.

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.

Commentary

Current dram shop legislation and court opinions cite numerous purposes for imposing liability on retail licensees. In several states, courts have characterized their states' dram shop statute as either remedial or penal, or both.[1] These characterizations have led to some confu-

1. *See, e.g.*, Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961); Camille v. Barry Fertilizer, Inc., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972).

sion and frequently appear to be contradictory. The penal nature of the statutes is used as a rationale for strictly construing their provisions, for example, by not extending coverage to damages caused by social hosts who negligently serve alcoholic beverages.[2] The remedial nature of the statues is used as a rationale for giving them a broad or liberal reading.[3] As noted by at least one court,[4] the statutes may thus appear to be remedial or penal depending on the outcome which the court seeks to justify. A further problem with the penal justification is that it frequently rests on a finding that the particular statute imposes strict liability upon the licensee. This denies defendants certain defenses, creates uncertainty and arbitrary results, and may impose an unwarranted burden on the alcoholic beverage retail trade.

Cases based on common law negligence principles, on the other hand, have cited both the preventive and compensatory purposes of the liability rule. Courts frequently point to the incidence of drunk driving fatalities and injuries as a justification for imposing liability on licensees and assert that the duty toward third parties will encourage them to exercise caution.[5] These opinions, however, have failed to analyze the standards of conduct which have been imposed to determine whether they are sufficiently certain to be understood and followed. To avoid this problem, the courts appear to rely heavily on a more certain justification—that the rule will provide a means for at least some victims to obtain compensation. Because of the lack of complete analysis, the compensation rationale appears to be the dominant justification for adoption of the new common law rule which imposes liability.

Section 2 specifically rejects the "penal" rationale and the strict liability rule adhered to in many states and explicitly adopts the prevention and compensation rationales found in *Rappaport* and other cases. This recognizes the grounding of the Act in common law negligence principles. The Act provides prevention as a primary purpose for two reasons:

(1) unless the Act does in fact prevent injuries and deaths, the burden placed on the alcoholic beverage retail industry may not be justified, particularly since alternative, fairer means for compensating victims maybe available;

(2) it places a responsibility on the judicial system to apply the provisions of the Act in such a way that they will encourage responsible practices among licensees.

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2. *See, e.g.*, Camille v. Berry Fertilizer Co., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975).

3. For review, *see* Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir.1961).

4. *Id.*

5. *See, e.g.*, Coulter v. Superior Court, 145 Cal. Rptr. 534, 577 P.2d 669 21 Cal. 3d 144, (1978); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

Compensation is a secondary purpose of the Act in recognition of victims' rights to recover damages from those with a duty to protect them who act negligently. In this respect, the provision merely recognizes the basis upon which our system of civil liability law rests. By placing compensation as a purpose secondary to prevention, it provides guidance to the judicial system for weighing alternative courses of action during the litigation process.

This section is not intended to impose a new burden of proof on either party or to exonerate the intoxicated tortfeasor from liability. It does, however, serve to emphasize the need for the judicial system to devise standards of conduct on the part of the alcoholic beverage retail industry which will actively deter intoxication-related injuries and deaths and to establish procedures which will encourage adherence to those standards. See in particular Section 10 (Responsible Business Practices Defense). At the same time, it is not intended to reduce the responsibility of those who become intoxicated and cause injuries and deaths.

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.

Commentary

Subsection (a): Adult

The Act relies on the legal age of purchase of each state (see Appendix B for listing). Because the Act only applies to service of alcoholic beverages by licensees or by those who should be licensed but are not, the rules and exemptions applicable to the service by licensees to minors are applicable (see Commentary to Section 6 for further discussion). For states with differential purchase ages depending on the type of alcoholic beverage, a slight modification of the definition may be necessary. The Act takes no position regarding an appropriate state legal purchase age.

Subsection (b): Alcoholic Beverages

Because the Act is designed as an integral part of the state's ABC Act, it is appropriate to define alcoholic beverages in accordance with the definition used for the entire Act. It is anticipated that the ABC Act includes all beverages designed for human consumption which are capable of inducing a person's intoxication. If this is not the case, the ABC Act definition should be amended to avoid confusion and to insure a comprehensive approach to alcoholic beverage control.[1]

Subsection (c): Intoxicated Person

See Commentary to subsection (d).

Subsection (d): Intoxication

The intoxication definition incorporates use of either alcoholic beverages or controlled substances. Thus, use of any combination of the two which deprives a person of his or her normal use of mental and physical capabilities is considered intoxication. The definition is based in part on that found in the Uniform Vehicle Code,[2] which also includes both drug and alcoholic beverage use in its definition. Although both alcohol and drug use are included, other sections of the Act provide that defendants do not have a duty to recognize signs of intoxication other than those associated with the use of alcoholic beverages (see Section 6, Commentaries to Sections 6, 10).[3]

The Act's language regarding the "impairment of mental or physical facilities" is based in part on the intoxication definition found in the

1. *See*, Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981), for a discussion of the problems associated with definitions of alcoholic beverage that are not sufficiently inclusive.

2. UNIFORM VEHICLE CODE § 11-902 (Supp. 1979).

3. Surprisingly, no reported dram shop case or state statute has addressed this specific issue.

Model Penal Code, which states that intoxication is the "disturbance of mental and physical capabilities resulting from the introduction of substances into the body."[4] The Act incorporates this language into the "reasonable care" and "prudent person" standards appropriate to a negligence-based cause of action. This is commonly done in applying an intoxication definition to driving while intoxicated cases.[5]

Early definitions of intoxication did not rely upon this impairment standard specifically, defining intoxication more generally, e.g., as a state in which a person does not possess that clearness of intellect and control that the person would otherwise have.[6] The Act's definition provides a more definite basis for the factfinder to determine the existence of intoxication.

The requisite impairment of mental and physical faculties provided under the Act can come at either high or low blood alcohol levels (BALs), depending on the reactions of a particular individual to alcohol use. Thus, the Act specifically does not incorporate a per se BAL rule, a common provision in drunk driving statutes.[7] The Act recognizes that the Act is directed primarily at the actions of servers of alcoholic beverages rather than drinkers, although drinkers do remain the primary tortfeasor. The key issue is thus whether the server knows or should know that the person being served is impaired due to intoxication such that additional alcoholic beverages should not be provided. See Commentaries in Sections 6 and 10 for further discussion. A per se BAL rule would tend to impose liability on a defendant whenever a patron is at the requisite BAL level without regard to the defendant's actual or constructive knowledge of intoxication. This is manifestly unfair, since signs of intoxication may not appear until BAL levels are reached that are much higher than those relied upon by existing per se rules.

Subsection (e): Licensee

The Act relies upon the state licensing provisions for determining what parties are licensed to serve alcoholic beverages. States that permit sales by governmental entities and do not wish to grant governmental

4. MODEL PENAL CODE § 2.08 (1980).

5. *See, e.g.*, Gilbert v. Municipal Court, 73 Cal. App. 3d 723, 140 Cal. Rptr. 897 (1977) (interpreting CAL. VEHICLE CODE § 23152).

6. *See, e.g.*, Commonwealth v. Buoy, 128 Pa. Super. 264, 193 A. 144 (1937).

7. This is in accord with all dram shop cases that have addressed this issue. *See, e.g.*, Sceley v. Sobczak, 281 N.W.2d 372 (Minn. 1979) (a .269 BAL did not establish as a matter of law that decedent drinker was obviously intoxicated when served). *Accord*, King v. Ludlow, 165 Cal. App. 2d 620 332 P.2d 345 (1958) (results of having a .15 BAL is not such a law of nature that the court must take judicial notice that driving therewith is intoxication as a matter of law).

immunity should include the phrase in brackets. See Commentary to Section 5 for further discussion.

Subsection (f): Minors

See Commentary to subsection (a).

Subsection (g): Person

The Act does not distinguish between individuals and corporate entities. This is in accord with most state ABC statutes and prevents efforts by defendants to avoid liability by attributing personal actions to a corporate body. The lack of such a definition has created ambiguities and confusion in several dram shop cases.[8] See Sections 4 and 5 for further discussion.

Subsection (h): Premises

It is anticipated that each state will define a licensee's premises in an identical fashion to the definition used in the state's Alcoholic Beverage Control Act. Attention should be placed on the inclusion of areas both inside and outside of a licensee's physical establishment which are under the licensee's exclusive control and which are accessible to the licensee's customers. This may include parking areas or rooms where alcoholic beverage consumption is not permitted.

Subsection (i): Service of Alcoholic Beverages; Service

The Act's definition encompasses all dispensing of alcoholic beverages by defendants in their capacity as commercial vendors. This insures that defendants will not circumvent the intent of the Act by resort to transactions not traditionally associated with actual sales. The definition is in accord with other dram shop statutes and case law.[9] This Act is not intended to cover the potential liability of social hosts for serving alcoholic beverages. See Commentary to Section 5 for discussion.

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.

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8. *See, e.g.*, Fowler v. Rome Dispensary, 5 Ga. 36, 62 S.E. 660 (1908); Rosenthal v. Dunphy, 18 Conn. Supp. 271 (1953).

9. *See, e.g.*, MICH. COMP. LAWS. § 436.22(5) (1983); Guitar v. Bieniek, 402 Mich. 152, 262 N.W.2d 9 (1978); IOWA CODE ANN. § 123.92 (West 1981).

(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.

Commentary

Any person (or corporate entity) suffering damages may bring a cause of action, subject to the limitations imposed by other provisions of the Act and subject to the limitation imposed in section (b). This is in accord with most negligence-based dram shop statutes,[1] and avoids ambiguities and confusion found in statutes with enumerated classes. Many such provisions list relatives, employers, etc., and "other persons" as possible plaintiffs, and courts have had difficulty determining the legislative intent of the listing particularly the identity of "other persons."[2] Statutes which limit the class of plaintiffs are sometimes interpreted to impose strict liability and in some cases create a cause of action not known at common law (e.g., for loss of support).[3] These ancillary issues are not present in the Act.

The Plaintiff Section, in subsection (b), makes one exception to the general rule that any person suffering damages may bring a cause of action pursuant to the Act. Under most existing dram shop laws, intoxicated persons, at least those who are not minors, are not permitted to recover for self-inflicted injuries due to their contributory negligence.[4] This rule has been established based on inferred legislative intent, even though most statutes are silent on the topic.[5]

The Act adopts this restriction in light of its near universal acceptance in states with dram shop liability and the tenet that one should not be permitted to benefit from one's own negligence. The Act does permit potential actions by intoxicated persons for reckless misconduct on the part of defendants (see Section 7). This recognizes the traditional common law rule that contributory and comparative negligence are not defenses to claims based on recklessness.[6]

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1. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602.1 (West 1980); ILL. REV. STAT. CH. 43 § 135 (Supp. 1983); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983); N.C. GEN. STAT. § 188-120 (1983).

2. *See, e.g.*, OHIO REV. CODE ANN. § 4399.01 (1982); Dworak v. Tempel, 17 Ill. 2d 181, 161 N.E.2d 258 (1959).

3. *See* Commentary to § 8, *infra*.

4. *See, e.g.*, Robinson v. La Mott, 289 N.W.2d 60 (Minn. 1979); Sager v. McClendon, 296 Or. 33, 672 P.2d 697 (1983).

5. *Id.*

6. In cases of aggravated misconduct short of intentionally harmful behavior, courts in comparative fault jurisdictions have been divided, with some holding that the plaintiff's contributory

The Act takes no position regarding the appropriateness of this rule for claims by intoxicated minors. The Alaska Supreme Court, in a landmark decision, has held that the minimum age drinking law (MADL) is designed to protect minors from their own alcohol-related injuries; thus their intoxication can not be used to reduce or bar their recovery from those who serve them in a negligence-based claim.[7] The California Supreme Court reached a similar result in its interpretation of that state's dram shop law.[8] Age does not appear to be a distinguishing factor for other courts interpreting statutory provisions that bar recovery for intoxicated persons.[9] It is too early to evaluate the impact of the Alaska and California decisions. MADL's are undergoing rapid changes, reflecting changes in social attitudes. This issue should therefore be carefully evaluated in light of current social policies and attitudes in each state and community.

Subsection (b) is specifically limited to claims based on negligent services of alcoholic beverages to the plaintiff ("to such person"). Claims against defendants for service to third parties are not barred under the subsection even if the defendant also served plaintiff and the intoxicated person in the drinking event. Several states have created the doctrine of "complicity," which bars claims by plaintiffs who "actively participate" in the drinking episode of another, who later injures plaintiff. Courts have had difficulties defining "active participation," and considerable confusion and litigation has resulted.[10] Complicity is especially prevalent in states which have "strict liability" statutes.[11] These provisions have been interpreted to preclude contributory and comparative negligence defenses, an added rationale for imposing the complicity doctrine.

The Act follows the better rule, that issues of participation in the drinking event should be presented to the fact-finder as an issue of comparative or contributory negligence and should not create a bar to recovery as a matter of law. This procedure is in accord with standard negligence principles and will avoid litigation of what is, in essence, a factual determination.

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negligence should reduce the recovery. *See*, PROSSER AND KEETON, THE LAW OF TORTS, 5th ed., § 67 (1984).

7. Morris v. Farley Enterprises Inc., 661 P.2d 167 (Alaska 1983).

8. Cory v. Shierloh, 29 Cal. 3d 430, 174 Cal. Rptr. 500, 629 P.2d 8 (1981).

9. *See, e.g.*, Randall v. Village of Excelsior, 103 N.W.2d 131 (Minn. 1960).

10. *See, e.g.*, Nelson v. Araiza, 43 Ill. App. 3d 685, 357 N.E.2d 207, 2 Ill. Dec. 230 (1976), *aff'd* 69 Ill. 2d 534, 374 N.E.2d 637 (1977); Heveron v. Village of Belgrade, 288 Minn. 395, 181 N.W.2d 692 (1970).

11. *Id.*

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.

Commentary

Section 5 provides that the Act only addresses the actions of persons licensed (or those who should have been licensed at the time of the act and were not) to serve alcoholic beverages. Thus, the Act does not include claims against nonlicensees ("social hosts"). This limitation has been imposed for three reasons:

(1) as several courts have noted, the service of alcoholic beverages in noncommercial settings is a fundamentally different activity than such service in commercial settings, involving distinct standards of conduct;[1]

(2) the Act relies heavily on related provisions in the states' ABC Acts, which are not applicable to nonlicensees;

(3) because licensees are in the business of providing alcoholic beverages and anticipate profits from such activities, it is reasonable to expect responsible practices in the conduct of the business.

Social Host Liability

Several courts have had to determine the extent, if any, of a social host's liability, and there is a substantial conflict of authority. Liability has most readily been imposed in situations involving service to minor, particularly when the facts show a lack of adequate adult supervision. Only a small number of appellate cases (in California, Minnesota, Iowa and New Jersey) have imposed liability on all social hosts for service to intoxicated adults.[2] All but the case in New Jersey, decided in 1984, have been overruled by legislative action. The New Jersey Supreme Court stated that imposing liability was justified in part by the changing social attitudes regarding drunk driving. It is too early to determine

1. Camille v. Berry Fertilizers, Inc., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975).

2. *See, e.g.*, Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972); Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669 145 Cal. Rptr. 534 (1978); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

whether this precedent-setting opinion will be followed by other states or will also be overruled by legislative enactment.

Social host liability may arise in a diverse set of circumstances; an employer's service to intoxicated employees; service to University students at University-sponsored events; wedding receptions where alcohol is served by a caterer; or service of alcoholic beverages to social acquaintances at a social host's home. Alternative theories of liability in these circumstances may be appliable. For example, some cases have imposed liability on employers under a respondeat superior theory for serving alcoholic beverages to intoxicated employees who subsequently injure a third party if the service occurred during the course of employment.[3] Universities have a special duty of care for their students that may be applicable. Service of alcoholic beverages to a person with a disability that is known to make him or her particularly sensitive to alcoholic beverages has also been held to be the basis of liability.[4] The Act takes no position regarding the appropriateness of these and other alternative theories of liability regarding social host service of alcoholic beverages.

