SERVER VS. DRIVER LIABILITY: A SUGGESTED CHANGE TO REDUCE DRINKING AND DRIVING

I. INTRODUCTION

The American public views the consumption of alcohol not disfavorably, but rather "as a lawful comfort which God alloweth to all men." This is evinced by the fact that in 1983 alone Americans spent more than 50 million dollars on alcoholic beverages. This large expenditure need not cause alarm since the consumption of alcohol is only 2.4 percent of total consumption expenditures. However, when the drinking of alcohol is coupled with the operation of an automobile, society is faced with a very significant problem. President Reagan, realizing the significance of the drunk driving problem, established The Presidential Commission on Drunk Driving in 1983. The Commission found that at least 50 percent of all highway deaths involve the use of alcohol. Moreover, the annual economic loss is estimated at 21 billion dollars.

Organizations such as Mothers Against Drunk Driving ("MADD"), Students Against Drunk Driving ("SADD") and Remove Intoxicated Drivers ("RID") have thrust the drinking and driving issue to the forefront of societal concern. Through their efforts, these groups have demonstrated the enormity of the drinking and driving problem as well as the risks of harm involved. As will be demonstrated, these effects have generated a variety of judicial and legislative responses focusing primarily on remedial rewards and punitive sanctions.

These efforts by the anti-drunk driving organizations, however, have not gone unchecked or unchallenged. A small, but growing number of states have made it more difficult for a third-party plaintiff

2. 64 SURVEY OF CURRENT BUSINESS, No. 7 (Table 2.4) (July 1984).
3. Id.
5. Id. at 1.
6. Id.
7. The states referred to include California, Colorado, Florida, New Jersey, Tennessee, and Wisconsin.
to recover for the negligence of the intoxicated patron or guest from one who serves alcohol. This response is primarily due to the pressure exerted on legislatures by the lobbyists for the alcoholic beverage industry, hotels, restaurants and insurance companies. The liquor lobby is pushing for a decrease in server liability to combat the skyrocketing costs of dram shop liability insurance. The increase in severity and frequency of judgments for liquor liability against dram shops has created a shortage of liquor liability insurance. It is estimated that 70 percent of the restaurants, taverns and bars in Michigan are currently without liquor liability insurance.

Emerging from the crises of large numbers of alcohol-related fatalities and the severe shortage of liquor liability insurance are two opposite factions, one pro liquor server liability and the other anti liquor server liability. This article will attempt to expose the weaknesses of the competing factions' policies and goals while at the same time combining and coordinating the strengths of each. The findings will then be applied to Illinois law where a suggestion will be made

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8. See, e.g., Tenn. Code Ann. §§ 57-10-101, 57-10-102. Section 57-10-101 states in part: “[T]hat the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.” Section 57-10-102 states:

Notwithstanding the provisions of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:

(1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or

(2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.


10. “Dram shop” has been defined as “A place where liquors are sold to be drunk on the premises.” McCormick v. Brennan, 224 Ill. App. 251, 254 (1922). See also South Shore Country Club v. People, 228 Ill. 75, 81 N.E. 805 (1907).


12. Id. at 1.

13. Id. at 55.
proposing a more effective way to deter the drunk driver, while still compensating the innocent victim.

II. HISTORY

To enhance the understanding of the theories to be advanced, it will prove beneficial to engage in a discussion of the current state of dram shop and social host liability in the various jurisdictions throughout the country. The two factions line up on opposite sides of a clearly drawn line. One side consists of common law liability, Dram Shop Acts and social host liability. The other side consists of traditional common law non-liability. This will be referred to as statutory immunity, and legislative reactions to "liberal" judicial decisions.

A. THE COMMON LAW

At common law it was not a tort to serve an able-bodied man intoxicating liquor. The reason for this rule was the belief that the drinking and not the serving of intoxicating liquor was the proximate cause of resulting injuries. Currently eleven states adhere to this

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14. While the topic at hand mandates familiarity with dram shop and social host liability, it is not the author's goal to give an in-depth dissertation on the subjects. However, to avoid trivializing these broad and very important topics, the reader is encouraged to review the following works to gain a more in-depth knowledge on the subjects. See, e.g., Note, Crespin v. Largo Corp. and the Legislative Response: The Turbulent State of Dram Shop Liability in Colorado, 57 U. Colo. L. Rev. 419 (1986) [hereinafter cited as Dram Shop in Colorado]; Note, Turn Out the Lights; the Party's Over: An Economic Analysis of Social Host Liability, 6 N. Ill. U.L. Rev. 129 (1986) [hereinafter cited as Economic Analysis of Kelly v. GwinneIl]; Comment, Imposition of Liability on Social Hosts in Drunk Driving Cases: A Judicial Response Mandated by Principles of Common Law and Common Sense, 69 Marq. L. Rev. 251 (1986) [hereinafter cited as Social Hosts in Drunk Driving Cases]; Comment, Reconsidering the Illinois Dram Shop Act: A Plea for the Recognition of a Common Law Action in Contemporary Dram Shop Litigation, 19 J. Marshall L. Rev. 49 (1985) [hereinafter cited as Reconsidering the Illinois Dram Shop Act].

