Comments

Dramshop Liability: Should the Intoxicated Person Recover for His own Injuries?

I. Introduction and Background

Recently, public concern about drunk driving and drinking-related accidents has increased dramatically. This has led to substantial changes in courts' approaches to tavern liability for injuries resulting from serving liquor to an intoxicated person.[1] Prior to 1959,[2] courts did not allow anyone, whether an intoxicated person or an innocent third party, to recover from tavern owners and operators[3] for drinking-related injuries.[4] Increasingly, however, courts are allowing innocent third parties who are injured by an intoxicated person to recover from the tavern. In the past two decades, twenty-eight states have allowed innocent third parties[5] to recover from the tavern on the theory that the tavern has a duty not to serve intoxicated persons.[6]

The liability of the tavern for the acts of intoxicated patrons is referred to as dramshop liability. A dramshop is a saloon or bar where spirituous or intoxicating liquors are sold.[7] Dramshop liability encompasses recovery by both innocent third parties and intoxicated persons for injuries caused by the latter's intoxication.

This Note will focus on Ohio law, illustrating that allowing recovery by the intoxicated person would be consistent with Ohio law in related areas of liability. Ohio

---

1. *See infra*, note 6 and accompanying text.

2. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 8 (1959) was the first case allowing an innocent third person to recover from a tavern owner for injuries caused by one of its intoxicated patrons.

3. Tavern owners and operators include anyone having an ownership interest in the tavern as well as managers, bartenders, and other servers. Throughout this Note, "tavern" will refer to tavern owners and operators.

4. At common law, it was not a tort to sell alcohol to "a strong and able-bodied man." Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889).

5. An innocent third party is one who has had nothing to do with illegally providing liquor to the intoxicated person. Henry v. Muzik, 374 N.W.2d 275, 278 (Minn. 1985).

6. The following cases have allowed an innocent third person to recover from a tavern for injuries caused by one of its intoxicated patrons: Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Buchanan v. Merger Enterprises, Inc., 463 So. 2d 121 (Ala. 1984); Nazareno v. Urie, 638 P.2d 671 (Alaska 1981); Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Kerby v. The Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975 (1974); Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980); Algeria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Pike v. George, 434 S.W.2d (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Trail v. Christain, 298 Minn. 101, 213 N.W.2d 618 (1973); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979); Carver v. Schafer, 647 S.W.2d 570 (Mo. App. 1983); Ramsey v. Anctil, 106 N.J. 375, 211 A.2d 900 (1965); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965); Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 884 (1983); Ross v. Scott, 386 N.W.2d 18 (N.D. 1986); Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1983); Brigance v. Velvet Dove Restaurant, Inc., 125 P.2d 300 (Okl. 1986); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977); Jardine v. Upper Darby Lounge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964); Walz v. City of Hudson, 327 N.W.2d 120 (S.D. 1982); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1964); Dickinson v. Edwards, 105 Wash. 2d 457, 716 P.2d 814 (1986); Callan v. O'Neil, 20 Wash. App. 32, 578 P.2d 890 (1978); Sorensen by Kerscher v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).

7. Snow v. State, 50 Ark. 557, 9 S.W. 306 (1888).

has taken most of the necessary steps toward extending dramshop liability to include intoxicated persons and merely needs the appropriate case in which to take the final step.[8] This Note will first expose weaknesses in the rationales for denying recovery and then will review arguments in favor of allowing recovery, concluding that Ohio should follow other progressive states by allowing recovery by intoxicated persons.

Traditionally, the common law denied recovery against dramshops for any drinking-related injuries, whether the injured person was the intoxicated person or an innocent third party. This position arose from the theory that it was not a tort to sell liquor to "a strong and able-bodied man."[9] Courts held that drinking the liquor, not selling it, was the proximate cause of the injury. Thus, the intoxicated person was solely responsible for the injury. This "proximate cause" rationale was used in most states to bar recovery by both injured intoxicated persons and injured innocent third parties.[10]

For example, in *Christoff v. Gradsky*,[11] the plaintiff's decedent died of acute alcohol posioning after being served liquor while visibly intoxicated.[12] The court denied recovery on the theory that drinking the liquor, not serving it, was the proximate cause of the injury.[13]

A court first renounced the proximate cause rationale for denying dramshop liability in a case involving recovery by innocent third persons. In 1959, in *Rappaport v. Nichols*,[14] New Jersey rejected proximate cause as a defense to a dramshop action. *Rappaport* allowed an innocent third person to recover against a dramshop for injuries caused by the intoxicated person, stating: "Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated . . . he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person."[15] In the past two decades, a majority of states have followed New Jersey's lead by rejecting the proximate cause rationale as a basis for denying recovery to innocent third persons.[16]

Ohio has followed this majority trend. In *Mason v. Roberts*,[17] the Ohio Supreme Court held that proximate cause is no longer a defense in dramshop actions. The court based its reasoning on two analytical principles: first, proximate cause may properly

8. *See infra*, notes 29–37 and accompanying text.

9. Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889).

10. Cherbonnier v. Rafolovich, 88 F. Supp. 900 (D.C. Alaska 1950); King v. Kenki, 80 Ala. 505, 60 Am. Rep. 119 (1886); Bolen v. Still, 123 Ark. 308, 185 S.W. 811 (1916); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Hull v. Rund, 150 Colo. 425, 374 P.2d 35 (1962); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 378, 28 S.E.2d 329 (1943); Britton's Adm'r. v. Samuels, 143 Ky. 129, 136 S.E. 143 (1911); Cruse v. Aden 127 Ill. 231, 20 N.E. 73 (1889); Wimmer v. Koenigseder, 108 Ill. 2d 435, 484 N.E.2d 1099 (1985); Couchman v. Prather, 162 Ind. 205, 70 N.E. 240 (1904); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958). Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966); LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955); Hauth v. Sambo, 100 Neb. 160, 158 N.W. 1036 (1916); Hall v. Budagner, 76 N.M. 591, 417 P.2d 71 (1966); Christoff v. Gradsky 140 N.E.2d 586 (Ohio C.P. Ct. 1956); Mitchell v. Ketner, 393 S.W.2d 755 (Tenn. 1964); Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).

11. 140 N.E.2d 586 (Ohio C.P. Ct. 1956).

12. *Id.* at 587.

13. *Id.* at 589.

14. 31 N.J. 188, 156 A.2d 1 (1959).

15. *Id.* at 193, 156 A.2d at 8.

16. *See supra* note 6 and accompanying text.

