



1984

Third Party Liability for Drunken Driving: When One for the Road Becomes One for the Courts

Julius F. Lang Jr.

John J. McGrath

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Criminal Law Commons](#), [Legal Remedies Commons](#), and the [Torts Commons](#)

Recommended Citation

Julius F. Lang Jr. & John J. McGrath, *Third Party Liability for Drunken Driving: When One for the Road Becomes One for the Courts*, 29 Vill. L. Rev. 1119 (1984).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol29/iss5/3>

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1983-84]

Comment

THIRD PARTY LIABILITY FOR DRUNKEN DRIVING: WHEN “ONE FOR THE ROAD” BECOMES ONE FOR THE COURTS

I.	INTRODUCTION	1120
II.	SUPPLIERS OF ALCOHOL LIABLE FOR DRUNKEN DRIVING	1122
	A. <i>Vendor Liability</i>	1122
	1. <i>Vendor Liability Under Traditional Common Law</i>	1122
	2. <i>Vendor Liability Under Dramshop Legislation</i>	1124
	3. <i>Vendor Civil Liability for Violation of Statute</i>	1135
	4. <i>Vendor Liability Under Modern Common Law</i>	1141
	B. <i>Social Host Liability</i>	1143
	1. <i>Social Host Liability Under Traditional Common Law</i>	1143
	2. <i>Social Host Liability Under Dramshop Legislation</i>	1145
	3. <i>Specific Legislation Directed Toward Social Host Liability</i> ...	1149
	4. <i>Social Host Civil Liability for Violation of Statute</i>	1151
	5. <i>Social Host Liability Under Modern Common Law: Abrogation of the Rule of Nonliability</i>	1157
	C. <i>Affirmative Defenses for Vendors and Social Hosts</i>	1160
	1. <i>Defenses to Actions Based Upon a Dramshop Act</i>	1161
	a. <i>Contributory/Comparative Negligence</i>	1161
	b. <i>Participation or Complicity</i>	1161
	c. <i>Assumption of the Risk</i>	1165
	d. <i>Statutory Defenses</i>	1167
	2. <i>Defenses to Actions Based Upon Violation of an Alcoholic Beverage Control Act</i>	1168
	a. <i>Contributory/Comparative Negligence</i>	1168
	b. <i>Willful and Wanton Misconduct</i>	1170
	c. <i>Participation or Complicity</i>	1172
	d. <i>Excuse or Justification</i>	1173
	3. <i>Defenses to Actions Based Upon Common Law Negligence</i> ...	1174
III.	NONSUPPLIERS OF ALCOHOL LIABLE FOR DRUNKEN DRIVING	1174
	A. <i>Negligent Entrustment</i>	1174
	B. <i>Respondeat Superior</i>	1177
	C. <i>Common Law Duty to Control Conduct of Others</i>	1180
IV.	ANALYSIS AND RECOMMENDATIONS	1184
	A. <i>Vendor and Social Host Liability</i>	1184
	B. <i>Liability for Nonsuppliers of Alcoholic Beverages</i>	1190
V.	CONCLUSION	1191
	APPENDIX	1193

(1119)

I. INTRODUCTION

Drunken driving today is a problem of staggering proportions.¹ Its cost to society has been estimated at over twenty-four billion dollars per year, but the value of human lives lost as a result of accidents caused by drunken driving remains immeasurable.²

Who is to pay for the injuries that stem from drunken driving, and how is drunken driving to be stopped? The drunken driver himself has long been criminally and civilly responsible for his drunken driving and the injuries it causes to others.³ Recently, legislatures across the country have enacted more stringent criminal sanctions for drunken driving in response to outcries that existing laws were inadequate to dissuade citizens from drinking and driving.⁴ In addition, legislatures and the courts have imposed greater civil liability on the drunken driver as society has become less tolerant of his transgression.⁵ Despite these changes, however, the problem of compensating the victims remains, because in many instances the drunk is unable to satisfy

1. It has been reported that in 1981, alcohol was involved in 50% of all fatal traffic accidents and in 20% of accidents involving serious injury to a driver or passenger. See Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D.L. REV. 445, 445 (1983) [hereinafter cited as Note, *Social Host Liability*]. See also Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1675 (1981) (arrests for drunken driving exceed 1.2 million each year, surpassing any other type of arrest).

2. See S.J. Res. 119, 98th Cong., 1st Sess., 97 Stat. 725 (1983) (proclaiming National Drunk and Drugged Driving Awareness Week, December 11-17, 1983). The Joint Resolution of Congress observed that traffic accidents resulted in over 44,000 deaths in 1982 and that in 50% of those fatal incidents, the driver was legally intoxicated. *Id.*

3. For a general discussion of the criminal liability of the drunk driver, see 7A AM. JUR. 2D *Automobiles and Highway Traffic* §§ 296-310 (1980). For a general discussion of the civil liability of the drunk driver, see *id.* § 775.

4. See, e.g., N.J. STAT. ANN. § 39:4-50 (West 1984); Act of Dec. 14, 1982, 1982 Ohio Legis. Serv. 5-500 (Baldwin) (codified in various sections of chs. 29, 37, 45 OHIO REV. CODE ANN. (Page Supp. 1982)). In 1982, 27 states had enacted more stringent laws imposing sanctions upon drunk drivers, and legislation was pending in a number of other states. See Starr, *The War Against Drunk Drivers*, Newsweek, Sept. 13, 1982, at 34, 35. The New Jersey statute, for example, imposes the following punishments: first offense—fine not less than \$250.00 nor more than \$400.00, or imprisonment for not more than 30 days, or both, and suspension of license for not fewer than six months nor more than one year; second offense—fine not less than \$500.00 nor more than \$1000.00, plus 30 days community service, or imprisonment for no more than 90 days, and suspension of license for two years; third offense—fine of \$1000.00 and imprisonment for not fewer than 180 days and suspension of license for ten years. N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1984). For a discussion of the Ohio drunken driving law, which imposes mandatory imprisonment sanctions, see generally Note, *S. 432: Ohio Enacts Stringent Penalties to Deter Driving While Intoxicated*, 9 U. DAYTON L. REV. 147 (1983). For a general discussion of how other countries deter drunken driving, see ROSS, *DETERRING THE DRINKING DRIVER* (1982).

5. See generally Kraft, *The Drive to Stop the Drinker from Driving: Suggested Civil Approaches*, 59 N.D.L. REV. 391 (1983) (suggesting that legislatures adopt a civil approach to deter the drinking driver). Many plaintiffs injured by drunken drivers also seek punitive damages from the inebriated tortfeasor. See Note, *The Drunken Driver and Punitive Damages: A Survey of the Case Law and the Feasibility of a Punitive Damage Award in North Dakota*, 59 N.D.L. REV. 413, 414 (1983).

a monetary judgment. This comment will focus on the civil liability of third parties for the damages caused by drunken drivers.⁶

Originally, at common law, a supplier of liquor could not be held liable in negligence for injuries caused or sustained by an "able-bodied man" to whom the supplier had furnished intoxicating beverages.⁷ This view was founded upon the notion that the consumption of alcohol was a superceding cause of the drinker's intoxication; the serving of alcohol was an act too remote to be the proximate cause of the drinker's intoxication and the resulting injuries.⁸ However, legislatures and courts have broken with this common law rule and have imposed civil liability on suppliers and other third parties. These defendants may be divided into three categories: (1) vendors who sell intoxicants to the drunken driver;⁹ (2) social hosts who gratuitously provide alcoholic beverages to the drunken driver;¹⁰ and (3) nonsuppliers of liquor who are held liable either because of some tortious conduct on their part or because of their relationship to the drunken

6. The "third parties" whose liability is the subject of this comment may be defined as persons other than the drunken driver who may be held liable for the driver's torts. They include those who supply alcohol to minors or inebriates, either in a commercial or social setting, and those who may be secondarily liable even though they did not furnish the intoxicating beverages.

7. See Note, *Social Host Liability*, *supra* note 1, at 446. See also *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889). As the *Cruse* court noted:

It was not a tort, at common law, to either sell or give intoxicating liquor to "a strong and able-bodied man," and it can be said safely that it is not anywhere laid down in the books that such act was ever held, at common law, to be culpable negligence, that would impose legal liability for damages upon the vendor or donor of such liquor.

Id. at 234, 20 N.E. at 74. For a list of jurisdictions that continue to follow this rule, see note 85 *infra*.

8. See, e.g., *Collier v. Stamatis*, 63 Ariz. 285, 290, 162 P.2d 125, 127 (1945) ("The principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking."); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 254, 78 A.2d 754, 756 (1951) ("Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor.").

One court explained the policies underlying the rule that serving alcohol is not the proximate cause of subsequent injuries as follows:

We are convinced that such courts [that allow recovery against vendors of alcoholic beverages] are basically unable to disentrall themselves of the lurking suspicion that liquor in and of itself is evil. This, in spite of the fact that the legislature here, as in almost every other state, has determined as public policy that liquor is part and parcel of our social scene. Abused it may be; evils it may produce; accidents, injury, and death it may cause . . . but legitimate the selling and consuming of it is declared. Indeed both state and federal governments indulge in the taxation and/or wholesaling of it, from which flow great sums of money into governmental treasuries.

Meade v. Freeman, 93 Idaho 389, 395, 462 P.2d 54, 60 (1969).

9. For a discussion of the liability of vendors under various theories, see notes 12-103 and accompanying text *infra*.

10. For a discussion of the liability of social hosts (nonvendors), see notes 105-200 and accompanying text *infra*.

driver.¹¹

This comment will discuss the civil liability of persons in these three categories by focusing on the theories under which such liability is imposed—dramshop acts granting a civil cause of action, negligence established by violation of a criminal statute, and common law negligence. Two strong but opposing trends will be discerned: the enlargement of liability for all three groups, especially social hosts (principally by the courts), and the limitation on liability for vendors and social hosts (principally by the legislatures). These trends are indicative of the many competing interests involved: deterrence of drunken driving versus reluctance to constrain social and business relations, and compensation for injured parties versus the financial burden on the parties held liable. The comment will conclude by examining the existing approaches to third party liability for drunken driving in light of these competing interests, and will then suggest a legislative response to the problem which will accommodate them. This prototypical Alcoholic Beverage Suppliers' Civil Liability Act is set forth in an appendix.

II. SUPPLIERS OF ALCOHOL LIABLE FOR DRUNKEN DRIVING

A. Vendor Liability

1. Vendor Liability Under Traditional Common Law

Under the traditional common law view, a commercial supplier of liquor could not be held liable for injuries caused or suffered by an intoxicated patron to whom the vendor had furnished alcohol.¹² Nevertheless, courts occasionally have broken with this view and have imposed liability upon vendors whose conduct exhibited a degree of culpability greater than negligence. In these situations, courts have imposed liability on the ground that the vendor's serving of a particular customer constituted willful misconduct.¹³ Willful and wanton misconduct has been defined as the "intentional

11. For a discussion of the liability of persons who have not supplied liquor to the intoxicated tortfeasor, see notes 295-331 and accompanying text *infra*.

12. For a discussion of the common law rule barring recovery against a supplier of alcoholic beverages, see notes 7-8 and accompanying text *supra*.

13. In some early cases, courts held vendors liable for serving slaves without their owners' consent, apparently on a theory that slaves were without any ability to resist the evils of alcohol. *See, e.g., Skinner v. Hughes*, 13 Mo. 440 (1850) (slave owner has cause of action against sellers of whiskey to her slave when the latter became intoxicated and froze to death; death was natural consequence since sale was "like placing noxious food within the reach of domestic animals").

However, most courts holding vendors liable under the common law required willful misconduct by the vendor in serving a person he knew to be helplessly intoxicated or otherwise as to be without the power to resist drinking. *See Hull v. Rund*, 150 Colo. 425, 427, 374 P.2d 351, 352 (1962) (supplier liable for injuries if he serves person in such condition as to be deprived of will power or responsibility for behavior); *Dunlap v. Wagner*, 85 Ind. 529, 530 (1882) ("A man who, in violation of law makes another helplessly drunk, and then places him in a situation where his drunken condition is likely to bring harm to himself or injury to others, may well be deemed guilty of an actionable wrong independently of any statute."); *McCue v. Klein*, 60 Tex. 168, 169 (1883) (defendants found liable for wrongful death after

doing of something . . . with knowledge, express or implied, that serious injury is a probable, as distinguished from possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences."¹⁴

In invoking this theory, courts have tended to require rather egregious fact situations before permitting the question of willful and wanton serving of alcohol to go to the jury.¹⁵ For example, in *Ewing v. Cloverleaf Bowl*,¹⁶ the plaintiffs brought a wrongful death action against a vendor alleging willful misconduct in his serving ten shots of 151-proof rum, two beer chasers, and one vodka collins in the space of one and one-half hours to someone who he knew had just turned twenty-one.¹⁷ The court held that a jury could find that the vendor acted with willful misconduct since (1) he was aware of the young patron's inexperience; (2) he knew of the customer's continued drinking; and (3) he disregarded the tavern's own practices regarding the serving of visibly intoxicated patrons and the pouring of certain size shots.¹⁸

However, in contrast to *Ewing*, some courts do not agree that a plaintiff may recover even if he can prove that the vendor engaged in willful miscon-

willfully and recklessly conspiring to induce habitual drunk to swallow large quantity of whiskey, knowing it was likely to end in his death).

Other cases allowed wives to recover against vendors for loss of consortium when their intemperate husbands were served in spite of notice having been given to the vendor not to do so. *See Swanson v. Ball*, 67 S.D. 161, 290 N.W. 482 (1940) (tavernkeepers liable for loss of consortium to wife resulting from their repeated sales of liquor to husband after numerous protests and warnings against serving him); *Riden v. Gremm Bros.*, 97 Tenn. 220, 36 S.W. 1097 (1896) (common law liability imposed on vendors for serving large quantities of alcoholic beverages to plaintiff's husband after written notice of his habitual drunkenness).

At least one court allowed a jury to determine whether a vendor intentionally sold liquor to a patron with the purpose of injuring him. *See Nally v. Blandford*, 291 S.W.2d 832 (Ky. 1956) (vendor could be liable where he sold quart of whiskey to patron knowing of his wager that he could drink entire bottle without stopping and patron died after drinking most of bottle).

14. *See Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 402, 572 P.2d 1155, 1161, 143 Cal. Rptr. 13, 20 (1978) (quoting *Williams v. Carr*, 68 Cal. 2d 579, 584, 440 P.2d 505, 509, 68 Cal. Rptr. 305, 309 (1968)).

15. *See Grasser v. Fleming*, 74 Mich. App. 338, 340, 253 N.W.2d 757, 758 (1977) (defendant sold liquor to visibly intoxicated elderly man after being requested by the plaintiff not to serve him because of weakness for alcohol and after agreeing not to serve him); *Davies v. Butler*, 95 Nev. 763, 766, 602 P.2d 605, 607 (1979) (after three days of initiation activity involving imbibing liquor, initiates in "drinking club" were given and urged to drink large quantities of liquor, some of it 190 proof, within one-half hour). *But cf. Kowal v. Hofher*, 181 Conn. 355, 436 A.2d 1 (1980) (permittee could be found wanton and reckless for serving alcoholic beverages to visibly intoxicated person who later drove car negligently and caused accident which killed plaintiff's decedent).

16. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

17. *Id.* at 396-98, 572 P.2d at 1157-58, 143 Cal. Rptr. at 16-17. The plaintiffs also alleged negligence, but the court noted that, assuming the person served was found by the jury to be negligent himself, the plaintiffs could only recover against the defendant on a willful misconduct theory. *Id.* at 398-404, 572 P.2d at 1158-61, 143 Cal. Rptr. at 17-21.

18. *Id.* at 403-04, 572 P.2d at 1162-63, 143 Cal. Rptr. at 20-21.

duct in serving a customer.¹⁹ Moreover, those courts that do recognize the cause of action often reject particular claims because the conduct alleged is not exceptional enough.²⁰

2. *Vendor Liability Under Dramshop Legislation*

States began to impose civil liability on vendors of alcoholic beverages for the consequences of their patrons' drunkenness through the use of "dramshop" or "civil damage" acts in the mid-nineteenth century.²¹ Dean Prosser describes a dramshop act as one "impos[ing] strict liability, without negligence, upon the seller of intoxicating liquor, when the sale results in harm to the interests of a third person because of the intoxication of the buyer."²²

At one time or another, thirty-eight states have had some form of dramshop act.²³ These laws were enacted as a result of the efforts of prohibitionists to curtail the availability of alcoholic beverages;²⁴ these same efforts were ultimately rewarded in 1919 with the passage of the eighteenth amendment

19. *See, e.g.*, *Ruth v. Benvenuti*, 114 Ill. App. 3d 404, 407, 449 N.E.2d 209, 211 (1983) (no common law cause of action based upon willful and wanton misconduct by tavernkeeper, however egregious the underlying facts; dramshop act is exclusive remedy against vendors).

20. *See, e.g.*, *Lucido v. Apollo Lanes & Bar, Inc.*, 123 Mich. App. 267, 333 N.W.2d 246 (1983) (defendant vendor, without asking for identification, sold alcoholic beverages to minor who was visibly intoxicated; court held that facts of case did not state claim for gross negligence); *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1981) (plaintiff alleged that merchant sold beer to minor without requesting identification and had regularly sold beer to minors without identification in the past; court held there was no willful and wanton misconduct as matter of law since "no suggestion of any special circumstances" surrounded sale to minor in question).

21. Wisconsin, in 1849, was the first state to pass an act providing for civil liability of a tavernkeeper. *See McGough, Dramshop Acts*, 1966-67 PROCEEDINGS OF A.B.A. SECTION OF INS., NEGL. & COMPENSATION L. 448, 449. These acts are also known as "civil damage," "civil damages" or "civil liability" acts. "Dramshop" has always been a term of purely legal significance, seldom found in nonlegal parlance. *Id.* at 448. It was originally used to refer to taverns selling alcoholic beverages in amounts of less than one gallon. *Id.*

22. PROSSER AND KEETON ON THE LAW OF TORTS § 81, at 581 (W. Keeton 5th ed. 1984) (footnotes omitted) [hereinafter cited as PROSSER AND KEETON].

23. The author of one study was unable to find a dramshop act in these jurisdictions: Alaska, Arizona, California, District of Columbia, Florida, Georgia, Hawaii, Idaho, Louisiana, Maryland, Mississippi, Montana, Tennessee, Utah, and Virginia. *See McGough, supra* note 21, at 449. Since that study was published, California and Utah have passed dramshop acts, so there are a total of twelve states that have never had a dramshop act. *See CAL. BUS. & PROF. CODE* § 25602.1 (West Supp. 1984); *UTAH CODE ANN.* §§ 32-11-1 to -2 (Supp. 1983).

24. *See Johnson, Drunken Driving—The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317, 320 (1961-1962); *McGough, supra* note 21, at 449-50. Although frequently cited as a judicial response to the harshness of the common law rule barring compensation for the victims of drunkenness, dramshop acts actually were enacted to stop the consumption of "demon rum." While legislators could have been motivated to some extent by a desire to compensate the relatively few persons injured by drunkenness in the pre-automobile age, their primary concern (or, more likely, that of their constituents) was to discourage imbibing. *See Comment, Liquor*,

and national prohibition.²⁵ After prohibition ended in 1933, states began to repeal their dramshop acts.²⁶ By 1978, only eighteen states had such acts on their books,²⁷ and no state had adopted one in the preceding forty years.²⁸

In more recent years, however, dramshop legislation has enjoyed a renaissance, with new acts being passed by three state assemblies²⁹ and being introduced in others.³⁰ Moreover, it appears that this trend will continue, this time sparked not by a conviction that liquor is immoral, but rather by public pressures to deter drunken driving and to compensate the victims of those accidents that do occur.³¹

Dramshop acts in effect today³² are usually described as being either

the Law, and California: One Step Forward—Two Steps Backward, 16 SAN DIEGO L. REV. 355, 356-57 n.8 (1979).

25. See D. KYVIG, REPEALING NATIONAL PROHIBITION 5-6 (1979) (prohibition was result of long temperance campaign, as well as progressive political movement and period of self-denial resulting from World War I).

26. See McGough, *supra* note 21, at 455.

27. Comment, *supra* note 24, at 356 n.8.

28. As of 1967, no state without a pre-existing act had adopted one since 1935. McGough, *supra* note 21, at 451. States changing the provisions of their dramshop acts by adopting a new act are not considered to be states "adopting a dramshop act" for the purposes of this discussion. The authors know of no state to adopt a dramshop act from 1935 until 1978, when California did so. See CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984).

29. See California, 1978: CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984); North Carolina, 1983: N.C. GEN. STAT. §§ 18B-120 to -129 (1983); Utah, 1981: UTAH CODE ANN. §§ 32-11-1 to -2 (Supp. 1983).

30. For example, during the 1983 session of the Texas legislature at least twenty-two bills relating to drunken driving were introduced in the house of representatives alone. See *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 318 n.2 (Tex. 1983) (McGee, J., dissenting). One of these, House Bill 708, would have imposed civil liability upon a vendor who knowingly sold liquor to an intoxicated person. Tex. H.B. 708, 68th Leg. (1983).

In Arizona, two dramshop bills were recently introduced but never passed. See *Ontiveros v. Borak*, 136 Ariz. 500, 512, 667 P.2d 200, 212 (1983).

31. For a discussion of the motivations underlying the passage of the original dramshop acts, see note 24 *supra*. There is no question that modern dramshop legislation is being enacted in response to the drunken driving situation. For example, the recent North Carolina dramshop provisions were passed as part of that state's Safe Roads Act of 1983, which was the result of the recommendations made by Governor James B. Hunt's Task Force on Drunken Driving. See N.C. GEN. STAT. §§ 18B-120 to -129 (1983); J. DRENNAN, THE SAFE ROADS ACT OF 1983: A SUMMARY AND COMPILATION OF STATUTES AMENDED OR AFFECTED BY THE ACT (1983). For further discussion of the purposes sought to be achieved by the North Carolina act, see notes 46-47 *infra*.

32. There are eighteen states with dramshop acts in effect at the present time: Alabama, ALA. CODE § 6-5-71 (1975); California, CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984); Colorado, COLO. REV. STAT. § 13-21-103 (1973); Connecticut, CONN. GEN. STAT. ANN. § 30-102 (West 1975); Georgia, GA. CODE ANN. § 51-1-18 (1982); Illinois, ILL. ANN. STAT. ch. 43, § 135-6-21 (Smith-Hurd Supp. 1984); Iowa, IOWA CODE ANN. § 123.92 (West Supp. 1984-1985); Maine, ME. REV. STAT. ANN. tit. 17, § 2002 (1983); Michigan, MICH. COMP. LAWS ANN. § 436.22(5) (West Supp. 1984); Minnesota, MINN. STAT. ANN. § 340.95 (West Supp. 1984); New York, N.Y. GEN. OBLIG. LAW §§ 11-100 to -101 (McKinney 1978 & Supp. 1983);

broad or narrow in form.³³ Currently, eight states have broad dramshop acts.³⁴ The language of a broad dramshop act is typified by that of the New York statute:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.³⁵

Although these broad statutes appear to grant a cause of action to *anyone* who is injured by the intoxicated person or by reason of his own intoxication, courts have usually barred the intoxicated person himself from invoking the statute in order to sue a supplier for his own injuries.³⁶ The effect of the

North Carolina, N.C. GEN. STAT. §§ 18B-120 to -129 (1983); North Dakota, N.D. CENT. CODE § 5-01-06 (Supp. 1983); Ohio, OHIO REV. CODE ANN. § 4399.01 (Page 1982); Rhode Island, R.I. GEN. LAWS §§ 3-11-1 to -2 (1976); Utah, UTAH CODE ANN. §§ 32-11-1 to -2 (Supp. 1983); Vermont, VT. STAT. ANN. tit. 7, § 501 (1972); Wyoming, WYO. STAT. § 12-5-502 (1982).

33. Many commentators have adopted this distinction. *See, e.g.*, Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLETTE L.J. 561, 564, 568 (1980); Kennan, *Liquor Law Liability in California*, 14 SANTA CLARA L. REV. 46, 52 (1973); Note, *Social Host Liability*, *supra* note 1, at 450.

34. *See* ALA. CODE § 6-5-71 (1975); ILL. ANN. STAT. ch. 43, § 135-6-21 (Smith-Hurd Supp. 1983); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MICH. COMP. LAWS ANN. § 436.22(5) (West Supp. 1984); N.Y. GEN. OBLIG. LAW §§ 11-100 to -101 (McKinney 1978 & Supp. 1983); N.D. CENT. CODE § 5-01-06 (Supp. 1983); UTAH CODE ANN. §§ 32-11-1 to -2 (Supp. 1983); VT. STAT. ANN. tit. 7, § 501 (1972).

35. N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1978). In 1983, the New York Legislature added a provision providing for civil liability for persons who knowingly cause "intoxication by unlawfully serving" a person that the server knows or has reasonable cause to believe is under nineteen years of age. N.Y. GEN. OBLIG. LAW § 11-100 (McKinney Supp. 1983-1984). This provision makes the dramshop act's coverage more broad by including minors as well as intoxicated persons within its protected class.

36. *See, e.g.*, *Maples v. Chinese Palace, Inc.*, 389 So. 2d 120, 123-24 (Ala. 1980) (person served has no cause of action under dramshop act); *Gora v. 7-11 Food Stores*, 109 Ill. App. 3d 109, 110, 440 N.E.2d 279, 280-81 (1982) (dramshop act restricted to third parties suffering damages resulting from actions of intoxicated person); *Ciemierek v. Jim's Garage*, 90 Mich. App. 565, 569, 282 N.W.2d 396, 398 (1979) (under dramshop act, intoxicated person has no right of action against bar). For a discussion of defenses relating to the plaintiff's fault, see notes 207-40 & 253-92 and accompanying text *infra*.

Similarly, although the wording of this type of dramshop act would seem to grant a cause of action against nonvendors, as of this writing there have been only two cases in which courts have permitted recovery against nonvendor defendants under a dramshop act. *See* *Williams v. Klemesrud*, 197 N.W.2d 614 (Iowa 1972) (minor requested that defendant adult procure liquor for him from state liquor store, and then injured plaintiffs in automobile accident after consuming liquor; plaintiffs held to have cause of action under dramshop act against defendant not engaged in

broad dramshop acts, therefore, has been to hold vendors civilly liable for damage to person, property or means of support sustained by persons other than the intoxicated patron.³⁷

Narrow dramshop acts are currently in effect in ten states.³⁸ In contrast to their broader counterparts, these acts place various limitations on the vendor's liability for the acts of his intoxicated patrons. For example, some statutes restrict the class of plaintiffs to those third persons who have given the server prior notice of the patron's intemperate habits³⁹ or of the patron's minority.⁴⁰ One statute further limits this class to the father, or, if the father is dead, to the mother, of a minor served without parental permission.⁴¹ In addition, some dramshop acts impose limitations on the amount a plaintiff may recover.⁴² In some states, a shorter statute of limitations is provided for

liquor traffic); *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972) (defendants who purchased liquor for minor who became intoxicated and was killed in automobile accident held liable under civil damage act since legislation found to include nonvendors). For a more detailed discussion of the *Ross* case, see notes 130-40 and accompanying text *infra*.

Furthermore, in those two states—Iowa and Minnesota—the legislatures subsequently amended their laws specifically to preclude nonvendor liability under a dramshop act. For a discussion of the legislative reaction to these two cases, see notes 122 & 139-40 and accompanying text *infra*.

37. For a general discussion of the types of injuries for which damages are recoverable under the dramshop acts, see 45 AM. JUR. 2D *Intoxicating Liquors* §§ 566-575 (1969).

38. See CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); GA. CODE ANN. § 51-1-18 (1982); IOWA CODE ANN. § 123.92 (West Supp. 1984); MINN. STAT. ANN. § 340.95 (West Supp. 1984); N.C. GEN. STAT. §§ 18B-120 to -129 (1983); OHIO REV. CODE ANN. § 4399.01 (Page 1982); R.I. GEN. LAWS §§ 3-11-1 to -2 (1976); WYO. STAT. § 12-5-502 (1982).

39. See, e.g., COLO. REV. STAT. § 13-21-103 (1973) (husband, wife, child, parent, guardian or employer must notify defendant in writing not to serve person who is habitual drunkard, or else defendant will not be liable); R.I. GEN. LAWS § 3-11-2 (1976) (in order to recover, husband, wife, parent, child, guardian or employer must have notified defendant in writing within past twelve months not to serve excessive drinker); WYO. STAT. § 12-5-502 (1982) (spouse or dependent may give written notice that spouse or person supporting dependent is habitual drunkard and is neglecting support because of drunkenness; if licensee serves anyway, person giving notice may bring suit).

Rather than restricting the class of plaintiffs directly, Ohio's statute places a restriction on the class of intoxicated persons covered by its provisions. See OHIO REV. CODE ANN. § 4399.01 (Page 1982) (recovery precluded unless the intoxicated person was served after the department of liquor control had issued an order "black-listing" him).

40. WYO. STAT. § 12-5-502 (1982) (court, parent or guardian may give written notice to licensee that child or ward is under 19; if licensee serves anyway, person giving notice may bring suit).

41. GA. CODE ANN. § 51-1-18(a) (1982).

42. See, e.g., CONN. GEN. STAT. ANN. § 30-102 (West 1975) (\$20,000 per person injured, up to \$50,000 per action); N.C. GEN. STAT. § 18B-123 (1983) (\$500,000 per occurrence). Illinois, considered to be a state with a broad statute, also imposes limits on recovery. See ILL. ANN. STAT. ch. 43, § 135-6-21 (Smith-Hurd Supp. 1984) (\$15,000 for injuries to person or property of any person; \$20,000 for loss of support).

dramshop actions than for other personal injury cases,⁴³ and in two states the action will be barred if the plaintiff does not give notice to the defendant within a specified period of time of his intention to bring suit.⁴⁴ With restrictions such as these, the traditional narrowly drawn dramshop act is generally not very helpful to persons seeking compensation from vendors for injuries resulting from drunken driving.⁴⁵

Notably, however, North Carolina recently enacted a narrowly drawn dramshop act⁴⁶ as part of that state's Safe Roads Act of 1983.⁴⁷ This act is a more workable modern approach to the problem of vendor liability.⁴⁸ The North Carolina act addresses itself only to the serving of minors, but specifi-

43. *See, e.g.*, CONN. GEN. STAT. ANN. § 30-102 (West 1975) (action must be brought within one year of act or omission); ILL. ANN. STAT. ch. 43, § 135-6-21 (Smith-Hurd Supp. 1984) (action barred unless brought within one year after cause of action accrued); MICH. COMP. LAWS ANN. § 436.22(5) (West Supp. 1984) (action must be brought within two years after injury or death); N.C. GEN. STAT. § 18B-126 (1983) (one year statute of limitations).