Licensee Liability

The distinction between social hosts and commercial servers of alcoholic beverages has created much confusion in the courts. The Act relies on the licensing provisions of the State Alcoholic Beverage Control (ABC) Act in order to avoid this uncertainty and to emphasize the Act's integral relationship to other ABC Act provisions. Nonlicensees required to obtain a license are explicitly included in the Act in order to eliminate any incentive on the part of licensees to avoid the relevant licensing provisions.[5]

Many courts have based the distinction between social hosts and licensees on whether an actual sale has occurred.[6] This may create an arbitrary result, as the social host may be acting substantially as a licensee even though actual payment for the service by those being served is lacking. For example, in some states, caterers are not required to obtain a license as a condition of serving alcoholic beverages at catered events. A licensee catering a social event may be potentially liable under the Act while a caterer which is not required to obtain a license would be protected.

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3. *See, e.g.*, Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

4. Cantor v. Anderson, 178 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).

5. *See*, Guitar v. Bieniek, 402 Mich. 152, 262 N.W.2d 9 (1978).

6. *See, e.g.*, Bartkowiak v. St. Adalbert's Roman Catholic Church Society, 40 A.D.2d 306, 340 N.Y.S.2d 137 (1973).

This suggests that the licensing provisions of the State ABC Act should be carefully reviewed so that all those acting in the role of a licensee (in the business of providing alcoholic beverages on a commercial basis) are required to obtain a license. One-day licenses, caterers' licenses, etc. may provide a means for reaching this result. It is anticipated that the licensing provisions will require a license for all commercial transactions of alcoholic beverages where a direct pecuniary gain for the sale is anticipated. This would exclude situations where the alcohol is served in a social setting in order to further an unrealted business venture or when those at a social gathering pool their resources to purchase a collective amount of alcoholic beverages.

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 mior 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.

COMMENTARY

A. Service of Alcoholic Beverages to Minors

Service of alcoholic beverages to an underaged person violates the licensing laws of every jurisdiction, and is punishable by criminal sanctions in all but one state.[1] These statutes are indicative of the universal legislative recognition that minors are neither physically nor emotionally equipped to handle the consumption of alcoholic beverages,[2] and that such consumption leads to tragic injuries and deaths. Civil liability for service to minors is already widely recognized by common law in at least 15 jurisdictions and by statute in at least 18.[3] This Act codifies an exclusive remedy for negligently providing alcohol to minors, while confining liability to circumstances reasonably within the control of licenses.

The liability imposed by this section is based on the premise that the hazards created by the intoxication of minors can be prevented in many cases by responsible licensee practices. The negligence standard imposes the duty on licensees to exercise reasonable care in avoiding service to minors. However, licensees may inadvertently cause the intoxication of minors because of convincing false identification, collusion with an adult, or apparent majority.

Subsections (d) and (e) address the most common means for minors to obtain alcoholic beverages—by collusion with a person of legal drinking age. Subsection (d) specifically exempts the defendant from liability when there is such collusion unless the defendant should reasonably have known that the collusion would occur affirmative duty to investigate subsequent service of alcoholic beverages off the premises.[4] These subsections also include optional provisions that may be applicable in states where certain adults (e.g., parents, spouses) are legally permitted to serve minors.

Checking the identification of patrons is a simple and effective means of reducing the risk of service to minors. Subsection (c) explicitly recognizes that failure to check the identification of a minor is evidence of negligence. The provision is similar to one included in a North Caro-

1. *See*, Appendix A. In North Carolina service to an underaged person is punishable as an administrative penalty, rather than as a criminal offense, with fines of up to $500.

2. *See, e.g.*, Young v. Caravan Corporation, 99 Wash. 2d 655, 663 P.2d 834 (1983).

3. *See, e.g.*, Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Sorensen v. Jarvis, 119 Wisc. 2d 627, 350 N.W.2d 108 (1984); N.C. Gen. Stat. § 18B-120 (1983).

4. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979) (applying Pennsylvania law).

lina statute providing licensee liability for sale of alcoholic beverages to minors.[5] However, when presented with convincing false identification, a licensee cannot reasonably be expected to prevent service to a minor, absent actual or constructive knowledge of the patron's minority. Implementation of the practices specified in Section 10 or due care in the use of reasonable alternative practices provide a defense to liability under this Act. States with statutory or regulatory provisions regarding checking identification without official documentation may wish to incorporate them by reference into this section.

Finally, unusual circumstances may arise where a licensee cannot reasonably be expected to suspect a patron is underaged. This will not normally arise, since current business practices recognize that age identification without documentation is extremely difficult and that, in general, proof of age should be required even when a patron appears to be several years older than the legal drinking age. Nevertheless, a situation may arise where, due to highly unusual physical characteristics or mode of dress, a patron's appearance may be sufficiently deceptive as to allay any reasonable suspicion on the part of the licensee. In these circumstances, the existence of a Responsible Business Practices Defense pursuant to Section 10 may be determinative.

Service of alcoholic beverages to a minor by a defendant may lead to liability even though the minor is not intoxicated when served. This is in accord with most state dram shop statutes and common law cases.[6] However, as in any negligence action, liability will not attach unless the service of alcoholic beverages is shown to be a substantial cause of subsequent damages.

B. Service of Alcoholic Beverages to Intoxicated Persons

Service of alcoholic beverages to intoxicated persons is negligent provided that the defendant knew or should have known that the person being served was intoxicated. Such service is illegal in all but seven states,[7] although liability under this section is not based on violation of criminal statutes but rather on common law negligence principles. Negligence per se claims are not permitted, as the Act provides the exclusive remedy for damages caused by negligent services of alcoholic beverages (see Section 14).

The statutory enactments will support a legislative finding that service to intoxicated persons creates a substantial risk of harm to both the

5. N.C. GEN. STAT. § 18B-121 (1983).
6. *But see* CAL. BUS. & PROF. Code § 25602(a)(1) (West 1980); *see* cases cited *supra* notes 3,4.
7. *See*, Appendix C.

intoxicated person and to others that is foreseeable to the defendant. This section codifies this finding within a negligence context.

The Act does not provide for liability for serving a nonintoxicated adult, even if the service leads to intoxication.[8] The defendant's duty is to avoid increasing the intoxication of the person being served once a state of intoxication has been reached. This recognizes the inability of a defendant to determine whether a given amount of alcoholic beverages will produce intoxication and the fact that risks of harm increase substantially as the level of intoxication increases. (In order to avoid attempts to circumvent the defendant's duty in this regard, multiple-drink service should be treated as distinct service.)

A California case, *Cantor v. Anderson*,[9] provides a limited exception to this rule, which is not followed in the Act. There, it was alleged that the social host served a person with a known disability whom the host should have known would lose control and become violent due to the intoxicating effects of alcoholic beverages on him. This limited cause of action is not recognized under the Act (nor is it recognized under any existing dram shop act) unless the defendant's conduct reaches the level of recklessness (see Section 7). This is in recognition of the potential for widespread abuse of such a cause of action, including the possibility of actions based on service known alcoholics, and the unfair burden that such a duty of care would place on defendants.

If a defendant knows of a person's particular sensitivity to alcoholic beverages, he may be on notice that intoxication of that person may result after a very limited number of drinks. Thus, a cause of action based on service to an intoxicated person may arise after a very limited number of drinks are served, depending on the particular facts of the case (see discussion this Commentary). Service to a nonintoxicated adult, however, may not give rise to a cause of action based on negligence.

A defendant may have either actual or constructive knowledge of the intoxication of the person being served. Constructive knowledge may be based on observations of the intoxicated person or on facts known to the defendant that would lead a reasonably prudent person to conclude that the person is intoxicated. Several courts and commentators have documented the observable signs of intoxication.[10]

A defendant is under a duty to ascertain whether a patron is intoxi-

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8. *Cf.* ILL. REV. STAT. CH. 43 § 135 (Supp. 1983).

9. 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).

10. *See, e.g.*, Strand v. Village of Watson, 245 Minn. 28, 70 N.W.2d 609 (1955); INTERMISSION, LTD., RESPONSIBLE BEVERAGE SERVICE TRAINING PROGRAM: PARTICIPANT'S MANUAL, 11 (Northampton, MA 1984).

cated by taking those steps which a reasonably prudent person would regard as adequate to ascertain whether the conduct of the prospective purchaser manifests the loss of control of actions or emotions that constitutes intoxication.[11] The Supreme Court of Minnesota gives a list of such steps which may be required of a seller to avoid a charge of negligence:

> . . . engage the prospective purchaser in conversation, to note specifically the details of the purchaser's physical appearance, to observe his conduct during the course of his drinking at the supplier's establishment, or to scrutinize his actions in other ways by which the supplier may detect intoxication which is observable even though not obviously.[12]

A defendant may also be held liable when he or she has actual knowledge of facts which would lead a reasonable person to the conclusion that the person being served is intoxicated. A seller who does not know of a patron's intoxication and cannot reasonably observe it may still be found negligent if the service took place under circumstances in which he should have known of the patron's intoxication. This may occur when a large quantity of alcoholic beverages is served to a person in such a short period of time that intoxication is bound to result.[13] Sellers of alcoholic beverages may be charged with knowing the effects of quantities of alcoholic beverages on their patrons, since they are in the business of purveying them. Other situations in which knowledge of intoxication may be imputed are when the server is told the number of drinks a person has consumed prior to the service.

These duties are also reflected in the Act in the Responsible Business Practices Defense (see Section 10 for further discussion), which is specifically cross referenced in this section. Thus, if a defendant can show that reasonable steps were taken to ascertain whether a person being served was intoxicated then a defense may be established.

Subsections (f) and (g) deal with particular problems that can arise when attempting to determine the intoxication of another. Subsection (f), modeled after a provision in the New Mexico dram shop statute,[14] deals with consumption of alcoholic beverages by a person prior to entering the premises. A defendant cannot reasonably be expected to know of such behavior unless he is told of it or unless he is given a reasonable time to observe the person. His duty is therefore substantially affected compared to service to a person who is sober upon entering the premises. Subsection (f) applies to both off- and on-premises defendants. Fact-find-

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11. Mjos v. Village of Howard Lake, 287 Minn. 427, 178 N.W.2d 862 (1970).
12. *Id.* at 435, 178 N.W.2d at 868.
13. Cimino v. Milford Keg, 385 Mass. 323, 431 N.E.2d 920 (1982).
14. N.M. STAT. ANN. s 41-11-1 (Supp. 1983).

ers should take into account that off-premises defendants have only a limited time to observe a customer before service of alcoholic beverages occurs, which may substantially affect their ability to determine the intoxicated condition of the person being served.

Subsection (g) provides that a defendant does not have a duty to recognize signs of intoxication other than those commonly associated with alcoholic beverage consumption. Many persons combine alcoholic beverages with other drugs. This may lead to intoxication that is not observable to a defendant not familiar with drug impairments other than those associated with alcoholic beverages. This subsection recognizes that a defendant's duty is related directly to the service of alcoholic beverages. However, if the defendant permits the use of other drugs on the premises, a duty may arise because of having knowledge of facts which would lead a reasonable person to the conclusion that the person being served is intoxicated (see discussion *supra*, this Commentary).

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.

Commentary

Subsection (a): General Definition

The general definition of reckless service of alcoholic beverages is a codification of the Restatement (Second) of Torts § 500[1] within the server liability context. The Restatement defines three key components of recklessness:

(1) *Intentionally serving alcoholic beverages*: The act of serving alcoholic beverages must first be intentional in order for the server's conduct to be reckless. It must be deliberate. "It . . . must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertance, or simple inattention. . . ."[2] For example, a server who brought a drink to one patron who later passed it on to a customer who was visibly intoxicated, may be negligent, but not reckless. The server must know that he or she is providing an alcoholic beverage to a particular patron in order for the service to be intentional.

(2) *Creating an unreasonable risk of physical harm to the drinker or to others*: There can be two types of reckless conduct in the service of alcoholic beverages. In the first, the server knows that the service creates a high degree of risk of physical harm to the drinker or to others. S/he appreciates the risk but acts in conscious disregard of the consequences. A second type of reckless conduct involves a server who know that s/he is serving a particular patron but s/he does not appreciate the risk that the service is creating, although a reasonable person would be conscious of the risk. In either situation, it does not matter that the server did not intend for the consequences to result. "If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then regardless of the actual state of mind of the actor and his actual concern for the rights of others, we call it willful misconduct . . ."[3] Recklessness is often used interchangeably by courts with willful and wanton misconduct.

In sum, reckless conduct involves a risk taken by the server of the alcohol that is unreasonable, such that physical injury is not merely a possible result, but a probable one. However, even when appreciated, it is not necessary that the server perceive the risk as being extremely hazardous in order to be considered reckless. "The risk must be of such

1. RESTATEMENT (SECOND) TORTS § 500 Reckless Disregard of Safety, defined (1965).
2. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS 185 (5th ed. 1984).
3. Ewing v. Cloverleaf Bowl, 20 Cal. 3d 395, 402, 572 P.2d 1155, 1158, 143 Cal. Rptr. 13, 17 (1978).

nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[4]

(3) *Distinguishing negligent and reckless conduct*: The Restatement (Second) of Torts labels the risk presented by both negligence and recklessness as being unreasonable, with the degree of unreasonable risk as the key factor in distinguishing the two concepts.[5] (For discussion of negligence, see Section 6, *supra*). "The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."[6] A defendant may be negligent in serving alcohol to a patron, but absent a showing of a greater degree of risk disregarded by him, such conduct is not reckless.

Subsection (b): Liability for the Reckless Service of Alcoholic Beverages

The rules for finding a defendant liable for reckless conduct are based on Section 501 of the Restatement (Second) of Torts. That section states that the rules for determining whether a person is liable for reckless disregard of another's safety are the same as those which determine his liability for negligence,[7] with three exceptions.

First, to be held liable for negligence, the actor's conduct must be a substantial factor in bringing about the harm. In an action for recklessness, the jury need only find that the actor's conduct bears a sufficient causal relation to another's harm to find him liable. In a recklessness action, then, the standard for finding a causal relation to a plaintiff's harm must be "sufficient" to warrant a finding of liability but not necessarily "substantial," even though, under negligence no such finding would be permissible.[8]

Second, the treatment of the plaintiff's conduct and its effect on the defendant's liability is handled differently under negligence and recklessness rules. In a negligence action, the plaintiff's contributory or comparative negligence may bar or reduce his recovery, while in an action involving a defendant's recklessness, it at worst would only reduce recov-

4. BLACK'S LAW DICTIONARY, p. 1142 (5th ed. 1979).
5. RESTATEMENT (SECOND) TORTS, § 500.
6. *Id.* § 500, Comment g.
7. *Id.*, §§ 430, 431.
8. *Id.*, § 501, Comment a.

ery. Third, a finding of recklessness may give rise to punitive damages. See the discussion concerning defenses and damages in Section 9 and 8, respectively, for the impact of a finding of recklessness.

Subsection (c): Admissible Evidence of Reckless Conduct in the Service of Alcoholic Beverages

The server practices that evidence reckless conduct which follow are not meant to be an exhaustive list. They serve as illustrations of the recklessness concept, and provide examples in the context of alcohol service. They do not create a presumption of recklessness and are subject to certain defenses as defined in Sections 9 and 10.

Subsection (c)(1): Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages

Serving practices that actively encourage intoxicated patrons to consume substantial amounts of alcoholic beverages can be evidence of recklessness. These practices center around an active urging or coaxing of intoxicated patrons to drink. These should be distinguished from practices which encourage sober patrons or intoxicated patrons, whom a server would not reasonably have known were intoxicated, to continue drinking. Thus, serving practices such as happy hours, free drinks, or other drink promotions, which are promoted only to patrons who are not known to be intoxicated may be evidence of negligence but not of recklessness. If such practices are applicable to all patrons, regardless of their intoxication, it may be evidence of recklessness.

The subsection also provides that patrons be encouraged to consume "substantial amounts" of alcoholic beverages. A showing that only one drink was offered to an intoxicated person is insufficient; rather, evidence of repeated serving is required. This requirement is included in recognition that determining intoxication of a patron is an inexact science and that reckless service of such persons must clearly be highly abusive in order to meet the standards set forth in the recklessness definition.