15. At common law it was not an actionable wrong to give or serve an able-bodied man alcoholic beverages; the reason being that the consumption and not the serving was the proximate cause of a resulting injury. See, e.g., State ex rel. Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951) (cause of action failed when plaintiff brought wrongful death action against tavern owner for the negligence of an intoxicated minor patron); 45 Am. Jur. 2d Intoxicating Liquors § 553 (1969).


17: See State ex rel. Joyce v. Hatfield, supra note 15, at 756; Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967) (No common tort law cause of action exists against one who furnishes intoxicating liquor to a person who voluntarily becomes intoxicated and thereby injures either himself or his own property); Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977) (Statute making supplying of liquors to minors illegal does not afford a basis for civil recovery where the common law holds consumption, rather than serving, as the proximate cause of injuries).
common law notion that the drinking, not the serving, is the proximate cause of resulting injuries. The courts adhering to the traditional common law analysis have refused to modify the established view of proximate cause. The sentiments of the varying jurisdictions are best expressed by the court in Ling v. Jan's Liquors, where it was stated that, "Although empowered to change the common law in light of changed conditions, this court recognizes that declaration of public policy is normally the function of the legislative branch of government."19

While a number of courts relegate policy change to the legislature in reference to what is the proximate cause, others realize that the common law is indeed not static.20 In 1959 two cases, Rappaport v. Nichols21 and Waynick v. Chicago's Last Department Store22 emerged to significantly alter the face of the common law. Both Waynick and Rappaport held that the serving, rather than the consumption, of intoxicating liquor could be the proximate cause of resulting injuries. The undertaking of this change was most eloquently phrased by Justice Cardozo:

A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience.23

Since the Waynick and Rappaport decisions the majority of jurisdictions have followed the standards established in those cases.24
The alteration in the common law stems from two points of origin. The first focuses on the duty aspect of a negligence theory. The basic premise of the Restatement (Second) of Torts is, “anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.”

Prior to the Waynick and Rappaport decisions the courts viewed “the act” as the consumption of the alcohol and thus placed a duty on the consumer of the intoxicating beverages to act with reasonable care. After those decisions, however, “the act” was the serving of alcohol and the duty to exercise reasonable care was placed on the server.

Notwithstanding the Restatement’s position, courts will balance a variety of factors in determining whether a duty of care should come into play. Because rapidly changing conditions will give rise


25. RESTATEMENT (SECOND) OF TORTS § 302 comment (a) (1965).

26. The factors include, “(1) foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant’s conduct and injury suffered; (4) moral blame attached to defendant’s conduct; (5) policy of preventing future harm; (6) extent of burden to defendant . . . ; (7) availability, cost and prevalence of insurance for the risk involved.” W. PROSSER & W. KEETON, THE LAW OF TORTS, 359 n.24 (5th ed. 1984).
to new duties, courts must forever be cognizant of shifting societal conditions and needs to effectively place duties on those capable of inflicting harm wherever and whenever they neglect to exercise reasonable care.

The second point of origin whereby the change in the common law resulted hinges on the sense of foreseeability. At common law the serving was not sufficiently connected to the actual harm incurred by a third party from the negligence of an intoxicated person. It was not foreseeable that the act of serving would result in the injury of a third person outside the serving establishment. However, as the dissent noted in *Garcia v. Hargrove*, "the basis upon which these cases [holding that it is not an actionable wrong to serve an able-bodied man liquor] were decided is sadly eroded by the shift from commingling alcohol and horses to commingling alcohol and horsepower." Hence, it is now deemed foreseeable that serving alcohol can cause harm to third parties.

Another justification put forth to uphold the traditional common law notion of server nonliability was that the serving was not the proximate cause of the injury because the intoxicant was viewed as an intervening force which created a superseding cause and thus prevents the server from being liable. The *RESTATEMENT (SECOND) OF TORTS* § 442 lists a variety of factors to consider in determining whether an intervening force is a superseding cause. These factors include:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

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27. W. PROSSER & W. KEETON supra note 26, at 359.
28. Many of the common law notions were established when man travelled by horse. The server of alcohol could not foresee any harm to third persons from an intoxicant driving a horse. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).
29. 46 Wis. 2d 724, 176 N.W.2d 566 (1971).
30. Id. at ___, 176 N.W.2d at 572.
§ 440 states: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."
§ 441(1) states: "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed."
(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
(d) the fact that the operation of the intervening force is due to a third person's act or failure to act;
(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion. 32

However, as most courts have noted, society has come a long way since the days of traditional common law server non-liability. The horse has been replaced by an exceedingly large number of automobiles, and the accident rate alone ought to put one on notice of the dangers inherent in serving alcohol to a person who, in all likelihood, will drive away from the point of consumption. Hence it is now reasonably foreseeable to envision harm from the serving of intoxicating liquors. 33

B. NEGLIGENCE PER SE

In a common law cause of action for negligence, part of the plaintiff's prima facie case is to determine the standard of care. There

32. Restatement (Second) of Torts § 442 (1965). For a more in-depth discussion of superseding causes and intervening forces see W. Prosser & W. Keeton, supra note 26, § 44, at 301. See also, Lopez v. Maez, 98 N.M. 625, —, 651 P.2d 1269, 1275 (1982) (The court changed its original common law holding of server non-liability to server liability thereby holding a liquor licensee liable for the negligence of an intoxicated patron).