44. *See* CONN. GEN. STAT. ANN. § 30-102 (West 1975) (requires notice of intent to bring action within 60 days after injury occurred); IOWA CODE ANN. § 123.93 (West Supp. 1984-1985) (six-month written notice required, but time period may be extended if plaintiff incapacitated or unable through reasonable diligence to discover defendants' names).

45. One authority has stated that most narrow dramshop acts are "so limited as to be of little practical consequence" anymore, and that suits are rarely brought under them. McGough, *supra* note 21, at 450-51. This same authority has referred to the dramshop acts in general as "something of an anachronism." *Id.* at 455. Wisconsin recently recognized this, and repealed a dramshop act that granted a cause of action to persons injured through the intoxication of a minor or habitual drunkard who was served by a person that had been notified not to serve the minor or habitual drunkard. *See* 1981 Wis. Laws 79511 (repealing Wis. STAT. ANN. § 176.35 (West 1974)) ("This provision was deleted because it is not used and appears to be unworkable.").

46. N.C. GEN. STAT. §§ 18B-120 to -129 (1983). This statute is considered "narrow" because recovery is limited to situations where a minor has been improperly served.

47. 1983 N.C. Adv. Legis. Serv. 435. The full title of the bill is "An Act to Provide Safe Roads by Requiring Mandatory Jail Terms for Grossly Aggravated Drunken Drivers, Providing an Effective Deterrent to Reduce the Incidence of Impaired Driving, and Clarifying the Statutes Related to Drinking and Driving." *Id.* North Carolina's dramshop act was thus enacted as part of a legislative "package" aimed at the problem of drunken driving that enlarged both criminal and civil liability in the hope of deterring drunken driving. *Id.*

48. Dramshop acts recently enacted in other states are more in the traditional mold. California's statute is very narrow, and confines a claim for relief strictly to the situation where a vendor serves an obviously intoxicated minor. *See* CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984). Utah's statute, although broad in form, is written along the lines of a temperance-era dramshop act, granting a cause of action to any third person injured as a result of the intoxication of a person furnished alcohol by the defendant. *See* UTAH CODE ANN. §§ 32-11-1 to -2 (Supp. 1983). This act does not address itself to any special compensation or deterrence problems, and grants immunity to the state for injuries arising from its involvement in the distribution of alcoholic beverages. UTAH CODE ANN. §§ 32-11-1 to -2 (Supp. 1983). Nevertheless, the new Utah dramshop act could apply to social hosts. For a discussion of this possibility, see note 125 *infra*.

cally states that it leaves all common law causes of action intact.⁴⁹ The act imposes civil liability upon a permittee⁵⁰ and upon local alcoholic beverage control boards⁵¹ if the plaintiff brings suit within one year⁵² and proves three elements. First, the plaintiff must prove that the sale of liquor was negligent under the circumstances.⁵³ The act offers guidelines for proving this element,⁵⁴ stating that proof that a vendor made a sale without requesting identification constitutes evidence of negligence.⁵⁵ The defendant may try to rebut the inference of negligence by introducing proof that the vendor engaged in good practices,⁵⁶ evidence that the minor lied about his age,⁵⁷ or

49. N.C. GEN. STAT. § 18B-128 (1983). Thus, the act does not preempt actions in negligence against vendors for serving intoxicated adults. *See, e.g.*, *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983) (cause of action against vendor exists for person injured in collision with intoxicated adult who had been served by tavern while in intoxicated condition in violation of statute). Indeed, the act originally addressed itself to the serving of intoxicated persons as well as minors, but included only minors in the final form. However, the legislature sought to ensure that no conclusions denying liability be drawn from this intentional omission by including the following provision in the act:

The original inclusion and ultimate deletion in the course of passing this act of statutory liability for certain persons who sell or furnish alcoholic beverages to intoxicated persons does not reflect any legislative intent one way or the other with respect to the issue of civil liability for negligence by persons who sell or furnish those beverages to such persons.

1983 N.C. Adv. Legis. Serv. 435 § 41.1.

50. N.C. GEN. STAT. § 18B-121 (1983). Thus, persons who sell alcoholic beverages without a permit, as well as social hosts who dispense alcoholic beverages without charging, are excluded from being named defendants under the act.

51. *Id.* Local alcoholic beverage control (ABC) boards operate state liquor stores in North Carolina. N.C. GEN. STAT. § 18B-800 (1983) (spirits or liquor may be sold only in ABC stores operated by local boards, except for retail sales by permittees). *Cf.* UTAH CODE ANN. § 32-11-2 (Supp. 1983) (providing immunity to the state, its agencies, employees, or political subdivisions for their activities in the sale of alcoholic beverages).

52. N.C. GEN. STAT. §§ 18B-121, -126 (1983). The one-year period of limitation is short in comparison to that applicable to other dramshop actions. Most dramshop acts do not specify any limitation period, and thus carry the same limitation period that would apply to other personal injury claims under their respective state laws. For a listing of those states that apply a short limitation period to their dramshop acts, see note 43 *supra*.

53. N.C. GEN. STAT. § 18B-121(1) (1983).

54. *Id.* § 18B-122. By adopting this negligence standard North Carolina departed from the traditional strict liability imposed by dramshop acts. *See* PROSSER AND KEETON, *supra* note 22, § 81, at 581.

55. N.C. GEN. STAT. § 18B-122 (1983). In most states that have decided the question, the serving of alcohol in violation of an alcoholic beverage control act is negligence *per se* rather than merely evidence of negligence. *See* note 93 and accompanying text *infra*. In any case, it is possible that someone who serves a minor in North Carolina but exercises due care in that he asks for and is shown credible identification would not be found to violate North Carolina's alcoholic beverage control act. *See* N.C. GEN. STAT. § 18B-302(d) (1983) (allowing for defense in criminal action that purchaser produced identification or otherwise led the server to conclude reasonably that he was of legal age).

56. N.C. GEN. STAT. § 18B-122 (1983). The statute provides that proof of good practices shall include but not be limited to "instruction of employees as to laws

evidence that the sale was made under duress.⁵⁸ Second, the plaintiff must prove that the consumption of the alcohol furnished by the defendant "caused or contributed to, in whole or in part"⁵⁹ the minor's intoxication at the time of injury.⁶⁰ Third, the plaintiff must establish that the minor's negligent operation of a vehicle while "impaired" was the proximate cause of the injury.⁶¹ Recovery under the act is limited to \$500,000 per occurrence.⁶² If a permittee does not satisfy a judgment against him, his permit will be revoked.⁶³

A third legislative response to the question of vendor liability has been the passage of what might be called "anti-dramshop" acts. Enacted in seven states,⁶⁴ anti-dramshop laws seek primarily to exempt vendors from civil liability except under some very specified—and usually very narrow—set of

regarding the sale of alcoholic beverages, training of employees, enforcement techniques, admonishment to patrons concerning laws regarding the purchase or furnishing of alcoholic beverages, or detention of a person's identification documents in accordance with G.S. 18B-129 and inquiry about the age or degree of intoxication of the person." *Id.* The act authorizes the permittee to retain identification documents for a "reasonable length of time" to determine if the patron is of legal age as long as he informs the patron of his reasons for doing so. *Id.* § 18B-129.

57. *Id.* § 18B-122. The drinking age in North Carolina is 19 for wine with an alcohol content between 6% and 17% and for beer, but 21 for stronger wines, liquor and mixed drinks. *Id.* § 18B-302(b).

58. *Id.* § 18B-122.

59. *Id.* § 18B-121(2). This language is rather broad, since it would seem that any serving of alcohol could be shown to "contribute . . . in part" to a person's intoxication. Similar language appears in other dramshop acts. *See* COLO. REV. STAT. § 13-21-103 (1973); ME. REV. STAT. tit. 17, § 2002 (1983); VT. STAT. ANN. tit. 7, § 501 (1972). For a criticism of this standard as being too onerous on the defendant server, see Comment, *supra* note 24, at 356 n.8.

60. N.C. GEN. STAT. § 18B-121(2) (1983).

61. *Id.* § 18B-121(3). The act refers to the minor's "being subject to an impairing substance . . . at the time of the injury." *Id.* § 18B-121(2). This is defined in the state's Motor Vehicles Code as driving "under the influence of an impairing substance," or having an alcohol concentration in the blood of 0.10% or more. *Id.* § 20-138.1(a). An "impairing substance" under the Motor Vehicle Code is defined as including "[a]lcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." *Id.* § 20-4.01(14a) (emphasis added). Thus, it would seem that a person could have less than .10% alcohol concentration in his blood and still be "subject to an impairing substance . . . at the time of injury." *Id.* § 18B-121(2).

62. *Id.* § 18B-123. For a comparison with other dramshop acts having a limitation on damages, see note 42 *supra*.

63. N.C. GEN. STAT. § 18B-1003(d) (1983). Additionally, no new permit will be issued to the person whose permit was revoked so long as the judgment remains outstanding. *Id.* § 18B-900(a)(7).

64. *See* Alaska, ALASKA STAT. § 04.21.020 (1983); California, CAL. BUS. & PROF. CODE §§ 25602-25602.1 (West Supp. 1984); Florida, FLA. STAT. ANN. § 768.125 (West Supp. 1984); Indiana, IND. CODE ANN. § 7.1-5-7-8 (West Supp. 1984); New Mexico, N.M. STAT. ANN. § 41-11-1 (Supp. 1984); Oregon, OR. REV. STAT. §§ 30.950-960 (1983); Pennsylvania, PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969).

circumstances.⁶⁵ The Pennsylvania⁶⁶ and Oregon⁶⁷ statutes limit the liabil-

65. The focus of the anti-dramshop acts is on limiting liability rather than providing compensation, i.e., on protecting defendants rather than plaintiffs. These statutes have resulted primarily from pressure applied by special interest groups, such as professional associations and the insurance industry, urging legislatures to cut back on remedies created by the courts for persons injured through their own intoxication or that of others. *See, e.g.*, *Sager v. McClenden*, 296 Or. 33, ___, 672 P.2d 697, 700 (1983) (anti-dramshop legislation was "proposed by Oregon Restaurant and Beverage Association and supported by various commercial alcoholic beverage servers," who "testified at hearings . . . that they were concerned about the expansion of their liability" and that it had become "much more difficult and expensive to obtain" liability insurance).

For the text of the various acts, see notes 66-67, 69-72 & 74 *infra*.

66. The Pennsylvania statute, passed in 1951, provides as follows:

No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee, unless the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969). The "visibly intoxicated" language appears to limit only a licensee's liability to a third person. *Id.* Thus, it would seem to allow for vendor liability for injuries sustained by an intoxicated minor who was sober when served but to preclude recovery by third persons injured by that same minor. *See* *Simon v. Shirley*, 269 Pa. Super. 364, 367 n.5, 409 A.2d 1365, 1366 n.5 (1979) (vendor violating alcoholic beverage control act by serving minor not civilly liable for injuries to third parties resulting therefrom if minor not visibly intoxicated when served; court implied that result would be different if illegally served patron had sought recovery).

67. The three Oregon provisions, passed in 1979, provide as follows:

No licensee or permittee is liable for damages incurred or caused by intoxicated patrons off the licensee's or permittee's business premises unless the licensee or permittee has served or provided the patron alcoholic beverages when such patron was visibly intoxicated.

OR. REV. STAT. § 30.950 (1983).

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.

Id. § 30.955.

Notwithstanding ORS 30.950, 30.955 and 471.130, no licensee, permittee or social host shall be liable to third persons injured by or through persons not having reached 21 years of age who obtained alcoholic beverages from the licensee, permittee or social host unless it is demonstrated that a reasonable person would have determined that identification should have been requested or that the identification exhibited was altered or did not accurately describe the person to whom the alcoholic liquor was sold or served.

Id. § 30.960.

The Supreme Court of Oregon recently had the opportunity to interpret § 30.950. *See* *Sager v. McClenden*, 296 Or. 33, 672 P.2d 697 (1983). In that case the plaintiff was the personal representative of the decedent who was served while intoxicated by the defendant licensees, and was fatally injured when he fell and struck his head. *Id.* at ___, 672 P.2d at 698. Since Oregon does not recognize a common law cause of action in favor of the intoxicated patron against the tavernkeeper, the plaintiff tried to argue that § 30.950 expressly created one. *Id.* at ___, 672 P.2d at 698. Rather than ruling that the statute only limited existing causes of action without creating a new one, the court instead determined that the legislature never intended the phrase "damages incurred or caused by intoxicated persons" to mean injuries to the

ity of vendors to suits by injured third parties in situations where the vendor sold liquor to a patron who was visibly intoxicated when served.⁶⁸ The New Mexico statute limits the liability of licensees to situations in which the licensee served an intoxicated person, the intoxication was "reasonably apparent" to the defendant, and the defendant "knew from the circumstances" that the person served was intoxicated.⁶⁹ Alaska limits the liability of vendors to

intoxicated person himself, but only injuries and damages to others for which the intoxicated person could be found liable. *Id.* at ___, 672 P.2d at 699-701 (emphasis added). The court therefore held that § 30.950 did not create a claim in favor of intoxicated persons against liquor licensees who served them when they were visibly intoxicated. *Id.* at ___, 672 P.2d at 701.

In explaining why it had construed the statute against the plaintiff, the Oregon court stated that the "legislative history of ORS § 30.950 indicate[d] that its purpose was to limit the liability of liquor licensees and permittees to third parties," because those licensees and permittees were "concerned about the expansion of their liability from . . . recent decisions of this court." *Id.* at ___, 672 P.2d at 700. It is submitted that it would have made more sense for the court to have decided the case by emphasizing the limiting functions of the statute on existing causes of action than to engage in a rather tortured construction of statutory language.

68. *See* OR. REV. STAT. § 30.950 (1983); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969). In jurisdictions that do not recognize this limitation, a party can recover if injured by a minor who purchases alcohol when sober but then becomes intoxicated and drives negligently. *Compare* Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 453 N.E.2d 430 (1983) (vendor can be liable for serving minor who is not visibly intoxicated since it is proscribed by alcoholic beverage act) *with* Simon v. Shirley, 269 Pa. Super. 364, 409 A.2d 1365 (1979) (vendor not liable for serving minor in violation of alcoholic beverage control act; liability limited by statute to situation where minor also visibly intoxicated when served).

69. N.M. STAT. ANN. § 41-11-1 (Supp. 1984). The New Mexico "anti-dram-shop" act provides:

A. No civil liability shall be predicated upon the breach of Section 60-7A-16 NMSA 1978 by a licensee, except in the case of the licensee who:

- (1) sold or served alcohol to a person who was intoxicated; and
- (2) it was reasonably apparent to the licensee that the person buying or apparently receiving service of alcoholic beverages was intoxicated; and
- (3) the licensee knew from the circumstances that the person buying or receiving service of alcoholic beverages is [was] intoxicated [sic].

B. No licensee is chargeable with knowledge of previous acts by which a person becomes intoxicated at other locations unknown to the licensee.

C. As used in this section, "licensee" means a person licensed under the provisions of the Liquor Control Act and the agents or servants of the licensee.

D. No person who has gratuitously provided alcoholic beverages to a guest in a social setting may be held liable in damages to any person for bodily injury, death or property damage arising from the intoxication of the social guest unless the alcoholic beverages were provided recklessly in disregard of the rights of others, including the social guest.

E. A licensee may be civilly liable for negligent violation of Sections 60-7B-1 and 60-7B-1.1 NMSA 1978. The fact-finder shall consider all the circumstances of the sale in determining whether there is negligence such as the representation used to obtain the alcoholic beverage. It shall not be negligence per se to violate Sections 60-7B-1 and 60-7B-1.1 NMSA 1978.

Id. New Mexico was in the minority of states that would not allow a person injured as a result of the intoxication of another to have a claim for relief against the server

licensees or their agents who serve a drunken person, or who serve a minor without securing a reasonably reliable identification document or statement from the minor that he is of legal drinking age.⁷⁰ California limits the liability of vendors to situations where the patron is an intoxicated minor.⁷¹ The

until 1982, when the state supreme court removed the bar. *See Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982). For a list of other jurisdictions that maintain such a bar, see note 87 *infra*. In *Lopez*, the defendant licensee sold alcohol to a visibly intoxicated man who later drove his car into that of Lopez, killing Lopez's wife and two of his children, causing a third child to go into a coma, and injuring two other children and Lopez himself. *Id.* at 627, 651 P.2d at 1271. The court held:

[A] person may be subject to liability if he or she breaches his or her duty by violating a statute or regulation which prohibits the selling or serving of alcoholic liquor to an intoxicated person; the breach of which is found to be the proximate cause of injuries to a third party.

Id. at 632, 651 P.2d at 1276. In passing the "anti-dramshop" act, the legislature was apparently reacting to the *Lopez* case. Although the plaintiff Lopez would probably have been able to recover despite the law's limitations, it seems clear that the legislature wanted to curb further judicial expansion of liability, especially into such areas as social host liability.

70. ALASKA STAT. § 04.21.020 (1983). The Alaska statute states as follows:

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

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

(2) the alcoholic beverages are provided to a drunken person in violation of AS 04.16.030.

71. CAL. BUS. & PROF. CODE §§ 25602-25602.1 (West Supp. 1984). The California statute, passed in 1978, provides as follows:

(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

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

CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984).

Although this statute would seem to preclude any civil liability for the serving of alcoholic beverages, the California dramshop act provides for a very limited cause of action:

Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or

Florida statute absolves a vendor of civil liability for the results of his patron's intoxication unless the vendor "willfully and unlawfully" served a minor,⁷² or "knowingly" served a habitual drunkard.⁷³ Indiana, rather than limiting the liability of all vendors, limits only the liability of "educational institutions of higher learning" to situations where they sell or otherwise supply alcoholic beverages to a minor.⁷⁴

death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person.

CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984).

It would appear that since § 25602.1 only makes an exception to subsection (b) of § 25602, and not subsection (c), a plaintiff could never succeed under § 25602.1. This is so because subsection (c) states that the consumption of alcoholic beverages and not their serving is, as a matter of law, the proximate cause of injuries inflicted by intoxicated persons. Nevertheless courts have construed § 25602.1 to allow for recovery for third persons injured by a minor who was obviously intoxicated when served by a licensee, but have denied recovery to the minor himself. *See Alendrin v. Shakey's Pizza Parlor Co.*, 151 Cal. App. 3d 370, ___ Cal. Rptr. ___ (1984).

72. FLA. STAT. ANN. § 768.125 (West Supp. 1984). The Florida statute, passed in 1980, provides as follows:

A person who sells 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 to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

Id.

The "willfully" language was recently interpreted by a Florida appellate court. *See Willis v. Strickland*, 436 So. 2d 1011 (Fla. Dist. Ct. App. 1983). In *Willis*, a third party injured in an automobile accident caused by an intoxicated minor sued a vendor who had sold alcoholic beverages to the minor without asking for identification, despite the minor having the "appearance, speech and mannerism of a sixteen year old." *Id.* at 1012. The defendant vendor argued that for a sale to be "willful" the seller must have actual knowledge that the purchaser is not of legal age. *Id.* The *Willis* court agreed, but stated that such knowledge may be proved either by direct evidence of actual knowledge or by circumstantial evidence, including facts relating to the apparent age of a person. *Id.* The court noted that a person's appearance "alone can impart knowledge of his or her age within certain ranges and to certain degree of certainty," and that it is up to the jury to decide whether such knowledge was imparted in a particular instance. *Id.* at 1012-13.

73. FLA. STAT. ANN. § 768.125 (West Supp. 1984). The usual "visibly intoxicated" person is absent from this class of persons. Thus it would seem that in Florida a vendor will not be liable for damage resulting from the drunken driving of any drunkard he serves who does not happen to be a "habitual" or "minor" one.

74. IND. CODE ANN. § 7.1-5-7-8 (West Supp. 1984). The statute provides:

This section shall not be construed to impose civil liability upon any educational institution of higher learning, including but not limited to public and private universities and colleges, business schools, vocational schools, and schools for continuing education, or its agents for injury to any person or property sustained in consequence of a violation of this section unless

3. *Vendor's Civil Liability for Violation of Statute*

Until 1959, courts generally followed the view that a vendor could only be held liable for damages caused by a patron's drunken driving under a dramshop act.⁷⁵ In 1959, however, the New Jersey Supreme Court issued the landmark opinion of *Rappaport v. Nichols*.⁷⁶ The resolution of this case marked the first time a state supreme court broke with this tradition and allowed a cause of action against a vendor in the absence of a dramshop act.⁷⁷ In *Rappaport*, the court considered whether a vendor could be held liable for injuries caused by an intoxicated minor who had been served by the defendant in violation of the New Jersey Alcoholic Beverage Control Act, which prohibited the serving of minors and intoxicated persons.⁷⁸ Initially, the *Rappaport* court determined that the Act was intended to protect the general public rather than merely minors or intoxicated persons.⁷⁹ The

such institution or its agent sells, barters, exchanges, provides, or furnishes an alcoholic beverage to a minor.

Id.

75. *See, e.g.*, *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949) (no recovery against vendor who served person he knew to be minor under the influence of alcohol); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951) (no recovery against vendor who sold alcohol to minor in violation of alcoholic beverage control act). For a discussion of the traditional common law approach, see notes 7-8 *supra*.

76. 31 N.J. 188, 156 A.2d 1 (1959).

77. *Id.* at 204, 156 A.2d at 10. It was necessary for the court to take this route to afford relief because New Jersey had repealed its dramshop act in 1934, 25 years before the *Rappaport* decision. *Id.* at 200, 156 A.2d at 8.

Just prior to *Rappaport*, two other courts had broken with the traditional common law proximate cause analysis. *See Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959) (in absence of dramshop act, tavernkeepers who sold alcoholic beverages to visibly intoxicated persons are liable to third persons injured or killed in collision caused by drunken driving), *cert. denied*, 362 U.S. 903 (1960); *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958) (even in absence of dramshop act, patron served while visibly intoxicated has cause of action against tavernkeeper for injuries received in altercation caused by patron's drunkenness). Both of these cases were cited with approval in the *Rappaport* opinion itself. *See Rappaport*, 31 N.J. at 197-98, 156 A.2d at 6-7.

78. 31 N.J. at 192, 156 A.2d at 3. The New Jersey Alcoholic Beverage Control Act prohibits sales to minors. *Id.* at 201-02, 156 A.2d at 8. *See* N.J. STAT. ANN. § 33.1-77 (West Supp. 1984). Although the act itself does not prohibit sales to visibly intoxicated persons, it authorizes the Director of the Division of Alcoholic Beverage Control to make rules and regulations governing the manufacture, sale and distribution of alcoholic beverages. *Id.* § 33.1-30. The serving in *Rappaport* was in violation of the section of the act prohibiting sales to minors and also was in violation of a regulation prohibiting the serving of visibly intoxicated persons. 31 N.J. at 201, 156 A.2d at 8.

79. 31 N.J. at 202, 156 A.2d at 8-9. For a court to adopt a criminal statute as the standard of care in a negligence action, the plaintiff usually must be a member of the class of persons sought to be protected by the statute, and the harm suffered must be of the kind the statute was intended to prevent. *See* PROSSER AND KEETON, *supra* note 22, § 36, at 220-27. The *Rappaport* court was thus deciding that the plaintiff was in the class of persons sought to be protected by the Alcoholic Beverage Control Act. The court then further determined that injuries resulting from accidents caused by drunken driving were the harm sought to be prevented by the statute, and thus that

court then stated that the statute provided the minimum standard of care for the tavernkeeper, and that its violation constituted evidence of negligence.⁸⁰ Although the issue of proximate cause traditionally had proven fatal to a plaintiff's cause of action,⁸¹ the *Rappaport* court observed that a person ought to be held liable for injuries if his negligence was a substantial factor in creating them, and if those injuries followed in the ordinary course of events from his negligence.⁸² Accordingly, the court concluded that a vendor could be held accountable for injuries resulting from drunken driving if the vendor sold alcoholic beverages to a minor in violation of a state statute and the sale resulted in the minor's intoxication and in turn caused the minor's negligent driving.⁸³

the harm suffered by the plaintiff was also within the purview of the act. 31 N.J. at 202-03, 156 A.2d at 8-9.

80. 31 N.J. at 202, 156 A.2d at 9. In holding that a violation of the statute or regulation was evidence of negligence, the *Rappaport* court said that the plaintiff could introduce further evidence that the vendor knew or should have known that the patron was a minor or was intoxicated when served. *Id.* at 203, 156 A.2d at 9. On the other hand, the court found that the vendor could claim that it "did not know or have reason to believe that its patron was a minor, or intoxicated when served, and that it acted as a reasonably prudent person would have acted at the time and under the circumstances." *Id.*

The *Rappaport* court's treatment of the violation of a statute as evidence of negligence is that of a minority of courts today: the majority view is that once a statute is adopted as the standard of care, its violation is negligence per se. See PROSSER AND KEETON, *supra* note 22, § 36, at 29-30.

81. For a discussion of the traditional common law rule that the consumption and not the serving of alcohol is the proximate cause of injuries resulting from the intoxication, see note 7 and accompanying text *supra*. To analyze the question of proximate cause, once cause in fact has been established, Prosser and Keeton suggest asking whether the defendant was "under a duty to protect the plaintiff against the event which did in fact occur." PROSSER AND KEETON, *supra* note 22, § 42, at 274 (footnote omitted). They note that this is essentially a matter of public policy. *Id.*

The New Jersey court decided that, in view of the high frequency of accidents from drunken driving, the harm was foreseeable and that it was therefore proper to impose a duty. 31 N.J. at 204, 156 A.2d at 8-9. The *Rappaport* court reasoned that its decision would do justice to innocent third parties injured through drunken driving, would fortify the statutory and regulatory program to prevent improper sales, and would not be unduly burdensome on defendants who could always avoid liability by exercising due care. *Id.* at 205, 156 A.2d at 10. In conclusion, the court 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.

Id. at 205-06, 156 A.2d at 10.

82. 31 N.J. at 203-04, 156 A.2d at 9. The *Rappaport* court further stated that an intervening cause, such as the patron's negligent operation of a vehicle while intoxicated, would only cut off liability to the tavernkeeper if it was unforeseeable or was not a formal incident of the risk created by the tavernkeeper's negligence. *Id.*

83. *Id.* at 204, 156 A.2d at 9. The court held that, under these circumstances, "a jury could reasonably find that the plaintiff's injuries resulted in the ordinary course of events from the defendant's negligence and that such negligence was, in fact, a substantial factor in bringing them about." *Id.* at 204, 156 A.2d at 9. For a discus-

All fifty states as well as the District of Columbia have alcoholic beverage control acts such as the one at issue in *Rappaport*.⁸⁴ Although some states continue to adhere to the old common law rule,⁸⁵ most states now hold that a vendor's violation of such an act constitutes either negligence per se or

sion of the defenses available in a negligence action based upon the violation of an alcoholic beverage control statute, see notes 253-92 and accompanying text *infra*.

Furthermore, the *Rappaport* court held that a jury could reasonably find that negligent driving on the part of a minor is a foreseeable or "normal incident of the risk" created by the defendant servers, and not a superceding cause that would cut off the server's liability for the plaintiff's injuries. See 31 N.J. at 204, 156 A.2d at 9.

84. See ALA. CODE § 28-3A-25 (Supp. 1984); ALASKA STAT. §§ 4.16.030, .16.051-.052 (1980); ARIZ. REV. STAT. ANN. §§ 4-241, -244 (1974); ARK. STAT. ANN. § 48-529 (1977); CAL. BUS. & PROF. CODE §§ 25602, 25658 (West Supp. 1984); COLO. REV. STAT. § 12-47-128 (1978); CONN. GEN. STAT. ANN. § 30-86 (West 1975); DEL. CODE ANN. tit. 4, §§ 711, 713 (1974); D.C. CODE ANN. § 25-121 (Supp. 1984); FLA. STAT. ANN. § 562.11 (West Supp. 1984); GA. CODE ANN. §§ 3-3-22 to -23 (1982); HAWAII REV. STAT. § 281-78(2) (1976); IDAHO CODE §§ 23-312, -929 (1979); ILL. ANN. STAT. ch. 43, § 131 (Smith-Hurd Supp. 1984); IND. CODE ANN. §§ 7.1.-5-7-8, -14 to -15 (West 1982 & Supp. 1983); IOWA CODE ANN. §§ 123.47, .49 (West Supp. 1984); KAN. STAT. ANN. §§ 41-261, -2704 (1973); KY. REV. STAT. §§ 244.070, .080 (1981); LA. REV. STAT. ANN. §§ 14:91 (West 1974), 26:88, :285 (West 1975 & Supp. 1984); ME. REV. STAT. ANN. tit. 28, §§ 303, 1058, 1058-A (Supp. 1983); MD. ANN. CODE art. 2B, § 119 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 138, §§ 34, 69 (West 1974 & Supp. 1984); MICH. COMP. LAWS ANN. §§ 436.29, (West 1978 & Supp. 1984); MINN. STAT. ANN. § 340.73 (West 1972 & Supp. 1984); MISS. CODE ANN. §§ 67-1-81, -1-83, -3-53 (Supp. 1983); MO. ANN. STAT. § 311.310 (Vernon 1963); MONT. CODE ANN. § 16-3-301 (1983); NEB. REV. STAT. § 53-180 (1978); NEV. REV. STAT. § 202.055 (1983); N.H. REV. STAT. ANN. § 175:6 (Supp. 1983); N.J. STAT. ANN. §§ 33:1-39, -77 (West 1940 & Supp. 1983); N.M. STAT. ANN. §§ 60-7A-16, -7B-1.1 (1981); N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1970 & Supp. 1983); N.C. GEN. STAT. §§ 18B-302, -305 (1983); N.D. CENT. CODE § 5-01-09 (1975); OHIO REV. CODE ANN. §§ 4301.22, .69 (Page 1982); OKLA. STAT. ANN. tit. 37, § 537 (West Supp. 1983-84); OR. REV. STAT. § 471.410 (1983); PA. STAT. ANN. tit. 47, § 4-493 (Purdon 1969 & Supp. 1984); R.I. GEN. LAWS § 3-8-1 (Supp. 1984); S.C. CODE ANN. §§ 61-5-30, -3-990 (Law. Co-op. 1976 & Supp. 1983); S.D. CODIFIED LAWS ANN. § 35-4-78 (1977); TENN. CODE ANN. §§ 57-4-203, -5-301 (Supp. 1983); TEX. ALCO. BEV. CODE ANN. §§ 101.63, 106.03 (Vernon 1978 & Supp. 1984); UTAH CODE ANN. §§ 32-7-14 to -15, -24 (1974); VT. STAT. ANN. tit. 7, § 658 (1972); VA. CODE § 4-62 (1983); WASH. REV. CODE ANN. §§ 66.44.200, .270, .310, .320 (1962 & Supp. 1983); W. VA. CODE § 60-3-22 (1977 & Supp. 1984); WIS. STAT. ANN. § 125.07 (West Supp. 1983); WYO. STAT. § 12-6-101 (1981).