17. 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

be a question for the jury if the intoxication so impaired the purchaser's will that he or she was unable to refrain from drinking; and second, the sale of intoxicants may properly be found to be the proximate cause of a third person's injuries if the sale was contrary to statute.[18] The relevant statute in Ohio states: "No sales shall be made to an intoxicated person."[19] *Mason* is representative of the majority position regarding recovery by innocent third persons.[20]

Since the *Mason* decision, the Ohio Eighth District Court of Appeals twice has considered whether the intoxicated person could recover for his or her drinking-related injuries. In both *Kemock v. Mark II*[21] and *Tome v. Berea Pewter Mug, Inc.*,[22] the court used the theory of contributory negligence to refuse recovery of damages by the intoxicated person. However, both of these decisions predated the advent of Ohio's comparative negligence statute.[23] The comparative negligence statute allows a court to reduce the amount of a plaintiff's recovery to the extent of his or her own negligence, unlike contributory negligence which bars recovery completely when the plaintiff's negligence contributed to the injury.[24] Moreover, both *Tome* and *Kemock* held that a person who is voluntarily intoxicated must conform to the same standard of care as a sober person,[25] potentially diminishing the effectiveness of comparative negligence for providing relief to an injured intoxicated person.

Recently, courts in other states have extended liability to the social host who serves an intoxicated person who, in turn, injures an innocent third person.[26] The Supreme Court of Ohio rejected social host liability for drinking-related injuries to an innocent third party. *Settlemyer v. Wilmington Veterans Post No. 49, American Legion, Inc.*[27] distinguished prior Ohio cases on the basis that those decisions involved commercial proprietors, not social hosts. The court viewed commercial proprietors as being in a better position to assume liability because they are better able to supervise and control patrons and can more easily bear financial responsibility. The court also denied recovery because the server of the intoxicants was not actually

---

18. *Id.* at 33, 294 N.E.2d at 887.

19. OHIO REV. CODE ANN. § 4301.22 (B) (Page 1982).

20. *See supra* note 6.

21. 62 Ohio App. 2d 103, 404 N.E.2d 766 (Cuyahoga Co. Ct. App. 1978).

22. 4 Ohio App. 3d 98, 46 N.E.2d 848 (Cuyahoga Co. Ct. App. 1978).

23. OHIO REV. CODE ANN. § 2315.19 (A) (I) (Page 1981). Ohio's comparative negligence statute became effective June 20, 1980. Although Tome v. Berea Pewter Mug, Inc. was decided after this date, the court refused to apply the comparative negligence statute to an action that arose prior to the date of effectiveness.

24. The comparative negligence statute provides:

> In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought. However, any damages recoverable by the person bringing the action shall be diminished by an amount that is proportionately equal to his percentage of negligence, which percentage is determined pursuant to division (B) of this action.

OHIO REV. CODE ANN. § 2315.19(1) (I) (Page 1980).

25. Kemock v. Mark II, 62 Ohio App. 2d 103, 119, 404 N.E.2d 766, 777 (Cuyahoga Co. Ct. App. 1978); Tome v. Berea Pewter Mug, Inc., 4 Ohio App. 3d 98, 102, 446 N.E.2d 848, 852 (Cuyahoga Co. Ct. App. 1982).

26. Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985); Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985); Kelly v. Grinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985).

27. 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984).

aware that the person who caused the injuries was intoxicated.[28] Although the court could have disposed of the case on this latter aspect alone, the court specifically addressed social host liability, perhaps to establish Ohio precedent.

Ohio cases involving dramshop liability are representative of major developments in the law of other states. A majority of states allow an innocent third person to recover from the tavern for injuries caused by the intoxicated person.[29] Ohio has followed this majority trend.[30] Currently, courts are considering whether social hosts should be liable for serving intoxicated persons. Ohio has refused to extend liability to the social host.[31] Finally, twenty-nine jurisdictions have considered whether an intoxicated person should recover for his or her own injuries. The cases have split about equally on this issue.[32] Those jurisdictions that have refused recovery have applied four rationales: (1) The tavern has no duty to protect an intoxicated person from drinking-related injuries;[33] (2) the proximate cause of the injury is drinking the liquor, not selling it;[34] (3) contributory negligence and assumption of the risk bar the intoxicated person from recovery[35]; and (4) the exclusive remedy for drinking-related injuries is provided in the state's dramshop act.[36] Ohio has denied recovery to the intoxicated person on the basis of contributory negligence, but these cases antedated the enactment of the comparative negligence statute.[37]

This Note will discuss these four rationales for denying recovery by the intoxicated person and demonstrate their inapplicability to Ohio dramshop law.[38] In addition, this Note will review the reasons supporting recovery by the intoxicated

---

28. *Id.* at 126, 464 N.E.2d at 523.

29. *See supra* note 6 and accompanying text.

30. Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

31. Settlemyer v. Wilmington Veterans Post No. 49, Am. Legion, Inc., 11 Ohio St. 3d 123, 127, 464 N.E.2d 521, 524–25 (1984).

32. The following cases have allowed the intoxicated person to recover: Farrington v. Houston's Inc., 250 F.2d 492 (5th Cir. 1985); Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961); Vance v. United States, 355 F. Supp. 756 (D.C. Alaska 1973); Morris v. Farley Enterprises, Inc., 661 P.2d 167 (Alaska 1983); Brannigan v. Raybuck, 136 Ariz. 513, 667 P.2d 213 (1983); Nally v. Blanford, 291 S.W.2d 832 (Ky. 1956); Parrett v. Lebarmoff, 402 N.E.2d 1344 (Ind. 1980); O'Hanley v. Ninety-Nine, Inc., 12 Mass. App. 64, 421 N.E.2d 1217 (1981); Grasser v. Fleming, 74 Mich. App. 338, 253 N.W. 757 (1977); Bissett v. DMI, Inc., 717 P.2d 545 (Mont. 1986); Ramsey v. Anctil, 106 N. H. 375, 211 A.2d 900 (1965); Sorensen v. Old Milford Inn, 46 N.J. 582, 218 A.2d 630 (1966); Dynarski v. U-Crest Fire District, 112 Misc. 2d 344, 447 N.Y.S.2d 86 (1981); Sager v. McClenden, 59 Or. App. 157, 650 P.2d 1002 (1982); Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965); Christiansen v. Campbell, 285 S.C. 164, 328 S.E.2d 351 (1985); Selchert v. Lien, 371 N.W.2d 791 (S.D. 1985); Young v. Caravan Corp., 99 Wash. 2d 655, 663 P.2d 834, *modified*, 100 Wash. 2d 567, 672 P.2d 1267 (1983).

The following cases did not allow the intoxicated person to recover: Snyder v. West Rawlins Properties, Inc., 531 F. Supp. 701 (D. Wyo. 1982); Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 378, 28 S.E.2d 329 (1943); Wright v. Moffitt, 437 A.2d 554 (Del. Sup. 1981); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); Thrasher v. Leggett, 373 So. 2d 494 (La. 1979); Klingerman v. SOL Corp. of Maine, 505 A.2d 474 (Me. 1986); Fisher v. O'Connor's Inc., 53 Md. App. 338, 452 A.2d 1313 (1982); Malone v. Lambrecht, 305 Mich. 58, 8 N.W.2d 910 (1943); Swartzenberger v. Billings Labor Temple Ass'n, 179 Mont. 145, 586 P.2d 712 (1978); Vadasy v. Bill Feigel's Tavern, Inc., 88 Misc. 2d 614, 391 N.Y.S.2d 32 *aff'd*, 55 A.D.2d 1001, 391 N.Y.S.2d 999 (1973).