33. Restatement (Second) of Torts § 447 (1965) appears to also recognize this position. § 447 states:
The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.
See also, Lopez v. Maez, supra note 32, at 1276.
exists four methods to establish the standard of care,34 the one relevant for our purposes is when the legislature defines the standard of conduct via statute.35 To ascertain whether a statute may be adopted as the standard of care, it is first necessary to show that (1) plaintiff is in the class the statute meant to protect; (2) the interest invaded was the interest sought to be protected by the statute; (3) the resulting harm is the harm contemplated by the statute; and (4) the interest protected was protected against the particular hazard from which the harm results.36 If the plaintiff's theory is that the defendant violated the statute and thus breached the standard of care, such theory is termed negligence per se.37

Currently, all states and the District of Columbia have beverage control acts in effect in some form.38 These statutes generally prohibit the sale or serving of intoxicating liquors to minors, visibly intoxicated persons and habitual drunkards.39 At present, only those jurisdictions which realize a common law cause of action against the server of intoxicating liquors will construe the beverage act to allow an action based upon negligence per se.40 Conversely, the states which have maintained traditional common law notions of server non-liability41 narrowly construe the statutes to be penal in nature whereby such statutes will not create a civil cause of action.42

In the jurisdictions which allow the beverage control act to represent the standard of conduct of a reasonable man, a violation

34. Restatement (Second) of Torts § 285 (1965). § 285 states:
The standard of conduct of a reasonable man may be
(a) established by a legislative enactment or administrative regulation which
so provides, or
(b) adopted by the court from a legislative enactment or an administrative
regulation which does not so provide, or
(c) established by judicial decision, or
(d) applied to the facts of the case by the trial judge or the jury, if there
is no such enactment, regulation, or decision.
35. Id. § 285(a).
36. Restatement (Second) of Torts § 286 (1965).
37. See, W. Prosser & W. Keeton, supra note 26, § 36, at 220.
38. For a complete listing of all statutes, see, Dram Shop in Colorado 57 U. COLO. L. REV. 419 n.49 (1986); In addition, the following statutes have been changed:
40. See supra note 24.
41. See supra note 18.
of that statute creates a conclusive determination, in the absence of an excuse, on the issue of negligence. This is not to say, however, that liability is determined. It remains necessary for the plaintiff to prove that the violation of the statute was the legal cause of plaintiff’s harm.

C. DRAM SHOP ACTS

Dram shop acts, sometimes referred to as civil damage acts, are statutes creating a civil cause of action against a server of alcoholic beverages. The cause of action is for the benefit of one injured by an intoxicated person due to the selling or furnishing of alcohol to said intoxicated person. Presently, fourteen states have dram shop acts on their books. Dram shop acts vary in structure but the majority of jurisdictions hold that the acts preclude any further recourse under the common law. This stance creates a very real possibility of harsh results especially when the acts are old and outdated, as it may be difficult to fit a cause of action within the statute.

43. See, W. Prosser & W. Keeton, supra note 26, § 36, at 230. (This says that the defendant's conduct is stamped as negligent, however, causation must still be proved and all defenses to negligence are still allowed).

44. RESTATEMENT (SECOND) OF TORTS § 288B comment b (1965). Comment b states in part: "This means that the violation becomes conclusive on the issue of the actor's departure from the standard of conduct required of a reasonable man. . . . His conduct must still be a legal cause of the harm to the plaintiff, and there remain the possibilities of defenses. . . ."


46. See, e.g., Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981) (Plaintiff, injured by intoxicated driver, sued social host who served alcohol to the intoxicated driver. Court held that Dram Shop Act only applied to vendors of liquor and the common law of Illinois affords no cause of action against the seller or server of alcohol to an able-bodied man). But see, e.g., Kowal v. Hofher, 181 Conn. 355, 436 A.2d 1 (1980) (Court held that the Dram Shop Act is not the exclusive remedy and a cause of action for negligence may exist against a server of liquor if causation is adequately traced back to each server).

47. The difficulty may arise when plaintiff proceeds with a valid cause of action under a dram shop act but such act limits the amount of recovery, i.e., if plaintiff prays for relief in the sum of $100,000 for hospital care and loss of support and the
D. SOCIAL HOST LIABILITY

The most recent issue to hit the courts and legislatures has been the role of the social host in regard to his intoxicated guest. As a general proposition, the vast majority of jurisdictions hold that a social host is not liable for the torts of his intoxicated guest.48 It does not matter whether the injured party brings his claim under a dram shop act, common law, or common law negligence per se, the results remain very much the same.

Claims against social hosts have attempted to be brought under broadly drafted dram shop acts; acts which use phrases similar to "against any person who by selling or giving alcoholic liquor..."49 However, the Illinois courts have consistently refused to extend the statute to include social hosts.50

A similar reaction occurred with New York's Dram Shop Act which also incorporated very broad language.51 In a series of decisions the New York courts refused the extension of the Dram Shop Act to social hosts.52 In Minnesota, the supreme court there interpreted the language of the Dram Shop Act to include social hosts under the dram shop net.53 The case involved there was Ross v. Ross54 where the court found a social host liable to a third party as a result of negligence of an intoxicated guest.55 The Minnesota legislature, in response to the Ross decision, deleted the word "giving" from their Dram Shop Act making it clear that the act only applied to a commercial seller.56 To avoid the inherent difficulties experienced by

act limits recovery to $40,000 and the act is the exclusive remedy. See, e.g., Cunningham v. Brown, 22 Ill. 2d 23, 174 N.E.2d 153. See also, ILL. REV. STAT. ch. 43, para. 135 (1985) (Dram Shop Act limiting recovery to $30,000 per personal injury and property damage, and $40,000 for loss of means of support).