85. The following five states still take the position that there can be no civil liability for serving alcoholic beverages in the absence of a dramshop act: Arkansas, *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965); Maryland, *Fisher v. O'Connor's, Inc.*, 53 Md. App. 338, 452 A.2d 1313 (1982); Nebraska, *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976); Nevada, *Yoscovitch v. Wasson*, 98 Nev. 250, 645 P.2d 975 (1982); Wisconsin, *Olsen v. Copeland*, 90 Wis. 2d 483, 280 N.W.2d 178 (1979).

The following six states hold that the only theory under which a vendor may be found liable is for violation of a dramshop act: California, CAL. BUS. & PROF. CODE §§ 25602-25602.1 (West Supp. 1984); Connecticut, *Nolan v. Morelli*, 154 Conn. 432, 226 A.2d 383 (1967); Georgia, *Nunn v. Comidas Exquisitos, Inc.*, 166 Ga. App. 796, 305 S.E.2d 487 (1983); Illinois, *Demchuk v. Duplancich*, 92 Ill. 2d 1, 440 N.E.2d 112 (1982); Iowa, *Snyder v. Davenport*, 323 N.W.2d 225 (Iowa 1982); Michigan, *Lucido v. Apollo Lanes & Bar, Inc.*, 123 Mich. App. 267, 333 N.W.2d 246 (1983).

Courts denying a cause of action against the vendor often emphasize the undue

evidence of negligence.⁸⁶ They then allow the jury to decide whether the

hardship that such liability would impose. For a discussion of this viewpoint, see notes 7-8 and accompanying text *supra*.

86. The following jurisdictions recognize a negligence cause of action against a vendor based on the violation of an alcoholic beverage control act: Alaska, *Morris v. Farley Enters., Inc.*, 661 P.2d 167 (Alaska 1983); Arizona, *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983); Delaware, *Taylor v. Ruiz*, 394 A.2d 765 (Del. Super. Ct. 1978); District of Columbia, *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973); Florida, *Davis v. Schiapacosse*, 155 So. 2d 365 (Fla. 1963) (limited by FLA. STAT. ANN. § 768.125 (West Supp. 1984)); Hawaii, *Ono v. Applegate*, 62 Hawaii 131, 612 P.2d 533 (1980); Indiana, *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); Kentucky, *Pike v. George*, 434 S.W.2d 626 (Ky. 1968); Louisiana, *Chausse v. Southland Corp.*, 400 So. 2d 1199 (La. Ct. App. 1981); Massachusetts, *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 453 N.E.2d 430 (1983); Minnesota, *Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (1973); Mississippi, *Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979); Missouri, *Sampson v. W.F. Enters.*, 611 S.W.2d 333 (Mo. Ct. App. 1981); New Hampshire, *Ramsey v. Ancil*, 106 N.H. 375, 211 A.2d 900 (1965); New Jersey, *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966); New Mexico, *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982); New York, *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (N.Y. Sup. Ct. 1965); North Carolina, *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983); Ohio, *Taggart v. Bitzenhofer*, 35 Ohio App. 2d 23, 299 N.E.2d 901 (1972), *aff'd*, 33 Ohio St. 2d 35, 294 N.E.2d 226 (1973) (per curiam); Oregon, *Davis v. Billy's Con-Teena, Inc.*, 284 Or. 351, 587 P.2d 75 (1978) (limited by OR. REV. STAT. §§ 30.950, .955, .960 (1983)); Pennsylvania, *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964); South Dakota, *Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982); Tennessee, *Brookins v. Round Table, Inc.*, 624 S.W.2d 547 (Tenn. 1981); Utah, *Yost v. State*, 640 P.2d 1044 (Utah 1981) (but note that new broad form dramshop act may be exclusive remedy); Washington, *Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834, *modified*, 100 Wash. 2d 567, 672 P.2d 1267 (1983); Wyoming, *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983).

Montana has implicitly recognized a negligence cause of action in favor of injured third parties against one who sells liquor in violation of an alcoholic beverage control act. In two 1978 cases, plaintiffs who were injured after being served illegally brought suit for damages against the vendors. *See Swartzenberger v. Billings Labor Temple Ass'n*, 179 Mont. 145, 586 P.2d 712 (1978); *Folda v. City of Bozeman*, 177 Mont. 537, 582 P.2d 767 (1978). The *Swartzenberger* and *Folda* courts denied recovery because of the plaintiffs' contributory negligence rather than because no cause of action existed. One could infer from these cases that an injured third person free of contributory negligence would have been allowed to proceed. *See also Deeds v. United States*, 306 F. Supp. 348 (D. Mont. 1969) (illegal sale and serving of liquor was proximate cause of plaintiff's injuries). *But see Runge v. Watts*, 180 Mont. 91, 589 P.2d 145 (1979) (Supreme Court of Montana refused to apply *Deeds* to social host case, and held that there could be no cause of action so long as person to whom liquor was furnished was not so helpless as to be deprived of willpower or responsibility for his behavior).

Idaho has recognized a negligence cause of action in favor of a third person injured in an accident caused by the intoxication of a minor negligently served by the defendant vendor. *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). However, liability was not based on violation of an alcoholic beverage control statute, but rather on common law negligence principles. *Id.* at 621, 619 P.2d at 139. For a discussion of a vendor's civil liability in common law negligence, see notes 96-103 and accompanying text *infra*.

There have been decisions by courts sitting in California, Illinois and Iowa that have allowed causes of action against vendors for the negligent serving of alcoholic beverages on the ground that the vendors violated the state's alcoholic beverage control act. *See Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959), *cert.*

negligent serving was the proximate cause of the injuries that resulted from the patron's drunken driving.⁸⁷

denied, 362 U.S. 903 (1960); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); *Lewis v. State*, 256 N.W.2d 181 (Iowa 1977). In *Vesely*, an injured third party sued a tavernkeeper for damages suffered in an accident caused by a drunken driver who was allegedly served by the tavernkeeper in violation of the state's alcoholic beverage control statute. 5 Cal. 3d at 157-58, 486 P.2d at 154, 95 Cal. Rptr. at 626. The Supreme Court of California stated that the statute defined the tavernkeeper's duty, that negligent serving of alcohol could be the proximate cause of the plaintiff's injuries if a jury were to find that the serving was a substantial factor in causing the injury, and that the intoxicated patron's negligent driving was reasonably foreseeable at the time of the serving. *Id.* at 163-65, 486 P.2d at 158-59, 95 Cal. Rptr. at 630-31. Thus, the *Vesely* court overcame the traditional proximate cause barrier to an injured party's recovery against a supplier of alcohol and held that the plaintiff should have an opportunity to try his case. *Id.* at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625. However, this decision was specifically abrogated by the California legislature. See CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1984); CAL. CIV. CODE § 1714(b) (West Supp. 1984) (consumption of alcoholic beverages is proximate cause of injuries resulting from person's intoxication).

In *Waynick*, the Seventh Circuit allowed a cause of action based on an illegal sale in violation of the Illinois alcoholic beverage control act. The plaintiffs sued three Illinois vendors for damages resulting from an accident that occurred in Michigan as a result of the drunken driving of persons served liquor by the defendants while those persons were visibly intoxicated. 269 F.2d at 323-24. The court recognized that in Illinois, the dramshop act was the exclusive remedy, but stated that since the accident occurred outside Illinois the case could be decided on common law principles. *Id.* at 324. The court then held that, under common law principles, the defendant tavernkeepers were liable for the plaintiffs' injuries since they resulted from the serving of alcohol in violation of Illinois' alcoholic beverage control act. *Id.* at 325-26. In Illinois, however, the dramshop act is still the exclusive remedy. See *Gora v. 7-11 Food Stores*, 109 Ill. App. 3d 109, 440 N.E.2d 279 (1982).

In *Lewis*, the plaintiffs sued the state of Iowa for injuries resulting from a car accident in which their automobile was hit by one operated by an intoxicated person. 256 N.W.2d at 184. The plaintiffs alleged that the drunken driver was sold liquor by the state liquor store in violation of the state's alcoholic beverage control statute prohibiting sales to minors. *Id.* at 184-85. Although the trial court found that the state's existing dramshop act did not apply to the state since it only granted a cause of action against a "person," the Supreme Court of Iowa held that the plaintiffs could have a cause of action in negligence based upon the state's violation of the alcoholic beverage control statute if the trier of fact found the violation to be the proximate cause of the plaintiff's injuries. *Id.* at 191-92. Since *Lewis*, however, Iowa's dramshop act has been revised. See IOWA CODE ANN. § 123.92 (West Supp. 1984). The Supreme Court of Iowa recently held that the revised statute is the exclusive remedy against tavernkeepers. See *Snyder v. Davenport*, 323 N.W.2d 225, 226 (Iowa 1982).

87. The courts allowing recovery against a vendor in the absence of a dramshop act have emphasized the problems associated with drunken driving. See *Walz v. City of Hudson*, 327 S.W.2d 120 (S.D. 1982) (overruling *Griffin v. Sebek*, 90 S.D. 692, 245 N.W.2d 481 (1976)). Overruling an earlier reaffirmation of the common law rule of nonliability, the Supreme Court of South Dakota said:

We take judicial notice that since *Griffin* was decided, alcohol has been involved in 50.8% of this state's traffic fatalities from 1976 to 1981; in 1981 alone, 62% of South Dakota's traffic fatalities were alcohol related. This tragic waste of life prompts us to review our conclusions in *Griffin*. If the Legislature does not concur with our application of [the alcoholic beverage control act], as now announced, it is the prerogative of the Legislature to so assert.

Courts that have applied the *Rappaport* approach have done so by finding that the applicable alcoholic beverage control statute was enacted to protect the general public,⁸⁸ or persons who could foreseeably be injured by the drunkenness of the high-risk individual served.⁸⁹ Since alcoholic beverage control acts generally prohibit the serving of alcoholic beverages to minors and visibly intoxicated persons,⁹⁰ most states allow a cause of action if a member of either class is served.⁹¹ Other states, however, require that minors be visibly intoxicated at the time they are served.⁹² The majority of states recognizing the cause of action consider the violation of an alcoholic beverage control act to be negligence per se,⁹³ while the minority deem it to be merely evidence of negligence.⁹⁴ Once a duty to the plaintiff is estab-

Id. at 122 (citations omitted).

In a special concurrence, Justice Wollman added:

I believe that those of us who were in the majority in *Griffin v. Sebek* took too narrow a view of the responsibility of the judiciary to fill a void by common law adjudication in the face of legislative inaction [sic]. . . . What may not have been perceived of as a remedial void requiring judicial action at the time [earlier cases] were decided has mushroomed into a societal problem of deadly, both in the literal and figurative senses of that word, proportions

Id. at 123 (Wollman, J., concurring specially).

Other courts have been more blunt:

Our highway safety problems have greatly increased. Death and destruction stalk our roads. The peaceful Sunday afternoon family drive through the hills has been abandoned by many as the result of brushes with near death at the hands of half-baked morons drunkenly weaving in and out of traffic at 80 or 90 miles per hour.

Carver v. Schafer, 647 S.W.2d 570, 573 (Mo. Ct. App. 1983) (quoting *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964)).

88. *See, e.g.*, *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983).

89. *See, e.g.*, *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983); *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982). *See also* *Morris v. Farley Enters., Inc.*, 661 P.2d 167 (Alaska 1983) (drinker himself included among those persons who could foreseeably be injured by the drunkenness of the high-risk individual served).

90. Some states' acts relate only to minors. *See, e.g.*, NEV. REV. STAT. § 202.055 (1983); VT. STAT. ANN. tit. 7, § 658 (1972). Many statutes also prohibit the serving of habitual drunkards. *See, e.g.*, N.H. REV. STAT. ANN. § 175:6 (Supp. 1983); OHIO REV. CODE ANN. § 4301.22 (Page 1982).

91. *See, e.g.*, *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 453 N.E.2d 430 (1983) (court rejected defendant's argument that there could be no civil liability for serving of minor unless minor also was visibly intoxicated when served).

92. *See, e.g.*, *Simon v. Shirley*, 269 Pa. Super. 364, 409 A.2d 1365 (1979) (defendant tavernkeeper not liable for serving minor in violation of alcoholic beverage control act; minor must be visibly intoxicated when served for civil liability to be imposed).

93. *See, e.g.*, *Munford v. Peterson*, 368 So. 2d 213 (Miss. 1979); *Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982); *Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834, *modified*, 100 Wash. 2d 567, 672 P.2d 1267 (1983). *See also* PROSSER AND KEETON, *supra* note 22, § 36, at 229-31.

94. *See, e.g.*, *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1967); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983).

lished, it becomes a question for the jury as to whether the breach of the act was the proximate cause of the plaintiff's injuries.⁹⁵

4. *Vendor Liability Under Modern Common Law*

Some courts finally have allowed a cause of action against a vendor based on the vendor's negligence in serving alcoholic beverages irrespective of dramshop acts and alcoholic beverage control laws.⁹⁶ The duty breached in such cases is defined by common law negligence principles rather than by statute. In *Rappaport v. Nichols*, in addition to holding that a vendor's violation of the alcoholic beverage control act was evidence of negligence,⁹⁷ the New Jersey Supreme Court opined that "if the circumstances are such that the tavernkeeper knows or should know that the patron is a minor or is intoxicated, his service to him may also constitute common law negligence."⁹⁸ The *Rappaport* court described the serving vendor's negligence in terms of the

95. For a discussion of the jury's considerations in the *Rappaport* case in deciding whether the vendor's serving of alcohol was the proximate cause of the plaintiff's injuries, see note 83 and accompanying text *supra*. Once a court has decided as a matter of public policy to allow the serving of alcohol, rather than merely its consumption, to be the proximate cause of a plaintiff's injuries, the analysis set forth by the *Rappaport* court in determining the issue in a particular case is a typical one. *See* 31 N.J. at 202-04, 156 A.2d at 9. Cause in fact is determined by deciding whether the defendant's conduct was a substantial factor in bringing about the plaintiff's injuries. *Id.* at 204, 156 A.2d at 9. Then, proximate cause is found to exist if the plaintiff's injury resulted in the ordinary course of events from the defendant's negligence. *Id.* If the subsequent negligence by the intoxicated person—or anyone else, for that matter—is foreseeable, it will not cut off the defendant's liability as an intervening cause of the plaintiff's injury. *Id.* at 203-04, 156 A.2d at 9.

96. The following courts have recognized a cause of action against vendors based at least in part on common law negligence: Alaska, *Nazareno v. Urie*, 638 P.2d 671 (Alaska 1981); Arizona, *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983); Idaho, *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980); Indiana, *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); Massachusetts, *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 431 N.E.2d 920 (1982); Minnesota, *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980); Missouri, *Carver v. Schaffer*, 647 S.W.2d 570 (Mo. Ct. App. 1983); New Jersey, *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); New York, *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (N.Y. Sup. Ct. 1965); Oregon, *Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977); Pennsylvania, *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); Tennessee, *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (1964); Utah, *Rees v. Albertson's Inc.*, 587 P.2d 130 (Utah 1978); Washington, *Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834, *modified*, 672 P.2d 1267 (Wash. 1983); Wisconsin, *Sorensen v. Jarvis*, No. 83-1821 (Wis. June 28, 1984); Wyoming, *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983).

97. *See Rappaport*, 31 N.J. at 202, 156 A.2d at 9. For a further discussion of the *Rappaport* case, see notes 76-83 and accompanying text *supra*.

98. *Rappaport*, 31 N.J. at 202, 156 A.2d at 9. The *Rappaport* court stated that in these circumstances, an unreasonable risk of harm is readily foreseeable since "traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent." *Id.* at 202, 156 A.2d at 8. As Wisconsin's Chief Justice Hallows wrote, the "shift from commingling alcohol and horses to commingling alcohol and horsepower" necessitates the recognition of a common law negligence cause of action against vendors. *Garcia v. Hargrove*, 46 Wis. 2d 724, 737, 176 N.W.2d 566, 572 (1970) (Hallows, C.J., dissenting).

“creation of a situation which involves unreasonable risk [to the public] because of the expectable action of another.”⁹⁹ Thus, under *Rappaport*, it appears that the vendor has a duty to refuse to serve a patron if “the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others” as a result of serving that patron.¹⁰⁰

Similarly, in *Campbell v. Carpenter*,¹⁰¹ the Supreme Court of Oregon embraced a common law negligence theory in holding a vendor liable for injuries caused by his intoxicated patron.¹⁰² Relying on *Rappaport*'s reasoning, the *Campbell* court stated that a tavernkeeper breaches his common law duty of care “if, at the time of serving drinks to a customer, that customer is ‘visibly’ intoxicated” and “it is reasonably foreseeable that when such a customer leaves the tavern he or she will drive an automobile.”¹⁰³

99. *Rappaport*, 31 N.J. at 201, 156 A.2d at 8.

The Pennsylvania Supreme Court has also expressed this idea as follows:

The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute. . . . An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm. He is as much a hazard to the safety of the community as a stick of dynamite that must be de-fused in order to be rendered harmless. To serve an intoxicated person more liquor is to light the fuse.

Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 631-32, 198 A.2d 550, 553 (1964).

100. *Rappaport*, 31 N.J. at 201, 156 A.2d at 8.

101. 279 Or. 237, 566 P.2d 893 (1977).

102. *Id.* at 243-44, 566 P.2d at 897. In *Campbell*, the plaintiffs represented two persons killed by an automobile that was driven by an intoxicated woman who had been served by the defendant tavernkeeper while visibly intoxicated. *Id.* at 239, 566 P.2d at 894.

103. *Id.* at 243, 566 P.2d at 897. See also *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 431 N.E.2d 920 (1982). In *Cimino*, the plaintiff sued a tavernkeeper for the wrongful death of his son, for his son's pain and suffering, and for negligent infliction of emotional distress upon himself after a patron of the defendant's tavern hit and killed the son as the latter walked on a sidewalk with his father. *Id.* at ___, 431 N.E.2d at 922. The essence of the plaintiff's claim was that the tavernkeeper negligently served the patron even though he knew or should have known that he was intoxicated, under circumstances such that it was reasonably foreseeable that the patron would drive upon leaving. *Id.* at ___, 431 N.E.2d at 922-23. The court held that a jury could find that the service of liquor by the defendant was a failure to exercise that degree of care for the safety of travelers that ought to be exercised by a tavernkeeper of ordinary prudence under the circumstances. *Id.* at ___, 431 N.E.2d at 926. The court also elaborated on the common law negligence cause of action:

The views we express make it clear that the cause of action for negligence in a case such as this is essentially composed of the same elements as any other tort for negligence for which the tavern owner and bartender are liable and they are (1) a patron of premises (2) who is served intoxicating liquors (3) while he is intoxicated (4) and under circumstances from which the defendant knew or reasonably should have known that he was intoxicated when served (5) operates a motor vehicle while intoxicated (6) such operation was reasonably foreseeable by the defendant (7) and a person of ordinary prudence would have refrained from serving liquor to that patron

B. *Social Host Liability*

Although historically most efforts to impose liability on those furnishing alcohol have been directed against tavernkeepers, numerous attempts have also been made to hold social hosts accountable for the intoxication of their guests. Social hosts are broadly defined as noncommercial suppliers of intoxicating beverages and include hosts ranging from private homeowners entertaining friends to employers sponsoring holiday parties for their employees.¹⁰⁴

1. *Social Host Liability Under Traditional Common Law*

Like their commercial counterparts, social hosts traditionally have been protected by the common law rule that those who furnish liquor to ordinary, able-bodied men are not liable for injuries caused or incurred by their intoxicated guests.¹⁰⁵ This principle was premised on the view that it was the consumption of the liquor that proximately caused any injuries, not its service.¹⁰⁶

Attempts to erode the common law rule of nonliability have met with only limited success;¹⁰⁷ the common law rule still controls in many jurisdictions.¹⁰⁸ Given the historical foundation of this approach, courts often defer

in the same or similar circumstances (8) and such operation causes the plaintiff's death or injury within the scope of the foreseeable risk.

Id. at ___ n.9, 431 N.E.2d at 926 n.9.

104. *See, e.g.*, Longstreth v. Fitzgibbon, 125 Mich. App. 261, 335 N.W.2d 677 (1983) (hosts at wedding reception); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (private homeowners entertaining a friend); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971) (college fraternity); Congini v. Portersville Valve Co., ___ Pa. ___, 470 A.2d 515 (1983) (employer hosting company Christmas party).

105. *See Note, Social Host Liability, supra* note 1, at 446.

106. *See id.*

107. *See, e.g.*, Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (recognizing a common law cause of action where host served obviously intoxicated guest when it was foreseeable that the guest would drive); Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976) (recognizing negligence cause of action against social host who served minor); Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (Law Div. 1982) (recognizing cause of action in negligence against social host who served intoxicated adult); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971) (recognizing common law negligence action against host who served minor with knowledge that minor would later drive). For a discussion of *Wiener*, see notes 186-93 and accompanying text *infra*. *See also* Garcia v. Jennings, 427 So. 2d 1329 (La. Ct. App. 1983) (recognizing common law duty of adults not to purchase liquor for and furnish liquor to minors).

108. *See, e.g.*, DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1979); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965) (dictum); Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (1980); Wright v. Moffitt, 437 A.2d 554 (Del. 1981); United Servs. Auto. Ass'n v. Butler, 359 So. 2d 498 (Fla. Dist. Ct. App. 1978); Lowe v. Rubin, 98 Ill. App. 3d 496, 424 N.E.2d 710 (1981); Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976); Johnson v. Paige, 47 Or. App. 1177, 615 P.2d 1185 (1980); Klein v. Raysinger, ___ Pa. ___, 470 A.2d 507 (1983); Cecil

to the legislature to adopt a rule imposing liability on furnishers of alcohol.¹⁰⁹ This sentiment was well articulated by the Wisconsin Supreme Court in *Olsen v. Copeland*.¹¹⁰

A change in the law which has the power to so deeply affect social and business relationships should only be made after a thorough analysis of all the relevant considerations. . . . The type of analysis required is best conducted by the legislature using all of the methods it has available to it to invite public participation.¹¹¹

Notwithstanding the apparent absoluteness of the common law rule, certain exceptions have been recognized under which noncommercial furnishers of alcohol may be subject to tort liability. The most notable exception to the common law rule arises when the service of liquor is wanton and reckless.¹¹² In *Kowal v. Hofner*,¹¹³ the Supreme Court of Connecticut stated that this exception applied not only to vendors but also to social hosts.¹¹⁴ Although Connecticut generally followed the common law view that the furnishing of the liquor was not the proximate cause of injuries inflicted by an intoxicated person,¹¹⁵ the *Kowal* court questioned whether the same principles of causation applied when the host's misconduct was wanton and reck-

v. Hardin, 575 S.W.2d 268 (Tenn. 1978). See also CAL. BUS. & PROF. CODE § 25602(b)-(c) (West Supp. 1984); CAL. CIV. CODE § 7415(b)-(c) (West 1984) (statutory adoption of common law view that it is the consumption, not the furnishing of the alcohol, which proximately causes the harm).

109. See, e.g., *Miller v. Moran*, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981). In *Miller*, plaintiff brought an action based on common law negligence against the social hosts who served their guest who became intoxicated and subsequently was involved in an automobile accident with the plaintiff, causing severe damages. *Id.* at 597, 424 N.E.2d at 1046. The *Miller* court declined to recognize such a cause of action, acknowledging the historical fact that Illinois had never before allowed such an action. *Id.* at 597-98, 421 N.E.2d at 1047. The court also felt that it should exercise judicial restraint because any common law liability imposed upon social hosts would necessarily be unlimited, while tavernkeepers had a statutorily imposed maximum exposure of only \$35,000.00. *Id.* at 601, 424 N.E.2d at 1049 (citing ILL. REV. STAT. ch. 43, § 6-21 (Smith-Hurd Supp. 1984)).

110. 90 Wis. 2d 483, 280 N.W.2d 178 (1979). In *Olsen*, a wrongful death action was brought against a tavernkeeper who had served a patron who was obviously intoxicated, with the knowledge that the patron would be driving. Soon after leaving the tavern by car, the patron collided with decedent's vehicle, causing decedent's death. *Id.* at 485, 280 N.W.2d at 179.

111. *Id.* at 491, 280 N.W.2d at 181. The *Olsen* court refused to recognize a common law cause of action against the vendor, and ordered that summary judgment be granted in the defendant's favor. *Id.* at 494, 280 N.W.2d at 183.

112. For a discussion of the liability of vendors who act recklessly or wantonly, see notes 13-20 and accompanying text *supra*.

113. 181 Conn. 355, 436 A.2d 1 (1980). In *Kowal*, an action was brought against a vendor to recover for the death of a motorist killed in a collision with a car driven by a patron whom the defendant had served although the patron was intoxicated. *Id.* at 356, 436 A.2d at 2-3.

114. *Id.* at 360-61, 436 A.2d at 3.

115. See *Slicer v. Quigley*, 180 Conn. 252, 429 A.2d 855 (1980); *Nelson v. Stefens*, 170 Conn. 356, 365 A.2d 1174 (1976).

less.¹¹⁶ Answering this question in the negative, the *Kowal* court held that “one ought to be required, as matter of policy, to bear a greater responsibility for consequences resulting from his act when his conduct is reckless or wanton than when his conduct is merely negligent.”¹¹⁷

2. *Social Host Liability Under Dramshop Legislation*

An early legislative response to the common law rule shielding suppliers of alcohol from civil liability was the enactment of dramshop or civil damage acts.¹¹⁸ Currently, eighteen states have dramshop legislation.¹¹⁹ Plaintiffs have made numerous attempts to use these statutes against social hosts who have furnished alcohol, but have met with little success.¹²⁰ Only Iowa and

116. 181 Conn. at 359, 436 A.2d at 3. The court determined that the policy considerations that justify protecting a social host who was merely negligent in serving an intoxicated person do not yield the same proclivity to protect the host who acts recklessly. 181 Conn. at 360-61, 436 A.2d at 3. As Prosser and Keeton have observed, recklessness “is still at essence negligent, rather than actually intended to do harm, but . . . is so far from a proper state of mind that it is treated in many respects as if it were so intended. Thus it . . . may justify a broader duty, and more extended liability for consequences” PROSSER AND KEETON, *supra* note 22, § 34, at 213 (footnotes omitted).

117. 181 Conn. at 361, 436 A.2d at 3. The result reached by the Connecticut court in *Kowal* regarding the causal parameters of reckless conduct parallels that suggested by the Restatement of Torts. See RESTATEMENT (SECOND) OF TORTS § 501(2) (1965). The Restatement provides in relevant part as follows:

The fact that the actor's misconduct is in reckless disregard of another's safety rather than merely negligent is a matter to be taken into account in determining whether a jury may reasonably find that the actor's conduct bears a sufficient causal relation to another's harm to make the actor liable therefor.

Id.

Under subsequent sections, the Restatement notes that an actor guilty of reckless or wanton misconduct is precluded from asserting as a defense any negligence of the plaintiff. See *id.* § 503(1).

For a further discussion of contributory/comparative negligence as a defense to claims against furnishers of alcohol, see notes 207-10 & 253-67 and accompanying text *infra*.

118. For a general discussion of the history of dramshop legislation, see notes 21-31 and accompanying text *supra*. These statutes impose civil liability upon tavernkeepers for damages resulting from the unlawful furnishing of liquor. See Note, *supra* note 1, at 450-51. For a discussion of the provisions of current dramshop acts, see notes 32-63 and accompanying text *supra*.

119. For a list of those jurisdictions that currently have dramshop or civil damage acts, see note 32 *supra*.

120. See, e.g., *DeLoach v. Mayer Elec. Supply Co.*, 378 So. 2d 733 (Ala. 1979) (dramshop act inapplicable where no sale was made to intoxicated person); *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889) (dramshop act inapplicable where social host gratuitously provided drinks for friend); *Heldt v. Brei*, 118 Ill. App. 3d 798, 455 N.E.2d 842 (1983) (dramshop act inapplicable even though social host sold alcohol to intoxicated guest); *Richardson v. Ansco, Inc.*, 75 Ill. App. 3d 731, 394 N.E.2d 801 (1979) (dramshop act inapplicable where plaintiff alleged that employer had allowed his employee to become drunk); *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964) (dramshop act inapplicable where employer unlawfully served minor employee); *Cady v. Coleman*, 315 N.W.2d 593 (Minn. 1982) (dramshop

Minnesota courts have recognized social host liability based upon violation of a dramshop act,¹²¹ and in each of these instances the state legislatures effectively overruled the decisions through subsequent amendments to their respective dramshop acts.¹²²

The language employed by legislatures in drafting dramshop acts allows these acts to be classified in one of two categories.¹²³ Narrowly drawn acts clearly limit their application to licensees or permittees.¹²⁴ Broadly drawn statutes, on the other hand, do not so specifically define those subject to their provisions.¹²⁵ In spite of the broad language of these acts, however,

act inapplicable even though plaintiff argued that defendant's serving of intoxicated driver was a barter in exchange for future business); *Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982) (dramshop act inapplicable to social host); *Gabrielle v. Craft*, 75 A.D.2d 939, 428 N.Y.S.2d 84 (1980) (dramshop act must be narrowly construed to exclude the social host); *Kohler v. Wray*, 114 Misc. 2d 856, 452 N.Y.S.2d 831 (Sup. Ct. 1982) (dramshop act inapplicable to social host in a non-commercial setting).