33. *See infra* notes 39–42 and accompanying text.

34. *See infra* notes 58–68 and accompanying text.

35. *See infra* notes 69–94 and accompanying text.

36. *See infra* notes 95–109 and accompanying text.

37. *See supra* note 22 and accompanying text.

38. This Note will not address evidence issues such as the necessary level of intoxication or what actions constitute visible signs of intoxication. The author will assume that the injured party was visibly intoxicated and that the bartender knew the person was intoxicated.

person, including the following: the dramshop is in the best position to avoid the risk and, recovery by intoxicated persons would reduce accidents to both intoxicated persons and innocent third persons.

II. Rationales For Denying Recovery By Intoxicated Persons

A. *No Duty to Protect the Intoxicated Person*

One jurisdiction has refused to allow recovery by the intoxicated person on the ground that the dramshop has no duty to protect another from the consequences of his voluntary intoxication.[39] This "no duty theory," however, should not bar Ohio courts from allowing recovery because Ohio adheres to the negligence per se doctrine. Negligence per se provides that violating a specific requirement of law that imposes an absolute duty is negligence as a matter of law.[40] The jury need not consider whether the violator exercised ordinary care. The jury determines only whether the defendant violated the specific statute.[41] The statute imposes the duty.

In addition to negligence per se, Ohio courts should consider the tavern owner's duty to exercise reasonable care for the safety of his invitees. An invitee is a business visitor—one rightfully on the premises of another for purposes in which the possessor of the premises has a beneficial interest.[42]

1. *Duty Under Negligence Per Se*

The duty to protect another from the consequences of voluntary intoxication arises from the Ohio penal statute. The statute provides: "No sales shall be made to an intoxicated person."[43] In order to give rise to negligence per se in Ohio, a statute must impose an absolute duty, make a specific requirement, and be enacted for the protection of the public.[44] The first two conditions require that "a positive and definite standard of care [be] established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact."[45] The statute must state the duty clearly and specfically.

The penal statute prohibiting sales to intoxicated persons meets all of these requirements. The statute establishes a specific duty and the jury need only determine whether the person was visibly intoxicated. Moreover, although no legislative history is available to confirm the purpose of the statute, the *Mason*[46] court's use of the statute to establish duty when the injured party is an innocent third person suggests the court believed that the statute was enacted for a public purpose.

---

39. Bizzell v. N.E.F.S. Rest, Inc., 27 A.D.2d 554, 275 N.Y.S. 2d 858 (1966); Paul v. Hogan, 56 A.D.2d 722, 392 N.Y.S.2d 766 (1977).

40. Swoboda v. Brown, 129 Ohio St. 512, 521, 196 N.E. 274, 278 (1935).

41. *Id.*

42. Scheibel v. Lipton, 156 Ohio St. 308, 330, 102 N.E.2d 453, 463 (1951).

43. Ohio Rev. Code Ann. § 4301.22 (B) (Page 1982).

44. Buckeye Stages v. Bowers, 129 Ohio St. 412, 414, 195 N.E. 859, 860 (1935).

45. Eisenhuth v. Moneyhon, 161 Ohio St. 367, 374, 119 N.E.2d 440, 444 (1954).

46. Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

In addition, at least two courts have included the intoxicated person in the protected class because the intoxicated person is unable to protect himself or herself. In *Christiansen v. Campbell*,[47] a South Carolina court stated:

> The reason the statute exists is to protect intoxicated persons from their own incompetence and helplessness . . . . The statute represents the legislature's judgment that an intoxicated person is a menace to himself . . . . Indeed, a purpose in prohibiting a vendor from selling beer to one who is already intoxicated is to prevent the person from becoming even more intoxicated so that he is not a greater risk when he leaves the bar.[48]

Other courts have included the intoxicated patron in the protected class because the statute purports to protect the patron from his own follies,[49] and the intoxicated person is much more in need of protection than a sober person.[50] These rationales, applied to the Ohio statute, support the inclusion of the intoxicated person in the protected class. Moreover, the statute certainly intends to protect the public, of which the intoxicated person is a member. Under Ohio law, a statute creates a duty if it is designed to protect the public interest.[51]

2. *Duty Under Principles of Negligence*

Irrespective of whether a violation of the penal statute is negligence per se, the duty not to serve intoxicated persons can arise from fundamental principles of negligence and from policy considerations. In addition to the tavern's duty not to serve intoxicated persons under the statute, "[i]t is the duty of the owner or occupier of premises to exercise ordinary or reasonable care for the safety of invitees . . . ."[52] Serving additional liquor to an impaired individual would fail to show reasonable care. "One dealing with a drunken person should anticipate that such a person often times will commit acts that he would refrain from so doing in his sober moments."[53] The liquor server is in the best position to recognize intoxication and to prevent further intoxication and injury by refusing further service.

The Fifth Circuit Court of Appeals, applying Louisiana law, recognized the duty not to serve intoxicated persons, relying on the principle of reasonable care. In *Farrington v. Houston's, Inc.*,[54] the defendant tavern served the plaintiff's husband liquor while he was intoxicated. After creating a disturbance, he was ejected from the bar. Shortly after he drove away, his car struck a tree and he was killed.[55] The court held that a tavern owes a duty both to business invitees to avoid acts that increase the peril of intoxicated persons and to other persons to protect them from the intoxicated person's disruptive and threatening behavior.[56]

---

47. 328 S.E.2d 351 (S.C. Ct. App. 1985).
48. *Id.* at 354.
49. Morris v. Farley Enters., Inc., 661 P.2d 167, 168–69 (Alaska 1983).
50. Ramsey v. Anctil, 106 N.H. 375, 377, 211 A.2d 900, 901 (1965).
51. Eisenhuth v. Moneyhon, 161 Ohio St. 367, 374, 119 N.E.2d 440, 444, (1954).
52. Kelly v. Daughters of Am., 19 Ohio Abs. 157, 159 (Mahoning Co. Ct. App. 1935).
53. Schafer v. Youngstown Mun. R.R. Co., 19 Ohio Abs. 205, 207 (Mahoning Co. Ct. App. 1935).
54. 750 F.2d 492 (5th Cir. 1985).
55. *Id.* at 493.
56. *Id.*

By allowing an innocent third person to recover for injuries caused by an intoxicated person,[57] Ohio already has recognized the duty not to serve intoxicated persons. Denying recovery to intoxicated persons on the ground that no duty exists would be inconsistent with the *Mason* decision, which explicitly recognized that duty.