As in the proof of negligence, BAL levels may be used as evidence that "substantial amounts" were served, but are not conclusive. No set BAL is established, and the circumstances of each case will be critical (see Commentary to Sections 2 and 10). Nevertheless, BAL levels substantially above a state's legal or presumptive definition of intoxication, which normally can only be reached with extremely heavy consumption of alcoholic beverages, may be relevant in the determination of this element of the definition.

The subsection also required that the server "actively encourage" the continued drinking by the intoxicated person. This standard has been adopted in recognition that the reckless conduct must be intentional and deliberate (see Commentary, *supra*, this section). Evidence that a server inadvertently permitted such drinking to occur, or that another patron helped to deceive the server could be used to show the lack of recklessness even though it might be sufficient to show negligence.

The conduct described in this subsection is defined as reckless in part because of the substantial risk it creates of harm to the drinker and others that is substantially greater than mere negligent service. The risk of injury rises dramatically as the drinker's intoxication level increases to ranges of BALS substantially greater than those normally associated with intoxication. The act of encouraging continued drinking beyond intoxication is thus evidence that the server is ". . . indifferent to the consequences it may impose. . . ."[9]

Subsection (c)(2): Service of alcoholic beverages to persons 16 years of age and under

This subsection recognizes the substantially greater risk of harm involved in serving a person 16 years of age or under. Children are known to be exposed to great risk of harm to themselves and others if they come under the influence of alcohol, and are also recognized as not capable of bearing the responsibility of their own drinking behavior. Thus, servers are held to a higher standard of conduct in their handling of very young patrons, and the latters' contributory or comparative negligence does not necessarily provide a defense to the server.

The subsection also recognizes that the failure to identify the underaged status of those 16 years and under evidences a much greater degree of carelessness and disregard for safety of others than service to those who are over 16 years of age but still under the legal drinking age. Although there may be circumstances in which a 16 year old might appear to be over the drinking age, it is unlikely that such a person would not appear to be an age that would clearly require the careful checking of identification. The evidence of recklessness would thus be more persuasive as the age of the patron decreases.

Service of alcoholic beverages to minors who are over 16 years of age may be reckless, depending on other circumstances, and the evidence of minority may be relevant to that determination. The mere service of alcoholic beverages to those over 16 years of age, even if intoxicated,

9. *See* Ewing v. Cloverleaf Bowl, 30 Cal. 3d at 402, 572 P.2d at 1158, 143 Cal. Rptr. at 17.

however, is not alone sufficient for a finding of recklessness. Other factors that may be relevant to the determination of recklessness include (but are not limited to) those found in other subsections of this provision.

Criminal laws in all states prohibit the furnishing of alcoholic beverages to minors generally. These laws evidence a legislative finding, well documented in research literature, that all those under the legal drinking age are particularly sensitive to alcohol and are at a greater risk to cause harm to themselves and others. This provision recognizes that those over 16 years of age have a greater degree of responsibility for their own conduct than their younger counterparts.

As with the service of alcoholic beverages to minors generally, evidence of responsible serving practices, particularly regarding false identification, may apply. However, the standards of responsible practices clearly become more strict as the age of the patron decreases.

Subsection (c)(3): Continuous and excessive service of alcoholic beverages

Alcohol is a drug that can act as a poison when ingested in large quantities. As a poison, it is second only to carbon monoxide as the agent responsible for the most deaths in the United States.[10] "Slow alcohol ingestion generally leads to unconsciousness before the drinker consumes enough to reach lethal blood level. Rapid alcohol ingestion while sober often causes vomiting. However, because intoxication depresses the brain's emetic mechanisms, rapid alcohol ingestion by a person already intoxicated can be fatal."[11] The liver is unable to metabolize the alcohol fast enough and therefore the amount of alcohol in the body reaches a toxic level.

The risk of alcohol poisoning is substantial when the patron's blood alcohol is already elevated to a high degree or when the amount of alcohol already consumed has the potential for creating a high blood alcohol level. In *Ewing v. Cloverleaf Bowl*,[12] an experienced bartender was alleged to have served a patron (who had just turned 21) 10 straight shots of 151 proof rum, 1 vodka collins and 2 beer chasers in less than an hour and a half. The patron died of acute alcohol poisoning. The court held that a jury could find that the bartender's conduct was not merely a want of ordinary care, but constituted reckless conduct.[13]

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10. L.J. WEST, ALCOHOLISM AND RELATED PROBLEMS: ISSUES FOR THE AMERICAN PUBLIC, 9 (1984).
11. *Id.*
12. 20 Cal. 3d 395, 572 P.2d 1155 143 Cal. Rptr. 13 (1978).
13. *See also* Davis v. Butler, 95 Nev. 763, 602 P.2d 605 (Nev. 1979).

Subsection (c)(4): Assistance of patron into an automobile

A bartender followed an intoxicated patron out to his car and gave the patron instructions on how to turn his steering wheel so that he might drive out of the parking lot. The court stated that "[i]t is not at all unlikely that a trier of fact could find the action of this defendant in helping a man with a morning-acquired state of intoxication into a car and sending him out on a public highway might well be considered reckless and wanton conduct on defendant's part."[14]

Clearly, a patron who is so intoxicated that, without aid by another, he would be unable to enter an automobile by himself, should not be driving. A responsible licensee practice would be to make alternative transportation arrangements for intoxicated patrons. But under no circumstances should active aid to an intoxicated patron into an automobile be rendered.

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.

Commentary

The damages section has been drafted in accordance with the intent of this Act which states the negligent or reckless service of alcohol by licensed vendors be governed primarily by ordinary principles of tort liability.

Review of all existing licensee liability statutes has revealed two primary approaches to damages. One approach specifies that damages be allowed for injuries to persons, property or means of support.[1] Some states allow additional or fewer types of specified damages.[2] These statutes have led to numerous interpretations as to the scope of the categories enumerated, which have in turn led to uncertainty and unnecessary

14. Galvin v. Jennings, 289 F.2d 15, 17 (3rd Cir. 1961).

1. *See, e.g.*, ILL. ANN. STAT. CH. 43, § 135 (Supp. 1983); IOWA CODE ANN. § 123.92 (West Supp. 1983); OHIO REV. CODE ANN. § 4399.01 (1982); Vt. Stat. Ann. tit. 7, § 501 (1972).

2. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602.1 (West 1980); CONN. GEN. STAT. ANN. § 30-1-2 (West 1975); MICH. COMP. LAWS § 436.22 (1978); MINN. STAT. ANN. § 340.95 (Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983).

litigation. Terms such as "persons," "property" and "support" have taken on specialized meanings in these states, not necessarily coinciding with ordinary tort principles of the jurisdictions.[3]

The other major statutory approach has been to allow recovery for "injuries," without specifying the meaning of the term.[4] Again, the lack of specificity of this type of statute has led to litigation over the intent of the term.

This Act explicitly rejects the view that the provision of licensee liability for serving alcohol is a special species of statute governed by principles differing from the common law. The damage provisions of this Act have been specifically linked to state policy as enunciated by the common law or by legislative common law codifications.[5] These well established bodies of law should provide the basis for uniform state rules on such issues as recovery for intangible injuries, e.g., loss of consortium and mental anguish.

The provision regarding punitive damages is intended to clarify the application of such damages in dram shop cases. The general rule in effect in most states is followed, that punitive damages are only allowed when aggravating circumstances are present.[6] Under this Act, reckless conduct presents aggravating circumstances that authorize imposition of punitive damages. The provision is structured so as to avoid litigation over whether reckless conduct also involves wilful or wanton conduct, malice, fraud, oppression, or other conduct associated with punitive damages.

The provision regarding damages under wrongful death and survival statutes is again intended to extend general tort law principles to liability arising under this Act. Wrongful death and survival provisions have been enacted in most jurisdictions to cure defects in the common law which deny recovery under various circumstances involving the death of a tort victim or the tortfeasor.[7] Although some current licensee liability statutes set out wrongful death or survival provisions in their text,[8] this Act incorporated existing provisions by reference for two reasons. First, wrongful death and survival provisions vary from state to state, and in-

3. *See, e.g.*, Kelly v. Hughes, 33 Ill. App. 2d 314, 179 N.E.2d 273 (1962); Podbielski v. Argyle Bowl, Inc., 392 Mich. 380, 220 N.W.2d 397 (1974); State Farm Mut. Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36 (1963).

4. *See, e.g.*, ALASKA STAT. § 04.21.020 (1980); FLA. STAT. ANN. § 768.125 (West Supp. 1984); OR. REV. STAT. § 30.950 (1980); PA. STAT. ANN. tit. 47 § 4-427 (Purdon 1969).

5. *See, e.g.*, GA. CODE ANN § 105-2002 (1982).

6. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, § 2 (5th ed. 1984).

7. *Id.* § 125A (5th ed 1984); SPEISER, RECOVERY FOR WRONGFUL DEATH, p. 407 (2d ed. 1975).

8. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983); N.D. CENT. CODE § 5-0106 (Supp. 1983); UTAH CODE ANN. § 32-11-1 (Supp. 1983).

corporation by reference facilitates a uniform state policy. Second, incorporation provides a well-settled body of law, eliminating litigation over the meaning of new provisions.

Legislatures may desire to incorporate an additional provision requiring that any wrongful death action be brought at the same time as the action under this Act. This would eliminate disputes that have arisen as to whether the Act's remedies are coextensive with those afforded under the wrongful death act, and whether relief in separate actions under both statutes would amount to an improper double recovery.[9] It was not possible to include such a provision under this Model Act, since a uniform provision could not respond to the varying statutory schemes presented by State wrongful death statutes.

Recovery Caps

Three states (Connecticut, Illinois, and North Carolina) have established limits on total awards on all claims brought under the states' dram shop acts.[10] Several other states are considering similar legislation. The Connecticut and Illinois recovery caps are very restrictive ($50,000 and $20,000 respectively), while North Carolina imposed a $500,000 limitation. The primary rationale for recovery caps concerns the cost of insurance. Dram shop liability may cause large increases in insurance premiums, particularly because of the uncertainty of the law and the potential for multi-million dollar claims. In Illinois, the statute imposes a strict liability approach such that a defendant may be found liable even if the patron who was served was not intoxicated at the time of service.[11] The recovery cap thus tends to counterbalance the potential unfairness of the statute, which is not based in negligence principles. Connecticut also has a "strict liability" statute,[12] although it has not been as broadly interpreted as the Illinois statute.

The Model Act addresses these concerns in part by creating the new "responsible practices" defense in Section 10. It is anticipated that if the law is enacted, insurance companies will offer discounts to those who adopt appropriate management and serving practices, thus alleviating the insurance cost issue at least to some degree.[13] The Act is also negligence-

9. *See, e.g.*, Wendeliln v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966); Fitzer v. Bloom, 253 N.W.2d 395 (Minn. 1977).

10. CONN. GEN. STAT. ANN. § 30-1-2 (West 1975); ILL. REV. STAT. Ch. 43 § 135 (Supp. 1983); N.C. GEN. STAT. § 18B-123 (1983). The limitations apply to all claims arising from a single incident; Connecticut and Illinois place lower limits for each plaintiff's claim.

11. *See, e.g.*, Tate v. Coonce, 97 Ill. App. 3d 145, 421 N.E.2d 1385 (1981).

12. *See, e.g.*, Pierce v. Albanese, 144 Conn. 241, 129 A.2d 606 (1957); Passini v. Decker, 39 Conn. Supp. 20, 467 A.2d 442 (1983).

13. According to Intermission, Ltd., at least one insurance company has already offered a dis-

based; thus defendants are given adequate defenses and are not facing strict liability. States may wish to take appropriate regulatory action so that insurance premiums accurately reflect costs. Unfortunately, very little is known regarding the insurance cost issue, and the debate regarding its impact is thus based on speculation and conjecture. A detailed evaluation of the topic is therefore warranted.

The Model Act therefore does not include a recovery cap. If a cap is deemed necessary, it should be imposed with caution and at a high enough level to cover the costs of most intoxication-traumatic injuries. Any recovery caps should not apply to punitive damages, as a cap may defeat the purpose of discouraging extremely inappropriate behavior. In general, recovery caps are in conflict with basic tort law principles, which assume that a plaintiff has a right to full recovery, regardless of amount, if he or she can prove defendant's fault and the amount of loss.

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.

Commentary

Because the Act codifies causes of action based on the negligence and recklessness of servers of alcoholic beverages, all defenses normally available to such actions may be asserted under the Act. Comparative negligence (or contributory negligence, depending on state law) and assumption of the risk are the most commonly asserted defenses to dram shop claims.

The Act takes no position regarding whether a state should adopt comparative negligence, and, if so, in what form. Most states, however, do not permit the person who becomes intoxicated to recover damage from the person who served him, a doctrine recognized in Section 4, *supra*. It should be noted that, in some jurisdictions, contributory/comparative negligence defenses are not available in actions based on recklessness. Thus, assuming a bar to a negligence claim is available to the defense the intoxicated person must show recklessness on the part of the defendant to recover.

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count if certain server training courses are attended. Personal interview with James E. Peters, Executive Director, Intermission, Ltd., 56 Main Street, Northampton, MA, December 10, 1984.

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;
(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; and
(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 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.

Commentary

Overview

The responsible business practices defense is a central provision of the Act. It provides a defendant a means of protection from liability if it can be shown that, at the time of the service of alcoholic beverages, the defendant was following those business practices which an ordinarily prudent person would follow with the same duty under like circumstances. The defense reaffirms the defendant's duty not to serve intoxicated persons and minors. Subsection (b) makes this clear by providing that when a defendant serves a person with actual knowledge that such person is a minor or intoxicated, the defense does not apply. Evidence of responsible business practices is needed to determine whether a defendant who did not have actual knowledge should have known of the person's intoxicated condition or age. Nor does the defendant have to pursue this defense in order to avoid liability. If the plaintiff cannot meet his or her burden of proof that the defendent served an intoxicated person or minor knowing or in circumstances where the defendant should have known of the intoxication or the underaged status, then liability will not attach, whatever business practices were in existence at the time of

the service. Thus, the defense does not create a new or alternative cause of action to those stated in Sections 6 and 7.

There are, however, numerous instances in which a defendant did not know of the person's intoxication, and the issue of liability rests on whether he should have known of this fact. The most common issue concerns whether the person's intoxication was "obvious" or "apparent." Frequently there is conflicting evidence regarding the obvious signs of intoxication, the number of drinks served and the other circumstances of the sale. Plaintiffs may be placed at an initial disadvantage due to the possible lack of evidence to make a prima facie case against a particular defendant; defendants in turn are put at a disadvantage if such a case is made due to the difficulty in recreating the particular circumstances of the sale and the very subjective and uncertain nature of the "obvious intoxication" standard. In such cases, where factual determinations are difficult to make, the responsible business practices defense may take on particular importance for the fact-finder in determining whether due care was exercised.

While this defense recognizes the difficulties in fulfilling the defendant's duty not to serve intoxicated persons and minors, it also provides that the defendant, as a member of the legitimate business operation, is in a position to take practical steps in the operation of that business to reduce the risk of harm to others. The Act's intent is to provide an incentive to adopt appropriate procedures, practices and actions in order to reduce those risks. Thus, the Act provides possible means of protection when an intoxicated person or minor is served, but only if the business is conducted in a responsible and prudent manner.

The defense is a relatively new concept in dram shop law, but not unprecedented. The North Carolina statute provides that evidence of "good practices" in cases involving service to minors, may be used as a defense.[1] In addition, business practices have been found relevant in some cases on the issue of negligence without any explicit standard in the state's dram shop statute.[2]

Responsible business practices encompass a broad range of business activities. The section provides a noninclusive set of practices to provide guidance to the fact-finder. Subsection (g) is critical in interpreting the intent of this listing. As stated in that provision, the defense may be available even if some of the practices (or others not listed) have not been met. The particular type of business, the existence of adequate resources

1. N.C. GEN. STAT. § 18B-122 (1983).
2. *See, e.g.*, Ewing v. Clover Leaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

for implementation, particularly of training programs and the defendant's community, may all have an input on how a reasonable person would act in defendant's circumstances. Thus, the "totality of the circumstances" must be considered in applying the section to particular facts.