121. *See Williams v. Klemesrud*, 197 N.W.2d 614 (Iowa 1972) (dramshop act imposes liability on social host who purchased liquor for minor); *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972) (civil damage act imposes liability on defendant who purchased alcohol for minor). For a discussion of *Ross*, see notes 130-40 and accompanying text *infra*.

122. *See Graham*, *supra* note 33, at 567-68. The Iowa statute construed by the court in *Williams v. Klemesrud* provided as follows:

Every . . . person who shall be injured in person or property . . . by any intoxicated person . . . shall have a right of action . . . against *any person* who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained

IOWA CODE ANN. § 129.2 (West 1949) (repealed 1971) (emphasis added). In 1971, the Iowa legislature repealed its dramshop act and enacted a new act restricting liability to licensees and permittees. *See IOWA CODE ANN. § 123.92* (West Supp. 1984). The new provision reads in pertinent part as follows: "Every . . . person . . . injured . . . by any intoxicated person . . . shall have a right of action . . . against any licensee or permittee, who shall sell or give any beer or intoxicating liquor to any such person while he or she is intoxicated" *Id.*

For a discussion of the amendments to the Minnesota civil damage act following *Ross*, see notes 139-40 and accompanying text *infra*.

123. For a discussion of broadly worded dramshop acts in effect today, see notes 32-37 and accompanying text *supra*. For a discussion of narrowly worded dramshop acts in effect today, see notes 38-63 and accompanying text *supra*. There are currently twelve dramshop acts whose terms create the possibility of finding a cause of action against a social host. *See ALA. CODE § 6-5-71* (1975); *COLO. REV. STAT. § 13-21-103* (1973); *GA. CODE § 51-1-18* (1982); *ILL. ANN. STAT. ch. 43, § 6-21* (Smith-Hurd Supp. 1984); *ME. REV. STAT. ANN. tit. 17, § 2002* (1964); *N.Y. GEN. OBLIG. LAW § 11-101* (McKinney 1978); *N.D. CENT. CODE § 5-01-06* (1975); *OHIO REV. CODE ANN. § 4399.01* (Page 1982); *R.I. GEN. LAWS §§ 3-11-1 to -2* (1976); *UTAH CODE ANN. § 32-11-1* (Supp. 1983); *VT. STAT. ANN. tit. 7, § 501* (1972).

124. *See, e.g., IOWA CODE ANN. § 123.92* (West Supp. 1984-85). For the relevant text of the Iowa statute, see note 122 *supra*.

125. *See, e.g., UTAH CODE ANN. § 32-11-1(1)* (Supp. 1983). The Utah statute provides as follows:

Any person who gives, sells, or otherwise provides intoxicating liquor to another contrary to subsection 16-1-13.1(8)(d), subsection 32-1-36.5(1)(1), section 32-7-14 or subsection 32-7-24(b) or (c), and thereby causes the

the general rule is that dramshop legislation does not apply to suits against noncommercial suppliers of alcohol.¹²⁶ Because dramshop acts are primarily penal in nature, courts are frequently unwilling to construe them liberally.¹²⁷ Thus, their application is usually limited to those who profit from the sale of alcohol,¹²⁸ or to those who are at least indirectly engaged in the liquor business.¹²⁹

Nevertheless, in *Ross v. Ross*,¹³⁰ the Minnesota Supreme Court concluded that Minnesota's Civil Damage Act did impose liability on social hosts.¹³¹ Plaintiffs in *Ross* were the survivors of a minor who was killed in an automobile accident while intoxicated.¹³² The defendants in the suit were two persons who had purchased the liquor for the minor.¹³³ Minnesota's Civil Damage Act created a cause of action against "any person" who un-

intoxication of the other person, is liable for injuries in person, property, or means of support to any third person, or the spouse, child, or parent of that third person, resulting from the intoxication.

Id. (emphasis added). By its own language, this dramshop act, and others similarly worded, appear to apply not just to commercial vendors, but to *any person*.

126. See Graham, *supra* note 33, at 568; Note, *Social Host Liability*, *supra* note 1, at 452. For a listing of cases following the general rule denying application of dramshop acts to social hosts, see note 120 *supra*.

127. See, e.g., *Heldt v. Brei*, 118 Ill. App. 3d 798, 455 N.E.2d 842 (1983) (due to the penal nature of the act, any enlargement of its scope to persons not engaged in the liquor business is left to the discretion of the legislature).

128. See, e.g., *Kohler v. Wray*, 114 Misc. 2d 856, 452 N.Y.S.2d 831 (Sup. Ct. 1982) (dramshop act is intended to prohibit certain commercial activity that is accompanied by an expectation of pecuniary gain). One justification for restricting the scope of dramshop acts to those who benefit financially from the service of alcohol is that, unlike the social host, the vendor can insure against liability and spread the risk to all customers as a cost of doing business. Graham, *supra* note 33, at 568.

129. See, e.g., *Parsons v. Smith*, 164 Ill. App. 509 (1911) (dramshop act held applicable to nonlicensee indirectly engaged in the liquor business, i.e., owner of premises leased to licensee). One suggested reason for exposing one engaged in the liquor industry to the higher, strict liability standard of the dramshop act is that "the vendor is able to check those served more carefully and determine how much a particular vendee drinks." Graham, *supra* note 33, at 568.

130. 294 Minn. 115, 200 N.W.2d 149 (1972).

131. *Id.* at 121, 200 N.W.2d at 152-53. The Minnesota Civil Damage Act cited in *Ross* provided as follows:

Every . . . person who is injured in person or property, or means of support, by an intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against *any person* who, by illegally selling, bartering or *giving* intoxicating liquors, caused the intoxication of such person, for all damages, sustained . . .

MINN. STAT. ANN. § 340.95 (West 1972) (amended 1977) (emphasis added). For a discussion of the subsequent amendments to this act, see notes 139-40 and accompanying text *infra*.

132. 294 Minn. at 116, 200 N.W.2d at 150. Because the plaintiffs were the survivors of the minor rather than the minor himself and were suing for loss of support rather than wrongful death, the court noted that the voluntary intoxication of the decedent would not bar the suit. *Id.* at 116 n.2, 200 N.W.2d at 150 n.2. For a general discussion of defenses available in dramshop actions, see notes 207-52 and accompanying text *infra*.

133. 294 Minn. at 116, 200 N.W.2d at 150.

lawfully sold or gave liquor to another causing his intoxication when that intoxication resulted in injury to the plaintiff.¹³⁴ Focusing on the legislative history of the act, the *Ross* court noted that at the time of its enactment in 1911, the problem of drunken driving was not particularly serious.¹³⁵ In all likelihood, the court reasoned, the Minnesota legislature had not foreseen extensive application of the statute to social hosts.¹³⁶ Nevertheless, the court concluded that the legislature's choice of the words "any person" was sufficiently broad to find that the Civil Damage Act imposed liability on everyone who violated its provisions.¹³⁷ Finally, the *Ross* court stated that anyone who furnished alcohol, whether vendor or social host, should be "responsible for protecting innocent third persons from the potential dangers of indiscriminately furnishing such hospitality."¹³⁸

Five years later, however, the Minnesota legislature amended its Civil Damage Act.¹³⁹ The legislature removed from the list of prohibited acts the "giving" of alcohol and limited violations to the illegal sale or barter of alcoholic beverages, thereby precluding the use of the act in suits against non-commercial social hosts.¹⁴⁰

134. *Id.* For the text of the applicable civil damage act, see note 131 *supra*.

135. 294 Minn. at 119, 200 N.W.2d at 151.

136. *Id.*

137. *Id.* at 121, 200 N.W.2d at 152-53. The Minnesota Supreme Court had previously ruled that legislation making it illegal to sell alcohol to minors applied to those not in liquor business. *Id.* at 119, 200 N.W.2d at 151-52 (citing *State v. McGinnis*, 30 Minn. 48, 14 N.W. 256 (1882) (nonlicensee criminally liable for furnishing alcohol to minor)).

The *Ross* court further noted that at the legislative session at which the Civil Damage Act was adopted, the legislature had sought to strengthen and tighten the then existing liquor laws, "using throughout . . . the words 'any person' and making no mention anywhere of persons in the liquor business." 294 Minn. at 121, 200 N.W.2d at 153. Moreover, the *Ross* court reasoned that "[s]ince the act applies only to illegal transactions, it is not unreasonable to assume that the legislature intended to include persons other than licensed vendors." *Id.*

138. *Id.* at 121-22, 200 N.W.2d at 153.

139. See MINN. STAT. ANN. § 340.95 (West Supp. 1984) (amending MINN. STAT. ANN. § 340.95 (West 1972)). The act now imposes civil liability only on any person who illegally sells or barter intoxicating liquors. *Id.*

140. See *Cady v. Coleman*, 315 N.W.2d 593 (Minn. 1982); *Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982). In examining the legislative purpose behind the 1977 amendment, the *Cole* court stated that

[t]he transcript of the floor debate in the State Senate on the proposed amendment to delete "giving" from the Civil Damages Act clearly shows that the legislators knew of the *Ross* decision, knew what results its application would produce, and purposefully proposed the amendment to change the law so that this court's interpretation of the Civil Damages Act would no longer be correct.

Cole, 314 N.W.2d at 839.

It is submitted that the fact that the Minnesota legislature opted to remove only the term "giving" from its statute, while leaving in the broad "any person" term, suggests an intent that the "any person" term refers to persons other than social hosts. For example, the term could refer to nonlicensees who are nonetheless involved in the liquor industry. See note 129 *supra*. It may also include "social hosts" who sell drinks to their guests. Cf. *Heldt v. Brei*, 118 Ill. App. 3d 798, 455 N.E.2d 842 (1983).

3. *Specific Legislation Directed Toward Social Host Liability*

Recently, a number of state legislatures have considered specifically whether a social host who furnishes alcohol to his guests may be held liable for subsequent injuries.¹⁴¹ The predominant trend has been to preclude social host liability.

The first state to enact legislation specifically curtailing a social host's civil responsibility was California.¹⁴² In 1978, following a series of judicial decisions that had extended liability for the torts of intoxicated persons to social hosts,¹⁴³ the California legislature amended its statutes to abolish liability for furnishers of alcohol.¹⁴⁴ This anti-dramshop law expressly states that *no person* who supplies liquor to another, either by gift or by sale, shall be liable to any person injured by the intoxicated consumer.¹⁴⁵

Several other states have followed California's lead, including Alaska, which revised its alcoholic beverage control statute in 1980 to shield non-licensees from civil liability.¹⁴⁶ Similarly, the New Mexico state legislature

141. See ALASKA STAT. § 04.21.020 (1980); CAL. BUS. & PROF. CODE § 25602(b)-(c) (West Supp. 1984); N.M. STAT. ANN. § 41-11-1 (Supp. 1984); OR. REV. STAT. § 30.955 (1983). See also A.43, — Sess., LXXI N.J. Legis. Ind. A2 (Oct. 22, 1984). Cf. FLA. STAT. ANN. § 768.125 (West Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-100 (McKinney Supp. 1983); N.D. CENT. CODE § 5-01-06 (Supp. 1983); UTAH CODE ANN. § 32-11-1 (Supp. 1983) (each of these statutes potentially applicable to issue of social host liability, though not expressly so). For a discussion of these statutes, see notes 142-50 and accompanying text *infra*.

142. See CAL. BUS. & PROF. CODE § 25602(b)-(c) (West Supp. 1984) (enacted 1978); CAL. CIV. CODE § 1714(b)-(c) (West 1984) (enacted 1978). In addition, in 1971 and 1977 the Iowa and Minnesota legislatures passed amendments to their respective dramshop acts which limited the liability of social hosts. See note 122 *supra* and notes 139-40 and accompanying text *supra*. Because these amendments clarified the legislative intent underlying each state's dramshop act specifically in order to overrule judicial extensions of the statutes to social hosts, the Iowa and Minnesota responses might also be included among those statutes specifically enacted and directed toward noncommercial suppliers of alcohol.

143. See *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (under negligence theories, social host liable for serving an obviously intoxicated person); *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972) (employer liable for serving a minor contrary to the state alcoholic beverage control laws). For a discussion of *Coulter*, see note 185 *infra*.

144. See CAL. BUS. & PROF. CODE § 25602(b)-(c) (West Supp. 1984); CAL. CIV. CODE § 1714(b)-(c) (West 1984). For a discussion of these statutes, see note 185 *infra*.

145. See CAL. BUS. & PROF. CODE § 25602(b) (West Supp. 1984). The statute reads in pertinent part as follows:

No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section [prohibiting the furnishing of alcohol to any habitual or common drunkard, or to any obviously intoxicated person] 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.

Id. (emphasis added). For a discussion of "anti-dramshop" legislation, see notes 64-74 and accompanying text *supra*.

146. See ALASKA STAT. § 04.21.020 (1980). This section provides as follows: "A person who provides alcoholic beverages to another person may not be held civilly

recently enacted legislation providing that a person who gratuitously serves alcohol to a guest in a social setting may not be held liable for any subsequent injuries.¹⁴⁷

At least one jurisdiction, however, has chosen to take the opposite tack. In Oregon, the legislature enacted a bill providing that a social host who serves a guest who is visibly intoxicated may be liable for damages incurred or caused by that guest.¹⁴⁸ Several other states have also adopted broad-scoped legislation which on its face may be construed to impose liability on noncommercial suppliers of alcohol.¹⁴⁹ Absent judicial interpretation or fur-

liable for injuries resulting from the intoxication of that person unless the person who provides the alcoholic beverages holds a license authorized under [the act], or is an agent or employee of such a licensee" *Id.*

147. See N.M. STAT. ANN. § 41-11-1 (Supp. 1984). Social hosts may be liable under this statute, however, if "the alcoholic beverages were provided *recklessly* in disregard of the rights of others, including the social guest." *Id.* § 41-11-1(D) (emphasis added). For a discussion of the common law rule that persons who recklessly or wantonly serve alcohol to their guests may be liable, see notes 112-17 and accompanying text *infra*.

148. See OR. REV. STAT. § 30.955 (1983). This 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*." *Id.* (emphasis added). See also *id.* § 30.960 (liability for serving minor who the host knew or ought to have known was underaged).

149. See, e.g., FLA. STAT. ANN. § 768.125 (West Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-100 (McKinney Supp. 1983); N.D. CENT. CODE § 5-01-06 (Supp. 1983); UTAH CODE ANN. § 32-11-1 (Supp. 1983).

The Florida statute, for example, provides as follows:

A person who sells 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 to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

FLA. STAT. ANN. § 768.125 (West Supp. 1984) (emphasis added). Because of the Florida legislature's choice of the terms "a person" and "furnishes," it is possible to construe this statute to impose liability on social hosts who willfully and unlawfully serve minors or habitual alcoholics.

For the text of the Utah statute, which employs equally broad language, see note 125 *supra*.

It has been argued that the North Dakota dramshop act is also sufficiently broad to include social hosts and that North Dakota case law would support such an extension. See Note, *Social Host Liability*, *supra* note 1, at 476. The dramshop act states that "[e]very . . . person who is injured by any intoxicated person . . . shall have a right of action against *any person* who caused such intoxication by disposing, selling, bartering, or *giving away* alcoholic beverages . . ." N.D. CENT. CODE § 5-01-06 (Supp. 1983) (emphasis added). The North Dakota Supreme Court has held that this act "is remedial in character and should be construed to suppress the mischief and advance the remedy." *Iszler v. Jorda*, 80 N.W.2d 665, 667 (N.D. 1957). Accordingly, one author concluded that the dramshop act should be interpreted liberally to impose liability upon social hosts. See Note, *Social Host Liability*, *supra* note 1, at 476-77.

Recent amendments to the New York legislation provide in pertinent part as follows:

ther legislative clarification, however, it remains unclear whether these broadly worded statutes will affect the liability of social hosts.¹⁵⁰

4. *Social Host Civil Liability for Violation of Statute*

Some courts have imposed liability upon social hosts based upon the host's violation of a particular statute, although the statute itself did not expressly provide for civil liability.¹⁵¹ Most often, courts rely on state alcoholic beverage control acts which typically make it unlawful to sell or furnish intoxicating beverages to minors, habitual drunkards, or obviously intoxicated persons.¹⁵² A violation of these acts generally constitutes a criminal offense, subjecting the actor to a fine or imprisonment.¹⁵³ In the civil con-

Any person who shall be injured . . . by reason of the intoxication or impairment of ability of any person under the age of nineteen years . . . shall have a right of action . . . against *any person* who knowingly causes such intoxication or impairment of ability by unlawfully *furnishing to or unlawfully assisting in procuring* alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of nineteen years.

N.Y. GEN. OBLIG. LAW § 11-100(1) (McKinney Supp. 1983) (emphasis added). This statute became effective in October, 1983. Although New York courts had previously construed the state's dramshop act to exclude social hosts, they reached this result on the ground that the dramshop act required an illegal "sale." See *Kohler v. Wray*, 114 Misc. 2d 856, 857, 452 N.Y.S.2d 831, 833 (1982) (dramshop act not applicable to social host even when he asks his guest to "chip in" for beer); N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1978). It is submitted that this construction was consistent with the language of § 11-101(1) of the act, which created a cause of action against one who caused the intoxication of another "by unlawful [sic] *selling to or unlawfully assisting in procuring* liquor for such intoxicated person . . ." N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1978) (emphasis added). By using the term "furnishing" in the new § 11-100(1), therefore, it is arguable that the legislature intended to create a cause of action against both commercial and noncommercial suppliers of alcohol. *But cf. Gabrielle v. Craft*, 75 A.D.2d 939, 940, 428 N.Y.S.2d 84, 87 (1980) ("give away" language of state alcoholic beverage control act construed to refer to those instances in which the licensed vendor provides the traditional "drink on the house").

150. See *Graham*, *supra* note 33, at 568 (broad scoped dramshop acts are not appropriate vehicles for creating social host liability). For a discussion of the limited applicability of broad scoped dramshop acts to social host litigation, see notes 125-29 and accompanying text *supra*.

151. *Social Host Liability*, *supra* note 1, at 459. For a list of cases imposing civil liability upon social hosts for violation of such statutes, see note 158 *infra*. For a discussion of vendor liability premised on violation of statute, see notes 75-95 and accompanying text *supra*.

152. See, e.g., PA. STAT. ANN. tit. 47, § 4-493(1) (Purdon 1969). The Pennsylvania law provides as follows:

It shall be unlawful—(1) For any licensee . . . to sell, furnish or give any liquor or malt or brewed beverages . . . to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.

Id.

153. See Note, *Social Host Liability*, *supra* note 1, at 459. For example, the Pennsylvania alcoholic beverage control laws provide:

Any person who shall violate any of the provisions of this article . . .

text, however, courts have construed these statutes to create a minimum, statutory standard of care,¹⁵⁴ and have held that their violation is evidence of negligence¹⁵⁵ or even negligence per se.¹⁵⁶

In order for a plaintiff to succeed against a social host on this theory of liability, the court must find that the alcoholic beverage control act in question was designed: (a) to protect a class of persons that includes the plaintiff; (b) to protect the interest of the plaintiff that has been invaded; (c) to protect against the particular type of harm that has been inflicted; and (d) to protect the plaintiff's interest against the particular cause of that harm.¹⁵⁷ Following this implied cause of action analysis, courts have imposed civil liability upon social hosts for violations of criminal statutes in an attempt to further the ultimate policies and goals of the legislature.¹⁵⁸

shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars (\$100), nor more than five hundred dollars (\$500), and on failure to pay such fine, to imprisonment for not less than one month, nor more than three months

PA. STAT. ANN. tit. 47, § 4-494(a) (Purdon 1969).

154. See generally Note, *Social Host Liability*, *supra* note 1, at 459-60; Graham, *supra* note 33, at 569-71. Liability premised on violation of an alcoholic beverage control act should be distinguished from statutory liability imposed by state dramshop or civil damage acts. For a discussion of social host liability under dramshop legislation, see notes 118-40 and accompanying text *supra*.

155. See, e.g., *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (violation of statute gives rise to presumption of negligence); *Longstreth v. Fitzgibbon*, 125 Mich. App. 261, 335 N.W.2d 677 (1983) (violation of statute constitutes prima facie case of negligence). Cf. *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 453 N.E.2d 430 (1983) (violation of statute by vendor is evidence of negligence). For a discussion of *Longstreth*, see notes 160-67 and accompanying text *infra*.

156. See, e.g., *Brattain v. Herron*, 159 Ind. App. 663, 309 N.E.2d 150 (1974); *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W.2d 820 (1973); *Lover v. Sampson*, 44 Mich. App. 173, 205 N.W.2d 69 (1972). See also *Congini v. Portersville Valve Co.*, — Pa. —, 470 A.2d 517 (1983) (violation of criminal code by social host constitutes negligence per se). For a discussion of *Congini*, see notes 172-78 and accompanying text *infra*.

157. See RESTATEMENT (SECOND) OF TORTS § 286 (1965). Prosser and Keeton explain the use of criminal statutes to impose civil liability as follows:

[T]he courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind. The statutory standard of conduct is simply adopted voluntarily, out of deference and respect for the legislature.

PROSSER AND KEETON, *supra* note 22, § 36, at 222 (footnotes omitted).

For a discussion of the use of criminal statutes in negligence actions, see generally Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949).

158. See, e.g., *Brattain v. Herron*, 159 Ind. App. 663, 309 N.E.2d 150 (1974) (purpose of Indiana liquor control laws, to protect citizenry from dangers posed by intoxicated minors, is furthered by imposing civil liability upon those who furnish alcohol to minors); *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W.2d 820 (1973) (statutes forbidding furnishing of alcohol to minors and consuming alcoholic beverages on highways enacted to protect public from risk of injuries caused by intoxicated minors).

In the vast majority of those cases imposing liability on this theory, the social host served intoxicating beverages to a minor.¹⁵⁹ For example, in *Longstreth v. Fitzgibbon*,¹⁶⁰ the parents of a minor brought a wrongful death action against the hosts of a wedding reception at which the minor had been a guest.¹⁶¹ The plaintiffs alleged that the defendants had furnished, or allowed to be furnished, intoxicating liquor to the minor in violation of Michigan law.¹⁶² As a result, they alleged, the minor was killed in an automobile collision following the affair.¹⁶³

The Michigan alcohol law expressly stated that it was a misdemeanor for any person to provide liquor to a minor.¹⁶⁴ Noting that the legislature had chosen the term "person" rather than retailer, vendor or licensee, the Michigan Court of Appeals held that the liquor control act's prohibition applied to all persons who violated its terms, including the social hosts of a wedding reception.¹⁶⁵ Accordingly, the *Longstreth* court stated that in a civil suit against a social host, violation of the act created a prima facie case of negligence.¹⁶⁶ Therefore, under *Longstreth*, a cause of action exists in Michi-

159. See, e.g., *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972); *Brattain v. Herron*, 159 Ind. App. 663, 309 N.E.2d 150 (1974); *Longstreth v. Fitzgibbon*, 125 Mich. App. 261, 335 N.W.2d 677 (1983); *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W.2d 820 (1973); *Lover v. Sampson*, 44 Mich. App. 173, 205 N.W.2d 69 (1972). See also *Congini v. Portersville Valve Co.*, — Pa. —, 470 A.2d 515 (1983) (violation of criminal code provision).

160. 125 Mich. App. 261, 335 N.W.2d 677 (1983).

161. *Id.* at 262, 335 N.W.2d at 678.

162. *Id.* at 263, 335 N.W.2d at 678. The Michigan alcoholic beverage control law provides in relevant part: "A person who knowingly sells or furnishes alcoholic liquor to a person who is less than 21 years of age . . . is guilty of a misdemeanor." MICH. COMP. LAWS § 436.33(1) (Supp. 1984). This statute is an amended form of an earlier Michigan law which stated as follows: "Any person, who knowingly gives or furnishes any alcoholic beverage to a minor . . . shall be guilty of a misdemeanor . . ." MICH. COMP. LAWS § 750.141a (1968) (repealed 1978) (emphasis added). Under this earlier provision, a civil cause of action existed for damages sustained as a result of a person furnishing alcohol to a minor. *Christensen v. Parrish*, 82 Mich. App. 409, 266 N.W.2d 826, *lv. denied mem.*, 403 Mich. 845 (1978) (violation of § 750.141a constitutes prima facie case of negligence); *Lover v. Sampson*, 44 Mich. App. 173, 205 N.W.2d 69 (1972) (violation of statute constitutes negligence per se).

163. 125 Mich. App. at 262, 335 N.W.2d at 678.

164. For the relevant text of the Michigan alcoholic beverage control law, see note 162 *supra*.

165. 125 Mich. App. at 266, 335 N.W.2d at 679. Interpreting legislative amendments, the *Longstreth* court stated that the legislature had not intended to make the prohibition against serving minors applicable only to vendors. *Id.* The *Longstreth* court's conclusion was based on the legislature's use of the word "person," where the words retailer, vendor or licensee could have been used. *Id.* Moreover, the court noted that the legislature had not restricted other provisions of the liquor laws to licensees. *Id.* at 266, 335 N.W.2d at 679-80 (citing MICH. COMP. LAWS § 436.33a (1978) (making it a misdemeanor to transport or possess alcoholic beverages in a motor vehicle)). For a comparison of the current and former Michigan statutes, see note 162 *supra*.

166. 125 Mich. App. at 267, 335 N.W.2d at 679-80. Cases under the former statute had been split as to whether a violation constituted negligence per se or gave rise to a prima facie case of negligence. Compare *Thaut v. Finley*, 50 Mich. App. 611,

gan against one who furnishes alcohol to a minor, even though that person is not a licensee or commercial vendor.¹⁶⁷

Notwithstanding the fact that a number of state alcoholic beverage control acts prohibit the service of alcohol to any person obviously intoxicated, only one court has found a social host liable for serving an adult in violation of such an act.¹⁶⁸ That decision has since been superseded by legislative amendment.¹⁶⁹

Although most courts look to the relevant state's alcoholic beverage control act to find the applicable minimum standard of care, violations of other statutes may also lead to tort liability against the social host.¹⁷⁰ For example, in Pennsylvania, the liquor control laws do not impose civil liability on nonlicensees.¹⁷¹ Therefore, the Supreme Court of Pennsylvania, in *Congini v.*

213 N.W.2d 820 (1973) (negligence per se) and *Lover v. Sampson*, 44 Mich. App. 173, 205 N.W.2d 69 (1972) (negligence per se) with *Christensen v. Parrish*, 82 Mich. App. 409, 266 N.W.2d 826 (1978) (prima facie negligence), *lv. denied mem.*, 403 Mich. 845 (1978). The *Longstreth* court explained that while "[i]t is true that a number of passages in cases speak of negligence per se almost in terms of strict liability, . . . closer examination of the application of the rule reveals that Michigan does not subscribe to such a harsh dogma." 125 Mich. App. at 265 n.8, 335 N.W.2d at 679 n.8 (quoting *Zeni v. Anderson*, 397 Mich. 117, 128-29, 243 N.W.2d 270, 276 (1976)). Violation of a statute under Michigan law therefore "creates only a prima facie case from which the jury may draw an inference of negligence." *Id.* at 265, 335 N.W.2d at 679 (quoting *Zeni v. Anderson*, 397 Mich. 117, 128-29, 243 N.W.2d 270, 276 (1976)).

For a discussion of other jurisdictions that hold that a social host's violation of a statute creates only a prima facie case or evidence of negligence, see note 155 *supra*.

167. 125 Mich. App. at 266, 335 N.W.2d at 680. The plaintiffs in *Longstreth* failed to allege that the defendants had "knowingly sold or furnished alcoholic liquor to a person who is less than 21 years of age, or . . . fail[ed] to make diligent inquiry as to whether the person is less than 21 years of age." *Id.* (quoting MICH. COMP. LAWS § 436.33(1) (Supp. 1984)). Absent such an averment, plaintiff's complaint failed to state a cause of action under the Michigan alcoholic beverage control statute. *Id.* at 267, 335 N.W.2d at 680. The court therefore remanded the action to the trial court, giving plaintiffs leave to amend their complaint to satisfy the statutory requirements. *Id.*

168. *See Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). In *Coulter*, defendants served alcoholic beverages to one Williams, an obviously intoxicated person, in violation of the state statute. *Id.* at 148-49, 577 P.2d at 671-72, 145 Cal. Rptr. at 536-37. *See* CAL. BUS. & PROF. CODE § 25602 (West 1964) (amended 1978) (misdemeanor to furnish alcohol to an obviously intoxicated person). The California court ruled that the statute could properly be used to hold social hosts civilly liable. 21 Cal. 3d at 152, 577 P.2d at 673-74, 145 Cal. Rptr. at 538-39.

169. *See* CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984); CAL. CIV. CODE § 1714(b) (West Supp. 1984). For a discussion of these amendments, see note 185 *infra*. *Cf.* *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984) (recognizing negligence of social host who serves an obviously intoxicated adult).

170. *See, e.g., De More v. Dieters*, 334 N.W.2d 734 (Iowa 1983) (defendant's negligence may be based on violation of contributing-to-delinquency statute); *Congini v. Portersville Valve Co.*, ___ Pa. ___, 470 A.2d 515 (1983) (defendant's negligence founded on violation of criminal accomplice liability statute). For a discussion of *Congini*, see notes 172-78 and accompanying text *infra*.

171. *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973) (nonlicensee who furnished intoxicants to intoxicated person for no remuneration cannot be held liable

Portersville Valve Co.,¹⁷² had to rely on other legislation in order to impose liability upon a social host who served alcohol to a minor.¹⁷³ Utilizing a rather unique approach, the *Congini* court began by noting that under the Pennsylvania Crimes Code,¹⁷⁴ a minor commits a summary offense if he "attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverage."¹⁷⁵ From this, the court reasoned that an adult who furnishes liquor to a minor is criminally liable as an accomplice to the minor's violation of the law.¹⁷⁶ As a result, the *Congini* court held

under Pennsylvania Liquor Code for injuries to a third party allegedly caused by the intoxicated person); *Couts v. Ghion*, 281 Pa. Super. 135, 421 A.2d 1184 (1980) (nonlicensee soft drink distributor could not be held liable under Pennsylvania Liquor Code for wrongful death of visibly intoxicated motorist on ground that distributor served him alcoholic beverages). For the text of the applicable section of the Pennsylvania Liquor Code, see note 152 *supra*.

For other jurisdictions refusing to apply alcoholic beverage control acts to the conduct of social hosts, see notes 182-84 *infra*.