48. See, e.g., Cady v. Coleman, 315 N.W.2d 593 (Minn. 1982) (The giving of alcohol is not a bargained-for exchange and hence by eliminating the word "giving" from the Civil Damages Act the legislature intended to insulate the social host).

49. ILL. REV. STAT. ch. 43, para. 135 (1985).


54. 294 Minn. 115, 200 N.W.2d 149 (1972).

55. Id. 294 Minn. at ___, 200 N.W.2d at 152-53.

56. See supra note 50, at § 340A.801.
the aforementioned courts, legislatures have drafted narrower statutes in order to ensure that dram shop liability only applies to commercial sellers.57

The landmark case of Kelly v. Gwinnell58 drastically changed the common law of New Jersey. Kelly allowed a third party, who was injured by the negligence of an intoxicated individual, to recover from the intoxicated individual’s social host.59 Although other jurisdictions have not explicitly followed Kelly, a few have statutorily adopted the view that a social host may be liable for an intoxicated guest’s negligence. An Oregon statute provides: “No private host is liable for damages incurred or caused by an intoxicated social guest unless the private host has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated.”60 A similar statute exists in New Mexico except that the alcoholic beverages had to be provided “recklessly in disregard of the rights of others . . . .”61

The last possibility to find a social host liable lies in the theory of negligence per se. As was previously discussed, every state and the District of Columbia have beverage control statutes.62 These statutes have a variety of constructions. The Wisconsin Supreme Court, utilizing the liquor control statute,63 realized a cause of action against a social host whereby the host was found to be negligent per se for serving an intoxicated minor.64 However the large majority of jurisdictions have strictly construed the beverage control statutes holding

57. See, e.g., CONN. GEN. STAT. § 30-102 (1985) (repealed and substituted by 1986 CONN. LEGIS. SERV. P.A. 86-338 § 7(a)), which says in part, “If any person, by himself or his agent, sells any alcoholic liquor . . .” [emphasis added]; IOWA CODE ANN. § 123.92 (West 1987) (which relates solely to licensees and permittees).
59. Id. 96 N.J. at ____, 476 A.2d at 1224.
60. OR. REV. STAT. § 30.955 (1983).
62. See supra note 38.
63. WIS. STAT. ANN. § 125.07 (Supp. 1986-87). This section provides that, “No person may procure for, sell, dispense or give away any alcoholic beverages to any underage person . . .” (emphasis added). Id. at § 125.07(2).
64. Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985). Other jurisdictions have also found the social host liable via negligence per se. See, e.g., Brattain v. Herron, 309 N.E.2d 150 (Ind. 1974) (minor consumed alcohol at his sister’s place of residence, became intoxicated, and drove away whereafter he collided with another vehicle. Court held that the social provider (sister) could be held liable in a civil action for negligence, and the violation of the statute prohibiting giving liquor to a minor is negligence per se); compare Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985) (violation of statute provides prima facie evidence of negligence and creates a rebuttable presumption of negligence).
that those provisions pertain only to commercial vendors and not to social hosts.\textsuperscript{65}

E. LEGISLATIVE REACTIONS TO "LIBERAL" COURT RULINGS

As was discussed above, there exists a distinct minority of states adhering to traditional common law principles of proximate cause in regard to the serving of alcohol.\textsuperscript{66} This minority, however, is not static in its rate of growth. To date five states have either passed or are in the process of passing legislation which will effectively limit the amount of server liability.\textsuperscript{67}

California, one of the first legislatures to react to the apparently unpopular decisions of the Court, abrogated decisions in \textit{Vesley v. Sager},\textsuperscript{68} \textit{Bernhard v. Harrah's Club}\textsuperscript{69} and \textit{Coulter v. Superior Court}\textsuperscript{70} in favor of prior judicial decisions which found the consumption rather than the serving of alcoholic beverages to be the proximate cause of injuries resulting from an intoxicated person.\textsuperscript{71} The California court in \textit{Vesely} used negligence per se to find a tavern owner liable.\textsuperscript{72}