One possible objection that has been raised regarding the responsible business practices defense concerns the potential increase in liability of the licensee if certain business practices are adopted too enthusiastically (a "good samaritan" rule objection). This section is drafted to avoid this problem. The defendant has a duty to take reasonable steps to avoid serving intoxicated person and minors. This section, as well as Section 6, provides a basis for balancing this duty against the defendant's need to conduct a legitimate business and the difficulties of recognizing intoxicated persons. Thus, a defendant who decides not to take reasonable steps to fulfill this duty does so at his or her own peril. The duty remains the same. If a defendant takes actions that go beyond such reasonable steps, it provides not an increase in liability, but additional support for a responsible business practices defense. In addition, Section 6 provides specific limitations on the defendant's duty to investigate behavior of persons outside the defendant's premises.

Training

The section provides that responsible business practices include comprehensive training of defendant and defendant's employees and agents regarding responsible service of alcoholic beverages and handling of intoxicated patrons. Numerous training programs are now in existence, but they are at a preliminary stage of development and vary widely in format, duration and content. The section does not attempt to define responsible service of alcoholic beverages in recognition of this experimental stage of development, and recognizes the need for the fact-finder to judge the training programs in light of community and business standards at the time of the service in question.

A critical variable, which is included in the section, concerns the development of both knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. This reflects the need to learn interaction skills in order to make the identification of intoxicated persons easier and to make interventions with patrons who drink heavily more effective. The inability to implement training procedures renders a training program useless. Several training pro-

grams currently in existence lack this skills development component.[3]

Training programs concerning potential sales to minors have more specific components, reflected in Subsection (f)(2). A realtively short training program can provide employees with skills for identifying whether an identification is authentic or false. In evaluating a defendant's training program, the fact-finder needs to take into account any on-the-job training efforts as well as the availability of training from outside sources. Comprehensive training is currently available only on a limited basis. Thus, a defendant's good faith effort to meet this standard may fall short of its goal. The type of training, if any, needed for different levels of employees may also vary signficantly. It is anticipated that current training programs will be expanded both in content and in geographic availability in the near future and that their effectiveness will be enhanced with further research, implementation, and evaluation. Thus this portion of the defense may change in its applicability both over time and by geographic location.

Management Policies, Procedures and Actions

The second major component of responsible business practices concerns management policies, procedures and actions designed to fulfill the defendant's duty not to serve intoxicated persons. As with the training component, the development of appropriate management procedures is in its infancy, with more research, implementation and evaluation necessary. Nevertheless, sufficient experimentation and consensus has occurred to devise general guidelines, found in Subsection (e)(1)-(7).[4]

As with the training component, management policies regarding potential service to minors can be more specifically ascertained. Management may establish procedures to insure that all identification of possible underaged persons is adequately inspected. Such procedures may be critical in cases in which the factual issues regarding place of service and type of identification are in doubt. This section provides a possible defense for the defendant if the fact-finder determines that such procedures were in place and being regularly followed at the time of the alleged service. (See Commentary to Section 6 for further discussion).

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3. For further discussion, *see*, Mosher, J. "Server Intervention: Present Status and Future Prospects," presented at the Research Workshop on "Alcohol and the Drinking Driver" sponsored by the National Institute on Alcohol Abuse and Alcoholism and the National Highway Traffic Safety Administration, Bethesda, Maryland, May 1984.

4. *Id.*; *see also*, Peters, J., ed. *Proceedings of the First Northeast Conference on Alcohol Server Liability* (Intermission, Ltd., Boston, MA) 1984; Intermission, Ltd. Minutes from a meeting to plan a comprehensive server and manager training curricula, Detroit, MI, April 16, 1984.

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 for reckless conduct shall be brought within —— year(s) of the conduct complained of.

Commentary

The statute of limitations provisions are left blank to allow jurisdictions to create limitations periods consistent with state policy. Given that the thrust of this statute is to extend ordinary principles of tort law to the serving of alcoholic beverages by a licensee, it is anticipated that limitations periods will be adopted that are consistent with the limitations periods for analogous actions. Separate limitations provisions are included for actions based on negligent and reckless conduct, as analogous actions may be governed by different limitations periods under state law.

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.

Commentary

Defendants who establish procedures for minimizing consumption of alcoholic beverages by minors or intoxicated persons may face potential liability claims by those affected by the procedures. False imprisonment, intentional infliction of emotional distress, and conversion are among the most likely civil claims that may arise. Most frequently, such claims are for minimal damages and are more in the nature of harassment. No reported case has been found which imposed liability on a defendant for acting in good faith to prevent service to minors or intoxicated persons. Indeed, existing defenses under common law may be adequate to provide protection to defendants.

The privileges found in Section 12 are nevertheless included in the Model Act as a means to prevent harassment claims and to promote responsible serving practices. However, nothing in this section should be interpreted as mandating any given action or procedure for the purposes of establishing or disproving a responsible practices defense as defined in Section 10. The privileges should be interpreted as a minimal protection available; as stated in Subsection (d), defendants have a right to assert any additional defenses available by law. It should be noted that the right to possess alcoholic beverages is restricted and more in the nature of a privilege than a right.[1] Thus, the state interest in preventing unlawful consumption and in preventing service to minors and intoxicated persons may be broadly construed when claims against defendants for failure to serve alcoholic beverages are made.

Subsection (a) provides a defendant a defense against claims based on the defendant's refusal to serve alcoholic beverages to those suspected of being minors or of being intoxicated or nearly intoxicated. Subsections (a)(1) and (a)(2) are substantially the same provisions found in the North Carolina dram shop act.[2] The provision complements Section 10, which provides a potential defense to a claim under the Act if a defendant reasonably relies on proof of age identification. Because of the potential for liability and the societal interest in preventing minors from consuming alcohol beverages, the defendant's privilege is broadly drawn to include refusal to serve alcoholic beverages to anyone who reasonably appears to be a minor, even when proof of identification is presented.

1. *Cf.*, California v. LaRue, 409 U.S. 109 (1972).
2. N.C. GEN. STAT. § 18B-129(a) (1983).

Defendants are required by law in most states not to serve anyone who appears intoxicated. Thus, no civil liability claim may be based on the defendant's refusal to serve such persons. Subsection (a)(3) extends this basic protection to situations in which defendant's refusal is based on a good faith effort to prevent a person's intoxication. The provision again complements Section 10, which provides a defense to a claim under the Act if defendant is adhering to responsible business practices. However, the failure to refuse service to a person in order to prevent his or her intoxication does not constitute negligence under Section 6, and the inclusion of this privilege in no way implies that the failure to do so constitutes unreasonable business practices. It is included as a means to protect defendants who may act more cautiously than is required by law in order, to insure that they are not punished for exercising that caution. The societal interest in preventing intoxication-related offenses and injuries is sufficient to justify this minimal restriction on an individual's right to possess alcoholic beverages, provided that the refusal of service is applied such that it does not violate some other paramount state interest (e.g. race discrimination).

Subsection (b) is based substantially on a provision found in North Carolina dram shop act[3] and provides explicit protection to defendants against the imposition of civil liability for holding identification papers for a reasonable time to determine their authenticity. It is anticipated that, if reasonably believed to be false, they may be held until law enforcement officers can be summoned to determine whether a crime has been committed. The protection found in this subsection may already be established in many states and may thus be unnecessary.

Subsection (c) is based on provisions found in the Restatement (Second) of Torts[4] and is a codification of common law principles.[5] A private citizen has a right to make a citizen's arrest if a breach of the peace or a felony is being or has been committed in his or her presence.[6] Subsection (c)(2) provides explicit protection from civil liability to defendants who detain a person attempting to commit a drinking driving offense. It is unclear whether this right of detention exists under subsection (c)(1) since, arguably, the detention may occur before the crime is actually being committed. In many states, such a right may be explicitly recognized, making this provision unnecessary. In addition, the rights of those

3. N.C. GEN. STAT. § 18B-129(b) (1983).

4. RESTATEMENT (SECOND) TORTS § 119 (1965).

5. *See* W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, 5th ed., § 26 (1984).

6. *Id.*; RESTATEMENT (SECOND) TORTS § 119 (1965); Commentary to Restatement §§ 115-119 for discussion of definitions and principles associated with this right.

making a legal citizen's arrest may be broader than those granted here (to detain for a reasonable time for the summoning of law enforcement officials). States may wish to broaden this language to conform with state law. Alternatively, subsection (d) will provide an avenue for a defendant to assert such rights.

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.

Commentary

Several issues may arise when a plaintiff settles with and releases a joint tortfeasor from liability. Courts will usually recognize a release from liability, although courts may strike down such an agreement if it is contrary to public policy.[1] Subsection (a) recognizes this principle, and requires that the release be "proper" in the sense that it does not violate public policy. Furthermore, courts are divided on the impact of a settlement and release upon other defendants. The old common law rule held that any other defendants would be subsequently released from liability.[2] Modern case law has permitted plaintiff to bring subsequent actions and allowed defendants to offset previous settlements by other defendants against any later judgments.[3] The Model Act, in Subsections (a) and (b),

1. *See, e.g.*, Scheff v. Homestretch, Inc., 60 Ill. App. 3d 424, 377 N.E.2d 305 (1978) (defendant raceway company obtained a release form from all participants in a racing event which it sponsored).
2. *See, e.g.*, Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947).
3. *See, e.g.*, Larabell v. Scshuknecht, 308 Mich. 419, 14 N.W.2d 50 (1944).

adopts this modern view, which is based on equitable principles.

Contribution, a concept that allows one who is liable to another to shift a portion of that liability to a third person, has a fairly uneven case history within a dram shop context. However, some general rules have been established by the courts. Licensed vendors will have a right of contribution among themselves,[4] and intoxicated wrongdoers have been able to recover contribution from the server.[5] On the other hand, there is conflicting authority as to whether servers can claim a right of contribution from their intoxicated customers. Courts which have not permitted servers to seek contribution from their intoxicated patrons have relied at least in part on the penal nature of the dram shop act. The Model Act therefore permits a right to such contribution [in subsection (d)], as do most courts which analyze dram shop liability within a negligence context, because the Act is not penal in nature (see Section 2), and because there is not a wide disparity of fault between the parties.[6] The North Carolina dram shop statute has substantially the same provision.[7]

Indemnity shifts the entire loss from one tortfeasor to another.[8] Within a dram shop context indemnity issues are rarely involved, as indemnity will only be allowed when there exists a wide disparity in the gravity of fault between tortfeasors. Licensees and intoxicated persons are usually not considered to have wide disparities in the gravity of fault,[9] thus precluding any right of indemnification. This principle is adopted in subsection (e), which provides that indemnification is permitted only if one defendant has committed reckless conduct.

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.

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4. *See, e.g.*, Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1973).

5. Morgan v. Kirk Bros., Inc., 111 Ill. App. 3d 914, 444 N.E.2d 504 (1982) (court relied on interpretation of newly enacted Illinois Contribution Act, which clearly stated that where two or more persons are subject to liability in tort arising out of the same injury there exists a right of contribution among them).

6. *See*, Pautz v. Cal-Ros, Inc., 340 N.W.2d 538 (Minn. 1983) (to deny the vendor a right of contribution would be a repudiation of the essential principle of contribution). *But see*, Virgilio v. Hartfield, 4 Mich. App. 582, 145 N.W.2d 367 (1966) (court denied vendors a right of contribution from the intoxicated wrongdoer based on the theory that the parties were not joint tortfeasors, despite a single, indivisible injury).

7. N.C. GEN. STAT. § 18B-124 (1983).

8. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, § 51 (5th ed. (1984).

9. Geocaris v. Bangs, 91 Ill. App. 2d 81, 234 N.E.2d 17 (1968).

Commentary

A pressing legal issue in many states with dram shop liability statutes is whether plaintiffs may seek alternative remedies at common law outside the statutory remedy. Although there is a conflict in authority, the modern trend is toward permitting common law actions based either on negligence per se or common law negligence standards.[1] Some state legislatures have addressed this issue explicitly. For example, in California, the dram shop statute purports to be the exclusive remedy for all service of alcoholic beverages; in North Carolina, the statute provides that it does not exclude common law claims.[2]

The primary reason for permitting alternative actions is that the statutory provisions in question are usually antiquated and are not based on common law principles.[3] In many cases, suits are permitted only by a limited class of plaintiffs and the acts giving rise to liability are defined very narrowly.[4] Courts have thus turned to common law principles as a means to avoid otherwise harsh results.

This Act codifies a common law negligence cause of action for the commercial service of alcoholic beverages. It therefore is the exclusive remedy, and an alternative set of duties, defenses, and other provisions are not permitted.

Section 14 is carefully worded so as to not preclude possible causes of actions outside this Act in at least two closely related circumstances:

(1) cases in which the licensee has acted negligently in a manner not related to the service of alcoholic beverages;
(2) cases that involve the service of alcoholic beverages by someone not included as a potential defendant in Section 5.

See Commentary to Section 5 for discussion of potential liability of noncommercial servers of alcoholic beverages. State legislatures may wish to preclude such suits as a matter of law.[5]

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

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1. *See, e.g.*, Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Mason v. Roberts, 294 N.E.2d 884 (Ohio 1973); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983). *But see* Nunn v. Comidas Exquisitos, Inc., 166 Ga. App. 796, 305 S.E.2d 487 (1983).
2. CAL. BUS. AND PROF. CODE § 25602 (West 1980); N.C. GEN. STAT. § 18B-128 (1983).
3. *See, e.g.*, McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).
4. *Id.*; *see also*, Kerby v. Flamingo Club, Inc., 532 P.2d 975 (Colo. 1974).
5. At least two states have taken such action. *See* CAL. CIVIL CODE § 1714 (West 1980); N.M. STAT. ANN. § 41-11-1(E) (Supp. 1983) (liability permitted only if recklessness is proven). *But see*, OR. REV. STAT. § 30.955 (1983), which permits such liability.

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.

Commentary

Perhaps the least recognized shortcoming of new legislation is its failure to evaluate its impact. Laws are enacted to address particular social problems, but without an evaluation, legislators and other social policymakers have no basis for determining whether the desired impact has been achieved. A carefully developed evaluation project is therefore vital to the legislative process generally and to the successful implementation of this Act.

This provision mandates the ABC agency of the state to conduct the evaluation, to be completed within two years of the Act's enactment. It is anticipated that the agency may need to contract with an organization that specializes in such studies, since most ABC agencies do not have the required expertise. The Act may need to be amended to establish the contracting process in such cases. In some jurisdictions, another state agency may have the resources and expertise to conduct an evaluation, and the Act should be modified to specify that agency, if one is available. A non-inclusive list of variables to be studied has been included to provide guidance.

In most circumstances, the evaluation study will require an appropriation of funds. Because of the current fiscal crisis in most states, this may create a barrier to passage. Strategies for funding can include imposing a special fee on all new license and renewal applications or imposing special court costs in all dram shop cases brought pursuant to the Act.

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.

Commentary

An optional notice provision is provided by the Model Act for use at the discretion of state legislatures. The provision is made optional due to the strong arguments that may be made for both the inclusion or exclusion of a notice requirement.

The principal argument in support of a notice provision is to allow a defendant to investigate a claim while the underlying facts are still fresh. Since dram shop cases often involve accidents occurring off premises, defendants often will have no knowledge of the accident until informed by the plaintiff. Absent a notice provision, a defendant may not learn of a claim until just prior to expiration of the applicable statute of limitations, which may be a period of several years. An additional argument in favor of a notice provision is that it will motivate plaintiff attorneys to act more promptly on their clients' behalf.

An argument against the optional provision is that notice provisions are an exception to the general rule in civil liability law. The law abounds with the imposition of civil liability for injuries occurring outside the presence of a defendant for which no notice is required. Arguably, it is unfair to make plaintiffs under the Model Act, who are generally innocent third parties, bear a burden not required of plaintiffs in other cases. A related argument, discussed in detail, *infra* is that notice provisions almost invariably involve uncertainty and litigation. Tradi-

tional notice provisions, which commence from the date of discovery of the injury, invariably involve litigation over incapacity, tolling periods and due diligence. The notice provision of the Model Act, which is based upon the beginning date of the lawyer-client relationship, may involve weighty questions regarding a plaintiff's ability to select counsel and the privacy of that relationship. These problems inherent in notice provisions may help explain why only three of the twenty-three existing dram shop statutes include notice provisions.