172. ___ Pa. ___, 470 A.2d 515 (1983). In *Congini*, plaintiff, a minor, had attended a holiday party hosted by his employer. *Id.* at ___, 470 A.2d at 516. Although intoxicated, the minor attempted to drive home. *Id.* at ___, 470 A.2d at 516. En route, plaintiff was involved in an automobile accident suffering serious permanent injuries. *Id.*

173. *Id.* at ___, 470 A.2d at 517.

174. 18 PA. CONS. STAT. ANN. §§ 101-9183 (Purdon 1983). The Pennsylvania Liquor Code is found at PA. STAT. ANN. tit. 47, §§ 1-101 to 796 (Purdon 1983). Unlike the Liquor Code, the Pennsylvania Crimes Code applies to all citizens of the Commonwealth. *Congini*, ___ Pa. at ___ n.3, 470 A.2d at 518 n.3. For the applicable language of the Liquor Code, see note 152 *supra*.

175. ___ Pa. at ___, 470 A.2d at 517 (quoting 18 PA. CONS. STAT. ANN. § 6308 (Purdon 1983)). The Pennsylvania Supreme Court stated that this provision, making it illegal for a minor to purchase, consume or possess alcohol, reflected a legislative judgment that persons under 21 years of age are incompetent to handle the effects of alcohol. ___ Pa. at ___, 470 A.2d at 517.

Next, the *Congini* court acknowledged that in the case of an ordinary able-bodied man, the common law provides that the consumption of alcohol, rather than the furnishing of it, is the proximate cause of any subsequent damage. *Id.* See *Klein v. Raysinger*, ___ Pa. ___, 470 A.2d 507 (1983) (companion case to *Congini* holding that a social host who serves liquor to an adult guest is not liable for the subsequent negligent acts of that guest). However, because of the legislative determination that persons under 21 are not like ordinary able-bodied men in their ability to handle alcohol, the *Congini* court concluded that the common law rule does not apply where the guest is a minor. ___ Pa. at ___, 470 A.2d at 517.

176. ___ Pa. at ___, 470 A.2d at 517 (citing 18 PA. CONS. STAT. ANN. § 306 (Purdon 1983)). The Pennsylvania accomplice liability statute provides in pertinent part:

(a) General rule.—A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(c) Accomplice defined.—A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; or

that the defendant host could be held liable for injuries to the minor proximately resulting from the minor's intoxication.¹⁷⁷ Thus, in Pennsylvania, it is the adult's violation of the accomplice liability statute, rather than violation of the liquor control laws, which constitutes negligence per se in a civil action against a social host who serves alcohol to his minor guest.¹⁷⁸

A finding that the host's violation of either an alcoholic beverage control act or another statutory provision constitutes negligence per se merely satisfies the plaintiff's burden of proving that the host breached the requisite duty of care.¹⁷⁹ In order to recover, the plaintiff must still prove that the social host's violation of the law proximately caused the damages suffered by the plaintiff.¹⁸⁰ Thus, it is possible that the common law view that the consumption of the alcohol is the proximate cause may preclude recovery under this theory of liability even though the defendant is negligent per se.¹⁸¹

Many courts have been unwilling to extend tort liability to social hosts for their violation of alcoholic beverage control laws. A number of jurisdictions have concluded that since the liquor control laws are primarily penal statutes, they should be given no civil or remedial application.¹⁸² Other

(2) his conduct is expressly declared by law to establish his complicity.

18 PA. CONS. STAT. ANN. § 306 (Purdon 1983) (emphasis added). An accomplice is thus held liable to the same extent as one who commits the offense. *See Congini*, ___ Pa. at ___, 470 A.2d at 517.

177. ___ Pa. at ___, 470 A.2d at 518-19. The Pennsylvania court noted, however, that a finding of negligence per se only satisfies the requirement of showing that the defendant was negligent. *Id.* at ___ n.4, 470 A.2d at 518 n.4 (citing *Kaplan v. Philadelphia Transp. Co.*, 404 Pa. 147, 171 A.2d 166 (1961)).

178. *See* ___ Pa. at ___, 470 A.2d at 517. In holding the social host negligent per se, the *Congini* court followed the analysis set forth in the Restatement. *Id.* at ___, 470 A.2d at 517-18. *See* RESTATEMENT (SECOND) OF TORTS § 286 (1965). For Dean Prosser's explanation of § 286, see text accompanying note 157 *supra*. Specifically, the court noted that the decision to make it an offense for minors to purchase or consume alcohol reflected the legislature's attempt "to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age." ___ Pa. at ___, 470 A.2d at 518 (interpreting 18 PA. CONS. STAT. ANN. § 6308 (Purdon 1983)).

179. PROSSER AND KEETON, *supra* note 22, § 36, at 230. *See also* RESTATEMENT (SECOND) OF TORTS § 288B (1965).

180. PROSSER AND KEETON, *supra* note 22, § 36, at 230. *See also* RESTATEMENT (SECOND) OF TORTS § 288B comment b (1965).

181. *See, e.g., Slicer v. Quigley*, 180 Conn. 252, 429 A.2d 855 (1980). In *Slicer*, the plaintiff claimed that the defendant host was negligent per se as a result of violating a statute which forbade the furnishing of alcohol to minors. *Id.* at 256, 429 A.2d at 857. *See* CONN. GEN. STAT. ANN. § 30-86 (West 1975). In spite of this alleged violation, the Connecticut court ruled that it was the minor's consumption, rather than the serving of alcohol, which proximately cause plaintiff's injuries. 180 Conn. at 256, 429 A.2d at 857. As summarized by the *Slicer* court, "[t]he common-law rule as to proximate cause applies in any common-law action of negligence, even though that action includes one or more alleged statutory violations . . ." *Id.* at 256-57, 429 A.2d at 858 (citing *Moore v. Bunk*, 154 Conn. 644, 647, 228 A.2d 510, 512 (1967)).

182. *See, e.g., Bell v. Alpha Tau Omega Fraternity*, 98 Nev. 109, 642 P.2d 161 (1982) (purpose of liquor control laws is not to enlarge civil remedies). For cases

courts have focused on the language and legislative intent underlying the alcoholic beverage control acts and have ruled that they are not designed to regulate the activities of nonlicensees.¹⁸³ Still other courts, analyzing the purpose of these statutes, have found that they are not designed to protect particular classes of plaintiffs and therefore do not necessarily give rise to a civil cause of action.¹⁸⁴

5. *Social Host Liability Under Modern Common Law: Abrogation of the Rule of Nonliability*

A select number of courts have abrogated the traditional common law rule and have imposed liability on social hosts for injuries suffered by third persons as a result of the negligence of an intoxicated guest.¹⁸⁵ The

refusing to hold vendors civilly liable for violations of alcoholic beverage control laws, see note 85 *supra*.

183. *See, e.g.*, *Chastain v. Litton Sys.*, 694 F.2d 957 (4th Cir. 1982) (applying North Carolina law), *cert. denied*, 103 S. Ct. 2454 (1983); *United Servs. Auto. Ass'n v. Butler*, 359 So. 2d 498 (Fla. Dist. Ct. App. 1978); *Edgar v. Kajet*, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975), *aff'd*, 44 A.D.2d 597, 389 N.Y.S.2d 631 (1976); *Johnson v. Paige*, 47 Or. App. 1177, 615 P.2d 1185 (1980); *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973); *Couts v. Ghion*, 281 Pa. Super. 135, 421 A.2d 1184 (1980). For a discussion of cases where courts determined that holding nonlicensees liable for violation of alcoholic beverage control acts was consonant with legislative intent, see note 158 and accompanying text *supra*.

184. *See, e.g.*, *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971) (no cause of action in favor of third persons injured by intoxicated minor); *Johnson v. Paige*, 47 Or. App. 1177, 615 P.2d 1185 (1980) (no cause of action in favor of minor who had been sold intoxicating beverages).

185. *See, e.g.*, *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *Kelly v. Gwinell*, 96 N.J. 538, 476 A.2d 1219 (1984); *Figuly v. Knoll*, 185 N.J. Super. 477, 449 A.2d 564 (Law Div. 1982); *Linn v. Rand*, 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971). Even when a court decides to abandon the common law rule of nonliability for social hosts, there is no guarantee that the legislature will not reinstate it. In *Coulter v. Superior Court*, the Supreme Court of California permitted a common law negligence claim against a social host for injuries caused by a guest's drunken driving. *See Coulter*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). In the same year, however, the California legislature amended its statutes to overrule expressly the court's holding in *Coulter*. *See CAL. BUS. & PROF. CODE* § 25602(c) (West Supp. 1984); *CAL. CIV. CODE* § 1714(b) (West Supp. 1984). These sections also expressly overruled two other cases which had judicially imposed civil liability on commercial suppliers of alcohol. *See Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

The relevant statute now provides that no social host can be held liable for furnishing alcoholic beverages to one who subsequently injures a third person. *See CAL. CIV. CODE* § 1714(c) (West Supp. 1984). The statute provides as follows:

No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

Id.

Similarly, the California Business and Professions Code now provides that no one may be held civilly liable for injuries suffered as a result of furnishing alcohol to

landmark decision in this area is *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*,¹⁸⁶ decided by the Supreme Court of Oregon in 1971. The plaintiff in *Wiener* was a passenger in a car driven by an intoxicated minor.¹⁸⁷ The minor negligently drove the vehicle into a building, causing injuries to the plaintiff.¹⁸⁸ The plaintiff alleged that the defendant fraternity was negligent in serving alcohol to the minor because it was foreseeable that he would later drive.¹⁸⁹

In its discussion, the *Wiener* court acknowledged that ordinarily a host who makes intoxicating beverages available to adult guests is not liable for subsequent injuries to third persons.¹⁹⁰ However, the court went on to note that there may be circumstances in which a social host has a duty to refuse to serve certain guests, as where the host "has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things."¹⁹¹ In the case before it, the Oregon court concluded that a jury might properly find that the fraternity's serving of the minor was unreasonable because he was a minor and the defendant fraternity ought to have known that he would be driving following the party.¹⁹² The *Wiener*

any habitual or common drunkard or to any obviously intoxicated person. See CAL. BUS. & PROF. CODE § 25602(b) (West Supp. 1984). Liability may be imposed, however, on licensees who furnish alcohol to any obviously intoxicated minor. See *id.* § 25602.1.

These legislative amendments also restore California to the common law view that the proximate cause of injuries inflicted by an intoxicated person is the drinking of the liquor rather than the furnishing of it. See *id.* § 25602(c); CAL. CIV. CODE § 1714(b) (West Supp. 1984). These sections have been construed to apply only prospectively, such that causes of action existing at the time of the 1978 amendments are governed by the *Vesely* and *Coulter* principles of duty and proximate cause. See *Fosgate v. Gonzales*, 107 Cal. App. 3d 951, 166 Cal. Rptr. 233 (1980).

186. 258 Or. 632, 485 P.2d 18 (1971).

187. *Id.* at 637, 485 P.2d at 20.

188. *Id.*

189. *Id.* at 637, 485 P.2d at 20-21. The party was held at the Country Squire Recreation Ranch, located approximately ten miles north of Eugene, Oregon. *Id.* at 635, 485 P.2d at 20. The owners and operators of the Ranch were also named as defendants in the suit. *Id.* at 636, 485 P.2d at 20. These defendants were charged with negligence in allowing minors to drink on the premises in violation of Oregon liquor control laws and in failing to supervise adequately the activities on the property. *Id.* at 641, 485 P.2d at 23.

Plaintiff *Wiener* also brought suit against *Kienow*, a member of the fraternity who had purchased and delivered the alcoholic beverages to the party knowing that minors would be present. *Id.* at 636, 485 P.2d at 20.

190. *Id.* at 639, 485 P.2d at 21 (citing *Le Gault v. Klebba*, 7 Mich. App. 640, 152 N.W.2d 712 (1967)).

191. *Id.* (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 175 (3d ed. 1962)). Persons identified by the *Wiener* court as putting the host on notice of a potential duty include persons "already severely intoxicated," those whose conduct the host knows to be unusually affected by alcohol, and minors. *Id.* at 639-40, 485 P.2d at 21.

192. *Id.* at 643, 485 P.2d at 23. The court ruled that the fraternity's role as host and its direct involvement in serving alcohol to the minor gave rise to a duty to refuse to serve intoxicating beverages to its guest "when it would be unreasonable under the circumstances to permit him to drink." *Id.*

court therefore ruled that plaintiff had adequately stated a cause of action in negligence against the defendant host.¹⁹³

More recently, in *Kelly v. Gwinnell*,¹⁹⁴ the Supreme Court of New Jersey held that a common law negligence cause of action would lie against a social host. The plaintiff in *Kelly* was injured in an automobile collision with a drunken driver who had been furnished alcohol by the defendant social host.¹⁹⁵

The *Kelly* court initially observed that, on the facts before it, a reasonable person in the position of the defendant host should have foreseen that the continued furnishing of alcohol to a guest would make it highly likely that the guest would be unable to drive safely, and would thereby pose a risk of harm to others.¹⁹⁶ Having thus determined that the usual elements of a negligence claim existed, the court turned to the remaining question of whether the social host had a duty to prevent the foreseeable risk of harm.¹⁹⁷

The *Kelly* court stated that the existence of a duty is a function of public policy.¹⁹⁸ The court then concluded that "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."¹⁹⁹

193. *Id.* With respect to the defendant owner-operators of the party premises, the *Wiener* court found that they owed no duty to protect the plaintiff from the negligence of Blair. *Id.* at 641, 485 P.2d at 22. The court reasoned that the host fraternity should bear the responsibility for supervising its guests and their consumption of alcohol, not the owners of the property. *Id.*

The court similarly found no liability against defendant Kienow, the purchaser of the alcohol. *Id.* at 640, 485 P.2d at 22. In dismissing plaintiff's claim that Kienow's negligence could be based on a violation of an Oregon law which directed that no person make alcoholic beverages available to minors, the court ruled that the purpose of the statute was not to protect third persons from injury. *Id.* at 638, 485 P.2d at 21. *See* OR. REV. STAT. § 471.410(2) (1983). Since the purpose of the law was to protect minors from the vices of drinking, no cause of action would be implied in favor of the plaintiff. 258 Or. at 638, 485 P.2d at 21. The court also ruled that since Kienow was merely a conduit in providing the alcohol, and had not in fact served alcoholic beverages to the minor involved, he could not be held liable under principles of common law negligence. *Id.* at 640, 485 P.2d at 22.

194. 96 N.J. 538, 476 A.2d 1219 (1984).

195. *Id.* at 541, 476 A.2d at 1220. The plaintiff, Kelly, originally had sued the drunken driver of the other vehicle, Gwinnell. *Id.* The drunken driver thereupon brought a third party claim against Mr. and Mrs. Zak, the hosts who had served him alcohol, seeking contribution. *Id.* Kelly then amended her complaint to assert a claim against the Zaks. *Id.* at 541-42, 476 A.2d at 1220.

196. *Id.* at 544, 476 A.2d at 1222.

197. *Id.* Specifically, the *Kelly* court found the negligence elements satisfied by "an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable." *Id.*

198. *Id.* The *Kelly* court observed that in the ordinary instance, a duty is presumed to exist merely on the basis of the actor's creation of an unreasonable risk of harm. *Id.* However, the imposition of a duty also reflects a value judgment in consideration of the relationship between the parties, the nature of the risk, and the public's concern with the solution. *Id.* (citing *Goldberg v. Housing Auth.*, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962)).

199. *Id.* at 545, 476 A.2d at 1222. The court explained:

Accordingly, the *Kelly* court held that a social host who provides liquor to an intoxicated guest, knowing that the guest will drive shortly thereafter, is liable for the foreseeable injuries suffered by third parties as a result of the guest's drunken driving.²⁰⁰

C. *Affirmative Defenses for Vendors and Social Hosts*

In those jurisdictions in which the legislature or the judiciary has recognized civil liability for alcohol vendors or social hosts,²⁰¹ the issue of defenses becomes particularly significant. Essentially, there are four categories of affirmative defenses²⁰² that are available to defendants who have served alcohol to their patrons or guests: 1) contributory or comparative negligence,²⁰³

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 to the point where the Governor notes that they are regarded as the toughest in the nation, . . . the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy.

Id. at 544-45, 476 A.2d at 1222. (footnote and citation omitted). The court acknowledged that imposing a duty on social hosts went beyond prior decisions of the court, but opined that public policy compelled such a result. *Id.* at 544-48, 476 A.2d at 1222-24.

The *Kelly* court also cited with approval a lower court decision imposing liability upon a social host who served an intoxicated minor. *Id.* at 546, 476 A.2d at 1223 (citing *Linn v. Rand*, 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976)). The court reflected the *Linn* court's reasoning: "It makes little sense to say that the licensee . . . is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because his is unlicensed." *Id.* at 547, 476 A.2d at 1223-24 (quoting *Linn*, 140 N.J. Super. at 217, 356 A.2d at 18). See *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959) (imposing civil liability upon a licensed vendor).

Additionally, the *Kelly* court responded to the argument that the liability of licensees is justified because unlike social hosts, they profit from serving liquor. 96 N.J. at 547-48, 476 A.2d at 1224. The court stated that the liability of both licensees and social hosts derives from the duty of care that accompanies control of the liquor supply, regardless of the motive for furnishing it. *Id.* at 548, 476 A.2d at 1224.

200. 96 N.J. at 559, 476 A.2d at 1230. The court further ruled that the social host and the guest-drunk driver are liable to the third party as joint tortfeasors. *Id.* (citing *Melone v. Jersey Cent. Power & Light Co.*, 18 N.J. 163, 113 A.2d 13 (1955); *Ristan v. Frantzen*, 14 N.J. 455, 102 A.2d 614 (1954); *Matthews v. Delaware, L. & W. R.R.*, 56 N.J.L. 34, 27 A. 919 (Sup. Ct. 1893)).

201. For a discussion of the liability of commercial suppliers of alcohol, see notes 12-103 and accompanying text *supra*. For a discussion of the liability of social hosts who furnish alcohol, see notes 105-200 and accompanying text *supra*.

202. Of course, a defendant supplier of alcohol may always defend by showing the plaintiff's failure to prove a requisite element of the asserted cause of action.

203. For a discussion of contributory or comparative negligence as a defense to an action brought under a dramshop act, see notes 207-10 and accompanying text *infra*. For a discussion of this defense in an action based upon violation of an alcoholic beverage control act, see notes 253-67 and accompanying text *infra*.

Also included in this category are defenses based upon the plaintiff's wanton or

2) participation or complicity;²⁰⁴ 3) assumption of the risk;²⁰⁵ and 4) statutory defenses, including the statute of limitations.²⁰⁶ The propriety of each type of defense seems to hinge upon the basis of the plaintiff's cause of action rather than upon the status of the defendant as vendor or social host.

1. *Defenses to Actions Based Upon a Dramshop Act*

a. Contributory/Comparative Negligence

It is generally accepted that contributory negligence on the part of the plaintiff is not a defense to an action based upon a state's dramshop act.²⁰⁷ The basis for this rule is simply that the plaintiff's cause of action is not grounded in negligence,²⁰⁸ but rather stems from a legislative judgment that a vendor who violates the act's terms is strictly liable.²⁰⁹ Furthermore, courts have reasoned that if contributory negligence were permitted as a defense, the purpose of the dramshop legislation would be frustrated.²¹⁰

b. Participation or Complicity

In a number of dramshop jurisdictions, courts have created a doctrine of complicity that may bar a plaintiff's recovery.²¹¹ Complicity, unlike con-

willful misconduct. For a discussion of cases where the plaintiff is barred by virtue of wanton or willful misconduct, see notes 268-75 and accompanying text *infra*.

204. For a discussion of participation or complicity as a defense to an action brought under a dramshop act, see notes 211-27 and accompanying text *infra*. For a discussion of this defense in an action based upon violation of an alcoholic beverage control act, see notes 276-84 and accompanying text *infra*.

205. For a discussion of assumption of the risk as a defense to an action brought under a dramshop act, see notes 228-40 and accompanying text *infra*.

206. For a discussion of statutory defenses in actions brought under dramshop acts, see notes 241-52 and accompanying text *infra*. In actions based upon violation of an alcoholic beverage control act, defendants may be able to assert an excuse or justification for the law's violation. For a discussion of excuse, see notes 285-89 and accompanying text *infra*. Some states have codified the excuses that are available to these defendants. See notes 290-92 and accompanying text *infra*.

207. See McGough, *supra* note 21, at 454. For cases holding that contributory negligence is not available as a defense to actions based on violations of a dramshop act, see, e.g., *Cookinham v. Sullivan*, 23 Conn. Supp. 193, 179 A.2d 840 (Super. Ct. 1962); *Quatrano v. Marrocco*, 61 Ill. App. 2d 1, 208 N.E.2d 632 (1965); *Berge v. Harris*, 170 N.W.2d 621 (Iowa 1969); *Genesee Merchants Bank & Trust Co. v. Bourrie*, 375 Mich. 383, 134 N.W.2d 713 (1965).

Liability of furnishers of alcohol based on violation of a dramshop act is currently restricted to actions against commercial suppliers of liquor. For a discussion of cases attempting to impose dramshop act liability on social hosts, see notes 118-40 and accompanying text *supra*.

208. See *Berge v. Harris*, 170 N.W.2d 621 (Iowa 1969) (contributory negligence is no defense to dramshop action founded on breach of a statutory duty).

209. For a discussion of the strict liability imposed by dramshop acts, see text accompanying note 22 *supra*.

210. For a discussion of this argument in the context of participation or complicity, see notes 220-27 and accompanying text *infra*.

211. See, e.g., *Parsons v. Veterans of Foreign Wars Post 6372*, 86 Ill. App. 3d 515, 408 N.E.2d 68 (1980); *Dahn v. Sheets*, 104 Mich. App. 584, 305 N.W.2d 547 (1981);

tributory negligence, relates to the plaintiff's role in causing the patron's intoxication,²¹² not the plaintiff's role in causing his own intoxication. Thus, courts have held that "a person who participate[d] in procuring the intoxication of the person who committed the act about which complaint is made, cannot recover under the [Dramshop] Act."²¹³

For example, in *Parsons v. Veterans of Foreign Wars Post 6372*,²¹⁴ an Illinois appellate court considered whether the trial judge had properly instructed the jury on the defense of complicity.²¹⁵ Examining state law,²¹⁶ the *Parsons* court declared that a plaintiff will be barred from recovery under the doc-

Martinson v. Monticello Municipal Liquors, 297 Minn. 48, 209 N.W.2d 902 (1973); Mitchell v. Shoals, Inc., 19 N.Y.2d 338, 227 N.E.2d 21, 280 N.Y.S.2d 113 (1967). For a discussion of *Parsons*, see notes 214-19 and accompanying text *infra*.

212. See *Parsons*, 86 Ill. App. 3d at 517, 408 N.E.2d at 71. The *Parsons* court explained:

Complicity cannot be based upon a variant of the inapplicable contributory negligence concept; nor upon an "assumption of risk" theory; nor upon a theory that plaintiff contributed to his injury by provoking the inebriate to attack him. . . . The only relevant issue is whether the plaintiff contributed to the inebriate's intoxication.

Id. at 517, 408 N.E.2d at 71 (citation omitted).

One commentator has proposed that complicity is actually contributory negligence masquerading under another name. See McGough, *supra* note 21, at 454.

213. See *Parsons*, 86 Ill. App. 3d at 521, 408 N.E.2d at 74 (quoting *Baker v. Hannan*, 44 Ill. App. 2d 157, 159, 194 N.E.2d 563, 564 (1963)) (emphasis added).

214. *Id.* at 515, 408 N.E.2d 68 (1980). The plaintiff in *Parsons* was a widow who sought to recover for the loss of means of support resulting from the death of her husband. *Id.* at 515, 408 N.E.2d at 70. The decedent, Edgar Parsons, and his wife, Margaret, had stopped at defendant's establishment after riding about on their motorcycle. *Id.* After joining a friend at a table, the Parsons and their friend drank together, with Margaret getting all of the drinks from the bar while Edgar and his friend shared the costs. *Id.* at 515-16, 408 N.E.2d at 70. About four and one-half hours later, Edgar attempted to ride the motorcycle despite his obvious intoxication. *Id.* at 516, 408 N.E.2d at 70. Edgar subsequently lost control of the vehicle and fell, suffering fatal injuries. *Id.* At trial, the jury returned a verdict in favor of the defendant vendor. *Id.*

215. *Id.* The trial court had instructed the jury on complicity as follows: If you find that the plaintiff did any of the following things then the plaintiff cannot recover damages in this case from [the defendant]:

Willingly encouraged the drinking which caused the intoxication of Edgar Parsons. Voluntarily participated to a material and substantial extent in the drinking which led to the intoxication of Edgar Parsons.

The law does not state what is participation to a material and substantial extent. This is for you to decide.

Id. (quoting Illinois Pattern Instruction 150.17).

216. *Id.* at 516-21, 408 N.E.2d at 70-74. The leading case in Illinois at the time *Parsons* was decided was *Nelson v. Araiza*, 69 Ill. 2d 534, 372 N.E.2d 637 (1977). In *Nelson*, the plaintiff consumed alcohol with the defendant in a bar. *Id.* at 537, 372 N.E.2d at 638. Although he was in an intoxicated condition, the defendant attempted to drive with the plaintiff as a passenger. *Id.* at 538, 372 N.E.2d at 638. However, due to the driver's intoxication, the car was involved in an accident, injuring the plaintiff-passenger. *Id.* On these facts, the Illinois Supreme Court stated that under the doctrine of complicity, "only one who actively contributes to or procures the intoxication of the inebriate is precluded from recovery." *Id.* at 543, 372 N.E.2d at 641 (citation omitted). As further stated by the court, unless complicity can be

trine of complicity if he or she "contribute[s] to the inebriate's intoxication."²¹⁷ Accordingly, the court determined that "one who provides liquor which does not significantly contribute to intoxication may not be attributed with complicity, whereas one who has encouraged drinking or provided significant companionship in drinking which causes intoxication, may be, regardless of whether that person has actually supplied the liquor."²¹⁸ Thus, the *Parsons* court held that the plaintiff was barred from recovery because of her participation in her husband's drinking even though she did not purchase the intoxicating alcohol.²¹⁹

Not all courts, however, have been willing to allow complicity as a defense to an action brought under a dramshop act. In *Passini v. Decker*,²²⁰ on plaintiff's motion to strike a proffered defense of participation,²²¹ the Supe-

established by the evidence as a matter of law, the issue is properly left to the discretion of the jury. *Id.*

The *Parsons* court cited cases in which the plaintiff was found to have "actively contributed" to the inebriate's condition. 86 Ill. App. 3d at 15, 408 N.E.2d at 73 (citing *Ness v. Bilbob Inn, Inc.*, 15 Ill. App. 2d 340, 146 N.E.2d 234 (1957); *Hays v. Waite*, 36 Ill. App. 397 (1890)). In *Hays*, the plaintiff had purchased drinks for and drunk with the intoxicated person throughout the evening. 36 Ill. App. at 398. In *Ness*, although the plaintiff did not purchase any drinks for the inebriate, the fact that the plaintiff drank with the inebriate was found to constitute active participation. 15 Ill. App. 2d at 340, 146 N.E.2d at 238. See also *Baker v. Hannan*, 44 Ill. App. 2d 157, 194 N.E.2d 563 (1963) (complicity established as a matter of law where plaintiffs drank beer with the intoxicated person who had purchased the alcohol, since this conduct constituted "procuring the intoxication" of the inebriate).

217. 86 Ill. App. 3d at 518, 408 N.E.2d at 72. For definitions of "contributes" under Illinois law prior to *Parsons*, see note 216 *supra*.

218. *Id.* at 518, 408 N.E.2d at 72. But see *Mitchell v. Shoals, Inc.*, 19 N.Y. 2d 338, 227 N.E.2d 21, 280 N.Y.S.2d 113 (1967) (defense of complicity not applicable where, although plaintiff drank with the inebriate, he neither purchased drinks nor encouraged inebriate to drink to excess; plaintiff's conduct therefore did not amount to guilty participation in the other's intoxication).

219. 86 Ill. App. 3d at 521, 408 N.E.2d at 74.

220. 39 Conn. Supp. 20, 467 A.2d 442 (Super. Ct. 1983). The plaintiff, Passini, who had been injured while a passenger in a car driven by Decker, brought suit against the owner of the tavern who had served alcohol to Decker and also against Decker herself. *Id.* at ___, 467 A.2d at 442. The liability of the vendor was predicated upon the Connecticut Dramshop Act. 39 Conn. Supp. at ___, 467 A.2d at 442. See CONN. GEN. STAT. ANN. § 30-102 (West 1975). For the relevant text of the act, see note 223 *infra*.

As the *Passini* court noted, the Connecticut Dramshop Act has been held to impose strict liability upon the seller with proof "that there was (1) a sale of intoxicating liquor (2) to an intoxicated person (3) who, in consequence of such intoxication, causes injury to the person or property of another." 39 Conn. Supp. at ___, 467 A.2d at 443 (quoting *Nelson v. Steffens*, 170 Conn. 356, 360, 365 A.2d 1174, 1176 (1976); *Sanders v. Officers' Club of Conn., Inc.*, 35 Conn. Supp. 91, 93, 397 A.2d 122, 124 (Super. Ct. 1978)).

221. 39 Conn. Supp. at ___, 467 A.2d at 443. Defendant seller had asserted in her defense that "[a]ny alcohol consumed by Debra Decker . . . at the premises of Yesterday's Cafe was done in the company of Debra Passini [plaintiff] who contributed to the supplying of alcoholic beverages, or who encouraged, facilitated or participated in the consumption of said beverages with Debra Decker . . ." *Id.* at ___, 467 A.2d at 442-43. The defendant argued that plaintiff's conduct barred her from re-

rior Court of Connecticut considered whether such a defense was viable under state law.²²² Focusing on the Connecticut Dramshop Act,²²³ the *Passini* court noted that the law's purpose was "to protect the public at large from tortious conduct committed by an intoxicated person who was served intoxicating liquor by a tavern owner while in an intoxicated state."²²⁴ The *Passini* court then reasoned that the act reflected a legislative determination that a vendor of alcohol should bear the loss for damages to others as a result of unlawful sales.²²⁵ Accordingly, in light of the purposes of the statute and under a plain reading of its provisions,²²⁶ the Connecticut court concluded that the participation or complicity of the plaintiff was not a viable defense.²²⁷

covery since the Connecticut Dramshop Act was intended to protect only innocent third parties, not those who participated in the consumption of alcohol by intoxicated persons. *Id.* at ___, 467 A.2d at 443.