B. *Lack of Proximate Cause*

A second rationale courts use to deny recovery to the intoxicated person is that drinking the liquor, not selling it, is the proximate cause of the injury.[58] Proximate cause is a necessary element of a negligence action. Under Ohio law, the injury must be the natural and probable consequence of the alleged negligence and must have been foreseeable in light of the attending circumstances.[59] If common experience does not show the negligence and the injury to be naturally in sequence, proximate cause is lacking.[60]

California adheres to the proximate cause rationale to deny liability. After the California Supreme Court allowed recovery by the intoxicated person in *Vesely v. Sager*,[61] the California legislature adopted Business and Professional Code section 25602, subdivision (c) which states:

> The Legislature hereby declares that this Section shall be interpreted so that holdings in cases such as *Vesely v. Sager . . . Bernhard v. Harrah's Club . . .* and *Coulter v. Superior Court . . .* be abrogated in favor of 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.[62]

This section intends to immunize certain alcoholic beverage providers from civil liability for injuries attributable to intoxication.[63]

The proximate cause rationale now remains in only a handful of jurisdictions.[64] Ohio has rejected this rationale when the injured party is an innocent third person.[65] Thus, proximate cause as a bar to recovery by the intoxicated person would not be consistent with Ohio law.

The proximate cause rationale fails to recognize that a tavern owner can witness the liquor consumption and foresee the consequences that naturally flow from drinking. A tavern is an establishment in which people consume alcohol. Unlike the owner of a liquor store, who cannot know when or how a sober liquor purchaser will drink the liquor, a tavern owner or operator can watch the liquor purchaser drink the

---

57. Mason v. Roberts, 33 Ohio St. 2d 29, 32–33, 294 N.E.2d 884, 887 (1973).
58. Cory v. Shierloh, 29 Cal. 3d 430, 437, 629 P.2d 8, 11–12, 174 Cal. Rptr. 500, 503–04 (1981).
59. Adams v. Young, 44 Ohio St. 80, 91, 4 N.E. 599, 604 (1886).
60. Railway Co. v. Staley, 41 Ohio St. 118, 122–23 (1884).
61. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
62. CAL. BUS. & PROF. CODE § 25602 (West 1985).
63. Cory v. Shierloh, 29 Cal. 3d 430, 437, 629 P.2d 8, 11, 174 Cal. Rptr. 500, 503 (1981).
64. The following cases have denied recovery because of a lack of proximate cause: Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981); Nolan v. Morelli, 154 Conn. 432, 266 A.2d 383 (1967); Wright v. Moffitt, 437 A.2d 554 (Del. Sup. 1981); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 378, 28 S.E.2d 329 (1943); Fisher v. O'Connor's Inc., 53 Md. App. 338, 452 A.2d 1313 (1982).
65. Mason v. Roberts, 33 Ohio St. 2d 29, 32–33, 294 N.E.2d 884, 887 (1973).

liquor while on the premises. If that purchaser is intoxicated, then the risk of harm to him or her is evident.[66]

Moreover, an act of negligence need not be the sole proximate cause of an injury to create liability.[67] The defendant's negligence may concur with another act to proximately cause the injury and the defendant is still liable.[68] Thus, although drinking is one cause of the injury, selling the liquor is a second cause that joins with the drinking to result in the injury. Since drinking liquor is a foreseeable result of selling liquor, the tavern should be liable for the consequences of the sale.

C. *Contributory Negligence and Assumption of the Risk*

The reason cited most often by courts that deny recovery by the intoxicated person is that the injured party was negligent and voluntarily assumed the risk of injury by deliberately drinking the liquor.[69] This is arguably the strongest reason for denying recovery. Undoubtedly, the intoxicated person was negligent to some degree in consuming the liquor.

One case denying recovery on this basis is *Swartzenberger v. Billings Labor Temple*.[70] In *Swartzenberger*, the intoxicated person, after being served while he was visibly intoxicated, fell down a flight of stairs and died.[71] The court denied recovery because the decedent was contributorily negligent. In the court's view, the decedent had become intoxicated voluntarily and disregarded his duty to use due care for his own safety. The decedent's contributory negligence intervened and became the proximate cause of his death.[72]

Ohio cases also have denied recovery on the basis of contributory negligence.[73] These cases, however, preceded the effective date of the comparative negligence statute. This statute provides:

> In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought. However, any damages recoverable by the person bringing the action shall be diminished by an amount that is proportionately equal to his percentage of negligence, which percentage is determined pursuant to division (B) of this section.[74]

This statute operates to reduce the injured party's recovery by the extent of his or her own negligence. The statute also merges with contributory negligence the defenses of

66. Tiger v. American Legion Post, 125 N.J. Super. 361, 369, 311 A.2d 179, 182 (1973).
67. Elder v. Fisher, 247 Ind. 598, 606, 217 N.E.2d 847, 852 (1966).
68. *Id.*
69. Thrasher v. Leggett, 373 So. 2d 494, 497 (La. 1979).
70. 179 Mont. 145, 586 P.2d 712 (1978).
71. *Id.* at 146, 586 P.2d at 712.
72. *Id.* at 150–51, 586 P.2d at 715.
73. Kemock v. Mark II, 62 Ohio App. 2d 103, 404 N.E.2d 766 (Cuyahoga Co. Ct. App. 1978); Tome v. Berea Pewter Mug, Inc., 4 Ohio App. 3d 98, 446 N.E.2d 848 (Cuyahoga Co. Ct. App. 1982).
74. OHIO REV. CODE ANN. § 2315.19(A)(I) (Page 1981).

assumption of the risk[75] and last clear chance.[76] With respect to these two counterparts to contributory negligence, one court stated: "It was the purpose of comparative negligence leglislation to remove the absolute bar to liability of the doctrines of contributory negligence and assumption of the risk, and to substitute instead a judgment of balance. Whichever party is more negligent, should be found liable for the accident."[77]

The comparative negligence statute does not allow recovery when the plaintiff's negligence exceeds the defendant's negligence. Both *Tome v. Berea Pewter Mug, Inc.*[78] and *Kemock v. Mark II*[79] held that an intoxicated person is held to the same standard of care as a sober person. This may diminish the effect of the comparative negligence statute. An intoxicated person is more likely to behave negligently than a sober person. If the intoxicated person is held to the same standard of care as a sober person, the intoxicated person's negligence often may exceed the tavern owner's negligence and prohibit recovery under the statute.

Courts in other jurisdictions have refused to allow the contributory negligence defense in an action by the intoxicated person. In *Majors v. Brodhead Hotel*,[80] the first case allowing recovery by the intoxicated person, the plaintiff was served liquor while he was visibly intoxicated. He then fell or jumped from a window in defendant's hotel and was injured.[81] The court denied the contributory negligence defense because the penal statute prohibiting sales to intoxicated persons intended to protect them from their inability to exercise self-protective care.[82] *Sorensen v. Olde Milford Inn, Inc.*[83] also used this rationale to allow recovery by an intoxicated person.

Another case that did not allow the contributory negligence defense was *Galvin v. Jennings*.[84] In *Galvin*, the plaintiff became intoxicated in defendant's tavern. Upon leaving, plaintiff had to be instructed by the bartender which way to turn the steering wheel because of his extreme inebriation. He was then injured in a car accident.[85] The court did not allow contributory negligence as a defense because the plaintiff had placed himself in a position of helpless peril; defendant, having knowledge of the situation, had an opportunity to prevent the injury by using reasonable care.[86] The

75. Anderson v. Ceccardi, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983). Assumption of the risk is consent or acquiescence in an appreciated or known risk. The defense applies only when the risk is so obvious that the plaintiff must have known and appreciated it.