The purpose of the notice provision is primarily to give a defendant an opportunity to investigate while the facts underlying a claim are still fresh.[1] This will cure the defect inherent in most licensee liability statutes that allows plaintiffs to prepare their case while the facts are fresh, without having to inform defendants of their potential liability until the limitations period of one or more years is about to elapse.

The requirements of the notice provision are based primarily on the Minnesota statute.[2] As in the Minnesota statute, the notice requirement begins to run upon the initiation of the attorney-client relationship, rather than the date of the occurrence in question. This is based on the tendency of traumatically injured persons to delay legal considerations until after medical matters are attended to, and the fact that defendants will not be put in an unfair position, because they can begin their investigations within a reasonable time of initiation of the plaintiff's case. Stale cases are eliminated by the statute of limitations provision. This approach is found to be preferable to that under the Connecticut[3] and Iowa statutes,[4] which base their notice requirements on the date of injury and engender litigation over incapacity, tolling periods and diligence.[5]

The notice period of 120 days for plaintiffs is adopted directly from the Minnesota statute. A notice period for contribution and indemnity claims of 120 days is used, rather than the 60 day period of the Minnesota statute, on the basis that such claims may require considerable investigation, which may not be complete within 60 days of plaintiff's notice.

The form of the notice is calculated to adequately inform defendants as to both the injury suffered and the underlying circumstances complained of. This is considered to be an improvement over the Connecticut and Iowa statutes, which only require plaintiffs to inform defendants

1. *See, e.g.*, Zucker v. Vogt, 329 F.2d 426 (2nd Cir. 1964) (applying Connecticut law); Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981) (additional purposes cited).

2. MINN. STAT. ANN § 340, 951 (West Supp. 1984). The statute was amended in 1982 to cure latent defects revealed in *Wegan v. Village of Lexington*, 309 N.W.2d 273 (Minn. 1981).

3. CONN. GEN. STAT. ANN. § 30-102 (West 1975).

4. IOWA CODE ANN. § 123.93.

5. *See, e.g.*, Ehlinger v. Mardorf, 285 N.W.2d 27 (Iowa 1979); Shersteen v. Sojka, 260 N.W.2d 48 (Iowa 1977); Harrop v. Keller, 253 N.W.2d 588 (Iowa 1977).

of the circumstances of the injury and their intention to bring an action. The broader language of Iowa's form of notice is used, rather than Minnesota's more specific provision, to allow for cases where specifics such as the time of injury or service cannot be established prior to discovery.[6] This is in keeping with the Minnesota provision, adopted in full, which protects the validity of notice containing errors or omissions which are not material.[7]

Court discretion to waive timely notice is authorized only under exceptional circumstances. Although the Minnesota statute bars claims not in compliance with the notice provisions, Minnesota decisions have recognized exceptions to the rule under equitable principles.[8] Discretion should be exercised only under truly unusual and unforeseen circumstances, such as death or incapacity of counsel. It is anticipated that this provision will be interpreted consistently with similar provisions found in state law.[9]

As in the Minnesota statute, actual notice of facts informing a defendant of the circumstances of a claim satisfies the notice requirement.[10] Such actual notice serves the same purpose as written notice—to afford the defendant a timely opportunity to investigate a claim.

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6. *See, e.g.*, Saur v. Tobin, 23 Conn. Supp. 145, 178 A.2d 158 (1962); Shasteen v. Sojka, 260 N.W.2d 48 (Iowa 1977).

7. *Cf.*, Thompson v. Bristol Lodge No. 712, Loyal Order of Moose, Inc., 31 Conn. Supp. 405, 372 A.2d 985 (1974).

8. *See, e.g.*, Hammerschmidt v. Moore, 174 N.W.2d 79 (Minn. 1978).

9. *Id.*

10. *See, e.g.*, Donahue v. West Duluth Lodge No. 1478 of the Loyal Order of Moose, 1 Conn. Supp. 405, 372 A.2d 985 (1974), *cf.*, Lavier v. Ulysses, 149 Conn. 396, 180 A.2d 632 (1962); Saur v. Tobin, 23 Conn. Supp. 145, 178 A.2d 158 (1962).

APPENDIX B

An Act Regarding The Establishment of Alcohol Server Training Programs

SECTION 1. The Formation and Purpose of the Regulation Board. The Alcoholic Beverage Control Commission, hereinafter referred to as the Commission, shall establish a Regulation Board with representation from the Commission, the Department of Public Safety, the Attorney General, the Division of Alcoholism, the Massachusetts association of hotels, restaurants, bars, taverns and package stores, the association of insurance companies, and the directors of the regional offices as shall be described forthwith. This board shall regulate the development of training courses and materials, the examination procedures, the fee structure, enforcement procedures, penalties and fines.

The Regulation Board shall, as necessary, establish regional offices for the purpose of education and consultation, examination administration, and coordination of enforcement of the permit system as defined in this chapter.

SECTION 2. *Implementation.* Upon passage of this act, the Regulation Board shall be formed and shall, during the first two years of this act, work with the Commission in establishing training courses and materials, the examinations and examination procedures, the fee structure, enforcement procedures, penalties and fines, and certification procedures for instructors and schools. The Commission and Regulation Board shall also oversee the establishment and licensing of regional schools, for the purpose of providing training courses which shall be evaluated and modified to provide the most comprehensive and efficient training. Participation in these programs shall be voluntary, but shall fulfill the requirements of this act for the purpose of obtaining a permit as described forthwith. During the third and subsequent years of this act, the Commission shall require that all applicants for new licenses issued under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 shall demonstrate that all managers and employees have attended an approved training school, and that such employees shall have permits for being employed in establishments licensed under Massachusetts General Law Chapter 138 sections 12, 12a, 13, 14 and 15 as described forthwith. Also, during the third and subsequent years of this act the Commission shall require that all applicants for renewed licenses issued

under Massachusetts General Law Chapter 138 Section 12, 12a, 13, 14 and 15 shall demonstrate that all managers and employees have attended an approved training school, and that such employees shall have permits for being employed in establishments licensed under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 as described forthwith until such time that all persons employed by establishments licensed under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 shall have permits as described forthwith.

SECTION 3. *Permits for Servers of Alcoholic Beverages or Wines and Malt Beverages to be Drunk on the Premises.* The Commission may annually grant to individual citizens of the Commonwealth employed as managers, bartenders, waiters, waitresses or other such persons responsible for serving alcoholic beverages to be drunk on the premises of licensees under section 12, 12A, 13 and 14 permits which shall authorize such employees to serve alcoholic beverages, and the fee for each permit shall be determined annually by the Commission and the Regulation Board. The Commission and Regulation Board may make and enforce rules and regulations covering the granting of permits under this section and regulating the exercise of the authority granted under such permits.

SECTION 4. *Permits for Servers of Alcoholic Beverages or Wines and Malt Beverages Not to be Drunk on the Premises.* The Commission may annually grant to individual citizens of the Commonwealth employed as managers and sales clerks or other such persons responsible for serving alcoholic beverages not to be drunk on the premises for licensees under section 15 permits which shall authorize such employees to serve alcoholic beverages and the fee for each permit shall be determined annually by the Commission and Regulation Board. The Commission and Regulation Board may make and enforce rules and regulations covering the granting of permits under this section and regulating the exercise of the authority granted under such permits.

SECTION 5. *Application and Issuance of Permits for Dispensing Alcoholic Beverages.* Application for a permit to serve alcoholic beverages as described in sections 3 and 4 may be made by any person except a person who has been issued a permit and whose permit is not in force because of revocation or suspension or whose permit is suspended by the Commission; but before such a permit is granted, the applicant shall pass such application as to his/her qualifications as the Commission and Regulation Board shall require, and no permit shall be issued until the Commission is satisfied that the applicant is a proper person to receive it and no permit shall be issued to any person who is not of the legal age to

serve or dispense alcoholic beverages as defined by Massachusetts General Law.

The applicant shall also be required to demonstrate he/she has successfully completed an alcohol education and training course approved by the Commission and Regulation Board. The aforesaid examination and alcohol education and training course shall be administered for each of three classifications of permit: 1) package store clerk 2) bartender, waitress/waiter or 3) manager. To each permittee shall be assigned some distinguishing number or mark; and the permits issued shall be in such form as the Commission shall determine provided, however, that a person issued a permit for each of the three classifications shall receive a permit of a different color. They may contain special restrictions and limitations. They shall contain a photograph of the permittee, the distinguishing number or mark assigned to the permittee, his/her name, his/her place of residence and address, and a brief description of him/her for purposes of identification and such other information as the Commission shall deem necessary. A person to whom a permit has been issued under this section shall not perform duties in a position other than that for which such permit has been made valid by the Commission. Every person issued a permit to perform in the job categories as aforesaid shall endorse his/her usual signature on the margin of the license in the space provided for the purpose immediately upon the receipt of said permit, and such permit shall not be valid until so endorsed. A permit or any renewal thereof issued to a server shall expire on the anniversary of the operator's date of birth occurring more than twelve months but not more than sixty months after the effective date of such permit. The permit issued to a person born on February twenty-ninth shall, for the purpose of this section, expire on March first. Every application for an original permit filed under this section shall be sworn to by the applicant before a justice of the peace or notary public. Any applicant shall be permitted, at his/her request, to take any written examination in connection with the issuances of such a license in a language other than English.

SECTION 6: *Forgery or Alteration of Servers Permit; Penalty; Suspension; and Reinstatement of Permit.* Whoever falsely makes, alters, forges or counterfeits, or procures or assists another to falsely make, alter, forge or counterfeit a permit to serve alcoholic beverages; or whoever forges or without authorization uses the signature, facsimile of the signature, or validating signature stamp of the Commissioner upon a genuine or falsely made, altered, forged or counterfeited permit to serve alcoholic beverages; or whoever has in his/her possession, or utters, or publishes as true, or in any way makes use of a falsely made, altered, forged or coun-

terfeited permit; and whoever has in his/her possession, or utters, or publishes as true or in any way makes use of a falsely made, altered, forged or counterfeit signature, facsimile of the signature or validating a signature stamp of the Commissioner, shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison for not more than five years or in jail or house of correction for not more than two years.

A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the Commission who shall suspend immediately the permit to serve alcoholic beverages of the person so convicted; and no appeal, motion for new trial or exceptions shall operate to stay the suspension of the permit. The Commission, after having suspended the permit to serve in accordance with this paragraph, shall not terminate such suspension nor reinstate the right to serve alcoholic beverages until one year after the said conviction provided, however, that if the prosecution of such a person has terminated in his/her favor, the Commission shall forthwith reinstate his/her permit to serve alcoholic beverages.

SECTION 7: *Examinations.*

a. No person shall be issued a permit to serve alcoholic beverages unless he/she shall have passed an examination conducted by the Commission.

b. Examination shall be written in the English language unless a second language is required as determined by the needs of the candidate. Examinations may also be administered using word processing or video equipment in those locations where such equipment is available.

c. Examinations shall be held at least twelve times a year. Additional examinations may be scheduled at the discretion of the Regulation Board with at least sixty days public notice.

d. Time allowed for the examinations will be set forth in the instructions to examinees.

e. Applicants will be given written notice when and where to appear for the examination.

f. The following examination rules will prevail, and violation of any part will be considered grounds for disqualification of the applicant:

1. Examinees will not be permitted the use of books or memoranda during the examination.

2. The copying of questions or making of notes relative thereto is prohibited during the examination.

3. No one shall be permitted to remove from the examination

room copies of the examination prior to or subsequent to the examination.

4. Examinees shall not leave the examination room for any reason until they have returned in to the person conducting the examination the complete examination papers and any other material relating thereto.

g. The results of the examination shall be mailed to the applicant.

h. The examination papers written by the applicant will not be returned to the applicant, and the applicant will not be permitted the examination papers except by making a written appeal to the Regulation Board.

i. Any appeal of the results of the examination must be filed in writing with the Regulation Board within fifteen days of notification of the results of the examination.

j. Applicants who fail to pass an examination may reapply for examination in no less than sixty days of notification of the results of the examination.

k. Reissuing of a permit by examination will be required for the initial permit and again every five years. In considering applicants for a renewed permit, the Regulation Board shall take into account every five years each candidate's continuing experience, education, training and maintenance of professional skills. Candidates not showing evidence of maintaining standards satisfactory to the Regulation Board shall be required to pass a written examination to sustain their present status.

The Commission and Regulation Board shall prescribe such reasonable rules and regulations as may be deemed necessary to carry out the provisions of this section.

Every licensee shall keep such records as the Commission and Regulation Board may by regulation require. The records of the licensee shall be open to the inspection of the Commission or Regulation Board or his representatives at all times during reasonable business hours.

No persons shall be employed by a licensee as an instructor, nor shall any person give instruction for hire in the serving of alcoholic beverages unless such a person is the holder of a certificate issued by the Regulation Board. Such certificate shall be issued only to persons qualified as described forthwith.

SECTION 8. *Application for License to Give Instruction for Hire in Alcohol Server Schools: Fee: Qualifications of Applicant: Suspension or Revocation of License or Instructor's Certificate.* No person shall engage in the business, hereinafter called Alcohol Server School, of giving instruction for hire in serving alcoholic beverages without being licensed by

the Commission and the Regulation Board. A separate license shall be secured for each place of business where a person operates an Alcohol Server School. Application for a license under this section may be filed with the Commissioner and shall contain such information as required by the Commission and Regulation Board. Every such application shall be accompanied by an application fee of fifty dollars, which shall in no event be refunded. If an application is approved by the Commissioner and Regulation Board, the applicant upon the payment of an additional fee the amount of which shall be determined annually by the Commission and Regulation Board shall be granted a license, which shall be valid for a period of one year from the date of its issuance. The annual fee for renewal of such license shall be determined annually by the Commission and Regulation Board. The Commissioner shall issue a license certificate to each licenses, which certificate shall be conspicuously displayed in the place of business of the licensee. In case of the loss, mutilation or destruction of a license certificate, the Commissioner shall issue a duplicate certificate upon proper proof thereof and payment of a fee of twenty-five dollars.

No license shall be issued to a person to conduct an Alcohol Server School as an individual unless he/she shall have been the holder of an instructor's certificate issued by the Commissioner under this section for at least two years, nor shall such a license be issued to a partnership unless at least one of the partners shall have held such a certificate for at least two years, nor to a corporation unless at least one of the directors shall have held a certificate for at least two years. The provisions of this paragraph shall not apply during the first two years of this act during which time the Commission and Regulation Board shall determine the necessary requirements for issuance of a license.

The Commission may deny the application of any person for a license, if, in his/her discretion, s/he determines that:

a. Such applicant has made a material false statement or concealed a material fact in connection with his/her application.

b. Such applicant, any officer, director, stockholder or partner, or any other person directly or indirectly interested in the business was the former holder, or was an officer, director, stockholder or partner, in a corporation or partnership which was the former holder of an Alcohol Server School license which was revoked or suspended by the Commissioner.

c. Such applicant or any officer, director, stockholder, partner, employee, or any other person directly or indirectly interested in the busi-

ness, has been convicted of a felony, or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

d. Such applicant has failed to furnish satisfactory evidence of good character, reputation and fitness.

e. Such applicant is not the true owner of the Alcohol Server School.

f. Such applicant or any officer, director, stockholder, partner, employee, or any person directly or indirectly interested in the business is the holder of a current license to serve alcoholic beverages for on or off premises consumption in the Commonwealth.

The Commissioner may suspend or revoke a license or refuse to issue a renewal thereof for any of the following causes:

a. The conviction of the licensee or any partner, officer, agent or employee of such licensee of a felony or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

b. Where the licensee has made a material false statement or concealed a material fact in connection with his/her application for the license or renewal thereof.

c. Where the licensee has failed to comply with any of the provisions of this section or any of the rules and regulations of the Commissioner made pursuant thereto.

d. Where the licensee or any partner, officer, agent or employee of such licensee has been guilty of fraud or fraudulent practices in relation to the business conducted under the license, or guilty of inducing another to resort to fraud or fraudulent practices in relation to securing for him/herself or another a permit to serve alcoholic beverages.

e. For any other good cause.