222. *Id.* at ___, 467 A.2d at 443. The *Passini* court acknowledged that no Connecticut Supreme Court decisions had determined whether participation was a defense to a dramshop action; however, it noted that a majority of superior court decisions had allowed the defense. *Id.* (citing *Cookinham v. Sullivan*, 23 Conn. Supp. 193, 179 A.2d 840 (Super. Ct. 1962) (one who actively procures the intoxication of another who commits a tortious act may not recover from the bar owner)).

223. CONN. GEN. STAT. ANN. § 30-102 (West 1975). The Connecticut Dramshop Act states in part as follows: "If any person, by himself or his agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured . . ." *Id.*

224. 39 Conn. Supp. at ___, 467 A.2d at 443 (citing *Sanders v. Officers' Club of Conn., Inc.*, 35 Conn. Supp. 91, 397 A.2d 122 (Super. Ct. 1978); *Cookinham v. Sullivan*, 23 Conn. Supp. 193, 179 A.2d 840 (Super. Ct. 1962)). The *Passini* court declared that third persons who accompany an intoxicated patron in his consumption of alcohol are members of the public at large and are thus protected parties within the meaning of the statute. *Id.* at ___, 467 A.2d at 444.

225. *Id.* at ___, 467 A.2d at 444. To achieve this goal, strict liability is imposed on vendors who violate the provisions of the dramshop act. *Id.* See note 220 *supra*. The *Passini* court, finding that the legislature had made such a determination in order to deter vendors from selling liquor to those who are intoxicated, stated that "[t]o allow a defense of 'participation' by a vendor would defeat by judicial amendment this legislative purpose in enacting the statute." 39 Conn. Supp. at ___, 467 A.2d at 444.

226. 39 Conn. Supp. at ___, 467 A.2d at 444. The Connecticut Supreme Court stated that a plain reading of the dramshop act indicated no intention to limit recovery to "innocent" third parties. *Id.* at ___, 467 A.2d at 445. Accordingly, the *Passini* court ruled that under Connecticut law the judiciary is not vested with the discretion to substitute its preferences for those expressed in the legislation. *Id.* at ___, 467 A.2d at 444 (citing *Frazier v. Manson*, 176 Conn. 638, 410 A.2d 475 (1979); *Galullo v. Waterbury*, 175 Conn. 182, 397 A.2d 103 (1978)).

227. 39 Conn. Supp. at ___, 467 A.2d at 445. The *Passini* court noted that those jurisdictions that recognize a participation defense base their conclusion on the rationale that the participant is partially responsible for the intoxication of the other and therefore should not be entitled to relief. *Id.* at ___, 467 A.2d at 444. The *Passini* court responded to this contention by arguing that

[t]his rationale fails to recognize that the participant would not be able to "participate" in the consumption of alcohol with the intoxicated person without the vendor selling him or her the alcohol being consumed. The

c. Assumption of the Risk

The third defense available to a vendor being sued under a dramshop act is assumption of the risk. Under general tort principles, assumption of the risk is asserted where the plaintiff has voluntarily encountered a known hazard.²²⁸ Where available, its effect is to bar any recovery by the plaintiff.²²⁹ Because of its harsh impact on plaintiffs, however, the doctrine has generally been abrogated, though the reasonableness of the plaintiff's conduct in assuming a risk may alter the recovery in jurisdictions with comparative fault principles.²³⁰ Nevertheless, in those jurisdictions that continue to recognize assumption of the risk as a viable defense, it may be available to defendants in a dramshop action.

In *Berge v. Harris*,²³¹ the Iowa Supreme Court noted that where the particular facts of the case might support a finding of assumption of the risk, the question should be submitted to the jury.²³² Although the Iowa Dramshop Act imposed strict liability on vendors, the *Berge* court determined that it did not thereby preclude a defendant from raising plaintiff's assumption of the risk as a defense.²³³ The court found that the application of the defense

legislature has placed the onus on the *vendor* for selling alcohol to intoxicated persons, not on any participant in the consumption of the alcohol.

Id. at ___, 467 A.2d at 444-45. As a result, the court found that the defense of complicity would defeat the public policy determination of the state legislature and the clear expression of legislative intent reflected in the express language of the dramshop act. *Id.* at ___, 467 A.2d at 445.

228. See PROSSER AND KEETON, *supra* note 22, § 68, at 480-92. As Prosser and Keeton articulate, "assumption of risk means that the plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone." *Id.* § 68, at 480 (footnote omitted).

229. *Id.* When one assumes a known risk, he relieves the defendant of all legal duty. *Id.*

230. *Id.* § 68, at 493-98. Other arguments against allowing assumption of the risk as a defense are that it accomplishes no purpose not served by other defenses and that it "adds only duplication leading to confusion." *Id.*

231. 170 N.W.2d 621 (Iowa 1969). In *Berge*, the plaintiff sued for injuries that she suffered while riding as a passenger in a car driven by the defendant Harris. *Id.* at 622. At the time of the accident, Harris was intoxicated; he had been drinking at a dance at the codefendant University Athletic Club, an establishment licensed to sell liquor. *Id.* at 623. The plaintiff's claim against the licensee-club was based on the Iowa Dramshop Act. 170 N.W.2d at 622. See IOWA CODE ANN. § 129.2 (West 1949) (current version as amended at IOWA CODE ANN. § 123.92 (West Supp. 1984)). For the text of § 129.2, see note 122 *supra*. Evidence adduced at trial showed that the plaintiff was aware that Harris had been drinking and that, in spite of her hesitation to do so, she consented to ride in his car. 170 N.W.2d at 624. On these facts, the trial judge directed a verdict in favor of defendants maintaining that plaintiff had assumed the risk as a matter of law. *Id.* at 622.

232. 170 N.W.2d at 625. The Supreme Court of Iowa reversed the trial court's finding of assumption of the risk as a matter of law. *Id.*

233. *Id.* at 627 (citing 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 14.5, at 804 (1956); RESTATEMENT (SECOND) OF TORTS § 523 (1965)). The *Berge* court adopted the reasoning of Dean Prosser that assumption of the risk is a form of contributory negligence that is governed by the subjective standard of the plaintiff him-

would not interfere with the purpose of the act, which was "to fulfill a need for discipline in the traffic of liquor and to provide a remedy for evils and dangers which flow from such traffic,"²³⁴ but rather would serve this purpose. Accordingly, the *Berge* court permitted the dramshop defendant to raise assumption of the risk as a defense.²³⁵

In contrast to *Berge*, some courts have refused to allow defendants to raise the plaintiff's assumption of the risk as a bar to recovery.²³⁶ As the Connecticut Supreme Court ruled in *Passini v. Decker*,²³⁷ such a defense "is not applicable to a statutory violation when the statute was enacted to create an obligation to the public at large."²³⁸ In the words of Dean Prosser, dramshop acts are frequently enacted for the protection of the general public such that "the obligation and the right so created are public ones, which it is not within the power of any private individual to waive."²³⁹ Essentially, then, courts disallowing the defense of assumption of the risk have determined that the fundamental purpose of the dramshop acts would be defeated if plaintiffs were permitted to assume the risk and to waive the statutory cause of action.²⁴⁰

self. *Id.* at 627 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 67, at 454 (4th ed. 1971)). Thus, assumption of the risk will bar recovery in an action in strict liability even though plaintiff's ordinary negligence will not. *Id.* at 627 (citing W. PROSSER, *supra*, § 67, at 454).

234. *Id.* at 626 (quoting *Osinger v. Christian*, 43 Ill. App. 2d 480, 485, 193 N.E.2d 872, 875 (1963)). The *Berge* court stated that one of the goals of the dramshop act was to protect against injuries caused by an intoxicated person. *Id.* at 626. In conclusion, the *Berge* court reasoned that if the defense were unavailable, the result would be to enhance the evils sought to be avoided since the plaintiff would effectively not be responsible for her own actions. *Id.* The Iowa court argued that the purposes of the act would not be fulfilled if the plaintiff could maintain a cause of action in spite of her voluntary submission to the danger of riding with an intoxicated person. *Id.* Such conduct would expose the plaintiff to the very hazard against which the dramshop act sought to protect. *Id.*

235. *Id.* at 627.

236. *See, e.g.*, *Passini v. Decker*, 39 Conn. Supp. 20, 467 A.2d 442 (Super. Ct. 1983). *Cf.* *Brannigan v. Raybuck*, 136 Ariz. 513, 667 P.2d 213 (1983) (questions of contributory negligence and assumption of the risk are left to the discretion of the jury). For a discussion of *Passini*, see notes 220-27 and accompanying text *supra*. For a discussion of *Brannigan*, see notes 287-89 and accompanying text *infra* (discussing defense of excuse in an action based upon violation of the liquor laws).

237. 39 Conn. Supp. 20, 467 A.2d 442 (Super. Ct. 1983). For the facts of *Passini*, see note 220 *supra*.

238. 39 Conn. Supp. at ___, 467 A.2d at 445 (citing *L'Heureux v. Hurley*, 117 Conn. 347, 168 A. 8 (1933); *Casey v. Atwater*, 22 Conn. Supp. 225, 167 A.2d 250 (Super. Ct. 1960)). The *Passini* court ruled that the Connecticut Dramshop Act was exactly that type of statute which was enacted for the protection of the public at large. 39 Conn. Supp. at ___, 467 A.2d at 445.

239. W. PROSSER AND KEETON, *supra* note 22, § 68, at 493. Assumption of the risk is usually not a defense in actions based upon violation of such public protection statutes. *Id.* § 68, at 492.

240. *Id.* § 68, at 492. *Cf.* *Passini*, 39 Conn. Supp. at ___, 467 A.2d at 444 (asserting a similar argument in precluding the defense of contributory negligence). For a discussion of this aspect of *Passini*, see notes 223-27 and accompanying text *supra*.

d. Statutory Defenses

Frequently, the strongest protection for vendors in an action based upon the violation of a dramshop act lies within the particular act itself. As noted earlier, dramshop acts often narrowly define the class or classes of plaintiffs entitled to recovery, usually excluding the intoxicated patron.²⁴¹ A number of these acts also restrict the conduct of the vendor that may lead to liability, providing a cause of action only if the seller served alcohol to a minor, an obviously intoxicated person or a "blacklisted" drunkard.²⁴²

In addition to these prerequisites, some legislatures have established statutory defenses to a vendor's dramshop act liability. For example, five states, Connecticut,²⁴³ Illinois,²⁴⁴ Iowa,²⁴⁵ Michigan²⁴⁶ and North Carolina,²⁴⁷ have set forth particular limitation periods or notice requirements applicable to dramshop suits.²⁴⁸ Under the Connecticut Dramshop Act, plaintiffs

shall give written notice to [defendant] seller within sixty days of the occurrence of such injury to person or property of his or their intention to bring an action under this section Such notice shall specify the time, the date and the person to whom such sale was made, the name and address of the person injured . . . , and the time, date and place where the injury to person or property occurred.²⁴⁹

The purpose of this notice requirement, and others like it, is to enable a prospective defendant to preserve and acquire his evidence.²⁵⁰ Failure to

241. *See, e.g.*, CONN. GEN. STAT. ANN. § 30-102 (West 1975) (creating cause of action in favor of "another" injured by an intoxicated person). For the relevant text of § 30-102, see note 223 *supra*. For a general discussion of the classes of persons protected by dramshop legislation, see notes 32-45 & 123-29 and accompanying text *supra*.

242. *See, e.g.*, CONN. GEN. STAT. ANN. § 30-102 (West 1975) (liability imposed only upon vendor who serves intoxicated person); N.C. GEN. STAT. § 18B-121 (1983) (liability imposed only upon vendor who serves an underaged person); OHIO REV. CODE ANN. § 4399.01 (Page 1982) (liability imposed only upon vendor who serves "black-listed" person).

243. *See* CONN. GEN. STAT. ANN. § 30-102 (West 1975). For the relevant text of the Connecticut act, see text accompanying note 223 *supra*.

244. *See* ILL. ANN. STAT. ch. 43, § 135-6-21 (Smith-Hurd Supp. 1983) (one-year statute of limitations).

245. *See* IOWA CODE ANN. §§ 123.92-93 (West Supp. 1984) (six-month written notice of claim required).

246. *See* MICH. COMP. LAWS ANN. § 436.22(5) (West Supp. 1984) (two-year statute of limitations).

247. *See* N.C. GEN. STAT. § 18B-126 (1983) (one-year statute of limitations).

248. For further discussion of these time requirements in dramshop actions, see notes 42-44 and accompanying text *supra*.

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

250. *See* Zucker v. Vogt, 329 F.2d 426 (2d Cir. 1964) (purpose of notice requirement is to enable a prospective defendant to begin marshalling his evidence while memories are still fresh); Thompson v. Bristol Lodge No. 712, 31 Conn. Supp. 405,

notify the vendor under these provisions bars the plaintiff's right to sue.²⁵¹

Furthermore, the Connecticut, Illinois and North Carolina statutes each provide for a special one-year limitation period within which a plaintiff must institute an action for violation of the respective dramshop acts.²⁵²

2. *Defenses to Actions Based Upon Violation of an Alcoholic Beverage Control Act*

a. Contributory/Comparative Negligence

Jurisdictions that have allowed a civil cause of action based upon the violation of a state alcoholic beverage control act have held that such an offense constitutes either evidence of negligence or negligence per se.²⁵³ Because the cause of action is grounded in negligence, the common law defenses to a negligence claim are available, including contributory negligence.²⁵⁴

Ohio, for example, has followed the general rule that contributory negligence may be a defense to a cause of action based upon violation of an alcoholic beverage control act.²⁵⁵ In *Tome v. Berea Pewter Mug, Inc.*,²⁵⁶ the

372 A.2d 985 (C.P. 1974) (the interests of the defendant in own self-defense are not reasonably protected if plaintiff fails to satisfy notice requirement).

251. See, e.g., *Saur v. Tobin*, 23 Conn. Supp. 104, 177 A.2d 225 (Super. Ct. 1961) (satisfaction of notice requirement is condition precedent to maintaining a cause of action under the Connecticut Dramshop Act).

252. See CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. ANN. STAT. ch. 43, § 135-6-21 (Smith-Hurd Supp. 1983); N.C. GEN. STAT. § 18B-126 (1983) (each providing one-year statute of limitations for actions brought under dramshop act).

253. For cases holding that violations of an alcoholic beverage control act constitute evidence of negligence in a civil action, see note 155 *supra*. For cases holding that violations of an alcoholic beverage control act constitute negligence per se, see note 156 *supra*.

254. PROSSER AND KEETON, *supra* note 22, § 36, at 229-31.

255. See *Tome v. Berea Pewter Mug, Inc.*, 4 Ohio App. 3d 98, 446 N.E.2d 848 (1982). For a discussion of *Tome*, see notes 256-61 and accompanying text *infra*. For other cases following the general rule that the court may consider the negligence of plaintiff in an action based on defendant's violation of an alcoholic beverage control act, see, e.g., *Parett v. Lebamoff*, 408 N.E.2d 1344 (Ind. Ct. App. 1980); *Munford v. Peterson*, 368 So. 2d 213 (Miss. 1979); *Sampson v. W.F. Enters.*, 611 S.W.2d 333 (Mo. Ct. App. 1981); *Swartzenberger v. Billings Labor Temple Ass'n*, 179 Mont. 145, 586 P.2d 712 (1978); *Kemock v. Mark II*, 62 Ohio App. 2d 103, 404 N.E.2d 766 (1978); *Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982); *Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834, *modified*, ___ Wash. 2d ___, 672 P.2d 1267 (1983).

See also *Congini v. Portersville Valve Co.*, ___ Pa. ___, 470 A.2d 515 (1983) (comparative negligence per se for violation of criminal code). For a discussion of defendant's liability in *Congini*, see notes 177-78 and accompanying text *supra*.

256. 4 Ohio App. 3d 98, 446 N.E.2d 848 (1982). In *Tome*, a tavernkeeper was sued by two patrons, including Tome, who were injured while Tome was driving in an intoxicated condition. *Id.* at 99-100, 446 N.E.2d at 849-50. At the time of the incident, Tome was two and one-half months short of being twenty-one years of age. *Id.* at 99, 446 N.E.2d at 850. The defendant was therefore found negligent per se for serving an underage person in violation of the Ohio Alcoholic Beverage Act. *Id.* at 103, 446 N.E.2d at 853. See OHIO REV. CODE ANN. § 4301.22(A), (B), (E) (Page 1982) (making it unlawful to serve persons under twenty-one). Defendant moved for summary judgment on the grounds that the plaintiffs' action was barred by their

Ohio Court of Appeals acknowledged that contributory negligence normally can be invoked even though the defendant is negligent per se.²⁵⁷ Referring to the Second Restatement of Torts²⁵⁸ for further guidance, the *Tome* court concluded that since the alcoholic beverage control act was not designed to place the entire responsibility on vendors for the harm that may result from a patron's intoxication,²⁵⁹ the defendant could assert the plaintiff's contributory negligence as a defense.²⁶⁰ The *Tome* court further noted, however, that where the vendor is willful and wanton in his violation of the act, the contributory negligence of the plaintiff is not a bar.²⁶¹

An exception to the appropriateness of the contributory negligence defense arises where the purpose of the statute is to protect a class of persons who otherwise would be unable to protect themselves.²⁶² For example, in *Chausse v. Southland Corp.*,²⁶³ the Louisiana Court of Appeals held that the

contributory negligence and assumption of the risk. 4 Ohio App. 3d at 99, 446 N.E.2d at 850. The trial court granted the motion and plaintiffs appealed. *Id.*

257. 4 Ohio App. 3d at 103, 446 N.E.3d at 853.

258. *Id.* at 104, 446 N.E.2d at 854 (citing RESTATEMENT (SECOND) OF TORTS § 483 (1965)). The Restatement provides: "The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant." RESTATEMENT (SECOND) OF TORTS § 483 (1965).

259. 4 Ohio App. 3d at 104, 446 N.E.2d at 854. The court found evidence of the legislative intent not to place the full responsibility on the vendor in § 4301.63 and § 4301.632 of the Ohio Liquor Control Law, which make it unlawful for persons under twenty-one to order, purchase or consume liquor. 4 Ohio App. 3d at 104, 446 N.E.2d at 854 (citing OHIO REV. CODE ANN. §§ 4301.63, .632 (Page 1982)). The court stated that by violating these provisions, *Tome* was negligent per se. *Id.* The court also noted that the Ohio legislature had provided by statute that vendors are civilly liable only for serving persons "blacklisted" by the Department of Liquor Control, and *Tome* had not been blacklisted. *Id.* (citing OHIO REV. STAT. ANN. § 4399.01 (Page 1982)). Based on these considerations, the *Tome* court concluded that the legislature had not intended that sellers be liable for sales to any and all intoxicated persons. *Id.*

260. *Id.* at 98-99, 446 N.E.2d at 849 (syllabus by the court).

261. *Id.* at 104, 446 N.E.2d at 854 (citing *Kellerman v. J.S. Durig Co.*, 176 Ohio St. 320, 199 N.E.2d 562 (1964)). However, such behavior by the defendant does not preclude a defense of assumption of the risk. *Id.* (citing *Wever v. Hicks*, 11 Ohio St. 2d 230, 228 N.E.2d 315 (1967)).

262. As Prosser and Keeton have pointed out, there are certain types of statutes, "such as child labor acts, those prohibiting the sale of dangerous articles such as firearms to minors, . . . which have been construed as intended to place the entire responsibility upon the defendant, and to protect the particular class of plaintiffs against their own negligence." PROSSER AND KEETON, *supra* note 22, § 65, at 461 (footnotes omitted). In these cases, the purpose of the statute itself would be defeated if contributory negligence were available as a defense. *Id.* at 461-62. For an example of this rationale, see notes 263-67 and accompanying text *infra*.

263. 400 So. 2d 1199 (La. Ct. App.), *cert. denied*, 404 So. 2d 278, *cert. denied*, 404 So. 2d 497, *cert. denied*, 404 So. 2d 498 (La. 1981). Plaintiffs in *Chausse* were minor passengers injured in a car driven by an intoxicated youth. *Id.* at 1201. The defendant seller had been found liable for selling alcohol to minors in violation of the Louisiana liquor control laws. *Id.* at 1201-02. See LA. REV. STAT. ANN. §§ 14:91, 26:88(1), :285(1) (West 1975). The trial court denied recovery to the plaintiffs, how-

contributory negligence of the plaintiff could not be asserted to bar the plaintiff's claim.²⁶⁴ In reaching this result, the court accepted the plaintiff's argument that "where the purpose of a statute is to protect the minor against the risk of his own negligence . . . the general rule is that the minor's contributory negligence . . . will not defeat recovery for his injury or death, the very risk and harm the statute was designed to prevent."²⁶⁵ In light of the legislature's determination that minors should be protected from the potential harm of their own intoxication,²⁶⁶ the *Chausse* court concluded that any contributory negligence of the minor should not be permitted as a defense.²⁶⁷

b. Willful and Wanton Misconduct of Plaintiff

Although many states have abrogated the doctrine of contributory negligence in favor of some form of comparative negligence,²⁶⁸ some still hold that a plaintiff's conduct will bar recovery completely if it rises to a level of willful and wanton misconduct.²⁶⁹ This theory has been applied by the Cal-

ever, because of their own affirmative acts of negligence in drinking and driving with one known to be intoxicated. 400 So. 2d at 1202.

264. 400 So. 2d at 1203. For other cases holding that contributory negligence is not a defense for violation of an alcoholic beverage control act, see, e.g., *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966); *Rhyner v. Madden*, 188 N.J. Super. 544, 457 A.2d 1243 (Law Div. 1982); *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965); *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958).

265. 400 So. 2d at 1202 (citing *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1978)).

266. *Id.* at 1203. The *Chausse* court held that the alcoholic beverage control laws reflected a legislative intent to keep alcohol out of the hands of minors because of their perceived inability to handle it safely. *Id.* The act was designed to protect against death and injury that could foreseeably arise as a result of a minor's intoxication. *Id.*

267. *Id.* The *Chausse* court quoted Dean Prosser's statement that "the object of the statute itself would be defeated if the plaintiff's fault were a defense . . ." *Id.* (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 65, at 426 (4th ed. 1971)). Defendant seller therefore was held liable for plaintiff's injuries. *Id.* at 1203. According to the dissent, recovery should have been precluded since the plaintiff knowingly rode with a group of young people who had drunk excessive amounts of alcohol and since Louisiana did not have a dramshop statute. *Id.* at 1204-05 (Edwards, J., dissenting).

268. For a thorough analysis of the development of comparative negligence in the United States, see Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 VILL. L. REV. 695 (1984).

269. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). In *Li* the California court stated:

Finally there is the problem of the treatment of willful misconduct under a system of comparative negligence. . . . The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves conduct of an entirely different order, and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct.

Id. at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873 (citation and footnotes omitted).

Prosser and Keeton have defined willful and wanton misconduct to include con-

ifornia courts on several occasions.²⁷⁰

For example, in *Kindt v. Kauffman*,²⁷¹ an intermediate California court ruled that a patron who knowingly drinks to a point of intoxication is guilty of willful and wanton misconduct.²⁷² Even though the plaintiff may be within the class of persons sought to be protected by the California liquor laws,²⁷³ the *Kindt* court stated that administrative, moral and socioeconomic factors militate against allowing the voluntarily intoxicated patron to recover for his own injuries.²⁷⁴ The *Kindt* court thus concluded that a civil

duct of an unreasonable character done in disregard of a known or obvious risk, usually accompanied by an indifference to highly probable consequences. PROSSER AND KEETON, *supra* note 22, § 34 at 213.

270. See *Trenier v. California Inv. & Dev. Corp.*, 105 Cal. App. 3d 44, 164 Cal. Rptr. 156 (1980) (plaintiff who imbibed 27 ounces of Jack Daniels bourbon and 4 ounces of tequila in less than two hours, and thereafter attempted to drive, was found to have engaged in willful and wanton misconduct and was therefore denied recovery in suit against commercial and noncommercial suppliers of alcohol); *Sissle v. Stefemoni*, 88 Cal. App. 3d 633, 152 Cal. Rptr. 56 (1979) (decedent's violation of state law prohibiting drunken driving constituted willful and wanton misconduct barring action against bartender); *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976) (patron who injured himself in automobile accident after becoming intoxicated guilty of willful and wanton misconduct barring recovery). For a discussion of *Kindt*, see notes 271-75 and accompanying text *infra*.

271. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976). In *Kindt*, the plaintiff sued the tavern owner, who had served him alcohol while the plaintiff was obviously intoxicated, for injuries he subsequently incurred in an automobile collision. *Id.* at 847, 129 Cal. Rptr. at 604. Defendant's conduct was in violation of a California statute. *Id.* at 847, 129 Cal. Rptr. at 604. See CAL. BUS. & PROF. CODE § 25602 (West Supp. 1978) (as amended).

272. 57 Cal. App. 3d at 852, 129 Cal. Rptr. at 608. The *Kindt* court argued that before a patron begins drinking, he is aware of the intoxicating effects of alcohol. *Id.* The *Kindt* court maintained that when a patron continues to drink even though he knows that excessive drinking may render him a danger to others, he is guilty of wanton and willful misconduct. *Id.* The court noted parenthetically, however, that minors and alcoholics may not be guilty of such willful and wanton misconduct given their respective incompetencies. *Id.* at 853, 129 Cal. Rptr. at 608.

273. *Id.* at 853, 129 Cal. Rptr. at 608. The *Kindt* court noted that the California Supreme Court had construed the statutory prohibition against serving intoxicated persons as designed to protect "members of the general public from injuries . . . resulting from the excessive use of intoxicating liquor." *Id.* (quoting *Vesely v. Sager*, 5 Cal. 3d 153, 165, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971)). Although himself intoxicated, plaintiff as a customer in defendant's bar was a member of the protected general public. *Id.* at 853, 129 Cal. Rptr. at 608.

274. *Id.* at 855-59, 129 Cal. Rptr. at 609-12. Although maintaining that the jury's difficulty in finding causation was not sufficient to bar plaintiff's recovery, the *Kindt* court did voice its apprehension with allowing the jury to speculate as to which drink served by the bartender proximately caused plaintiff's injuries, particularly in light of the fact that violation of the statute required that the plaintiff already be intoxicated. *Id.* at 855, 129 Cal. Rptr. at 609-10. From a moral standpoint, the *Kindt* court asserted that an individual's intoxication reflected a conscious, self-indulgent act that the law should not reward through monetary recovery in a civil action. *Id.* at 855-56, 129 Cal. Rptr. at 610. Finally, the court felt that socioeconomic considerations militated against a successful cause of action. *Id.* at 858, 129 Cal. Rptr. at 611. Recognizing the large quantity of statistical evidence of injuries caused by drunken driving, the *Kindt* court stated that everything reasonably conceivable should be done

cause of action for a vendor's breach of the state's liquor control laws did not lie on behalf of the drunken party.²⁷⁵

c. Participation or Complicity

Although the defense of participation or complicity by the plaintiff has been recognized in an action based upon a dramshop act,²⁷⁶ the question of whether the defense is available in an action based upon the violation of an alcoholic beverage control act is still open to debate.²⁷⁷

In *Morris v. Farley Enterprises*,²⁷⁸ the Alaska Supreme Court was presented with the issue of whether the plaintiffs' decedents' participation in the intoxication of another minor would bar their recovery in an action for wrongful death.²⁷⁹ The plaintiffs alleged that the defendant was negligent per se for serving a minor in violation of Alaska statute.²⁸⁰ The *Morris* court stated that its purpose in adopting the liquor laws as a standard of care was to advance the laws' underlying policies.²⁸¹ According to the court, one of these policies was to protect minors from the effects of alcohol since minors

to discourage such activity, including holding persons responsible for their own intoxication. *Id.*

275. *Id.* at 860, 129 Cal. Rptr. at 613. The court distinguished between plaintiffs who are merely negligent and those who engage in wanton and willful misconduct. *Id.* at 859-60, 129 Cal. Rptr. at 612-13. In the former instance, the court stated that the patron may be able to recover. *Id.* at 859, 129 Cal. Rptr. at 612 (citing *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (adopting comparative negligence in place of contributory negligence)).

276. See *McGough*, *supra* note 21, at 454 (courts pay "verbal tribute" to the rule that contributory negligence is not a defense to a dramshop action, while at the same time allowing participation to bar recovery). For a discussion of participation as a defense to a dramshop action, see notes 211-27 and accompanying text *supra*. For a discussion of contributory negligence as a defense to a dramshop action, see notes 207-10 and accompanying text *supra*.

277. Compare *Morris v. Farley Enters.*, 661 P.2d 167 (Alaska 1983) (complicity of minor plaintiff is not a bar to minor's recovery in light of legislative intent underlying alcoholic beverage control law) and *Brookins v. Round Table, Inc.*, 624 S.W.2d 547 (Tenn. 1981) (where minor plaintiff is involved, capacity and judgment to contribute to another's intoxication is issue for the jury) with *Miller v. City of Portland*, 288 Or. 271, 604 P.2d 1261 (1980) (denying minor a cause of action based upon his own conduct in purchasing alcohol).

278. 661 P.2d 167 (Alaska 1983).

279. *Id.* at 170. In *Morris*, a seventeen-year-old minor had purchased a bottle of tequila from the defendant's liquor store, sharing the alcohol with four minor companions. *Id.* at 168. Subsequently the five youths were involved in an automobile accident that killed two of them, including the plaintiffs' decedents who were passengers in the car driven by one of the intoxicated minors. *Id.*

280. *Id.* Plaintiffs had based their action on defendant's violation of Alaska's Alcoholic Beverage Control Act. *Id.* See ALASKA STAT. § 04.15.020(a) (1980) (repealed 1980) (prohibiting the sale of alcohol to minors). The trial court granted defendant's motion for summary judgment and plaintiffs appealed. 661 P.2d at 168.