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\item \textsuperscript{65} For a more exhaustive discussion of social host liability, see, Social Hosts in Drunk Driving Cases, 69 MARQ. L. REV. 251 (1986).
\item \textsuperscript{66} See supra note 18 and accompanying text.
\item \textsuperscript{67} The five states include California, Colorado, Florida, New Jersey and Wisconsin.
\item \textsuperscript{68} 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (A motorist was injured when his automobile was struck by another automobile driven by an intoxicated driver. Court held that injured plaintiff was within the class of persons for whom the statute, making it a misdemeanor to serve liquor to an intoxicated person, was designed to protect).
\item \textsuperscript{69} 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), cert. denied, 429 U.S. 859 (California resident brought an action against a Nevada tavern owner for personal injuries alleging that the sale of intoxicating liquors to patrons, causing them to become intoxicated, was the proximate cause of his injuries).
\item \textsuperscript{70} 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (Plaintiff, a passenger in defendant’s automobile, brought an action against both the owner and the manager of an apartment complex alleging that the manager, as a social host, knew or should have known that defendant was becoming visibly intoxicated due to the manager’s service of alcohol and that he would be driving later; therefore the manager and owner should be liable for damages to plaintiff. The Supreme Court of California found that the plaintiff’s allegations gave rise to a cause of action.).
\item \textsuperscript{71} CAL. BUS. & PROF. CODE § 25602 (West, 1985 Supp.) (no person who gives away or serves alcohol “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”); CAL. CIV. CODE § 1714 (West 1985) (which reinstates the old analysis that consumption and not serving of alcohol is the proximate cause of third party injuries. This section also makes the social host immune from liability to third parties injured as a result of a guest’s intoxication.).
\item \textsuperscript{72} See supra note 68, at 631.
\end{itemize}
This indicates that the court must have used serving rather than consumption as the proximate cause of resulting injuries. If a contrary view were held, the case would have been dismissed based upon a failure to state a claim upon which relief could be granted. In Bernhard the court used the modified common law principle that serving may be the proximate cause of injuries to find a Nevada tavern owner liable for injuries inflicted in California by an intoxicated patron of the Nevada tavern.73 Coulter involved a social host who served alcohol to an intoxicated guest and was subsequently held liable for a third party plaintiff’s injuries.74 With the enactment of § 25602 and § 1714, the legislature has effectively tied the hands of the California courts in further decisions involving liquor server liability.75

In Colorado the legislature added a section to the criminal beverage act, which made it unlawful to sell intoxicating liquor to minors, visibly intoxicated persons or habitual drunks,76 which in essence gives tavern owners a defense in any prosecution under the act by invoking a willful and wanton standard of conduct.77 The legislation also limits the amount of recovery allowed under the section to $150,000.78 The effect of this addition is uncertain. However, defendants in a negligence per se action arising under the beverage act will apparently be immune from prosecution so long as they do not act willfully or wantonly. This legislative enactment comes after a Colorado decision awarding a plaintiff $500,000 against a tavern owner under dram shop negligence and negligence per se.79

The Florida legislature also created server immunity by only allowing the server of intoxicating liquors to be liable if he acts both willfully and unlawfully.80 This reaction was in response to Florida’s

73. See supra note 69.
74. See supra note 70.
75. See supra note 71.
76. COLO. REV. STATS. § 12-47-128 (Supp. 1986).
77. Id. at § 12-47-128.5(3)(a) which states:
No licensee is civilly liable to any injured individual or his estate for any injury to such individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcoholic beverage to such person, except when:
(I) It is proven that the licensee willfully and knowingly sold or served any malt, vinous, or spirituous liquor to such person who was under the age of twenty-one years or who was visibly intoxicated. . . .
78. Id. at § 12-47-128.5(3)(c).
80. FLA. STAT. ANN. § 768.125 (West Supp. 1985) ("A person who sells
liberal court holdings in cases like *Barber v. Jensen* where the court held that a tavern owner who sold liquor to a minor could be liable in negligence for a third party's injuries resulting from such minor's intoxication.81 The New Jersey legislature, after the changes generated by the *Kelly* decision,82 is currently attempting to pass legislation to ameliorate the effects of the decision.83 If the legislation is passed, it will significantly alter the effect of the *Kelly* decision.

In Wisconsin, legislation was passed which also makes the server of alcohol immune from prosecution except under very limited circumstances.84 One may speculate that the legislative intent was to limit the Wisconsin court's options especially after the decision in *Koback v. Crook*.85

F. STATUTORY IMMUNITY

At the extreme opposite end of the spectrum from dram shop liability lies the legislative enactments in Missouri and Tennessee.86

or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages . . .”).

82. See supra note 58.
83. ASSEMBLY LAW, PUBLIC SAFETY, DEFENSE AND CORRECTIONS COMMITTEE, STATEMENT TO SENATE COMMITTEE SUBSTITUTE FOR SENATE, Nos. 1152 and 545, June 9, 1986. The bill reads in part:

The bill provides that a third party may recover damages from a social host when the following three factors are present: a. the social host willfully and knowingly provides alcoholic beverages either (1) to a social guest who is visibly intoxicated in his presence; or (2) to a social guest who is visibly intoxicated under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another; and b. the social host provides alcoholic beverages to a social guest under circumstances that create a reasonably foreseeable risk of harm to others and the host fails to exercise reasonable care and diligence to avoid the foreseeable risk; and c. the injury arises out of an accident caused by the negligent operation of a vehicle by a social guest who was provided alcoholic beverages by a social host.

The bill provides that no social host will be liable for damages to a social guest, or the guest's estate, heirs, or assigns sustained as a result of the social host's willful and knowing provision of alcoholic beverages.