The term "fraudulent practices" as used in this section shall include but shall not be limited to any conduct or representation on the part of the licensee or any partner, officer, agent or employee of a licensee tending to induce another or to give the impression that a permit to serve alcoholic beverages may be obtained by any other means other than those prescribed by law or furnishing or obtaining the same by illegal or improper means or requesting, accepting, exaction or collecting money for such purpose.

Notwithstanding the renewal of a license, the Commissioner may revoke or suspend such license for causes and violations as prescribed by this section and occurring during the two license periods immediately preceding the renewal of such license.

Except where a refusal to issue a license or renewal or revocation or

suspension is based solely on a court conviction or convictions, a licensee or applicant shall have an opportunity to be heard, such hearing to be held at such time and place as the Commissioner shall prescribe.

A licensee or applicant entitled to a hearing shall be given due notice thereof. The sending of a notice of a hearing by mail to the last known address of a licensee or applicant ten days prior to the date of the hearing shall be deemed due notice.

SECTION 9. *Certification of Instructors for Alcohol Server Schools.* The Regulation Board shall have authority to grant upon application provisional and permanent certificates, as provided in this section, to instructors of Alcohol Server Schools licensed under this chapter. Each application shall be accompanied by a fee to be determined annually by the Regulation Board.

Any applicant shall be eligible for a provisional or a permanent certificate who satisfied the requirements of this section and who furnishes the Regulation Board with satisfactory proof that he/she 1) is an American citizen, 2) is of sound moral character, 3) possesses a bachelor's degree or an earned higher academic degree or is a graduate of a four year normal school approved by the Regulation Board and 4) meets such requirements as to courses of study, semester hours therein, experience, advanced degrees and such other requirements as may be established and put into effect by the Regulation Board; provided, however, that no requirements as to courses of study, semester hours therein, experience, advanced degrees and other such requirements shall take effect prior to one year subsequent to the promulgation of such requirements by the Regulation Board.

The first certificate which the board may grant to any eligible applicant shall be a provisional certificate for two years from the date thereof. Before the Regulation Board grants any other certificate, the applicant shall be evaluated by an evaluation committee in the manner hereinafter provided.

Each evaluation committee shall be selected by and under the auspices of the Regulation Board and shall consist of persons who hold a permanent certificate. Each evaluation committee shall consist of three persons, one of whom shall be appointed by the Regulation Board, one nominated by the applicant and the third shall be appointed by the other two members of the evaluating committee from professionals in the same field as the applicant or as closely allied thereto as possible.

Before an applicant completes a second year of service under his/her provisional certificate, he/she shall be evaluated by the evaluation committee described in the preceeding paragraph as to his/her readiness

ness, has been convicted of a felony, or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

d. Such applicant has failed to furnish satisfactory evidence of good character, reputation and fitness.

e. Such applicant is not the true owner of the Alcohol Server School.

f. Such applicant or any officer, director, stockholder, partner, employee, or any person directly or indirectly interested in the business is the holder of a current license to serve alcoholic beverages for on or off premises consumption in the Commonwealth.

The Commissioner may suspend or revoke a license or refuse to issue a renewal thereof for any of the following causes:

a. The conviction of the licensee or any partner, officer, agent or employee of such licensee of a felony or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

b. Where the licensee has made a material false statement or concealed a material fact in connection with his/her application for the license or renewal thereof.

c. Where the licensee has failed to comply with any of the provisions of this section or any of the rules and regulations of the Commissioner made pursuant thereto.

d. Where the licensee or any partner, officer, agent or employee of such licensee has been guilty of fraud or fraudulent practices in relation to the business conducted under the license, or guilty of inducing another to resort to fraud or fraudulent practices in relation to securing for him/herself or another a permit to serve alcoholic beverages.

e. For any other good cause.

The term "fraudulent practices" as used in this section shall include but shall not be limited to any conduct or representation on the part of the licensee or any partner, officer, agent or employee of a licensee tending to induce another or to give the impression that a permit to serve alcoholic beverages may be obtained by any other means other than those prescribed by law or furnishing or obtaining the same by illegal or improper means or requesting, accepting, exaction or collecting money for such purpose.

Notwithstanding the renewal of a license, the Commissioner may revoke or suspend such license for causes and violations as prescribed by this section and occurring during the two license periods immediately preceding the renewal of such license.

Except where a refusal to issue a license or renewal or revocation or

to obtain a permanent certificate in terms of his/her professional growth and performance. Any evaluation made by the evaluation committee shall be based on criteria determined by the Regulation Board.

The evaluation committee may recommend to the Regulation Board that the applicant be granted a permanent certificate; and if the applicant has met all the other requirements established by the board, the board shall grant the applicant a permanent certificate.

The evaluation committee may, as one of its alternatives, recommend that the applicant's provisional certificate be renewed for an additional two years; and if the applicant has met all the other requirements established by the Regulation Board, the board shall grant the applicant a renewal of his/her second year of service under a renewed provisional certificate, the applicant shall be reevaluated in accordance with the provisions that govern the evaluation of an applicant under an initial provisional certificate.

If the evaluation committee recommends that a renewal of the original provisional certificate shall not be granted to an applicant, or if the evaluation committee recommends that a permanent certificate shall not be granted to an applicant, or if the board denies a renewal of a provisional certificate or of a permanent certificate to an applicant because he/she has not met all the requirements for eligibility as provided in this section, the Regulation Board shall notify the applicant of the adverse recommendation of the evaluation committee or the denial for certification by the Regulation Board; and such notice shall be accompanied by a report of the evaluation committee or a report of the reasons for the denial of certification by the Regulation Board, as the case may be, and a description of the procedures by which the applicant may initiate an appeal before a hearing officer; and such notice shall be mailed to the applicant by registered or certified mail not later than thirty days from the date of the meeting of the evaluation committee.

Notwithstanding any provisions of this section to the contrary, a person whose application for a renewal of a provisional certificate or whose application for a permanent certificate has been denied by the Regulation Board may submit a new application for certification in accordance with the provisions of this section at any time subsequent to two years after the expiration date of his/her last certificate. A person whose provisional certificate has expired, provided the Regulation Board has not denied the issuance of a provisional or permanent certificate, may reapply for a provisional certificate immediately.

For the purpose of certifying provisional instructors, the Regulation Board may approve programs at colleges or universities devoted to the

preparation of instructors for Alcohol Server Schools. A college or university offering such an approved program shall certify to the Regulation Board that a student has completed the program approved and shall provide the Regulation Board with a transcript of the person's record.

Any certificate issued by the Regulation Board may be revoked for cause, pursuant to standards and procedures established by rules and regulations of the Regulation Board.

The Regulation Board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this section.

SECTION 10. *Curriculum of Alcohol Server Training Schools.* The curriculum of Alcohol Server Schools shall be determined by the Regulation Board and shall include, but not be limited to, the following:

Level 1: Package Store Clerks (9 hour minimum)

Alcohol as a drug and its effects on the body and behavior, especially driving ability. Blood alcohol content (BAC).

Effects of alcohol in combination with commonly used drugs, legal, illegal, prescription and nonprescription.

Recognizing the problem drinker and community treatment programs and agencies.

Massachusetts General Law for package stores, especially the alcoholic beverage laws such as sale to minors, sale to intoxicated persons, sale for on/off premise consumption, hours of operation and penalties for violation of these laws. The drunken driving laws and third party liability.

Level 2: Bartenders, waitresses and waiters (15 hour minimum)

Same as Level 1 plus—

Intervention with the problem customer. Communication skills for intervening with the intoxicated customer. Ways to cut off service and protect the customer. Alternative means of transportation to get the customer home safely. Ways to deal with the belligerent customer.

More comprehensive understanding of the Massachusetts General Laws pertaining to sale of alcoholic beverages.

Knowledge of mixology. Storage and servics of various alcoholic and non-alcoholic beverages.

Sanitation procedures, refrigeration and public health policies.

Level 3: Managers (30 hour minimum)

Same as Levels 1 and 2 plus—

Legal responsibilities of licensees.

Recognition of signs and symptoms of problems with employees. Development of Assistance Programs.

Advertising and marketing for safe and responsible drinking patterns. Standard operating procedures for dealing with problem customers.

Record keeping for fulfilling statutory obligations.

Understanding of management practices and their relation to safe and responsible drinking patterns including the number of employees on the job, the number of patrons allowed on the premises, the interior design, hours of operation, and the use of promotional techinques.

SECTION 11. *Penalties for Violation of this Chapter.* The Commission and Regulation Board shall establish guidelines for fines and penalties of violations in this chapter. These shall include, but not be limited to, the following violations:

Establishments employing workers without the proper permits.

Employees working without proper permits.

Employees working with permit suspended or revoked.

Employees not having permit available for inspection by Commission or Regulation Board.

Employees with permit convicted of violating a statute related to sale of alcoholic beverages, such as sale to minor, sale to intoxicated person, sale after hours, etc.

SECTION 12. *Funding for Administration, Implementation and Enforcement of this Chapter.* Fees collected under this chapter shall be used for the administration and enforcement of this system. These funds shall also be used for the development of educational programs and materials. Additional funding shall come from licensing fees, fines from drunken drivers, fines and penalties from violations of this chapter, and private sources such as restaurant and package store associations, insurance companies, brewers and distillers.

There shall be a scholarship fund established for those applicants with a demonstrated need who have to attend an education course. Money awarded from this fund shall be reimbursed by the individuals after employment has been obtained.

SECTION 13. *Employee Manual.* All establishments licensed under this act will be required to have a manual prepared by the Regulation Board on the premises at all times and available to all employees. The manual will detail all the information required for the passage of the permit examination as described in this chapter. In addition, the manual will describe specific situations encountered by bartenders, waiters and

waitresses and package store clerks with alternative methods of dealing with these situations so as to avoid liability. There will also be specific suggestions for marketing safe, responsible drinking patterns in customers.

**APPENDIX C: TABLE 1.

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)#	
Florida		yes, if willful and unlawful 768.125	yes, if knowingly 768.125			

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* 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
Georgia		yes 51-1-18		only parent may bring cause of action		
Hawaii					Ono v Applegate 612 P2d 533 (1980)* negligence per se	
Idaho						Algeria 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 Bourrie 120 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 900 (1965)• negligence	
New Jersey					Kelly v. Gwinnell 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 Obl 11-101	yes Gen Obl 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			
South Dakota					Walz v City of Hudson 372 NW2d 120 (1982)* negligence per se	

\# Appellate Level Case
* State Supreme Court 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
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 1047 (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		yes 12-5-502	yes 12-5-502	written notice required		

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

APPENDIX C: TABLE 2

STATES WITHOUT ESTABLISHED DRAM SHOP LIABILITY

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

APPENDIX C: TABLE 3

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
ALABAMA (28-3A-25)	19	misdemeanor	0-6 months	$100-1000	3-6 months	$100-1000	6-12 months	$100-1000
ALASKA (04.16.180)	21	Class A misdemeanor	1 year	$5000				
ARIZONA (4-241)	19	misdemeanor	30 days-6 months	$100-$300	30 days-6 months	$100-$300	30 days-1 year	$100-$1000
ARKANSAS (48-524, 48-901,2,3)	21	misdemeanor	—	$100-$250	6 months-1 year	$250-$500	6 months-1 year	$250-$500
CALIFORNIA (B&P 25658)	21	misdemeanor	< 6 months	< $500				
COLORADO (12-46-114)	21/18*	misdemeanor	—	$100-$500 ($100 fine is	—-	$100-$500 mandatory)	—	$100-$500
CONNECTICUT (30-113)	20	misdemeanor	< 1 year	< $1000				
DELAWARE (4-713,904)	21	misdemeanor	30 days	< $100				
D.C. (25-121,132)	21/18#	unspecified	< 1 year	< $1000				
FLORIDA (562.11)	19	misdemeanor	< 60 days	< $500				
GEORGIA (Act 1980, 1573, 1649)	19	misdemeanor	< 1 year	< $1000				

Key to Symbols:

< indicates not more than specified penalty
* indicates beer only
# indicates beer and wine

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
HAWAII (281-78,102)	18	misdemeanor	< 6 months	< $500				
IDAHO (23-603)	19	misdemeanor 1 year	3 months-$1000	$300-(felony)	5 years	$5000 (felony)	5 years	$5000
ILLINOIS (43.149)	21	Class B misdemeanor	< 6 months	< $1000				
INDIANA (7.1-5-7-7)	21	misdemeanor	< 60 days	$10-$100	< 6 months	$25-$200		
IOWA (123.50)	19	misdemeanor	< 30 days	< $100				
KANSAS (21-3610)	21/18*	Class B misdemeanor	< 6 months	< $1000				
KENTUCKY (244.080)	21	misdemeanor	< 6 months	$100-$200	< 6 months	$200-$500		
LOUISIANA (14.91)	18	misdemeanor	0-6 months	$0-$300				
MAINE (28-155,303 28-1058)	20	violation	no criminal	action				
MARYLAND (28-69,118)	21	misdemeanor	< 2 years	< $1000				
MASSACHUSETTS (138-34)	20	??	< 6 months	< $1000				

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CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
MICHIGAN (18.1004, 18.1021)	21	misdemeanor	< 6 months	< $500				
MINNESOTA (340.73)	19	gross misdemeanor	30 days-90 days	$50-$100				
MISSISSIPPI (67-1-71,81)	21/18*	misdemeanor (liquor)	—	$500-$1000	< 1 year	$100-$2000		
(67-3-53)		misdemeanor (wine and beer)	< 6 months	< $500				
MISSOURI (311.310)	21	misdemeanor	< 1 year	$50-$1000				
MONTANA (16-3-301,314)	19	misdemeanor	< 6 months (Civil fine	< $500 of $1500	also	possible)		
NEBRASKA (53-180, 53-180.05)	20	Class III misdemeanor	0-3 months	$0-$500				
NEVADA (202.055)	21	misdemeanor	< 6 months	< $1000				
NEW HAMPSHIRE (175:6)	20	misdemeanor	< 1 year	< $1000				
NEW JERSEY (2:1-4, 2C:43-8, 33:1-77)	21	petty offense	< 6 months	< $1000				
NEW MEXICO (60-7A-25, 7B-1)	21	individual: corporation:	0-7 months —	$0-300 $0-$1000				
NEW YORK (ABC 65, Penal 260.20)	19	misdemeanor	30 days-1 year	$200-$1200				

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CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
NORTH CAROLINA (18B-104, 18B-302)	21/19*	none	—	up to $500	—	up to $750	—	up to $1000
NORTH DAKOTA (5-02-06, 12.1-32-01)	21	Class A misdemeanor	< 1 year	< $1000				
OHIO (4301.22(A), 4301.69,99)	21/19*	misdemeanor	—	$100-$500	—	$200-$500	—	
OKLAHOMA (37-538f)	21	felony (for 3.2% and above)	5 years maximum	$0-$5000				
		none (for .5% to 3.2%)	none	none				
OREGON (471.410)	21	Class A misdemeanor		$350-$500		$1000	30 days	$1000
PENNSYLVANIA (47-4-471,493)	21	misdemeanor	1-3 months	$100-$500	3 months-1 year	$300-$500		
RHODE ISLAND (3-8-1, 3-8-5)	21	misdemeanor	up to 1 year	$250	up to 1 year	$500	up to 1 year	$750
SOUTH CAROLINA (61-3-990, 61-13,290)	21/18#	misdemeanor	< 5 years	< $5000				
SOUTH DAKOTA (35-4-78, 22-6-2)	21/18*	Class 1 misdemeanor	1 year	$1000				
TENNESSEE (57-4-203)	19	misdemeanor	30 days-6 months	$25-$1000	1-3 years (felony)	$500-$3000	1-3 years	$500-$3000
TEXAS (106.06)	19	misdemeanor	—	$100-$500				

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
UTAH (32-7-15, 32-8-59(	21	misdemeanor	30 days-1 year	$100-$1000				
VERMONT (7-658)	18	misdemeanor	2 years	$200-$1000				
VIRGINIA (4-37,62,92)	21/19*	misdemeanor	< 1 year	< $500				
WASHINGTON (66.44.180,310)	21	individuals: corporations:	2 months no term	$500 $5000	6 months —	— $10000	1 year —	— $1000
WEST VIRGINIA (60-3-22a1)	21	misdemeanor	< 1 year	$100-$500				
WISCONSIN (125.07:1)	19	forfeiture	—	< $500	—	$200-$500	—	$200 $500
WYOMING (12-6-101,102)	19	misdemeanor	< 6 months	< $100				

Key to Symbols:

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* indicates beer only
# indicates beer and wine

Sources:
Commerce Clearing House, Liquor Control Law Reporter, 1983.
National Highway Safety Traffic Administration, A Digest of State Alcohol-Highway Safety Related Legislation, 1983.