76. Mitchell v. Ross, 14 Ohio App. 3d 75, 470 N.E.2d 245 (Cuyahoga Co. Ct. App. 1984). If the defendant was the last in time to be negligent—after becoming aware of the plaintiff's danger—the doctrine of last clear chance was an absolute bar to the defense of contributory negligence.

77. *Id.* at 77–78, 470 N.E.2d at 248.

78. 4 Ohio App. 3d 98, 102, 446 N.E.2d 848, 853 (Cuyahoga Co. Ct. App. 1982) (holding that "a person who is voluntarily intoxicated must be held to the same standard of care as a sober person . . .").

79. 62 Ohio App. 2d 103, 119, 404 N.E.2d 766, 777 (Cuyahoga Co. Ct. App. 1978) (holding that intoxication does not relieve one "from exercising the degree of care imposed upon a sober person under the same circumstances.").

80. 416 Pa. 265, 205 A.2d 873 (1965).

81. *Id.* at 268, 205 A.3d at 875.

82. *Id.* at 269, 205 A.2d at 876.

83. 46 N.J. 582, 218 A.2d 630 (1966).

84. 289 F.2d 15 (3d Cir. 1961).

85. *Id.* at 16.

86. *Id.* at 18.

plaintiff could no longer protect himself. The defendant's subsequent negligence barred the contributory negligence defense.[87]

Ohio could choose to follow the aforementioned cases by disallowing contributory negligence as a defense, rather than by applying comparative negligence. However, this approach would disregard Ohio's comparative negligence statute. Moreover, this approach fails to encourage the intoxicated person to assume any responsiblity for the consequences of his own intoxciation. Comparative negligence would place the burden of drinking-related injuries on both of the responsible parties.[88] Thus, both parties would be encouraged to limit liquor consumption.

If Ohio courts apply comparative negligence to cases involving injured intoxicated persons, a jury would decide the apportionment of liability among the parties based on the facts of the case. A jury could consider how much the bartender served the intoxicated person, the extent of the intoxication, and what signs of intoxication were visible.

In addition, to the previous two approaches, some courts have disregarded contributory or comparative negligence as a defense when the defendant's acts were wilful, wanton, or reckless.[89] In *Kemock*, the Ohio Eighth District Court of Appeals stated: "[I]f we find that a jury could conclude that [defendant's] conduct was such as to constitute wilful misconduct, and [plaintiff's] conduct to be merely negligent, [plaintiff] could recover."[90] Since this case antedated the enactment of the comparative negligence statute, wilful misconduct presumably also would bar the application of comparative negligence. Other courts have disregarded comparative negligence when the defendant was wilful, wanton, or reckless,[91] giving two reasons for this result: (1) The result is consistent with the comparative negligence statute's softening of the contributory negligence rule. Prior to comparative negligence, any contributory negligence by the plaintiff would completely bar recovery; and, (2) defendant's wilful, wanton, or reckless conduct is close to intentional.[92]

In Ohio, a violation of the penal statute would not necessarily constitute wilful and wanton negligence. The negligence determination is a question for the jury.[93] Wanton misconduct is defined as "all absence of care or an absolute perverse indifference to the safety of others, knowing of a dangerous situaton, yet failing to use ordinary care to avoid injury to others."[94] Thus, wanton misconduct would depend on the particular facts of the case. However, in many cases, wanton misconduct is likely to exist, particularly if the bartender was aware of a patron's extremely intoxicated condition and nonetheless continued to serve the patron. Thus,

---

87. *Id.*

88. *See supra* note 24.

89. Draney v. Bachman, 138 N.J. Super. 503, 514, 351 A.2d 409, 415 (1976); Davies v. Butler, 95 Nev. 763, 772, 602 P.2d 605, 611 (1979); Danculovich v. Brown, 593 P.2d 187, 194 (Wyo. 1979).

90. Kemock v. Mark II, 62 Ohio App. 2d 103, 117, 404 N.E.2d 766, 776 (Cuyahoga Co. Ct. App. 1978).

91. Draney v. Bachman, 138 N.J. Super. 503, 514, 351 A.2d 409, 415 (1976).

92. *Id.* at 507, 351 A.2d at 411.

93. Higbee Co. v. Jackson, 101 Ohio St. 75, 90, 128 N.E. 61, 65 (1920), *overruled on other grounds*, Union Gas & Elec. Co. v. Crouch, 123 Ohio St. 81, 174 N.E. 6 (1930).

94. Roszman v. Sammett, 26 Ohio St. 2d 94, 98, 269 N.E.2d 420, 423 (1971).

in the case of wanton misconduct, comparative negligence would not apply. The tavern would be solely liable.

D. *Exclusive Remedy Is Provided In Civil Damage Act*

One Iowa court has denied recovery to the intoxicated person on the ground that the Civil Damage Act provides the exclusive remedy for all dramshop actions.[95] A civil damage act is a state statute that expressly provides who may recover for drinking-related injuries and under what conditions recovery is possible.[96] This bar to recovery should not be an obstacle to Ohio courts because the Ohio Supreme Court has held that the Ohio Civil Damage Act is not the exclusive remedy.[97]

In *Mason*, the Ohio Supreme Court held that Ohio Revised Code section 4399.01, the Civil Damage Act,[98] does not provide the exclusive remedy for drinking-related injuries. The court stated:

> However, to hold that the enactment of R.C. 4399.01 had the effect of prohibiting any other cause of action from being asserted by a third person against a dispenser of intoxicating beverages, for harm caused by the recipient of those beverages, would serve to distort the purpose of the Dram Shop Act. As stated in *Howlett v. Doglio* (1949), 402 Ill. 311, 317, 83 N.E.2d 708, it was the purpose of these sort of acts that they 'shall be liberally construed, to the end that the health, safety and welfare of the people of this state shall be protected and temperance in the consumption of alcoholic liquors fostered and promoted by sound and careful control and regulation of their manufacture, sale and distribution.'[99]

The Ohio Supreme Court agreed with the court below that the purpose of the statute, to increase public protection, would be defeated if it construed the statute as an exclusive remedy.[100]

Furthermore, the wording of the Ohio statute differs substantially from the statute in *Robinson v. Bognanno*,[101] the Iowa case denying recovery on this basis. In *Robinson*, the plaintiff fell down a flight of stairs and was injured after becoming intoxicated on the defendant tavern's premises.[102] The court denied recovery on the ground that "[w]hen a dramshop action is created by statute it generally becomes exclusive."[103] The court distinguished *Majors*[104] and *Sorensen*,[105] the first two cases

---

95. Robinson v. Bognanno, 213 N.W.2d 530, 532 (Iowa 1973).
96. Mason v. Roberts, 33 Ohio St. 2d 29, 32, 294 N.E.2d 884, 887 (1973).
97. *Id.*
98. The Ohio Civil Damage Act provides:

> A husband, wife, child, parent, guardian, employer, or other person injured in person, property, or means of support by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of a person, after the issuance and during the existence of the order of the department of liquor control prohibiting the sales of intoxicating liquor as defined in section 4301.01 of the Revised Code to such person, has a right of action in his own name, severally or jointly, against any person selling or giving intoxicating liquors which cause such intoxication, in whole or in part, of such person.