*Id.*

84. WIS. STAT. ANN. § 125.035 (West Supp. 1986) (a person who sells or gives away alcoholic beverages is immune from civil liability except when the provider should have known that the person procuring alcohol was under the legal drinking age).
85. See supra note 64 and accompanying text.
Both legislatures paralleled the decisions of the California, Florida and Wisconsin legislatures by making the consumption, and not the serving, the proximate cause of a resulting injury; however, the legislatures in Missouri and Tennessee have gone one step further. Rather than stating outright that tavern owners or servers of alcohol are immune from liability resulting from injuries inflicted upon another by an intoxicated person, the legislature in Missouri made consumption the proximate cause, thus eliminating a cause of action against a seller of intoxicating liquor on a negligence cause of action, unless, and only unless the plaintiff can first show that the defendant was convicted of violating the Missouri statute making it a crime to serve a minor or obviously intoxicated person. In addition to showing that defendant violated the statute, plaintiff must also show that the selling of the intoxicating liquors is the proximate cause of the injury sustained in order to succeed in a case against a tavern owner. This prospect is difficult because Missouri allows a good faith defense to § 311.310, making it more difficult to secure a conviction. Hence the reason for the term statutory immunity.

Tennessee, while attempting the same approach as Missouri, settled on a different, yet equally stringent approach. The change in proximate cause is substantially the same as in Missouri, except that Tennessee requires the plaintiff to prove beyond a reasonable doubt that the business or individual server furnished alcohol to a person already obviously intoxicated or known by the seller to be a minor. In conjunction with this plaintiff must also prove beyond a reasonable doubt that such serving was the proximate cause of the resulting injury. The "beyond a reasonable doubt" burden of proof is an exacting standard because, "[t]he fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise."

87. Mo. Ann. Stat. § 311.310 (Vernon 1985). Section 537.053(3) states in part that, "notwithstanding subsections 1 and 2 [which reinstitute the original common law holding that consumption and not serving is the proximate cause of injuries incurred by a third person inflicted by an intoxicant] a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against a server who pursuant to § 311.310, RSMO, has been convicted of selling "intoxicating liquor" to an underage person or an "obviously intoxicated person."


89. Telephone conversation with Mr. John Summers, executive director of the Tennessee Trial Lawyers Association (November 1986).


91. Restatement (Second) of Torts § 433B comment b (1965).
Hence, the reality of the term statutory immunity assumes great force in the law.

III. THE ILLINOIS APPROACH

Illinois belongs to that minority of states who uphold the traditional common law principles of proximate cause. Historically the Illinois Supreme Court has held that there exists no cause of action in negligence for the sale or gift of liquor to an able-bodied man under the common law. This rule stems from the theory that it is the consumption of alcohol rather than the providing that is the proximate cause of intoxication.

The Illinois decisions have indicated a reluctance on the part of the judiciary to allow a cause of action against a seller of intoxicating liquors based upon a theory of negligence per se. By making such a rule of law the courts reveal a consistency of decision between common law and negligence per se causes of action. Negligence per se only creates a presumption of negligence. The plaintiff still must prove causation, therefore the common law of Illinois, which does not recognize a cause of action in negligence against a tavern owner, mandates dismissal of the action for failure to state a claim upon which relief can be granted.

The Illinois Dram Shop Act is similar in scope to most other jurisdictions having similar acts. The Act does not stem from the common law and is considered "sui generis and purely a creature of statute." The Act contains language expressly limiting the dollar amount of recovery allowed in any action against a seller of intoxicating liquors. In 1985, the recovery amounts were increased from

92. See supra note 18 and accompanying text.
93. Graham v. General U.S. Post No. 2665 V.F.W., 43 Ill. 2d 1, 248 N.E.2d 657 (1969) (Plaintiff sued for injuries inflicted by an intoxicated driver under both common law negligence and the Dram Shop Act. Court held that there exists no common law cause of action against a tavern owner for the negligence of a patron and the Dram Shop Act is the exclusive remedy).
94. Cunningham, supra note 47.
95. Gora v. 7-11 Food Stores, 109 Ill. App. 3d 109, 440 N.E.2d 279 (1982) (Plaintiff, a minor, became intoxicated in a bar, went outside and fell asleep in a snow bank and was subsequently injured. The court held that negligence per se was not an appropriate cause of action because no common law cause of action in negligence is allowed against a tavern owner in Illinois).
96. See supra note 43.
97. See supra note 45.
98. Demchuk v. Duplancich, 92 Ill. 2d 1, 5, 440 N.E.2d 112, 114 (1982).
99. See supra note 45.
$15,000 to $20,000 for injury to person or property, and from $30,000 to $40,000 for loss of means of support. The limited amount of recovery allowed is suggestive that the Act is penal in nature, and indeed this was the case as noted in Maras v. Bertholdt.\textsuperscript{100} It must also be noted that the Dram Shop Act is exclusive of other remedies which are already covered by the Act. The fact that a ceiling amount has been placed upon recovery in combination with the exclusiveness of the remedy and the lack of a common law cause of action can sometimes lead to very harsh and apparently unjust results.\textsuperscript{102}

In regard to social host liability, the Illinois courts have consistently held that the Dram Shop Act should be narrowly construed to deny recovery to one bringing an action against a social host under the Act.\textsuperscript{103} The reason for this narrow construction of the act was because the Act was deemed to relate only to commercial sellers of alcohol who were in the business for profit.\textsuperscript{104}

The situation in Illinois is a middle of the road approach to the liability of servers of intoxicating liquors. Illinois neither makes tavern owners immune from civil liability nor allows unlimited liability to the same tavern owners. With extremes to either side of the Illinois approach to liquor liability it now becomes necessary to analyze the varying approaches to liquor liability in light of this nation's goal of ridding the highways of drunk drivers.