APPENDIX C: TABLE 4

CRIMINAL LIABILITIES FOR SERVING INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
ALABAMA	xx	none	none	none				
ALASKA (04.16.030, 04.16.180)	drunken	Class A misdemeanor	< 1 year	< $5000				
ARIZONA (4-244, r-246)	intoxicated or disorderly	misdemeanor	30 days-6 months	$100-$300	30 days-6 months	$100-$300	30 days-1 year	$100-$1000
ARKANSAS (48-529, 48-901,2,3)	intoxicated condition	misdemeanor	—	$100-$250	6 months-1 year	$250-$500	6 months-1 year	$250-$500
CALIFORNIA (B&P 25602)	obviously intoxicated	misdemeanor	< 6 months	< $500				
COLORDAO (12-46-112, 12-46-114)	visibly intoxicated	misdemeanor	—	$100-$500 ($100 fine is mandatory)	—	$100-$500	—	$100-$500
CONNECTICUT (30-102, 30-113)	intoxicated	misdemeanor	< 1 year	< $1000				
DELAWARE (4-711, 4-903)	intoxicated or appears to be intoxicated	not specified	30 days	< $100				
D.C. (25-121,132)	intoxicated or appears to be intoxicated	not specified	< 1 year	< $1000				
FLORIDA	xx	none	none	none				
GEORGIA (5A-509)	noticeable intoxication	misdemeanor	< 1 year	< $1000				
HAWAII (281-78, 281-102)	under the influence	misdemeanor	< 6 months	< $500				

Key to Symbols:

< indicates not more than specified penalty

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
IDAHO (23-605)	intoxicated or apparently intoxicated	misdemeanor 1 year	3 months-$1000	$300-				
ILLINOIS (43.131, 43-148)	intoxicated	Class B misdemeanor	< 6 months	< $1000				
INDIANA (7.1-5-10-15)	state of intoxication if person knows the other is intoxicated	misdemeanor	< 60 days	$10-$100	< 6 months	$25-$200		
IOWA (123.49, 123.50(1))	intoxicated or simulating intoxication	misdemeanor	< 30 days	< $100				
KANSAS (21-4501, 41-715)	physically or mentally incapacitated by liquor consumption	misdemeanor	< 30 days	< $200				
KENTUCKY (244.080)	actually or apparently under influence	misdemeanor	< 6 months	$100-$200	< 6 months	$200-$500		
LOUISIANA (26:88:2, 26:191)	intoxicated	misdemeanor 6% or more	1-6 months	$100-$500				
(26:285:2	intoxicated	.5% to 6%	1-6 months	$100-$500	2-12 months	$200-$1000	2-12 months	$200-$1000

Key to Symbols:

< indicates not more than specified penalty

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
MAINE (28-155,303, 28-1058)	under the influence of liquor	violation	none	none				
MARYLAND (2B-69,118)	visibly under influence of any alc bev	misdemeanor	< 2 years	< $1000				
MASSACHUSETTS (138-69)	intoxicated or known to have been intox within 6 months preceding	??	1-12 months	$50-$500				
MICHIGAN (18.993&1021) (436.29&50)	intoxicated condition	misdemeanor	< 6 months	< $500				
MINNESOTA (340.73)	obviously intoxicated	gross misdemeanor	30-90 days	$50-$100				
MISSISSIPPI (67-1-71, 67-3-53, 69)	visibly or noticeably intoxicated	misdemeanor	< 6 months	$500				
MISSOURI (311.310)	intoxicated or appearing to be intoxicated	misdemeanor	<1 year	$50-$1000				
MONTANA (16-3-301, 16-6-4)	intoxicated or actually, apparently, or obviously intoxicated	misdemeanor	< 6 moniths (Civil fine	< $500 of $1500	also	possible)		

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
NEBRASKA (53-180, 53-180.05)	physically or mentally incapacitated	Class III misdemeanor	0-3 months	$0-$500				
NEVADA	xx	none	none (Local laws	none may	control)			
NEW HAMPSHIRE (175:6)	under the influence of liquor	misdemeanor	< 1 year	< $1000				
NEW JERSEY	xx	none	none (Local laws	none may	control)			
NEW MEXICO (60-7A-16,25)	intoxicated with knowledge recipient is intoxicated	individual: corporation:	0-7 months —	$0-300 $0-$1000				
NEW YORK (ABC 65, 130)	intoxicated, or actually or apparently under influence of liquor	misdemeanor	30 days-1 year	$200-$1200				
NORTH CAROLINA (18B-104, 18B-305)	intoxicated	administrative	—	up to $500	—	up to $750	—	up to $1000
NORTH DAKOTA (5-01-09, 12.1-32-01)	intoxicated	Class A misdemeanor	< 1 year	< $1000				
OHIO (4301.22(B), 4399.09,99)	intoxicated	misdemeanor	—	$100-$500	—	$200-$500	—	$200-$500

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CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
OKLAHOMA (37-538g)	intoxicated	felony	1 year maximum	$0-$1000				
OREGON (471.410)	visibly intoxicated	Class A misdemeanor		$350-$500		$1000	30 days	$1000
PENNSYLVANIA (47-4-471,493)	visibly intoxicated	misdemeanor	1-3 months	$100-$500	3 months-1 year	$300-$500		
RHODE ISLAND (3-8-1;3-11-5)	intoxicated	misdemeanor	3 months	$200	6 months	$300	< 1 year	< $500
SOUTH CAROLINA (61-3-990, 61-5-30)	intoxicated condition	misdemeanor	< 1 month	< $100				
SOUTH DAKOTA (22-6-2, 35-4-78)	intoxicated at the time	Class 1 misdemeanor	1 year	$1000				
TENNESSEE (57-4-203)	visibly intoxicated	misdemeanor	30 days-6 months	$500-$1000				
TEXAS (101.63)	intoxicated	misdemeanor	< 1 year	$100-$500	< 1 year	$500-$1000		
UTAH (32-7-14, 32-8-59)	under or apparently under influence of liquor	misdemeanor	30 days-1 year	$100-$1000				
VERMONT	xx	none	none	none				
VIRGINIA (4-37,62,92)	intoxicated	misdemeanor	< 1 year	< $500				

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CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
WASHINGTON (66.44.180,200)	apparently under influence of liquor	individuals: corporations:	2 months —	$500 $5000	6 months —	— $10000	1 year —	— $1000
WEST VIRGINIA (60-3-22a3, 60-7-13)	intoxicated	misdemeanor	< 1 year	$100-$500				
WISCONSIN (125.07:2)	intoxicated	misdemeanor	< 60 days	$100-$500				
WYOMING	xx	none	none	none				

Sources:
Commerce Clearing House, Liquor Control Law Reporter, 1983.
National Highway Safety Traffic Administration, Digest of State Alcohol-Highway Safety Related Legislation, 1983.

PREVENTING ALCOHOL-RELATED INJURIES: DRAM SHOP LIABILITY IN A PUBLIC HEALTH PERSPECTIVE

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Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective†

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*James F. Mosher, J.D.****

The relationship between intoxication-related injuries and the law has had a long, if uneven, history. One aspect of this relationship is "dram shop"[1] laws, which impose civil liability upon sellers of alcoholic beverages for injuries caused by intoxicated or underaged patrons. California, in a short period of time, has proceeded in a circular fashion on the issue of fault. Beginning with *Vesely v. Sager*[2] in 1971, the California Supreme Court imposed civil liability upon a licensee[3] for violation of a penal statute. After a series of decisions, the trend toward increased server accountability culminated in 1978 in *Coulter v. Superior Court of San Mateo County*,[4] a decision which extended dram shop liability to a non-licensed social host. The exceptional *Coulter* decision led to a legislative purge of liability in the same year. California has thus become an

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1. In the mid-1800's a drinking establishment where liquors were sold to be consumed on the premises was sometimes known as a "dram shops." *See* BLACK'S LAW DICTIONARY 445 (5th ed. 1979).

2. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

3. As used herein, a Licensee refers to an alcoholic beverage retailer licensed under the provisions of the state alcohol and beverage control (ABC) act or those who should have been licensed under the State ABC Act. *See, e.g.*, CAL. BUS. & PROF. CODE § 2339.1 (West 1980).

4. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (overruled by CAL. BUS. & PROF. CODE § 25602).

excellent case study for analyzing the scope of issues surrounding dram shop liability.

But California's 1978 legislation limiting server liability significantly reduces the potential impact of dram shop liability in the effort to reduce drunk driving casualties. Despite the recent rise in concern with alcoholism and drunk driving, and the national trend toward the establishment and extension of dram shop liability,[5] California and other state legislatures have neglected the potential public health role of dram shop liability in reducing harm to society caused by irresponsible drinking practices. Furthermore, California's legislative immunity for both licensees and social hosts has been eroded by recent court decisions which skirt the rigorous immunity statutes. Alternative theories, such as respondeat superior, are being used to impose liability for alcohol-related injuries. These developments indicate the need for equitable legal standards which encourage more responsible service of alcoholic beverages. This article proposes that a dram shop law which encourages "server intervention" strategies[6] and can be a forceful deterrent to irresponsible serving of alcoholic beverages, thereby aiding in the prevention of alcohol-related injuries.

First, the article will survey the common law background of dram shop law and discuss its policy implications from a public health perspective.[7] California's seven year excursion into common law server liability prior to the 1978 purge will be outlined, with an emphasis on the features of the case law that led to legislative action. The forces which led to the 1978 legislation will also be examined,[8] and the gaps and inconsistencies created by the current statutes will be scrutinized. Finally, the authors will propose a legislative approach which encourages responsible business practices by commercial alcohol sellers.

I. THE DEVELOPMENT OF DRAM SHOP LIABILITY

In September of 1978, Governor Brown signed into law two bills that overruled three California Supreme Court decisions.[9] These deci-

5. Nine states have enacted new dram shop liability statutes since 1971, and seven of these have been passed in the last five years. Six additional states have established common law dram shop liability in the last five years, at least for serving minors. *See* National Alcoholic Beverage Control Association, Inc. A Compilation of Dram Shop Statutes and Judicial Rulings (4th ed. 1984).

6. *See, infra* notes 109-115 and accompanying text.

7. *See* Mosher, *Dram Shop Liability and the Prevention of Alcohol-Related Problems*, 40 J. OF STUDIES ON ALCOHOL 773 (1979), for an earlier treatment of this issue.

8. For a detailed legislative history *see* Comment, *California Liquor Liability: Who's to Pay the Costs?*, 15 CAL. W.L. REV. 490 (1980).

9. *See* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

sions had held that commercial vendors and social hosts were liable for injuries sustained by third parties caused by the negligent furnishing of alcoholic beverages to obviously intoxicated or underaged persons. These two bills, Senate Bill 1645 and Senate Bill 1175, limited the liability of suppliers to circumstances in which the customer was an obviously intoxicated minor.[10] The passage of this legislation signalled a return to traditional common law, which California had followed until 1971.

A. The Early Common Law Doctrine

Under common law, the furnishers of alcohol were not civilly liable for actions of intoxicated patrons that resulted in injury to innocent third parties. The general rule of non-liability is based on three rationales: (1) the presumption that consumption, and not sale, of the alcoholic beverage is the proximate cause of injuries sustained; (2) traditional social mores, dating back to Prohibition, which hold the drinker morally and legally liable for his actions; and (3) the constitutional doctrine that courts should defer questions of liability to the legislature.[11] The common law doctrine also protects vendors of alcohol from suits by drinkers who injured themselves.[12]

The first case to establish this non-liability doctrine in California was *Lammers v. Pacific Electric Railway Co.*[13] Lammers, an intoxicated passenger who was refused entry onto a train because he could not produce his ticket, was struck by another train when he wandered away from the station. In dictum, the California Supreme Court said the sale of the intoxicating liquor was not the proximate cause of injuries received.[14] Subsequent California cases followed this analysis.[15]

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10. CAL. BUS. & PROF. CODES §§ 25602, 25602.1, 25602.3 (West Supp. 1985). Despite the new statute, criminal liability and actions by the State Alcohol Beverage Control (ABC) against the licensee are still available in CAL. BUS. & PROF. CODES §§ 25602(a), 25602.2, 25602.3, and 25658 (West Supp. 1983).

11. *See* Cole v. Rush, 45 Cal. 2d 345, 354, 289 P.2d 450, 452 (1955). *See also* Howlett v. Doglio, 402 Ill. 311, 82 N.E.2d 708, 712 (1949); Tarwater v. Atlanta Co., Inc., 176 Tenn. 510, 144 S.W.2d 746, 747-748 (1940); Scibel v. Leach, 233 Wis. 66, 288 N.W. 774, 775 (1939).

12. Hitson v. Dwyer, 61 Cal. App. 2d 803, 808, 143 P.2d 952, 955 (1943).

13. 186 Cal. 379, 199 P. 523 (1921).

14. *Id.* at 384, 199 P. at 525.

15. Twenty-two years later a California appellate court in Hitson v. Dwyer, 61 Cal. App. 2d 803, 145 P.2d 952 (1943), inquired directly into whether the sale of the alcoholic beverage was the proximate cause of plaintiff's injuries. The court, citing *Lammers*, similarly concluded that consumption, and not the wrongful sale, was the proximate cause of plaintiff's injuries. In 1949, Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949), resolved the question of a liquor vendor's liability to injured third parties. There the court sustained a demurrer and held that the sale was not the proximate cause of plaintiff's injuries. Hence, no cause of action was stated despite allegations that the tavern operators were aware the drinker was a minor, furnished him alcohol when he was already intoxicated, and knew he drove to the premises and would drive away, allegedly creating a known risk to innocent parties. *Id.* at 251, 210 P.2d 534.

In *Cole v. Rush*,[16] the court left open the question of whether a duty would exist when the tavern owner's patron was not "a competent person," *e.g.*, a minor or an alcoholic. In such a case, the *Cole* court implied that furnishing alcohol could be considered a proximate cause of the injuries sustained by the patron or third parties. *Cole* involved a widow of the decedent drinker who sued the tavern owner for wrongful death. Aware of her husband's drinking tendencies, the widow had expressly warned the bartender on several previous occasions not to serve him when he was obviously intoxicated. Nonetheless, the Supreme Court held that tavern operators have no duty towards patrons for any actions or consequences occurring outside the premises itself.