OHIO REV. CODE ANN. § 4399.01 (Page 1982).
99. Mason v. Roberts, 33 Ohio St. 2d 29, 32, 294 N.E.2d 884, 887 (1973).
100. *Id.*
101. 213 N.W.2d 530 (Iowa 1973).
102. *Id.* at 531.
103. *Id.* at 532.
104. 416 Pa. 265, 205 A.2d 873 (1965).
105. 46 N.J. 582, 218 A.2d 630 (1966).

allowing the intoxicated person to recover, on the ground that those states did not have dramshop acts similar to Iowa Code section 123.93 which states, in part:

> Every husband, wife, child, parent, guardian, employer or other person who is injured in person or property or means of support by any intoxicated person or resulting from the intoxication of any such person, has a right of action, for all damages actually sustained, severally or jointly, against any licensee or permittee, who sells or gives any beer, wine, or intoxicating liquor to a person while the person is intoxicated, or serves a person to a point where the person is intoxicated.[106]

The Iowa court reasoned that "[i]n adopting the statutory right of recovery against dramshop operators, the legislature expressly and carefully limited the class of persons to whom that right was given."[107] This bar to recovery has been used similarly in Connecticut.[108]

The Ohio Civil Damage Act allows recovery only "after the issuance and during the existence of the order of the department of liquor control prohibiting the sale of intoxicating liquor as defined in section 4301.01 of the Revised Code to such person . . . ."[109] This statute is much more limiting than the Iowa statute. The Iowa statute incorporates a much broader class of victims and more appropriately may be deemed exclusive. Thus, the Ohio statute is really inapplicable.

E. *Other Reasons For Denying Recovery*

In addition to the rationales most often asserted, courts denying recovery to injured intoxicated persons have addressed several other problems.

1. *Problems With Balance of Powers and Administration*

Some courts that denied recovery reasoned that allowing recovery would create problems with the balance of power between the legislative and judicial branches of government. For example, in *Wright v. Moffitt*,[110] the Delaware Supreme Court denied recovery on the ground that the creation of a cause of action was best left to the legislature.[111] In *Wright*, the defendant tavern served the plaintiff liquor while he was visibly intoxicated. After leaving the tavern in an intoxicated state, plaintiff was struck by a car and injured.[112] The court commended the benefits of a law allowing recovery by intoxicated persons, but believed that the legislature could address the practical implications of this law.[113] The court stated:

> On the contrary, we think that a law which imposes some such responsibility on a licensee who wilfully or carelessly serves alcohol to an intoxicated patron has much to commend it. But, in our view, the General Assembly is in a far better position than this Court to gather

106. IOWA CODE ANN. § 123.92 (West Supp. 1986).
107. Robinson v. Bognanno, 213 N.W.2d 530, 532 (Iowa 1973).
108. Nolan v. Morelli, 154 Conn. 432, 435-36, 226 A.2d 383, 385 (1967).
109. OHIO REV. CODE ANN. § 4399.01 (Page 1982).
110. 437 A.2d 554 (Del. 1981).
111. *Id.* at 556.
112. *Id.* at 555.
113. *Id.* at 556.

> the empirical data and to make the fact finding necessary to determine what the public policy should be as to a Dram Shop law, and the scope of any such law.[114]

The Delaware Court was concerned with the following implications:

> [S]hould any such liability extend to a hotel dining room or restaurant owner (or to a social host) as well as to a 'tavern' owner? should it extend to assaults or other torts by an inebriated patron? to whom should such a cause of action accrue? should there be a special rule for minors?[115]

However, Ohio courts already have answered many of these questions. The Ohio Supreme Court has held that a social host is not liable for injuries caused by an intoxicated person[116] and that a tavern owner is liable for the violent acts of intoxicated patrons.[117] Furthermore, the wording of the penal statute itself—"[n]o *sales* shall be made to an intoxicated person"[118]—implies that a hotel dining room or restaurant owner would be liable for liquor sales to visibly intoxicated patrons. In other words, Ohio law draws the line by asking whether the liquor was sold. In addition, other courts have allowed minors to recover for injuries received after being served liquor[119] since the penal statute also prohibits sales to minors.[120] Thus, the courts, rather than the legislature, can and do address these questions.

In *Brannigan v. Raybuck*[121], an Arizona court considered the issue of recovery by the intoxicated person and declined to await legislative action. In *Brannigan*, the plaintiff's decedents were intoxicated minors. The defendant tavern served liquor to the minors, who were later killed in a car accident.[122] The defendant argued that the court should await legislative action. The court, however, stated:

> We believe there is a legislative objective to keep drunk drivers off the roads . . . . Adoption of a rule which will make those who furnish alcohol to those who are forbidden to use it civilly responsible to pay damages for the injuries caused by their violation of law is a step designed to meet a problem which has become acute. This is not judicial legislation, but merely the response of the common law to changed social conditions. If the legislature considers it to be unwise, it has the means of so informing us.[123]

In addition, *Brannigan* addressed other administrative problems with allowing the intoxicated person to recover. In *Brannigan*, the defendant argued that the rule of liability would pose difficulties if the patron had visited several taverns and had consumed varying amounts of liquor in each tavern.[124] In addition to specifically addressing each hypothetical situation, the *Brannigan* court recognized that these

---

114. *Id.*

115. *Id.*

116. Settlemyer v. Wilmington Veterans Post No. 49, Am. Legion, Inc., 11 Ohio St. 3d 123, 127, 464 N.E.2d 521, 524 (1984).

117. Taggart v. Bitzenhofer, 33 Ohio St. 2d 35, 36, 294 N.E.2d 226, 227 (1973).

118. OHIO REV. CODE ANN. § 4301.22(B) (Page 1982 & Supp. 1986) (emphasis added).

119. Brannigan v. Raybuck, 136 Ariz. 513, 518, 667 P.2d 213, 218 (1983); Morris v. Farley Enter., Inc., 661 P.2d 167, 170 (Alaska 1983).

120. OHIO REV. CODE ANN. § 4301.22(A) (Page 1982 & Supp. 1986).

121. 136 Ariz. 513, 667 P.2d 213 (1983).

122. *Id.* at 515, 667 P.2d at 215.

123. *Id.* at 519, 667 P.2d at 219.

124. *Id.*

causation problems exist in other tort actions and are not beyond the ability of the jury to decide. The court stated: "We acknowledge that the system will not handle each case perfectly, but we think it better to adopt a rule which will permit courts to attempt to achieve justice in all cases than to continue to rely on one which guarantees injustice in many cases."[125]

Other administrative problems such as the requisite level of intoxication and the necessary acts to show visible intoxication can be addressed by adopting an appropriate standard of proof. Ohio adopted an "actual knowledge" standard in *Settlemyer*[126] and *Mason*.[127] The liquor server must be aware of the patron's intoxication.[128] Whether the plaintiff meets this standard of proof is a question for the jury to answer.