281. 661 P.2d at 171. For a general discussion of the use of statutory provisions as establishing standards of conduct regarding the furnishing of alcohol, see notes 75-95 & 151-84 and accompanying text *supra*.

were presumptively unable to protect themselves.²⁸² Reasoning that to bar recovery because of one of the minors' role in acquiring the liquor for another would be contrary to the purpose of the statute,²⁸³ the court held that the plaintiffs' decedents' participation did not constitute a defense.²⁸⁴

d. Excuse or Justification

Where the defendant's liability for furnishing alcohol is premised upon his violation of an alcoholic beverage control act, he may also seek to defend on the grounds of excuse or justification.²⁸⁵ If available, this defense operates when the actor's conduct, although contrary to the liquor control law, is reasonable under the circumstances.²⁸⁶

For example, in *Brannigan v. Raybuck*,²⁸⁷ the Arizona Supreme Court found that "where a violation of the statutes pertaining to furnishing liquor to those who are underage or already intoxicated is shown, negligence exists as a matter of law, but under proper facts the jury may be allowed to find that the violation was excusable."²⁸⁸ The *Brannigan* court suggested that instances of an excusable violation might exist where the minor appeared to be of age and had presented identification to that effect, albeit false, or where the conduct or demeanor of the patron was such that there was no reason to believe him to be intoxicated.²⁸⁹

282. 661 P.2d at 171.

283. *Id.* The *Morris* court noted further that as between the seller and the minor, it is the seller who bears responsibility for the transaction. *Id.* The fact that the minor himself may have violated a statute in acquiring the alcohol is of no relevance since the purpose of both laws was to prevent minors from acquiring liquor, not to protect vendors. *Id.*

284. *Id.* The *Morris* court, however, expressly left open the issue of whether the plaintiff's conduct could be considered as a partial defense under comparative negligence principles. *Id.* at 171 n.7.

285. These defenses are not available in dramshop actions since vendors are held strictly liable when they serve a customer in violation of the act's provisions. *See* text accompanying note 22 *supra*.

286. *See, e.g., Brannigan v. Raybuck*, 136 Ariz. 513, 667 P.2d 213 (1983). For a discussion of *Brannigan*, see notes 287-89 and accompanying text *supra*.

287. 136 Ariz. 513, 667 P.2d 213 (1983). In *Brannigan*, parents of minors killed in an automobile accident brought suit against the operators of a tavern who had unlawfully served the decedents. *Id.* at 514, 667 P.2d at 214. Plaintiffs asserted that defendants were guilty of negligence per se for serving intoxicating beverages to minors contrary to state law. *Id.* at 517, 667 P.2d at 217. *See* ARIZ. REV. STAT. ANN. § 4-244(9) (West 1974).

288. 136 Ariz. at 518, 667 P.2d at 218. In response to defendants' argument that unjust results would be reached if vendors in the future would be held liable even when they exercised reasonable diligence, the *Brannigan* court noted that the prohibition against serving minors did not impose an absolute duty upon sellers. *Id.* at 517-18, 667 P.2d at 217-18. Even if the legislature had imposed strict criminal liability on vendors for improper serving of alcoholic beverages, the Arizona court stated that it was free to excuse certain violations when the statute was used to define the standard of care in a civil case. *Id.* at 518, 667 P.2d at 218.

289. *Id.* at 518, 667 P.2d at 218. The *Brannigan* court stated that unexcused violations would continue to constitute negligence per se. *Id.* at 518 n.1, 667 P.2d at 218 n.1. Since the trial court had granted summary judgment based upon the over-

Some states have provided similar defenses by statute.²⁹⁰ Under the Pennsylvania Liquor Code,²⁹¹ for instance, a defendant in a civil or criminal proceeding may offer in his or her defense a statement signed by the purchaser at the time of the sale attesting to his or her majority.²⁹²

3. *Defenses to Actions Based Upon Common Law Negligence*

In those jurisdictions that acknowledge a common law action against suppliers of alcohol,²⁹³ it would appear that there is no justification for curtailing the defenses usually available at common law.²⁹⁴ Therefore, defendants should be protected to some degree by allegations of the plaintiff's contributory negligence or assumption of the risk. Additionally, the defendant may invoke the applicable statute of limitations to bar the plaintiff's suit.

III. NONSUPPLIERS OF ALCOHOL LIABLE FOR DRUNKEN DRIVING

In addition to holding furnishers of alcohol liable for injuries inflicted as a result of the guest's intoxication, courts have also held other persons civilly accountable. The liability of nonsuppliers of liquor has generally been founded on one of three theories: negligent entrustment; respondeat superior; or breach of a duty to control the drunken driver's conduct.

A. *Negligent Entrustment*

Under the theory of negligent entrustment, a plaintiff may recover against the owner or person in control of an automobile for damages result-

ruled notion that the consumption of liquor rather than its serving could be the proximate cause of injuries resulting from drunken driving, the court remanded the case for trial on the merits. *Id.* at 521, 667 P.2d at 221 (citing *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983) (old common law rule abolished in Arizona)).

290. *See, e.g.*, PA. STAT. ANN. tit. 47, § 4-495(e) (Purdon 1969).

291. PA. STAT. ANN. tit. 47, §§ 1-101 to 796 (Purdon 1969).

292. *Id.* § 4-495(e). The provision states as follows:

The signed statement in the possession of a licensee or an employe [sic] of a State Liquor Store may be offered as a defense in all civil and criminal prosecutions for serving a minor, and no penalty shall be imposed if the Liquor Control Board or the courts are satisfied that the licensee or State Liquor Store employe [sic] acted in good faith.

Id. The signed statement referenced in this subsection is required to be obtained from any person whose age may be in question. *Id.* § 4-495(c).

293. For a discussion of cases imposing liability on vendors for willful and wanton misconduct in the serving of alcoholic beverages, see notes 13-20 and accompanying text *supra*. For a discussion of cases imposing liability on vendors for the negligent serving of alcoholic beverages, see notes 96-103 and accompanying text *supra*.

For a discussion of cases imposing liability on social hosts for wanton and reckless conduct in the serving of alcoholic beverages, see notes 112-17 and accompanying text *supra*. For a discussion of cases imposing liability on social hosts for the negligent serving of alcoholic beverages, see notes 185-200 and accompanying text *supra*.

294. Those state appellate courts that have recognized a negligence-based cause of action generally have not addressed the issue of available defenses. Because these courts have merely applied traditional tort concepts rather than creating a "new" tort, there is no reason to doubt that equally traditional defenses remain viable.

ing from the drunken driving of a third person based on the former's negligence in relinquishing control of the automobile to someone incompetent to drive.²⁹⁵ Liability may be imposed on the defendant either for entrusting the automobile to a person who is intoxicated at the time of entrustment, or for entrusting it to someone who may reasonably be expected to become intoxicated.²⁹⁶ The entrustment under these circumstances is itself negligent since a reasonable person exercising ordinary care would foresee the risk of harm to the motoring public presented by the suspect driver and thus would refuse to let that person drive the car.²⁹⁷

In order to bring a cause of action under a negligent entrustment theory, a plaintiff must prove four elements: (1) the automobile was entrusted by the owner or person in control;²⁹⁸ (2) the trustee was an incompetent

295. The general rule at common law is that an owner of an automobile is not liable when he gives his permission for another individual to use his car and that individual is subsequently negligent. *Stafford v. Far-Go Van Lines*, 485 S.W.2d 481, 485 (Mo. Ct. App. 1972) (citing 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 573 (1980)). There are two situations where exceptions to this rule are recognized: where the automobile has been negligently entrusted to an unsuitable driver, and where the circumstances are such that the principles of respondeat superior apply. *Id.* at 486.

Prosser and Keeton describe liability under a negligent entrustment theory as follows: "Where the owner of the car entrusts it to an unsuitable driver, he is held liable for the negligence of the driver, upon the basis of his own negligence in not preventing it." PROSSER AND KEETON, *supra* note 22, § 73, at 523 (footnote omitted).

For a discussion of the respondeat superior doctrine in holding nonsuppliers of alcohol liable for the drunken driving of others, see notes 304-15 and accompanying text *infra*.

296. PROSSER AND KEETON, *supra* note 22, § 104, at 717. Negligent entrustment need not be based on the trustee's *intoxication*. As summarized by the Second Restatement of Torts:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

RESTATEMENT (SECOND) OF TORTS § 390 (1965).

297. The risk of harm from negligent entrustment is similar to that which arises when one serves alcoholic beverages negligently. The Supreme Court of Idaho recognized this connection, in *Alegria v. Payonk*, in justifying its recognition of the latter tort. *See Alegria*, 101 Idaho 617, 619 P.2d 135 (1980). In *Alegria*, two vendors were sued for negligently serving beer to a minor. The court stated:

The "negligent entrustment" tort approved in *Kinney* is a recognition of the risk of injury which exists when two ingredients are combined; the automobile and an incompetent or incapacitated driver. In *Kinney*, we said that a party may be liable for providing an intoxicated individual with an automobile. The issue in this case is the converse, i.e., should a party ever be held liable for providing the driver of an automobile with intoxicants.

Id. at 620, 619 P.2d at 138 (citing *Kinny v. Smith*, 95 Idaho 328, 408 P.2d 1234 (1973)).

298. *See Hendershott v. Rhein*, 61 Mich. App. 83, 232 N.W.2d 312 (1975) (in negligent entrustment case, plaintiff must prove that motor vehicle driven with permission and authority of owner); *Gier v. Gleason*, 189 Neb. 156, 201 N.W.2d 388 (1972) (defendant not liable for entrusting vehicle to farm hand who took vehicle

driver;²⁹⁹ (3) the owner or person in control had actual or constructive knowledge at the time of the entrustment that the trustee was or was to become incompetent or unqualified to operate the vehicle;³⁰⁰ and (4) the entrustment was the proximate cause of the plaintiff's injuries.³⁰¹

This theory is a useful device to provide the plaintiff with the opportunity to recover in situations where the drunken driver himself cannot compensate his victim but the owner of the car can.³⁰² The negligent entrustment theory has been used, for example, to impose liability on an employer who had reason to know of an employee's propensity to drive while intoxicated, but nevertheless permitted the employee to use the employer's vehicle.³⁰³

from pasture where he was working and drove it while intoxicated). *But see* *Alspach v. McLaughlin*, 144 Ind. App. 592, 247 N.E.2d 840 (1969) (jury could find that leaving intoxicated person in automobile that could be started without key would foreseeably result in his driving it).

299. *See Hendershott*, 61 Mich. App. at 89, 232 N.W.2d at 315 (1975). Incompetency due to consumption of alcoholic beverages is defined by state statutes, which may proscribe driving "while under the influence of intoxicating liquor" or "while in an intoxicated condition" or may use other language. *See* 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 302 (1980). The driver's intoxication will most likely be proved through the chemical analysis of his blood, breath, saliva, or urine. *Id.* § 305.

300. *See Hendershott v. Rhein*, 61 Mich. App. 83, 232 N.W.2d 312 (1975) (plaintiff must show that defendant knew that trustee was incompetent or that he had knowledge of facts and circumstances as would imply knowledge of incompetency); *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922) (plaintiff must show defendant knew or had reason to believe trustees were incompetent or reckless persons to drive car). *But see Jones v. Cloud*, 119 Ga. App. 697, 168 S.E.2d 598 (1969) (knowledge of trustee's incompetency must be actual rather than constructive, but actual knowledge may be proved by circumstantial evidence); *Sports, Inc. v. Gilbert*, — Ind. App. —, 431 N.E.2d 534 (1982) (defendant must have actual knowledge of trustee's incompetency).

301. In a successful negligent entrustment case, the plaintiff's injury is found to be caused by the combined negligence of the owner and the driver; the owner in allowing an unsuitable driver to operate the automobile, and the driver in operating it negligently. *See Mitchell*, 119 Wash. at 552, 206 P. at 9. The establishment of proximate cause in such a situation requires a finding that the owner's entrustment was a substantial factor in causing the injury complained of, as well as a determination that the harm was foreseeable. *See Connolly v. Bressler*, 283 Or. 265, 268, 583 P.2d 540, 542 (1978). "Foreseeability" of harm refers to whether the actual harm caused was of the general kind to be anticipated from the negligent act. *Id.* *See also Alspach v. McLaughlin*, 247 N.E.2d 840 (Ind. Ct. App. 1969) (test of proximate cause is probability of injurious consequences fairly to be anticipated from negligent conduct). However, the particular manner of the injury in a given case need not be anticipated. In *Connolly*, the court held that turning over a vehicle to a group of intoxicated youths can be the proximate cause of injuries received in a wreck, even if no one could have anticipated the bizarre manner in which the accident actually occurred. 283 Or. at 268, 583 P.2d at 542.

302. For a discussion of the reasons for seeking recovery from the owner of an automobile in addition to the driver, see note 304 *infra*.

303. *See Jones v. Cloud*, 119 Ga. App. 697, 168 S.E.2d 598 (1969) (jury could reasonably find that employer was negligent in entrusting vehicle to employee if it found that employer knew of employee's excessive use of intoxicants); *Winzer v. Lewis*, 251 So. 2d 650 (La. Ct. App.) (employer liable for negligent entrustment for

B. *Respondeat Superior*

A second theory under which nonsuppliers of alcohol can be held liable for the consequences of the drunken driving of others is the doctrine of respondeat superior.³⁰⁴ Under this doctrine the defendant, because of his relationship with the tortfeasor, is liable for that person's negligence even though the defendant himself was not necessarily negligent.³⁰⁵ For example, in *Har-*

allowing employee to use vehicle knowing that employee had no driver's license and that it had been revoked for drunken driving; in addition, violation of statute prohibiting employers from hiring as drivers persons without driver's licenses could be proximate cause of injuries resulting from employee's drunken driving), *cert. denied*, 259 La. 934, 253 So. 2d 379 (1971). *Cf. Gier v. Gleason*, 189 Neb. 156, 201 N.W.2d 388 (1972) (employer not liable under negligent entrustment theory since employee not authorized to drive employer's vehicle on public highways for any purpose).

Another situation in which corporate defendants could be liable for negligent entrustment is in the rental of automobiles and other vehicles. *See generally* Annot., 78 A.L.R. 3d 1170, §§ 6, 8(a) (1977) (discussing liability of rental agencies for entrusting vehicles to intoxicated persons).

304. The automobile has been responsible for an enlargement of the doctrine of respondeat superior. PROSSER AND KEETON, *supra* note 22, § 73, at 525. The need for expanding the doctrine came from the frequency of traffic accidents and the inability of the driver to compensate the injured person. *Id.*

The owners of vehicles are one group whose liability has been enlarged under respondeat superior, and Prosser and Keeton give three reasons for this increased liability in the absence of fault: (1) since automobiles are expensive, it is likely that one who can afford to buy one has more financial resources than a driver; (2) since owners are the persons most likely to carry insurance on the automobile, they can spread the cost of accidents among themselves through insurance; and (3) since owners of automobiles enjoy the privilege of using the public highways constructed at great expense to the taxpayer, they should be accountable for damages resulting from the use of their vehicles. *Id.*

The above reasoning also supports holding an owner liable for negligently entrusting his automobile to an unsuitable driver, with the owner's own negligence as an additional justification for imposing liability on him. For a discussion of negligent entrustment as it relates to drunken driving, see notes 295-303 and accompanying text *supra*.

305. PROSSER AND KEETON, *supra* note 22, § 69, at 499. Respondeat superior is the only theory discussed in this comment whereby a defendant who has committed no tortious conduct is held liable for the consequences of the drunken driving of another. Relationships sufficient to make the doctrine relevant in a drunken driving case fall into five general categories. The first is the master/servant relationship, whereby an employer is responsible for the torts committed by his employee within the scope of his employment. *See id.* § 70, at 501. The test used in the majority of jurisdictions to determine if an employee is acting in the scope of his employment is (1) whether his conduct is "benefitting" the employer's business, and (2) whether the employer has the "right to control" his conduct. *See* Comment, *Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action Under Respondeat Superior*, 19 CAL. W.L. REV. 107, 122-23 (1982). A minority of jurisdictions has adopted an "enterprise" approach in lieu of the "right to control" prong. *Id.* California, for example, deems an act to be within the scope of employment if it benefits the employer's business and is sufficiently connected with the enterprise, i.e., whether the act of the employee is not so unusual or startling that it would be unfair to include the loss resulting from it in the employer's expenses of doing business. *Id.*

A second basis for invoking vicarious liability is the "joint enterprise" doctrine, which makes passengers liable for the tortious conduct of the driver. *See* PROSSER AND KEETON, *supra* note 22, § 72, at 517. This doctrine has been said to consist of

ris v. Trojan Fireworks Co.,³⁰⁶ an employer held a Christmas party at the company's plant during working hours, paying the employees' salaries as though they were working.³⁰⁷ Afterwards, an intoxicated employee caused an automobile accident on his way home that resulted in the death of one person and injuries to two others.³⁰⁸ The defendant employer's argument was two-fold: (1) that California's "anti-dramshop" act precluded a cause of action against nonvendors for the negligent serving of alcohol,³⁰⁹ and (2) that respondeat superior was inappropriate because the accident occurred while the employee was on his way home.³¹⁰ The California Court of Appeals held

four elements: "(1) contract, (2) a common purpose, (3) a community of interest, (4) equal right to a voice, accompanied by an equal right of control." *Id.* § 72, at 518 (quoting *Carboneau v. Peterson*, 1 Wash. 2d 347, 95 P.2d 1043 (1939)). Under this theory, the central focus is whether there existed equality in the control of the vehicle. In this respect, the jury may consider such factors as a common property interest in the vehicle, the sharing of expenses of a trip, or alternating in the driving to determine whether the parties have agreed to share the management of the vehicle equally. *See id.* § 72, at 521.

A third basis for the application of vicarious liability in the drunken driving situation stems from statutes imposing liability upon owners for the negligence of persons operating the owners' vehicles with the owners' permission. *See* 7A AM. JUR. 2D *Automobiles and Highway Traffic* §§ 665-84 (1980). These statutes are a supplement to the common law respondeat superior doctrine, and may be said to make one who drives a vehicle with the owner's permission the latter's "agent" for purposes of vicarious liability despite the absence of an employer/employee or other relationship. *Id.* § 665. For a discussion of who is an "owner" under these statutes, see Annot., 74 A.L.R. 3d 739 (1976).

The fourth situation in which vicarious liability can be imposed exists when the owner is present in the automobile and is deemed by the court to retain control over the driver, and thus constitutes the principal or master while the driver is considered his agent or servant. *See* PROSSER AND KEETON, *supra* note 22, § 73, at 523. In order to apply this theory, some courts require only the owner's presence in the vehicle, while others require that the plaintiff show that the owner in fact retained some control over his vehicle. *Id.* In the latter situation, the owner is really being held liable for his own negligence in failing to exercise such control to prevent the driver's negligence, and this view is analogous to a negligent entrustment theory.

Finally, the fifth basis for the imposition of vicarious liability is the so-called "family purpose" or "family car" doctrine, whereby liability can be imposed upon the owner of an automobile who makes it available to members of his household for normal family activities. *See* PROSSER AND KEETON, *supra* note 22, § 73, at 524-27. "Normal family activities" can include driving for pleasure, but the scope of the owner's consent is analyzed in a manner similar to the scope of employment under respondeat superior. *Id.* The theory underlying this doctrine is that the owner has made family purposes his "business" and accordingly the permitted driver is his "servant." *Id.* § 73, at 524. It should be noted, however, that in states that have statutes imposing liability upon the owner of an automobile when it is used with his consent, the family purpose doctrine is inappropriate. *Id.* § 73, at 527.

306. 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981).

307. *Id.* at 164, 174 Cal. Rptr. at 456.

308. *Id.* at 159, 174 Cal. Rptr. at 453. The trial judge dismissed the case by sustaining the defendant's demurrer. *Id.* at 158, 174 Cal. Rptr. at 453.

309. *Id.* at 160, 174 Cal. Rptr. at 453. *See* CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984). For the text and a discussion of this statute, see note 71 and accompanying text *supra*.

310. 120 Cal. App. 3d at 160, 174 Cal. Rptr. at 453-54. The defendant argued

that even if the employer did not commit a tortious act in supplying the employee with liquor, a jury could find that the employee had become intoxicated during and within the scope of his employment if it found that the party was a benefit to the employer³¹¹ and that a foreseeable injury resulted from this activity.³¹² In the event the jury made this finding, the court determined that the employee's negligent operation of his automobile would be imputed to the employer.³¹³

The *Harris* court justified its holding by pointing out that one goal of vicarious liability was to hold liable the party who could best afford the cost of liability either by raising prices or by obtaining liability insurance.³¹⁴ Also, the court emphasized that it would be unjust to allow a company to disavow responsibility for injuries resulting from risks incident to its doing business.³¹⁵

that the "going and coming" rule, which exempts an employer from vicarious liability for accidents occurring while his employee is commuting both to and from work, should operate to bar the plaintiff's claim. *Id.* at 160-61, 174 Cal. Rptr. at 454-55.

311. *Id.* at 164, 174 Cal. Rptr. at 456. The court said that a jury could infer that the purpose of the party was to improve employer/employee relations, or to increase employee morale and length of employment by the granting of a fringe benefit in the form of a party, or to foster good relations among the employees by giving them the chance to socialize. *Id.* *But cf.* *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964) (to say that employer received pecuniary benefit from party of employee association held on its premises is "far-fetched").

312. 120 Cal. App. 3d at 163, 174 Cal. Rptr. at 456. The court defined "foreseeable" to mean that "the employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business." *Id.* (citing *Rogers v. Kemper Constr. Co.*, 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143, 149 (1975)). The court decided that a jury could find that the employee's intoxication at the party was foreseeable since it could be inferred that the employer intended that his employee attend the party because it was held during work hours and the employee was paid to attend, and that the employer intended that the employee consume alcoholic beverages since it furnished them to him and allegedly encouraged him to drink large amounts. *Id.* at 164, 174 Cal. Rptr. at 456. As a result, the court further concluded that it would be foreseeable that the employee would try to drive home and could get into an accident. *Id.* at 165, 174 Cal. Rptr. at 457.

313. *Id.* at 163, 174 Cal. Rptr. at 456. In a footnote, the court stressed that any liability imposed upon the employer in this case would not be based upon its own negligence in furnishing liquor to its employee. *Id.* at 165 n.7, 174 Cal. Rptr. at 457 n.7. Rather, the *Harris* court said that the furnishing of alcohol by the employer should be considered only in deciding whether the employee became intoxicated in the scope of his employment for purposes of vicarious liability. *Id.*

314. *Id.* at 163, 174 Cal. Rptr. at 455.

315. *Id.* at 163-64, 174 Cal. Rptr. at 455-56. *See also* *Chastain v. Litton Sys.*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 2454 (1983). In *Chastain*, an employer held a Christmas party for its employees at its place of business during normal working hours. *Id.* at 959. An employee became intoxicated, left the party in his van, and had an accident which resulted in the death of the plaintiff's decedent. *Id.* at 959. Applying North Carolina law but relying on *Harris*, the Fourth Circuit held that a jury should determine whether the employee became intoxicated within the scope of his employment by deciding whether the party was sufficiently related to the employer's business, i.e., whether the employer was promoting a commercial interest by bettering its employees' working relationships. *Id.* at 960, 962. If it was determined

C. *Common Law Duty to Control Conduct of Others*

The third category of nonsuppliers of alcoholic beverages who have been held liable for the injuries resulting from the drunken driving of another consists of persons upon whom the common law imposes a duty to act. The Second Restatement of Torts states that the law will impose such a duty (1) upon a person who has a "special relation" with another that requires him to control the other's conduct for the other's own protection or the protection of third persons, or (2) upon a person who has a "special relation" with another that requires him to protect that person from the actions of a third party.³¹⁶ This special relationship may have its source in an affirmative act performed by the person charged with a duty to act further, in an existing relationship between the parties, or in some combination of the two. In the drunken driving context, most courts considering the issue have refused to impose a duty upon a nonsupplier to control the conduct of the intoxicated person,³¹⁷ or to impose a duty upon a supplier to control the intoxicated person's conduct absent some unique relationship between the parties.³¹⁸

that the employee became intoxicated within the scope of his employment, the court stated that the jury should then decide whether the employee was negligent in consuming so much liquor at the party, and whether this negligent intoxication continued until the time of the accident and was its proximate cause. *Id.* at 962. *See also* Boynton v. McKales, 139 Cal. App. 2d 777, 294 P.2d 733 (1956).

Despite *Harris* and *Chastain*, other courts may be unwilling to extend respondeat superior liability to drunken driving cases. *See, e.g.,* Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964). The *Miller* court's statement that it is "at best, far-fetched" to say that an employer has a pecuniary interest in a party of an employee association held on its premises is probably the more typical reaction. *Id.* at 423, 199 N.E.2d at 306. However, the plaintiffs in *Miller* were arguing that the employer, the employees' association and various employee defendants were sellers under the Illinois dramshop act. 48 Ill. App. 2d at 414, 199 N.E.2d at 302. Also, the party in *Miller* was sponsored by the employees' association, and the employer did not furnish anything served at the party. *Id.* at 414, 199 N.E.2d at 302.

For a discussion of the relationships justifying the imposition of vicarious liability, see note 305 *supra*. For a discussion of a proposed cause of action based on holding an employer vicariously liable when a party is held away from ordinary business premises, see Comment, *supra* note 305, at 136-39.

316. RESTATEMENT (SECOND) OF TORTS § 315 (1965). While the general rule is that no one has a duty to control the conduct of others, it is subject to exception. The Restatement provides as follows:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another *unless*

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id. (emphasis added).

317. *See, e.g.,* Sports, Inc. v. Gilbert, ___ Ind. App. ___, 431 N.E.2d 534 (1982) (private citizen owes no duty to motoring public to detain intoxicated motorist who enters premises, when that citizen has not served any alcohol to the motorist even though he knows motorist will drive away while intoxicated).

318. *See, e.g.,* Dwan v. Dixon, 216 Cal. App. 2d 260, 30 Cal. Rptr. 749 (1963)

However, some courts have found a duty to control the conduct of another under certain circumstances. For example, responsibility for another's drunken driving was imposed where an employer served large amounts of alcoholic beverages to an underage employee at a Christmas party and then induced him to drive home.³¹⁹ Similarly, in *Leppke v. Segura*,³²⁰ where tavernkeepers refused to serve an intoxicated man but nevertheless "jump-started" the man's car enabling him to drive, the Colorado Court of Appeals ruled that the tavernkeepers were liable for injuries caused by the drunken driver.³²¹ The court stated that a person "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."³²² Further, the court said that a jury could find that the tavernkeepers gave the drunken driver a mobility he otherwise lacked and then "set into motion a force involving an unreasonable risk of harm to others."³²³ In describing the duty it was imposing, the court stressed that liability would be based on performing an affirmative act—"jump-starting" the car of a person clearly incompetent to operate it—as distinguished from cases where liability was imposed for failing to stop a dangerous person from causing harm.³²⁴

On the other hand, in *Otis Engineering Corp. v. Clark*,³²⁵ the Supreme Court of Texas analogized the duty to control a drunken driver to the duty

(social host not liable even though he allegedly put intoxicated person into car and helped him drive away); *Vale v. Yawarski*, 78 Misc. 2d 522, 357 N.W.S.2d 791 (Sup. Ct. 1974) (vendor not negligent in permitting patron from leaving even though she knew or should have known he was not fit to drive safely).

319. *See* *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968) (company held Christmas party, served minor to point of gross intoxication, placed him in automobile, and directed him to drive home; although no liability for mere serving of liquor, extra facts justifying liability here are relationship between parties and affirmative acts of employer).

Cf. *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983) (employer could be held liable when, after requiring employee to work twenty-seven hours, he sent him out to drive home rather than providing rest or transportation for him; liability would be imposed if jury found that this action created foreseeable unreasonable risk of harm to others).

320. — Colo. App. ___, 632 P.2d 1057 (1981).

321. *Id.* at ___, 632 P.2d at 1058. The trial court had granted a motion for summary judgment in favor of the defendants, stating that it was "unaware of any doctrine imposing a legal duty upon defendants . . . to plaintiffs merely by virtue of having used their battery jumper cables to get [the] defendant [driver's] automobile started." *Id.* at ___, 632 P.2d at 1059.

322. *Id.* at ___, 632 P.2d at 1059 (quoting RESTATEMENT (SECOND) OF TORTS § 320 comment a (1965)). Prosser and Keeton note that liability is imposed in this "misfeasance" situation because the defendant has created a new risk of harm and consequently may be liable to "any person to whom harm may reasonably be anticipated as a result of the defendant's conduct, or perhaps even beyond . . ." PROSSER AND KEETON, *supra* note 22, § 56, at 374 (footnote omitted).

323. — Colo. App. at ___, 632 P.2d at 1059.

324. *Id.* at ___, 632 P.2d at 1059.

325. 668 S.W.2d 307 (Tex. 1983).

to prevent a dangerous person from doing harm to others.³²⁶ In *Otis*, an employee of the defendant corporation became intoxicated by drinking during his shift.³²⁷ Despite his having knowledge of the employee's inability to drive in his inebriated condition, the employer sent the employee home.³²⁸ On his way, the employee was involved in an accident in which he and his two passengers were killed.³²⁹

In remanding the case to the trial court, the Supreme Court of Texas established a new duty for employers, ruling that "when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others."³³⁰ The majority in *Otis* cited "changing social standards and increasing complexities of human relationships in today's society" as policy justification for establishing this new duty.³³¹

326. *Id.* at 311. This duty to exercise control over a dangerous person is described by the Restatement as follows:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

RESTATEMENT (SECOND) OF TORTS § 319 (1965).

327. 668 S.W.2d at 308.

328. *Id.* The *Otis* court stated that, as a result, the supervisor knew that the employee was not fit to drive safely when he left the plant. *Id.*

329. *Id.* The passengers' husbands sued Otis Engineering Corp. for negligently sending the employee home while knowing that he was incapable of driving. *Id.* The trial court granted summary judgment for the defendants on the grounds that, as a matter of law, they had no duty to restrain the employee nor to control his conduct while he was off duty and off the premises. *Clark v. Otis Eng'g Corp.*, 633 S.W.2d 538, 540 (Tex. Civ. App. 1982), *aff'd*, 668 S.W.2d 307 (Tex. 1983).