B. New Common Law

The Arizona Supreme Court, in *Pratt v. Daly*,[17] broke new ground by holding that the sale of alcoholic beverages can be a basis for liability when the consumer lacks the willpower to refuse a drink. The *Pratt* court, in analyzing common law cases where damages sustained by plaintiff were in consequence of a sale of habit-forming drugs, noted that the reasoning of habitual drug cases was applicable to intoxicating liquors. In both circumstances, habitual use of the substance destroys the volition of the user to act in such a manner that he has no power to do anything but consume the habit-forming substance.[18] Hence, the consumption and sale of such substances are merged and become the act of the vendor.[19]

In 1959 two cases implied a duty of care toward the public from liquor control penal provisions. In *Waynick v. Chicago's Last Department Store*,[20] the court imposed a duty on the vendor citing both the common law of Michigan and an Illinois criminal code which prohibited the sale of alcoholic beverages to obviously intoxicated persons or habitual drunkards. The court reasoned that the criminal code created a duty to protect members of the public and found the vendor liable.[21] The New Jersey Supreme Court utilized a similar rationale to establish liability in *Rappaport v. Nichols*.[22] There, plaintiff's intestate was killed in an

16. 45 Cal. 2d 345, 348, 289 P.2d 450, 452 (1955).
17. 55 Ariz. 535, 104 P.2d 147 (1940).
18. *Id.* at 538-39, 104 P.2d at 151.
19. Moreover, because the habitual drunkard becomes incapable of resisting the urge to drink, the *Pratt* court took the view that the consumer was incapable of validly consenting to receiving and drinking the intoxicating liquor, thereby negating the defense of contributory negligence. *Id.* at 539-40, 104 P.2d 152.
20. 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).
21. *Id.* at 325.
22. 31 N.J. 188, 156 A.2d 1 (1959).

automobile accident involving a minor driver who had purchased alcohol in defendant's bar. The court held that defendants had violated a statutory prohibition against serving minors or intoxicated persons and that the statutes were intended for the protection of the general public.[23]

C. *California's Creation of Common Law Liability*

In *Vesely v. Sager*,[24] the California Supreme Court adopted the "protect the public" rationale lead of the *Rappaport* and *Waynick* decisions and forged a duty of care upon commercial servers of alcohol to third parties injured by intoxicated patrons. This duty of care was found in the California Business & Professions Code Section 25602, which provided that vendors would be guilty of a misdemeanor when selling to obviously intoxicated persons.[25] This section, the court found, was enacted for the purpose of protecting members of the general public from personal injury and property damage resulting from excessive use of intoxicating liquor.[26] In addition, the court had no trouble finding that the furnishing of alcohol could be the proximate cause of subsequent injury.[27]

1. *Social Host Liability*

The creation of a common law tort action against an unlicensed alcohol server (or "social host") is a phenomenon that has very modern roots.[28] Historically, courts have been reluctant to impose liability upon the noncommercial furnisher, either by common law[29] or through broad interpretation of the state's dram shop statute.[30] Some courts have em-

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23. *Id.* at 201-02, 156 A.2d at 8.

24. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). For an amplication of the history of dram shop law in California, *see*, Note, *California Liquor Liability: Cole v. Rush Revived?*, 12 LOY. OF L.A.L. REV. 387 (1979).

25. Vesely, 5 Cal. 3d at 164, 95 Cal. Rptr. at 631 (court also made clear that a duty may be found in a legislative enactment which does not explicitly provide for civil liability).

26. *Id.* at 165, 95 Cal. Rptr. at 631 (the court found similar public safety considerations in corresponding alcohol control statutes in other states).

27. The court stated:

> It is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are forseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes the furnishing negligent.

Id. at 164, 95 Cal. Rptr. at 631.

28. *See, e.g.*, Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L.R. 561 (1980); Note, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L.J. 95 (1978).

29. *See, e.g.*, Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969).

30. *See, e.g.*, Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964) ("This court is not convinced that the legislature ever intended to enact a law that makes social drinking of intoxicating liquors, and the giving of drinks of intoxicating liquors to another,

phasized the lack of adequate insurance protection for social hosts, the inability of unlicensed servers to monitor consumption of his guests (especially in large gatherings), and the fact that social hosts are not profiting from the liquor furnished.[31]

The concept of allowing recovery by a third party against a noncommercial server had its California genesis in *Brockett v. Kitchen Boyd Motor Co.*[32] There, an intoxicated minor drank at an employee Christmas party for seven hours, was placed into his own automobile and "directed" by defendant employer to drive home, whereupon he struck a stopped vehicle, injuring all seven of the occupants. The appellate court fashioned a narrow duty for the social host by imposing liability only when the host "knowingly furnishes" to the minor large amounts of alcohol when the minor obviously is going to be driving a vehicle.[33]

The decision which eventually led to legislative action was *Coulter v. Superior Court*.[34] *Coulter* further extended social host liability to noncommercial servers who furnished alcohol to one who is "obviously intoxicated." Plaintiff, a passenger injured in an automobile accident, brought a negligence action against the manager of an apartment complex who was hosting a cocktail party for the tenants. The *Coulter* court extended the unlicensed furnisher's duty to minors, established in *Brockett*, by construing California Business & Professions Code Section 25602 to apply to social hosts who serve obviously intoxicated drinkers. The court noted that this penal statute was broadly interpreted in order to protect members of the general public from injuries to person.[35]

The reaction to the *Coulter* decision was exceptionally vociferous.

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such conduct as to render the giver or host liable under the States' Dram Shop Act"); LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967).

31. *See* Linn v. Rand, 140 N.J. Super. 212, 217, 356 A.2d 15, 18 (1976); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548, *aff'd*, 55 A.D.2d 591, 389 N.Y.S.2d 631, mot. for lv. to app. dsmd. 41 N.Y.2d 892, 393 N.Y.S.2d 1026, 362 N.E.2d 626 (1975).

32. 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

33. *Id.* at 94, 100 Cal. Rptr. at 756.

34. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). For an extended analysis of the case, *see*, Comment, *Torts—California Finds Social Host Can Be Liable to Third Parties for Intoxicated Guests Negligent Act—Coulter v. Superior Court*, 12 CREIGHTON L. REV. 945 (1979); Comment, *Torts—Negligence Liability of Social Host for Furnishing Liquor to Guest Who Later Injures a Third Person*, 35 WAYNE L. REV. 975 (1979).

35. *Id.* at 150, 577 P.2d at 674, 145 Cal. Rptr. at 537 (*quoting Vesley*, 5 Cal. 3d at 165, 486 P.2d at 159. 95 Cal. Rptr. at 631). The court also held that a common law duty of care is owed to the public by all citizens who furnish alcohol. ("We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated person intends to drive a motor vehicle creates a reasonably foreseeable risk of injury to those on the highway.") (*Id.* at 152-153, 145 Cal. Rptr. at 539). Practically speaking, the court reasoned that the danger of ultimate harm to the potential victim on the highway is just as foreseeable to the social host as it is to the bartender. *Coulter* took notice of the adverse impact upon society as a result of drunk driving and cited various statistics to that effect. The court opined that the burden of liability placed upon social hosts was easily outweighed by the prevention of alcohol-related injuries. (*Id.* at 154, 577 P.2d at 675, 145 Cal. Rptr. at 540.)

automobile accident involving a minor driver who had purchased alcohol in defendant's bar. The court held that defendants had violated a statutory prohibition against serving minors or intoxicated persons and that the statutes were intended for the protection of the general public.[23]

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The liquor lobbyists and insurance industry, already up in arms over *Veseley*, were now joined by many California citizens who had no special interests other than hosting cocktail parties. These social hosts were concerned that their homeowner's policy premiums would increase to compensate for the newly-formed liability.

Despite the court's obvious concern with the negative repercussions of alcohol on society[36] the landmark decision failed to appreciate the different serving contexts that social hosts and commercial servers face. In relying on an "obviously intoxicated" standard, triers of fact could be ignoring possible probative evidence of an individual's drinking habits, which could be relevant in a social host or even a neighborhood bar situation. Because the court made social hosts as equally culpable as servers, it would appear irrelevant whether or not the social host directly served the intoxicated guest so long as alcohol was provided.[37] In addition, the majority opinion also failed to distinguish between serving one who is "becoming" intoxicated as opposed to one who is "obviously" intoxicated. In his concurring opinion, Justice Mosk noted that the furnishing of the alcohol that produced the "original intoxication" may be the proximate cause of the resulting injury as well.[38]

Although the California courts were concerned with protecting the public health, the creation of common law server liability from 1971-1978 ultimately led to a purge of dram shop liability. The courts initially established well-reasoned duties of care for commercial servers, but the far-reaching implications of the *Coulter* decision put the question of dram shop liability in the hands of the California legislature.

D. California' Legislative Purge

Once the California Supreme Court decided that noncommercial suppliers of alcohol could be held liable for serving those "obviously intoxicated," the California Legislature quickly responded to the pressures of homeowners, insurers and the liquor industry. In the 1978 legislative

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36. *See, supra* note 41, and accompanying text.

37. This is exactly the issue that separates *Coulter* from the recent New Jersey case which imposed social host liability. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219, 1224 (1984) ("A host who serves liquor to an adult social host, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication.")

38. *Coulter*, 21 Cal. 3d at 156, 577 P.2d at 676, 145 Cal. Rptr. at 541 (Mosk, J., joined by Bird, C.J.). Some states do not require a sale to an allegedly intoxicated person. *See, e.g.*, Tate v. Coonce, 97 Ill. App. 3d 145, 421 N.E.2d 1385, 1388 (1981) ("the operable act for a dram shop action is simply a sale which causes the intoxication of a person and the injury by that intoxicated person of another person or property.")

session, Senator Ayala introduced Senate Bill 1645[39] which provided that both statutory and nonstatutory grounds for dram shop liability should be eliminated. In the same session, Senator Foran presented a similar but less radical bill, Senate Bill 1175. This bill would have retained commercial seller liability under an amended Bus. & Prof. Code § 25602 when the seller furnished alcohol to obviously intoxicated persons. Thus, Senate Bill 1175, at its inception, would have only overruled *Coulter* and its imposition of social host liability.[40] When the dust in Sacramento had settled, however, both bills had been enacted, and Senator Foran's bill had undergone a metamorphosis. The new legislation retained commercial seller liability solely when furnishing alcohol to an obviously intoxicated minor.[41] The only organized lobbying group fighting the two bills was the California Trial Lawyer's Association.[42]

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39. The bill intended to amend CALIFORNIA BUS. & PROF. CODE § 25602 by eliminating civil liability of any person furnishing alcohol to anyone injured as a result of intoxication by the consumer of such alcohol.

40. In *Brockett*, 24 Cal. App. 3d 90, 93-94, 100 Cal. Rptr. 752, 756 (1972), the court specifically reserved the question of whether a host at a social gathering is subject to liability under section 25602 for injuries caused by intoxicated guests.

41. The relevant amended statutes set forth in their entirety, with italics representing additions to the text now read as follows: Business and Professions Code § 25602. Sales to drunkard or intoxicated person; offense; civil liability (a) Every person who sells, furnishes, fives or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor; (b) *No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage; (c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313) and Coulter v. Superior Court (21 Cal. 3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.* Business and Professions Code § 25602.1. Sales to intoxicated minors; cause of action for injury or death Notwithstanding subdivision (b) of Section § 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person. Civil Code § 1714. Responsibility for willful acts and negligence; contributory negligence (a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want or ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief. (b) *It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313), and Coulter v. Superior Court (21 Cal. 3d 144) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person. (c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.*

42. *See* President's Message, 7 CTLA News, Vol. III, No. 91 (Sept. 1978), for an explanation of the legislative scenario in Sacramento regarding the two bills. The CTLA was in the arguably self-serving posture of a trial lawyer's organization trying to preserve laws which established civil liability. Though the CTLA denied any selfish motivation for their stance, they remained alone in the

Commercial establishments had some legitimate concerns with California's imposition of liability in 1971. Licensed drinking establishments were being hit with the full spectrum of law suits, including "nuisance" actions. The loser in this scenario was the commercial alcohol industry, especially smaller businesses, who had to pay inflated insurance premiums for dram shop liability coverage.[43] In the end, the new legislation made the alcohol industry the chief benefactor as it rode the coattails of the outraged citizenry.

II. Civil Liability—Is the Cupboard Bare?

The large issues raised by dram shop liability are more than legal issues—they are social and, ultimately, ethical questions. The problems are easily observed: alcoholism, drunk driving and their impact on highway fatalities. But the weighty policy question for lawmakers is: upon what parties should a duty of care be imposed towards those injured by an intoxicant's actions? The California Legislature is clear in its answer—the person who consumes alcohol alone must bear the responsibility for his/her conduct. Despite the fact that California's 1978 statutory amendments clearly granted a general immunity from civil liability for all alcohol servers (except for licensees furnishing alcohol to obviously intoxicated minors), courts in California have sanctioned the imposition of dram shop liability for both licensed and non-licensed servers of alcoholic beverages. The viability of the legal theories described below indicates that courts are increasingly willing to skirt statutory immunity and older common law for certain alcohol-related injuries. These legal developments suggest a judicial response to alcohol-related injuries which parallels the heightened public awareness of alcohol problems and its attendant health costs.

A. Drinker as Plaintiff

The California statutes are ambiguous regarding possible recovery

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battle to save dram shop liability. Many other special interest groups did not undertake the role of lobbyist despite a potential interest in the legislative outcome. In particular, law enforcement agencies, state and local agencies, citizen groups dealing with drunk driving, and public and private alcoholism treatment and prevention programs did not, at that time, see relevant connections between dram shop laws and the prevention of alcohol-related problems, notably drunk driving. The CTLA alone opposed the powerful lobbies pushing for an end to dram shop liability—restaurant and tavern associations, the alcohol industry and insurance companies. The alcohol beverage industry donated campaign contributions to the majority of members of the Assembly Judiciary Committee just prior to passage of the two bills. Elections and Political Reform Division, Secretary of State, State of California (1978)

43. *See, e.g.*, NRN Special Report, "Public concern spurs decline in liquor sales," Nation's Restaurant News, February 13, 1984 at 1, 27; "Liquor Liability Churns Up the Coast," Western Foodservice, Sept. 1977, at 13-17.

by the drinker for self-injury.[44] In *Cory v. Shierloh*,[45] after reluctantly upholding the constitutionality of the 1978 amendments, the court applied them to an action by a minor social guest injured through his own intoxication.[46] Although it found some ambiguities in the amendments, the court held, in light of the statutory reference to judicial interpretation prior to *Veseley*, the social host amendment must be reasonably construed to bar "a suit by the intoxicated consumer as well as by third persons injured by him from suing a social host."[47] This construction was necessary to avoid the anomalous result of allowing recovery by a drinker but not by an innocent third party.[48]

However, such immunity will not extend to serving practices which can be characterized as "reckless." The California statutes had not named *Ewing v. Cloverleaf Bowl*[49] as one of the cases specifically abrogated. In *Ewing*, an action for wrongful death, decedent died after being served ten straight shots of 151 proof rum, as well as one mixed drink and two beers within an hour and a half.[50] That court, in overturning defendant's motion for nonsuit, expressly held that bartenders owe a duty of care to their patrons, and analyzed the facts under a "reckless" standard of conduct, in addition to the "negligence" standard referred to in the 1978 legislation.[51] The court held that service of alcohol to decedent which leads to alcohol poisoning could amount to willful misconduct on the part of the bartender.[52] Thus, if the service of alcohol can be characterized as reckless the drinker, whether a minor or an adult, can

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44. Sections referring to commercial vendors limits their immunity to "injuries inflicted *upon another* by an intoxicated person." (CAL. BUS. & PROF. CODE § 25602 (c); CAL. CIV. CODE § 1714 (b) (emphasis added). In contrast, the social host immunity provision extends to "damages suffered by such person (the alcohol consumer)" as well as to injuries or death of "any third person resulting from the consumption of such beverages." (CAL. CIV. CODE § 1714 (c).

45. Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

46. *Id.* at 433, 629 P.2d at 11-12, 174 Cal. Rptr. at 501.

47. *Id.* at 437, 629 P.2d at 12, 174 Cal. Rptr. at 504.

48. *Id.*

49. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

50. *Id.* at 394, 572 P.2d at 1156, 143 Cal. Rptr. at 15. For a well-reasoned argument holding CAL. BUS. & PROF. CODE § 25602(b) and (c) unconstitutional as violative of equal protection, *see* Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 165, 174 Cal. Rptr. 452, 457 (1981 (Garst, J. concurring). However, this argument was exhaustively heard and rejected in the *Cory* case.

51. CAL. BUS. & PROF CODES §§ 25602(c), 25602.1, and CAL. CIV. CODE § 1714(b) all use the negligence element of "proximate cause," no reference is made to willful misconduct principles. *Cf.* Grasser v. Fleming, 74 Mich. App. 338, 253 N.W.2d 757 (1977) (dram shop act did not preclude common-law cause of action for gross negligence or willful, wanton and intentional misconduct in sale of alcohol by tavern owner to intoxicated person who was a known compulsive alcoholic contrary to agreement not to serve such person).

52. If the jury decided that the bartender's conduct amounted to willful misconduct, and the patron was found not to have assumed the risk of acute alcohol poisoning, then plaintiff, even if contributorily negligent, would be allowed to recover Ewing, 20 Cal. 3d at 401, 572 P.2d at 1161, 143 Cal. Rptr. at 19. *Accord*, Davies v. Butler, 95 Nev. 763, 769, 602 P.2d 605, 609 (1979) (contributory negligence not a bar to recovery for injury or damage caused by the wilful or wanton misconduct of a defendant.)

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