2. *Burden on the Server*

Another argument against allowing recovery is that the duty not to serve intoxicated persons places too great a burden on the server.[129] During busy periods, the server may be unable to carefully observe all of his or her patrons. However, at least one Ohio tavern already addresses this concern. This tavern employs individuals specifically for the purpose of determining which patrons should no longer be served.[130] These employees mingle among the crowd and note which patrons are visibly intoxicated and should not be served additional liquor.[131]

Furthermore, seminars are held in Butler County, Ohio to educate the owners and employees of taverns about determining the intoxication level of patrons.[132] This seminar educates liquor servers to ask friendly questions such as "How was your day?" and "Where have you been today?", to ascertain the status of the patron's intoxication level.[133] If the patron has had a bad day or if he or she has been in places where intoxicants are sold, then the patron already may have had intoxicants that day. Thus, the server should be alert for signs of intoxication.[134] The seminar also provides servers with guidelines regarding the amount of liquor to serve under various conditions.[135]

Furthermore, allowing injured intoxicated patrons to recover damages does not increase the burden of serving intoxicated patrons. The penal statute imposes the duty.[136] Additionally, the server has this duty in Ohio because of the *Mason* rule allowing third persons to recover.[137] Moreover, the benefits discussed later in this

---

125. *Id.*

126. Settlemyer v. Wilmington Veterans Post No. 49, Am. Legion, Inc., 11 Ohio St. 3d 123, 126, 464 N.E.2d 521, 523 (1984).

127. Mason v. Roberts, 33 Ohio St. 2d 29, 34, 294 N.E.2d 884, 888 (1973).

128. Mason v. Roberts, 33 Ohio St. 2d 29, 34, 294 N.E.2d 884, 888 (1973); Settlemyer v. Wilmington Veterans Post No. 49, Am. Legion, Inc., 11 Ohio St. 3d 123, 126, 464 N.E.2d 521, 524 (1984).

129. Wright v. Moffitt, 437 A.2d 554 (Del. 1981).

130. The Brown Derby in North Canton, Ohio hires Buckeye Security for this purpose.

131. *See supra* note 130 and accompanying text.

132. Weikel, *Some Friendly Bartenders Testing Drinker's Condition*, Cin. Enquirer, Oct. 24, 1985, at E2.

133. *Id.*

134. *Id.*

135. *Id.*

136. OHIO REV. CODE ANN. § 4301.22(B) (Page 1982 & Supp. 1986).

137. Mason v. Roberts, 33 Ohio St. 2d 29, 32–33, 294 N.E.2d 884, 887 (1973).

Note outweigh any additional burden placed on the bartender by allowing the intoxicated person to recover.[138]

3. *Impact on Lawsuits*

One of the concerns posed by the Supreme Court of Delaware in *Wright v. Moffitt*[139] is that allowing recovery would result in a great number of lawsuits and thus burden the courts[140]. States that have allowed recovery, though, have not experienced this problem, perhaps because many of the cases settle out of court. Furthermore, courts exist for the purpose of providing a forum for the effective development of the law. The possibility of many lawsuits being filed should not impede the development of appropriate dramshop laws. Allowance of recovery by intoxicated persons is designed to prevent future accidents as well as to provide for compensation of the injured party.[141] Any burden on the courts will be outweighed by the social benefits realized in reducing the number of such accidents[142].

4. *Premium on Intoxication*

Allowing intoxicated persons to recover could place a premium on the state of intoxication. Individuals might drink more with the knowledge that the burden of any injury would be borne by the tavern. The purpose of allowing recovery, however, is to force servers to refuse to serve intoxicated persons and to prevent possible injury. The intoxicated person would not have the opportunity to drink more once the bartender was aware of the patron's intoxication. Moreover, it is unlikely that anyone drinks with the anticipation of injury and a lawsuit.

5. *Cause of Drunk Driving*

Beverage Retailers Against Drunk Driving (BRADD) has opposed the imposition of liability on the tavern, arguing that this would not have an impact on drunk driving[143]. BRADD contends that "most alcohol-related highway accidents are caused by drivers with serious drinking compulsions and that it is these problem drinkers, not casual drinkers, who must be targeted."[144] BRADD proposes tough first-time sentences and follow-up addiction treatment instead of imposing liability on the tavern owner.[145]

BRADD supports this argument with research showing that the overwhelming majority of those arrested for drunk driving have been in trouble with the law previously.[146] In addition, "sixty percent of drivers killed in alcohol-related accidents

---

138. *See infra* notes 152–64, and accompanying text.
139. 437 A.2d 554 (Del. 1981).
140. *Id.* at 556.
141. Kelly v. Gwinnell, 96 N.J. 538, 540, 476 A.2d 1219, 1222 (1984).
142. *See infra* notes 152–64, and accompanying text.
143. Moskowitz, *Trying to Temper Drunk-Driving Laws*, Bus. Wk., Sept. 30, 1985, at 52.
144. *Id.*
145. *Id.*
146. *Id.* at 53.

had blood-alcohol levels more than fifty percent above the standard for drunkenness."[147]

Although the concern that tavern liability will not affect drunk driving is valid, it may be less significant than BRADD indicates. First, BRADD is organized for the purpose of reducing dramshop liability and all arguments will reflect its self-interest.[148] Second, these statistics may not be as significant as they seem. Previous trouble with the law does not necessarily mean that the trouble was alcohol-related. Moreover, the blood-alcohol level for drunkenness in Ohio is .10.[149] Thus, fifty percent above the standard would imply a blood-alcohol level of .15. This level does not necessarily indicate a problem drinker, but may only reflect an infrequent occurrence for the individual. The duty not to serve intoxicated persons is designed to prevent individuals from attaining a high level of intoxication. The duty contemplates problem drinkers as well as those seeking occasional intoxication.[150] Casual drinkers[151] are not the focus of the law since casual drinkers would not be visibly intoxicated. Thus, BRADD's substantiating evidence does not strongly support the argument that tavern liability will not impact upon drunk driving.

III. Reasons Supporting Recovery

The recommendation that Ohio allow recovery by the intoxicated person follows from the weaknesses of the rationales discussed above. In addition, allowing recovery will provide many benefits.

A. *Economic Benefits*

1. *Financial Capabilities of the Tavern*

The most significant benefit from allowing recovery is the possibility of preventing an accident. Allowing intoxicated persons to recover for their injuries encourages the dramshop to adhere to its duty not to serve intoxicated patrons. A tavern is in business for a profit and responds to actions that threaten its profits. If the server may be liable for injuries to a patron, he or she is likely to take the necessary steps to prevent such an injury.

A dramshop's financial resources also provide it with the ability to supervise and control its patrons. The Ohio Supreme Court recognized this in *Settlemyer*.[152] In distinguishing social host liability from dramshop liability, the court stated:

---

147. *Id.*

148. *Id.* at 52.