330. 668 S.W.2d at 311. The *Otis* court relied upon other cases imposing a duty to act. *See id.* at 310-11 (citing *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968) (when person having special relationship with drunken minor employee induces the improper operation of automobile by voluntary action, there exists duty to exercise ordinary care for protection of minor and general public); *Leppke v. Segura*, ___ Colo. App. ___, 632 P.2d 1057 (1981) (person doing affirmative act under duty to others to exercise care of reasonable person to protect them against unreasonable risk of harm to them coming out of act); *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983) (jury could find that employer had duty to guard against unreasonable harm that was the foreseeable result of employer's requiring employee to work long hours and then sending him home in an exhausted state)). For a discussion of the *Leppke* case, see notes 320-24 and accompanying text *supra*. For a discussion of the *Brockett* and *Robertson* cases, see note 319 *supra*.

331. 668 S.W.2d at 310. The *Otis* majority quoted from Dean Prosser, who has urged the creation of new duties when changing social conditions call for it. *Id.* (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 327 (4th ed. 1971)).

In deciding whether to adopt a new duty, the *Otis* court stated that the "risk, foreseeability, and likelihood of injury" should be weighed against the "social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer." *Id.* at 309. However,

Thus, despite traditional notions and case law that nonsuppliers owe no

having articulated these factors, the court never discussed how much weight should be assigned to each of them, nor how they would balance.

The *Otis* court said that it should be up to the jury to decide whether the defendant employer had breached his duty, and set forth certain factors for them to consider in making the determination: the availability of a bed where the employee could have rested; the possibility of calling the employee's wife; the possibility of having another employee drive the inebriated employee home; the possibility of terminating his employment rather than sending the employee home early; and the foreseeable consequences of the employee's driving an automobile when he was so extremely intoxicated. *Id.* at 311.

In a vehement dissent, Justice McGee criticized the imposition of a duty upon the employer as being unsupported either by judicial precedent or public policy. *Id.* at 319 (McGee, J., dissenting). Justice McGee distinguished the cases relied upon by the majority. He argued that *Leppke* was inappropriate because it was not an employer-employee case, and because the affirmative acts taken by the defendants were so significant as to be an indisputable assumption of duty, whereas the employer's act in the *Otis* case was relatively insignificant. *Id.* at 314-15 (McGee, J., dissenting) (citing *Leppke v. Segura*, ___ Colo. App. ___, 632 P.2d 1057 (1981)). Justice McGee urged that the *Brockett* case did not apply since, unlike *Otis*, it involved a minor, the employer had served the alcoholic beverage to his employee, and the employer had placed the drunken driver in his car and directed him onto the highway. *Id.* at 315 (McGee, J., dissenting) (citing *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968)). Finally, Justice McGee distinguished *Robertson* by noting that an affirmative act by the employer in that case had caused the incapacity of the exhausted employee. *Id.* (citing *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983)).

Furthermore, the dissent argued that four cases where courts refused to impose liability upon employers for negligent social serving of alcoholic beverages were more applicable to the *Otis* facts. *Id.* at 316-17 (McGee, J., dissenting). See *Wienke v. Champaign County Grain Ass'n*, 113 Ill. App. 3d 1005, 447 N.E.2d 1388 (1983); *Edgar v. Kajet*, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976); *Congini v. Portersville Valve Co.*, 312 Pa. Super. 461, 458 A.2d 1384 (1983), *rev'd*, ___ Pa. ___, 470 A.2d 515 (1983); *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 458 P.2d 897 (1969) (en banc).

The *Congini* case was reversed by the Pennsylvania Supreme Court, and no longer supports Justice McGee's position, since that court held that liability could be imposed upon the employer. See *Congini v. Portersville Valve Co.*, ___ Pa. ___, 470 A.2d 515 (1983). For a discussion of the *Congini* case and social host liability, see notes 172-78 and accompanying text *supra*.

Moreover, Washington courts have been limiting *Halvorson* by permitting a cause of action against a supplier who negligently serves alcohol to a person who is obviously intoxicated. See *Halligan v. Pupo*, 37 Wash. App. 84, 678 P.2d 1295 (Wash. Ct. App. 1984) (citing *Wilson v. Steinbach*, 98 Wash. 2d 434, 656 P.2d 1030 (1982)).

Justice McGee next criticized the majority opinion as being contrary to public policy. He argued that to say that the employer "took control" of his employee in this case by failing to take control of him will obliterate the concept of an omission, nonfeasance, or inaction. 668 S.W.2d at 317 (McGee, J., dissenting). He maintained that, since the employer as a nonsupplier of alcohol was less culpable than a vendor or social host, but was nevertheless held liable in this case, lower courts will interpret the decision as a mandate to hold all vendors and social hosts liable. *Id.* at 317-18 (McGee, J., dissenting). Furthermore, Justice McGee maintained that there were situations when an employee may be "incapacitated" but when it would not be proper to impose liability on an employer. *Id.* at 318 (McGee, J., dissenting). Justice McGee gave as an example of this the case of an employee with a history of heart trouble who experiences pain and is sent home to rest, but has a heart attack on the

duty to control intoxicated drivers, cases like *Otis* and *Leppke*, where courts have recognized a duty, could have a broad impact on future decisions, especially if drunken driving continues to be the problem that it is today.

IV. ANALYSIS AND RECOMMENDATIONS

A. Vendor and Social Host Liability

In order to achieve the ultimate goals of deterring the careless dispensing of alcohol to persons who will be driving and compensating the injured victims of drunken driving, furnishers of alcohol ought to be held civilly liable. Because the harm caused by an intoxicated person is the same regardless of the source of the intoxicating beverage, vendors and social hosts ought to be held equally responsible under the law.³³²

The urgency of the situation compels the conclusion that the question of civil liability for furnishers of alcoholic beverages is best addressed through comprehensive legislation. As part of a well reasoned attempt to control the drunken driving crisis, a legislative approach will do more to achieve the deterrent and compensatory goals than will a case-by-case judicial solution.³³³ Acting by statute, a legislature is better equipped to define the parameters of vendor and social host liability and, at the same time, to promote

way home and causes an accident. *Id.* Finally, Justice McGee reproached the majority for placing an unreasonable burden upon employers. *Id.* He argued that smaller employers do not have rest facilities for their employees, that an employer has no right to detain an employee, and that it is in fact common practice to let an indisposed employee leave his workplace and seek relief. *Id.* Justice McGee also asserted that the deterrence and compensation goals of the majority opinion would be better served by legislation. *Id.*

³³² For a discussion of vendor liability, see notes 12-103 and accompanying text *supra*. For a discussion of social host liability, see notes 105-200 and accompanying text *supra*.

It is frequently argued that social hosts ought not to be held to the same standard of liability as vendors, who presumably possess greater knowledge and expertise with respect to alcohol and its debilitating effects, and who expect to benefit financially from serving alcohol. However, like the vendor, "[a social] host has a choice of serving alcohol to whomsoever he pleases. In making that choice he may decide to serve the alcohol illegally or under circumstances which create an unreasonable risk of harm to others." *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. at 640, 485 P.2d at 22. As the New Jersey Supreme Court has pointed out, the duty of care imposed on both vendors and social hosts arises out of their control of the liquor supply. *Kelly v. Gwinnell*, 96 N.J. at 547, 476 A.2d at 1224. "Whatever the motive behind making alcohol available to those who will subsequently drive, the provider has a duty to the public not to create foreseeable, unreasonable risks by this activity." *Id.*

³³³ This comment advocates full legislative treatment as preferable to judicial treatment, but a judicial attempt to solve the problem is preferable to none at all. In the face of legislative inaction, the courts must step in to fill the void.

It could be argued that the fact that most legislatures have not presented a solution to the problem of civil liability for suppliers of alcoholic beverages is indicative of a standoff between the competing interests, and that effective compromise is apparently not possible. If true in the past, this is no longer the case today. The seriousness of drunken driving is being recognized more now than ever before, and the

continuity and uniformity in holding furnishers of alcohol civilly responsible for the harms of drunken driving.

Initially, the vendor and social host liability statute ought to grant a cause of action to any person who is injured as a result of the drunken driving of an unlawfully served person.³³⁴ In order to effectuate fully the goals of deterring the negligent serving of alcoholic beverages and compensating injured persons, the act should not exclude the drunk driver from the class of potential plaintiffs.³³⁵ However, the vendor or host should be permitted to raise as a defense any fault attributable to the intoxicated patron or guest.³³⁶

The liability statute should then require that a plaintiff prove the following four elements in an action against the vendor or social host: (1) the defendant served alcoholic beverages to a member of a defined prohibited class; (2) the defendant's furnishing of alcohol contributed in some part to the consumer's intoxication at the time of the incident; (3) the plaintiff's injury was proximately caused by the consumer's negligent operation of a motor vehicle; and (4) the plaintiff was in fact injured. Proof of these elements would merely establish a plaintiff's prima facie case; the statute, unlike traditional dramshop acts, should not be intended to impose strict

same forces stimulating the proliferation of tougher criminal laws for drunken driving will no doubt have an influence in the realm of civil liability.

The passage of legislation does not have to wait for every factual permutation to present itself before a court. Problems can be anticipated through legislative fact finding, hearings and debates, and the statutes can embody solutions found through this process. The North Carolina Dramshop Act is an example of a liability statute currently in effect that presents a comprehensive and carefully drafted approach to vendor liability. *See* N.C. GEN. STAT. §§ 18B-120 to -129 (1983). For a description and discussion of the provisions of this act, see notes 46-63 and accompanying text *supra*. For the text of an "Alcoholic Beverage Suppliers' Civil Liability Act" proposed by the authors, see Appendix *infra*.

334. For a proposed definition of "unlawfully served person," see note 339 and accompanying text *infra*.

The class of plaintiffs granted a cause of action under the act should include not only those third parties directly injured by the negligence of the drunk driver, but also the survivors of a drunken driver, on the principle that persons harmed through no fault of their own should not be denied a right to recover for their injuries.

335. Some existing dramshop acts exclude the patron by their express terms. *See, e.g.*, CONN. GEN. STAT. ANN. § 30-102 (West 1975); N.C. GEN. STAT. § 18B-120(1) (1983); UTAH CODE ANN. § 32-11-1 (Supp. 1983). Other acts have been judicially interpreted to exclude the patron. *See, e.g.*, *Gora v. 7-11 Food Stores*, 109 Ill. App. 3d 109, 440 N.E.2d 279 (1982) (recovery under Illinois dramshop act restricted to third parties); *Ciemierek v. Jim's Garage*, 90 Mich. App. 565, 282 N.W.2d 396 (1979) (intoxicated person has no claim for relief against bar under Michigan dramshop act); *Matalavage v. Sadler*, 77 A.D.2d 39, 432 N.Y.S.2d 103 (1980) (New York dramshop act does not grant cause of action to intoxicated person, and no cause of action is transmitted to his estate if he does not survive). With this exclusion, the deterrent effect of a liability statute is at least partially thwarted, since certain furnishers of alcohol may be willing to take the chance that third parties will not be injured. Allowing the patron or guest to sue, however, does not necessarily mean that the vendor-host will be held fully liable since he may offer in his defense the contributing fault of the plaintiff.

336. For a discussion of contributory negligence as a defense to vendor and social host liability generally, see notes 207-10 & 253-67 and accompanying text *supra*.

liability upon the furnisher of liquor.³³⁷ Rather, it ought to be designed to encourage reasonably careful conduct in the service of intoxicating beverages without being unduly oppressive upon business and social relations.³³⁸

Accordingly, as the first element of a plaintiff's claim, the injured party must show that the vendor or social host engaged in specific unreasonable conduct. In its vendor and social host liability act, the legislature should therefore indicate the classes of patrons it views as presenting the greatest risk of danger. Specifically, the statute should grant a cause of action for sales of alcohol to minors, intoxicated persons and habitual drunkards when it is likely that the member of the proscribed class will drive.³³⁹ It is axio-

337. For a discussion of the strict liability impact of existing dramshop acts, see note 22 and accompanying text *supra*.

If a vendor or social host may protect himself from liability by acting responsibly in furnishing alcohol to others, then perhaps he or she will be encouraged to do so. If, on the other hand, the vendor-host is subject to strict liability, then the incentive to act prudently may be substantially diminished since liability would be imposed regardless of the vendor-host's precautions. Furthermore, the threat of strict liability is an unjustified burden on business and social relations, failing to accommodate the legitimate interests of furnishers of alcoholic beverages.

338. In this sense, the liability statute would resemble the negligence-based approach of the common law. For a discussion of the liability of vendors and social hosts under modern common law, see notes 96-103 & 185-200 and accompanying text *supra*.

339. The three groups are those traditionally mentioned in dramshop acts and alcoholic beverage control laws. Some acts encompass all three groups. *See, e.g.*, MINN. STAT. ANN. §§ 340.73, .95 (West Supp. 1984) (prohibiting serving of persons under 19, obviously intoxicated persons, or habitual drunkards, as well as spend-thrifts and improvident persons); R.I. GEN. LAWS §§ 3-11-1 to -2 (1976) (granting cause of action for serving minors, visibly intoxicated persons or habitual drunkards); UTAH CODE ANN. § 32-11-1 (Supp. 1983) (granting cause of action for serving minors, visibly intoxicated persons and habitual drunkards). Most acts, however, include only one or two groups in their prohibited class. *See, e.g.*, CONN. GEN. STAT. ANN. § 30-102 (West 1975) (intoxicated persons); GA. CODE ANN. § 51-1-18 (1982) (minors); IOWA CODE ANN. § 123.92 (West Supp. 1983) (minors and persons visibly intoxicated); MICH. COMP. LAWS ANN. § 436.22(5) (Supp. 1983) (minors and persons visibly intoxicated).

Each legislature makes a determination of the legal drinking age in its state for the various categories of intoxicating beverages. This decision is typically reflected in the state's alcoholic beverage control act. For a listing of the alcoholic beverage control acts, see note 84 *supra*. The legal drinking age embodies a legislative determination that those who fall below that age are not capable of handling the effects of alcohol and so should be prevented from using it, both for their own protection and that of the general public. Serving a minor therefore runs counter to this legislative determination, and the server should be held liable for the harm that results.

Similarly, when one serves a person whom one perceives to be intoxicated, it should be foreseeable that the person served becomes more of a danger to himself and the public at large. Common tavernkeeper practice is therefore to "cut off" such a person, and one who does not do so should expect to be held liable for the results.

Finally, the large number of alcoholics is of great concern in the United States today. Commonly recognized as a disease, alcoholism is not going to be cured by a particular vendor's refusal to serve an alcoholic. However, when a vendor does sell intoxicating beverages to a person whom he knows to be incapable of controlling his consumption of them, that vendor should foresee that the person is very likely to become intoxicated and present a danger to himself and to the general public.

matic that the foreseeability of the risk of harm increases dramatically when the vendor or social host serves liquor to any one of these persons.³⁴⁰ Therefore, a victim of drunken driving ought to be afforded the opportunity to prove that his injuries were proximately caused by the furnishing of alcohol to a member of one of these groups.

The second and third proposed elements necessary to support a prima facie cause of action relate to the issue of causation.³⁴¹ The second element, that the defendant's service of alcohol contributed to the consumer's intoxication at the time of the accident, may itself be further divided into two requirements. First, the plaintiff must show that the drunken driver who was responsible for the plaintiff's injuries was in fact intoxicated when the accident occurred. Second, the plaintiff must demonstrate that this intoxication was a result of the consumption of alcohol unlawfully furnished by the defendant. Proof of this causal nexus is necessary to ensure that the conduct of the vendor or social host was culpable.

The third element of the plaintiff's case, requiring proof that the intoxicated person's negligent driving was the proximate cause of the injury, is the final link between the unlawful furnishing of alcohol and the plaintiff's injury. This requirement is necessary to demonstrate that the accident was not caused by something other than the driver's intoxication.³⁴²

Finally, a plaintiff under the proposed liability statute must offer evi-

Therefore, the vendor should be responsible for any harm that has been caused by his negligent serving of such a person.

340. See *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984) (serving intoxicated adult); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971) (serving minor).

341. It has been noted throughout that the traditional common law view maintained that it is the consumption of the alcohol and not its service which causes any subsequent injury. See text accompanying note 8 *supra*. As observed by the New Jersey Supreme Court, however, the liability imposed upon furnishers of alcohol may be analogized to that "traditionally imposed on owners of vehicles who lend their cars to persons they know to be intoxicated." *Kelly v. Gwinnell*, 96 N.J. at 549, 476 A.2d at 1224 (citing *Knight v. Gosselin*, 124 Cal. App. 290, 12 P.2d 454 (1932); *Harris v. Smith*, 119 Ga. App. 306, 167 S.E.2d 198 (1969); *Pennington v. Davis-Child Motor Co.*, 143 Kan. 753, 57 P.2d 428 (1936); *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956); *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922)). The *Kelly* court continued: "If, by lending a car to a drunk, a host becomes liable to third parties injured by the drunken driver's negligence, the same liability should extend to a host who furnishes liquor to a visibly drunken guest who he knows will thereafter drive away." *Id.* In the negligent entrustment context, the injury is caused by the furnishing of the vehicle in conjunction with the driver's negligence; similarly, in the vendor-social host context, the injury is caused by the furnishing of the liquor in conjunction with the negligence of the consumer.

For a general discussion of the negligent entrustment theory of liability, see notes 295-303 and accompanying text *supra*.

342. It is a presumption, rebuttable by the defendant, that a driver's inebriated condition is the cause of his negligent driving. The vendor-social host therefore may be relieved of liability if he can demonstrate that some superseding cause brought about the accident or injury. An example of such a superseding cause might be a defect in the automobile.

dence that he or she was harmed. The recovery permitted under the act should compensate for injuries to person, property, and means of support.³⁴³

In addition to setting forth the elements of a plaintiff's cause of action, the liability statute should specify defenses available to the vendor and social host.³⁴⁴ Because one of the goals of the act is to encourage prudent conduct in the serving of intoxicating beverages, the defendant ought to be able to defend on the grounds that his actions were reasonable under the circumstances.³⁴⁵ For example, under the statute a furnisher of alcohol should be permitted to offer evidence of the following: that a minor misrepresented his age;³⁴⁶ that a reasonable person in the position of the defendant would not have known that the consumer was intoxicated when served;³⁴⁷ that it was not reasonably foreseeable that the consumer would subsequently attempt to operate a motor vehicle; or that alcohol was furnished under duress. By establishing these defenses, the statute will encourage vendors and social hosts to make the proper inquiries and to act cautiously when providing alcohol to their patrons and guests. Additionally, the availability of known defenses will tend to lessen the constraining impact that a civil liability act might otherwise have on business and social relations.

Furthermore, specific affirmative defenses and limitations not related to the defendant's conduct should also be expressly incorporated into the liabil-

343. Recovery should not be unlimited, however. For a discussion of a recommended dollar limitation on recovery, see notes 350-51 and accompanying text *infra*.

344. For a general discussion of defenses currently available to vendors and social hosts, see notes 201-94 and accompanying text *supra*.

345. Because a vendor's or social host's liability would be premised upon the violation of a statute, any defense that his conduct was "reasonable under the circumstances" is similar to the defense of "excuse" permitted by some courts in actions for violation of alcoholic beverage control laws. For a discussion of excuse as a defense, see notes 285-92 and accompanying text *supra*.

346. *See, e.g.*, N.C. GEN. STAT. § 18B-122 (1983) (evidence that underage person misrepresented age is evidence that permittee was not negligent in serving him); PA. STAT. ANN. tit. 47, § 4-495(e) (Purdon Supp. 1984) (statement signed by minor claiming he is of legal age is defense in all civil and criminal prosecutions for serving minors).

347. By employing a "reasonable person" standard, this defense implicitly allows for a difference between vendor and social host liability. Specifically, a vendor may be held to a higher standard, as result of his apparent expertise, to recognize when a particular patron is intoxicated. Therefore a social host may have a defense in situations where a vendor in a comparable situation would not.

This reasonable person standard, however, imposes more of a duty upon vendors and social hosts than does the frequently employed alcoholic beverage control act proscription against serving "visibly intoxicated persons." *See, e.g.*, TENN. CODE ANN. § 57-4-203(c) (Supp. 1983) (prohibiting sale or furnishing of alcoholic beverages to anyone "visibly intoxicated"); *See also* GA. CODE ANN. § 3-3-22 (1982) (prohibiting sale to anyone in a state of "noticeable intoxication"); WASH. REV. CODE ANN. § 66.44.200 (1962) (prohibiting sale to anyone "apparently under the influence of liquor"). Under the reasonable person criteria, the vendor or social host in certain situations ought to know that his patron or guest is or might be intoxicated even though that patron or guest does not exhibit any "visible" signs, for example where the vendor or host knows that his guest has consumed a number of drinks in a short time.

ity statute. These would include such defenses as contributory negligence or comparative fault.³⁴⁸ Additionally, the act should set forth the period of limitation during which a plaintiff may assert a claim. This limitation period should be the same as that for other personal or property injury claims under state law.³⁴⁹

While a plaintiff should be entitled to recover for any harm to person, property or means of support, the statute should place some limit on the amount recoverable in order to regulate the financial exposure of culpable defendants.³⁵⁰ The limitation imposed, however, should be on a "per plaintiff" rather than a "per occurrence" basis,³⁵¹ the dollar figure should be the result of legislative fact finding, accommodating the competing interests of injured victims and responsible defendants.

Since the drunken driver, and at times the owner of the vehicle, will also be liable for the injuries resulting from the drunken driving,³⁵² the liability statute should specifically provide that the vendor or host and driver or owner are liable to the plaintiff as joint tortfeasors.³⁵³ Such a provision will discourage improvident consumption of alcohol by those intending to drive by reminding them that they too are civilly accountable to the injured

348. For a discussion of contributory negligence as a defense under currently available theories of liability, see notes 207-10 & 253-67 and accompanying text *supra*.

The availability of these defenses is less severe than the traditional dramshop act interpretation denying altogether a cause of action to the patron. For a discussion of this exclusion, see note 26 *supra*. The traditional limitation is inconsistent with modern tort principles, and a liability statute ought not to exclude any injured plaintiff as long as it accords the defendant an opportunity to raise appropriate issues of the plaintiff's own responsibility for his injuries.

349. Currently a number of dramshop acts have statutes of limitation shorter than the period for other personal injury claims. For a discussion of such dramshop acts, see note 43 and accompanying text *supra*. However, the interests of a plaintiff in a dramshop case are no less than those of any other plaintiff in this respect, and the concerns of the defendant are no greater than those of a defendant in a typical tort claim. A shorter limitation period is unjustified and works an unfair penalty on the injured plaintiff.

350. *See, e.g.*, ILL. ANN. STAT. ch. 43, § 135-6-21 (Smith-Hurd Supp. 1983) (maximum recoverable is \$15,000 for injury to person or property and \$20,000 for loss of support); MINN. STAT. ANN. § 340.95 (West Supp. 1984) (\$500,000 is maximum recoverable for all damages arising out of single illegal sale); N.C. GEN. STAT. § 18B-123 (1983) (limitation of \$500,000 per occurrence).

351. Some existing dramshop acts limit recovery on a "per occurrence" basis. *See, e.g.*, MINN. STAT. ANN. § 340.95 (West Supp. 1984) (\$500,000 is maximum recoverable for all damages arising out of single illegal sale); N.C. GEN. STAT. § 18B-123 (1983) (limitation of \$500,000 per occurrence). However, society's interest in compensating victims demands that an injured party's recovery not be contingent upon the number of other persons injured in an accident.

352. For a brief discussion of the liability of the drunken driver, see note 3 and accompanying text *supra*. For a discussion of the automobile owner's liability, see notes 295-303 and accompanying text *supra*.

353. *See, e.g.*, N.C. GEN. STAT. § 18B-124 (1983) (vendor and driver jointly and severally liable, with right of contribution but not indemnification). *See also* Kelly v. Gwinnell, 96 N.J. at 559, 476 A.2d at 1230 (expressly holding that social host and guest are liable to injured third party as joint tortfeasors).

party.³⁵⁴

B. *Nonsuppliers of Alcohol Beverages*

In a number of circumstances, nonsuppliers of alcohol should also be held accountable for the injuries caused by another's drunken driving. The imposition of liability on certain nonsuppliers because of their relationship to the drunk driver or because of their own negligent conduct is justified as furthering the goals of deterring drunken driving and compensating its injured victims. As discussed above, nonsupplier liability has been premised upon one of three theories: (1) negligent entrustment;³⁵⁵ (2) respondeat superior;³⁵⁶ or (3) common law duty to control another's conduct.³⁵⁷

Under a negligent entrustment theory, the owner of an automobile would be held liable for the drunken driver's conduct on the basis that the owner himself was negligent in entrusting the car to such a driver. This theory follows general negligence concepts, which dictate that entrusting a vehicle to someone who is intoxicated or likely to become so with the knowledge that such person will soon drive creates a foreseeable risk of harm to others. The threat of liability here may deter owners from allowing the drunken driver to get behind the wheel. Like vendor and social host liability, this approach seeks to curtail drunken driving by focusing on the source of the risk. The former aims at the supplier of the alcohol, the latter aims at the supplier of the automobile.

Under certain circumstances, the common law doctrine of respondeat superior ought to be available to a plaintiff injured by a drunken driver. This doctrine is frequently said to emanate from a desire to find a defendant with "deep pocket[s]."³⁵⁸ Accordingly, the imposition of liability under this theory is consistent with the goal of compensating injured persons. It has also been noted that respondeat superior liability derives from the relationship between principal and agent and the ability of the principal to exercise some degree of control over his agent who is acting on his behalf.³⁵⁹ Since the principal reaps the benefit of the relationship, he should also bear the cost.

Because of the elements necessary to support a claim pursuant to the

354. An alternative provision to creating joint liability between the vendor or host and guest would be to make the vendor or host secondarily liable, requiring judgment against the drunken driver as a prerequisite to suit against the furnisher of the alcohol. *See Kelly v. Gwinnell*, 96 N.J. at 569, 476 A.2d at 1235 (Garibaldi, J., dissenting).

355. For a discussion of the theory of negligent entrustment, see notes 295-303 and accompanying text *supra*.

356. For a discussion of respondeat superior in the drunken driving context, see notes 304-15 and accompanying text *supra*.

357. For a discussion of the common law duty to control another's conduct, see notes 316-31 and accompanying text *supra*.

358. *See PROSSER AND KEETON*, *supra* note 22, § 69, at 500 (citing *BATY, VICARIOUS LIABILITY* 154 (1916)).

359. *See id.*

doctrine of respondeat superior, this theory of liability may not benefit a large number of plaintiffs.³⁶⁰ Nevertheless, this cause of action is important since it serves at least indirectly to deter drunken driving and it serves directly to compensate those harmed.

Finally, nonsuppliers ought to be held liable where the common law imposes upon them a duty to control the conduct of the drunk driver. Such a duty arises in three situations. First, a duty to control should be imposed upon a person who commits an affirmative act that is in itself so significant that the person ought to be deemed to have voluntarily assumed such a duty, such as when one "jump-starts" an automobile for an obviously intoxicated person.³⁶¹

Second, a duty to act should be imposed upon a person when the relationship between the parties is "of such a character that social policy justifies the imposition of a duty to act."³⁶² Such a relationship exists, for example, between parent and child.

Third, a duty to act may arise out of a combination of some affirmative act and the existence of a fiduciary relationship, although neither one alone necessarily would be sufficient. An example of this is where an employer seeing that his employee is too intoxicated to perform his work properly, sends him out to drive home.³⁶³ Here, in light of the relationship between the parties, the act assumes a significance it would otherwise lack, and the person acting is properly vested with a duty to control the conduct of the other for the other's own protection or the protection of the general public.

In each of these cases, the imposition of a duty to act and subsequent liability for failing to do so aids in deterring drunken driving by encouraging others to take reasonable steps in preventing an intoxicated person from driving.

V. CONCLUSION

Each year the statistics for injuries from drunken driving become more and more alarming. As the crisis takes on epidemic proportions, it becomes apparent that legislative and judicial action is needed. In spite of a history

360. For a discussion of the elements necessary to sustain a defendant's vicarious liability for another's drunken driving, see notes 304-15 and accompanying text *supra*.

361. *Cf.* RESTATEMENT (SECOND) OF TORTS § 321 (1965). The Restatement provides as follows:

(1) If an actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Id. See, e.g., *Leppke v. Segura*, ___ Colo. App. ___, 632 P.2d 1057 (1981). For a discussion of *Leppke*, see notes 320-24 and accompanying text *supra*.

362. See PROSSER AND KEETON, *supra* note 22, § 56, at 374 (footnote omitted).

363. See, e.g., *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983). For a discussion of the *Otis* case, see notes 325-31 and accompanying text *supra*.

of holding the drunken driver criminally and civilly liable, the senseless loss of life and property continues. It is therefore strongly encouraged that legal efforts be aimed at those who are able in part to control drunken driving—the suppliers of alcohol and those nonsuppliers whose negligent conduct or relationship with a drunken driver justifies the imposition of liability. Drunken driving is a detriment to all society. By spreading the burden of liability beyond the drunken driver, society can begin to eliminate one of its greatest problems.

Julius F. Lang, Jr.
John J. McGrath

APPENDIX

ALCOHOLIC BEVERAGE SUPPLIERS' CIVIL LIABILITY
ACT

1. Any person suffering bodily or property harm or loss of means of support, as a result of the negligent operation of a motor vehicle [as defined by *] by a person in an intoxicated condition [as defined by *], shall have a cause of action for damages against any person or other legal entity that shall have supplied, directly or indirectly, any alcoholic beverage [as defined by*] to the intoxicated person if:

- (a) the alcoholic beverage was supplied unreasonably under the circumstances;
- (b) at the time the alcoholic beverage was supplied, the intoxicated person was [**] and a person who the supplier of the alcohol knew or should have known was likely to operate a motor vehicle;
- (c) the alcohol supplied contributed in whole or in part to the intoxicated person's intoxication; and
- (d) the negligent operation of the motor vehicle was the proximate result of the intoxication of the intoxicated person.

2. Liability under this section may be imposed against any supplier of alcohol, whether or not that supplier is a licensee under [*], subject to the limitations outlined in section 1.

3. Recovery under this section is subject to the terms of [***].

4. Liability under the section is limited to [\$ ****] per person per occurrence.

5. An action under this section must be commenced within [****] years of the date of the accident.

6. The supplier of alcohol liable under section 1 and the intoxicated person shall be jointly and severally liable to the injured party.

* Reference to applicable state law provision.

** Legislature to decide the limits, if any, to place on the class of intoxicated persons whose intoxication may be the proximate cause of injuries for which the statute allows recovery.

*** Reference to state statute or judicial decision adopting comparative fault principles, if any.

**** Legislature to decide damages and time limitations.