IV. PRESENT POLICIES, DESIRED ENDS AND A PRACTICABLE APPROACH

Society has identified a large and very grave risk faced by all drivers of our nation's highways. The recognition of this risk is evinced by the fact that a presidential commission was established to

\begin{itemize}
  \item \textsuperscript{100} 126 Ill. App. 3d 876, 886, 467 N.E.2d 599, 606 (1984).
  \item \textsuperscript{101} See supra note 94.
  \item \textsuperscript{102} Gustafson v. Mathews, 109 Ill. App. 3d 884, 441 N.E.2d 388 (1982) (Patron of a bar and four of his five children were killed when his automobile collided with a truck. The tavern's employees helped the patron into his car when patron was incapacitated. The court held that the tavern owed no duty to prevent patron from driving away).
  \item \textsuperscript{103} See Fabian v. Polish American Veterans, \textit{supra} note 50; Thompson v. Trickle, 114 Ill. App. 3d 930, 449 N.E.2d 910 (1983) (Employer not liable for damages caused by the negligence of an employee after employer served employee intoxicating liquor).
\end{itemize}
determine the extent of the problem and to seek possible remedies to the ubiquitous problem at hand. For the present it will be assumed that all jurisdictions have the same desire or goal identified by the presidential commission; solve the nation’s drunk driving epidemic.

There are three ways to respond to an identified risk. First, the harm may be redressed after it occurs; second, punishment of those who cause the harm; or third, control the risk before it has resulted in harm. Although not explicitly enacted or decided for the purpose of preventing drunk driving, the present state of liquor liability may be used as a guide to possible ways to effectuate a remedy. This assumption is based upon the recommendation of the Presidential Commission that more dram shop liability be instituted in the states.

Currently, the majority of states advocate some sort of liquor server liability, either through common law or dram shop. Analogizing this to a form of risk response, that of redressing the harm, the method of creating more liability on the servers of alcohol will not solve, but aggravate, the drinking and driving problem. The basic premise behind this method is that of compensating innocent third parties injured by an intoxicated driver. The remedial function here identified, although necessary to reach an equitable result, can be carried too far. Given the skyrocketing liquor liability insurance rates, servers of alcoholic beverages are forced to carry a much larger burden. In most circumstances this burden could be passed on to the consumer in the form of higher drink prices for example, but not so with alcohol. Alcohol is characterized as a relatively elastic good. Hence, the entire cost of increased liquor liability insurance

105. See supra note 4.
107. See supra note 4, at 28.
108. See supra notes 24 and 45.
109. See supra note 11 (liquor liability insurance rates vary with the type of establishment, size, percent of liquor sales to total sales and location. These factors make it difficult to pinpoint a percentage increase in rates of coverage, however, a common trend is toward coverage limits of $300,000 to $500,000 per accident).
110. Elasticity is an economic term of art which, measures consumers' responsiveness in the amount of consumption of a good or goods to a change in the price of that good. The calculation goes as follows:

\[
\frac{\text{% change in quantity demanded}}{\text{% change in price}}
\]

Elastic means that for a relatively small price change the amount demanded by the consumer falls more than the rise in the price. What this means is that price may only be increased by small proportions or the amount of total profits of the business will diminish and eventually go to zero.
rates will not be passed on to the consumer and much of the cost will be subsumed in the business as fixed overhead costs. Since the consumer is not paying the price a drink would cost him had the burden of increased liquor liability insurance rates been passed on, the consumer is actually getting a bargain in the price of his drink. Hence, as most bargains go, the consumer purchases more of a good thing.

A second problem exists in jurisdictions allowing for joint and several liability. In these jurisdictions the injured plaintiff may sue all defendants or one defendant. If the one defendant is sued for the entire damage and he is but 10% negligent, he must in turn attempt to indemnity himself from all other defendants.111 Since tavern owners generally carry more liability insurance than the typical patron carries in auto insurance, an injured third party will sue the tavern owner for the entire amount of the damage due to the tavern owner's "deep pocket." This in turn creates an incentive for the patron to drink more, since such patron may not be sued at all.112

Statistics exist which suggest that imposing greater liquor seller liability does little to reduce the number of drunk driving fatalities. In Michigan, a state which imposes both common law negligence and dram shop liability on its liquor servers,113 in fatal traffic accidents occurring on the state's roads in 1985, 45.7% had evidence of at least one of the participants in the accident, the deceased or a survivor, having consumed alcohol prior to the accident.114 The figure for 1981 was 56.7%.115 Maryland and Connecticut, two east coast states of comparable size, lend more credence to the argument that increasing liquor server liability will not reduce the amount of drunk driving. Connecticut has both common law negligence and a Dram Shop Act to hold a liquor server liable.116 However, the amount of drunk driving fatalities, fatalities meaning the death of any party to the accident and not only the drunk, has increased from 29% in 1980 to 40% in 1985.117 This increase may be caused by many demographic

112. If the patron who caused the harm to a third party was an uninsured driver and lacked personal assets, there would be little incentive for the tavern owner to sue such person for indemnity.
113. See supra notes 24 and 45.
114. MICHIGAN DEPARTMENT OF STATE POLICE, TRAFFIC ACCIDENT FACTS (1981-85).
115. Id.
116. See supra notes 24 and 45.
factors, yet 40% of all highway fatalities in the state still involve alcohol. Maryland, a state with no dram shop act and no common law negligence to hold a tavern owner liable for a third party's injuries, has experienced a decrease in alcohol-related highway fatalities. From the years 1980 to 1985, alcohol-related highway fatalities in Maryland have decreased from 62% to 29%.118

Consumers believe they are getting a bargain in their drink price and have less of a risk of getting sued for their negligence. Coupled with the above statistics, this suggests that liquor server liability should be reduced.