149. Ohio Rev. Code Ann. § 4511.19(A)(2) (Page Supp. 1986).

150. Christiansen v. Campbell, 328 S.E.2d (S.C. Ct. App. 1985).

151. Drinkers have been classified according to the following scheme: Alcoholics drink an *average* of 8 ounces or more of pure alcohol daily; moderate drinkers drink an average of 3.5 ounces of pure alcohol daily; occasional drinkers drink an average of .5 ounces or less of pure alcohol daily. These quantities are daily averages and, thus, an occasional drinker could consume 7 ounces of pure alcohol over a two-week period. Committee on Medicolegal Problems, American Medical Association, Alcohol and the Impaired Driver at 7 (1968).

152. Settlemyer v. Wilmington Veterans Post No. 49, Am. Legion, Inc., 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984).

> [T]he commercial proprietor has a proprietary interest and profit motive, and should be expected to exercise greater supervision than in the (non-commercial) social setting. Moreover, a person in the business of selling and serving alcohol is usually better organized to control patrons, and has the financial wherewithal to do so. It also is reasonable to conclude that by virtue of its experience, the commercial proprietor is more familiar with its customers and their habits and capacities.[153]

Financially, the dramshop is capable of assuming the duty not to serve intoxicated patrons because it has the resources to provide supervision and control.

2. *Least Cost Avoider Theory*

In addition to its financial resources, a dramshop is in the best position to prevent the injury. The theory of the least cost avoider asserts that the entity that can avoid the accident at the least cost to society should bear liablity if an accident should occur.[154] The logic behind this theory is that liability will encourage the least cost avoider to prevent the accident.[155]

The least cost avoider initially is the intoxicated patron. He or she can prevent any alcohol-related accident by not drinking at all. However, after the patron has become intoxicated, the server becomes the least cost avoider. An extremely intoxicated person is no longer an "ordinary able-bodied m[a]n."[156] He cannot make a rational decision to stop drinking and cannot acknowledge the risk of his intoxication.[157] On the other hand, the server is likely to recognize the signs of intoxication and can refuse to continue serving the intoxicated person. The server should be aware of the various indicators of intoxication. Those courts allowing intoxicated persons to recover have recognized that the intoxicated person is incompetent and helpless,[158] is unable to care for himself,[159] and has a subnormal capacity for self-control.[160]

This dual aspect of the least cost avoider theory—the intoxicated patron and the server being least cost avoiders at different points in time—suggests that application of comparative negligence is the best approach to dramshop liability because it is the fairest way to apportion liability. Comparative negligence would encourage both parties to avoid the accident by making both of them liable for resulting injuries, according to each party's degree of fault.

---

153. *Id.* at 127, 464 N.E.2d at 524.

154. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). *See also*, Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 73 (1985); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977) (explaining least cost avoider theory).

155. *See supra* note 154.

156. Christiansen v. Campbell, 328 S.E.2d 351, 354 (S.C. Ct. App. 1985).

157. *Id.*

158. *Id.*

159. Majors v. Brodhead Hotel, 416 Pa. 265, 268, 205 A.2d 873, 875 (1965).

160. Brannigan v. Raybuck, 667 P.2d 213, 216 (Ariz. 1983).

B. *Public Policy Benefits*

Allowing recovery by intoxicated persons emphasizes the duty already imposed on tavern owners by the *Mason*[161] decision and the penal statute.[162] The most important benefit that could result from recognizing this duty is a reduction in the number of accidents to intoxicated persons, as well as to innocent third persons. In *Rappaport v. Nichols*, the Supreme Court of New Jersey stated:

> Liquor licensees, who operate their businesses by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons and if, as is likely, the result we have reached in the conscientious exercise of our traditional judicial function substantially increases their diligence in honoring that obligation, then the public interest will indeed be very well served.[163]

Thus, allowing recovery would benefit the public as a whole, and not just injured intoxicated persons.

Public concern for drunk driving is particularly acute now. Drunk driving is certainly one of the most senseless reasons for death or injury. The New Jersey court, in expanding liability to social host alcohol providers, stated:

> In a society where thousands of deaths are caused each year by drunken drivers, where the damage caused by such deaths is regarded increasingly as intolerable, where liquor licensees are prohibited from serving intoxicated adults, and where long-standing criminal sanctions against drunken driving have recently been significantly strengthened . . . the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy. Unlike those cases in which the definition of desirable policy is the subject of intense controversy, here the imposition of a duty is both consistent with and supportive of a social goal—the reduction of drunken driving—that is practically unanimously accepted by society.[164]

Indeed, other methods for reducing drunk driving may be more effective than dramshop liability. However, dramshop liability would prevent some accidents and deaths and therefore would be valuable to society.

IV. CONCLUSION

Whether a tavern should be liable for the injuries of an intoxicated patron is an issue many jurisdictions are currently addressing. The courts have split approximately equally with respect to allowing recovery.[165] Ohio courts have not had the opportunity to consider this issue in light of current changes in related areas of law.[166]

The law in Ohio has developed in accordance with the majority trends concerning dramshop liability. Prior to *Mason v. Roberts*,[167] Ohio adhered to the

---

161. Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

162. OHIO REV. CODE ANN. § 4301.22 (Page 1982 & Supp. 1986).

163. Rappaport v. Nichols, 31 N.J. 188, 205–06, 156 A.2d 1, 10 (1959).

164. Kelly v. Gwinnell, 96 N.J. 538, 544–45, 476 A.2d 1219, 1222 (1984). *See also*, Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985) (discussing public policy of preventing drunk driving).

165. *See supra* note 32.

166. *See supra* notes 29–37 and accompanying text.

167. 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

common law principle that the proximate cause of an alcohol-related injury was drinking the liquor, not selling it.[168] In *Mason*, the Supreme Court of Ohio rejected this rationale and allowed an innocent third person to recover from a tavern owner who served a visibly intoxicated person.

Thereafter, the Ohio Eighth District Court of Appeals considered whether the injured intoxicated person could recover from the tavern owner who served the intoxicated person.[169] The court denied recovery because of the intoxicated person's contributory negligence.[170] However, Ohio has enacted a comparative negligence statute in the wake of these decisions.[171]

In light of these developments, the rationales used by other courts to deny recovery would not be consistent with Ohio law. This Note recommends that Ohio allow recovery within the framework of comparative negligence. This would place the burden of responsibility on both the tavern and the intoxicated person. In addition, this Note discusses the benefits associated with allowing recovery. First, a dramshop is capable of supervising and controlling its patrons. The bartender is in the best position to prevent injury once the patron is intoxicated. Second, recovery by the intoxicated person could reduce the number of accidents to both intoxicated persons and innocent third persons. Thus, society as a whole would benefit.

Julia A. Harden

168. Christoff v. Gradsky, 140 N.E.2d 586, 589 (Montgomery Co. C.P. 1956).
169. Icme v. Berea Pewter Mug Inc., 4 Ohio App. 3d 98, 446 N.E.2d 848 (Cuyahoga Co. Ct. App. 1982).
170. *Id.* at 104, 446 N.E.2d at 855.
171. OHIO REV. CODE ANN. § 2315.19 (Page 1981).