This same result, that of low consumer awareness of the costs of drinking and driving, occurs in jurisdictions which reduce or eliminate server liability.119 If the servers are not being held liable for their actions then there is no incentive to serve less alcohol. At the same time, alcohol prices will remain low if it may be assumed that liquor liability insurance costs are reflective of the dram shop legislation enacted.120 This means that because of lower insurance rates, no need exists to pass through higher costs. Therefore, at either extreme, society is no closer to realizing its goal of reducing the amount of drunk driving.

A logical solution to the problem is to find a middle ground similar to Illinois' present approach to liquor liability.121 To ensure that servers of alcohol can reasonably afford liquor liability insurance and hence pass the cost on to the consumer, the amounts of recovery should be given reasonable ceiling limits.122 Setting limits at or below the amount a dram shop may insure itself against has a somewhat stabilizing effect on both liquor liability insurance rates as well as extraordinary jury awards for pain and suffering and loss of means of support.123 The current Illinois dram shop limits might well be

118. MARYLAND DEPARTMENT OF TRANSPORTATION, AUTOMATED ACCIDENT REPORTING SYSTEM (1980-85).
119. See supra notes 66-91 and accompanying text.
120. This assumption is the corollary argument that if dram shop acts which increase server liability also increase liquor liability insurance costs, then it follows that dram shop legislation which reduces or eliminates server liability ought to reduce liquor liability insurance costs.
121. See supra notes 92-104 and accompanying text.
122. See supra note 111.
123. If insurers are aware that a dram shop act is the exclusive remedy under which an injured plaintiff may recover from a server, and such act limits the amount of recovery, then the insurer is able to gauge his rates accordingly without fear that a jury award far in excess of the established limits would be imposed. As the risk to the insurer is less, the costs should also be less.
raised from $40,000 to $150,000.124 This would more adequately effectuate a remedy for loss of means of support, especially when the one injured was the sole means of support for a medium to large-sized family.

The second portion of the solution, one also recognized by the presidential commission,125 is to defray the costs of alcohol to the consumer. This can be accomplished by raising the compulsory auto liability insurance limits to $75,000-$100,000.126 By doing so, and by enacting dram shop acts within the aforementioned limits in all jurisdictions, this would force the consumer of alcohol to be a primary provider of the remedy for his wrong. The suggestion that dram shop acts should exist in all jurisdictions ensures that tavern owners may also be liable, hence forcing them to be conscious of intoxicated patrons. Instituting larger auto liability insurance limits will also entice the injured party to sue the driver directly due to his “deeper pockets,” thereby creating a heightened awareness in the drivers themselves of the consequences of drinking and driving.

To ensure that all drivers are insured and have the proper amount of insurance, Illinois might adopt a policy similar to that in Vermont. Vermont has a mandatory annual vehicle inspection for all passenger vehicles excluding buses.127 To fulfill this mandatory inspection, owners of vehicles must show, at the time of inspection, that the vehicle is properly insured.128 This program has reduced the amount of uninsured drivers on Vermont roads from 14% to 3.5%.129

Stabilizing insurance rates and recovery amounts and invoking mandatory insurance limits more evenly spreads the risk of loss between consumer and server of alcohol. This in turn heightens the awareness of the consumer to the consequences of taking that extra drink and will reduce the amount of drinking and driving.

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124. The suggestion of a $150,000 limit stems from two factors:
1) This amount more adequately compensates a victim for losses actually incurred, i.e. hospitalization and loss of means of support.
2) The amount is more in tune to the coverage limits currently offered by insurance companies.

See supra note 109.

125. See supra note 4.

126. See supra note 11, at 55. The other suggestions in this paper have also been put forth by Alan Jay Kaufman of Kaufman & Payton, a Michigan law firm specializing in liquor liability law. Mr. Kaufman’s suggestions are put forth in this same article on p. 58.

129. Telephone conversation with Mr. Thomas McCormick, Director of Law Administration, Vt. Dept. of Motor Vehicles.
V. Conclusion

The drinking and driving problem has plagued American society since the invention of the automobile. The problem, although recognized, has not been sufficiently dealt with as evinced by the number of alcohol-related fatalities on American highways each year. Imposing more liability or less liability on servers of liquor offers far too inadequate a remedy for such a large and widely spread problem.

Drinking and driving will continue to plague this country until the consumer of alcohol is fully aware of the total cost of drinking and subsequently driving. Adoption of dram shop acts which offer an exclusive remedy, and making the remedy have a minimum/maximum amount of $150,000; coupled with compulsory auto liability insurance of $100,000 enforced by mandatory vehicle inspections are the suggested means. By implementing these means Illinois will effectuate the consumer awareness desired and reduce the amount of drinking and driving on its highways.

Grant Pearson