LIQUOR LIABILITY **2019** UPDATE

WILSON ELSER

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CONTENTS

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LIQUOR LIABILITY REVIEW

2019 UPDATE

ALABAMA

1. STATUTE

Alabama's Dram Shop Act, Ala. Code §6-5-71, provides as follows:

> (a) Every wife, child, parent or other person who shall be injured in person, property or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.
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> (b) Upon the death of any party, the action or right of action will survive to or against his executor or administrator.
>
> (c) The party injured, or his legal representative, may commence a joint or separate action against the person intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof. ALA. CODE §6-5-71 (2018).

The Civil Damages Act, Alabama Code §6-5-70, provides that a parent or guardian of a minor may bring a cause of action against someone who unlawfully provides alcoholic beverages to a minor child. The person selling or furnishing the liquor to the minor must have knowledge or be chargeable with notice of knowledge of the person's minor status.

In 1994, a new statute was enacted which provides for liability to third persons who unlawfully sell or furnish alcohol or a controlled substance to a minor who then causes injury to a third person if the injury was proximately caused by the consumption of alcohol. Conviction under a criminal law relating to an unlawful sale shall conclusively establish an unlawful sale for the purposes of this statute. ALA. CODE §6-5-72(c) (2018).

These statutory sections are commonly referred to as the Dram Shop Act (the "Act"). They provide for liability when alcohol is sold "contrary to the provisions of law" or "unlawfully." Title 28 of the Alabama code regulates intoxicating liquors, and therefore, any violation of a provision of Title 28 would constitute unlawfulness under the Dram Shop Act. In addition, rules and regulations of the Alabama Alcoholic Beverage Control Board and violations thereof would also support a cause of action under the Dram Shop Act. In order to show a violation of the Dram Shop Act, the plaintiff must prove three elements: The sale [or provision of alcohol] must have 1) been contrary to the provisions of law; 2) been the cause of the intoxication; and 3) resulted in the plaintiff's injury. *Attalla Golf and Country Club, Inc. v. Harris*, 601 So.2d 965, 967–68 (Ala. 1992).

The most frequently cited provision is Ala. Admin. Code 20-X-6-.02(4)[1] which provides, "[n]o ABC Board on-premises licensee, employee or agent thereof shall serve any person alcoholic beverages if such person appears, considering the totality of the circumstances, to be intoxicated." In respect of minors, Alabama Code §28-3A-25(a)(3) makes it unlawful for any licensee, or their employees, to furnish alcoholic beverages to any person under the legal drinking age or to permit any person under the legal drinking age to consume or possess any alcoholic beverages on the licensee's premises. Finally, trial courts recognize violations of municipal codes regulating the sale of alcoholic beverages, happy hours, etc. as consistent with the provisions of the statutes, and allowing a civil cause of action under the Dram Shop Act.

It should be noted that the Alabama Supreme Court has repeatedly refused to hold a social host liable under the Dram Shop Act. *See Runyans v. Littrell*, 850 So.2d 244 (Ala. 2002); *Williams v. Reasoner*, 668 So.2d 541 (Ala. 1995); *Gamble v. Neonatal Assoc., P.A.*, 688 So.2d 878 (Ala. Civ. App. 1997).

Regarding voluntary payment or mental anguish as injuries, the court held that a parent's voluntary payment of an adult child's funeral expenses do not constitute an injury to the parent's property in the context of the Dram Shop Act. *Johnson v. Brunswick Riverview Club, Inc.*, 39 So.3d 132, 138 (Ala. 2009). Further, the court adopted the widely accepted general rule that mental anguish does not constitute an "injury in person" in the context of the Dram Shop Act. *Id.* at 139.

2. COMMON LAW CAUSE OF ACTION

Alabama no longer allows a common law cause of action for the negligent sale of alcohol to a person who is visibly intoxicated. Such a cause of action was previously recognized by the court. *Buchanan v. Merger Enterprises, Inc.*, 463 So.2d 121 (Ala. 1984). In *Buchanan*, the court held the common law claim did not fall within the provisions of the Dram Shop Act because it was prior to the enactment of Regulation 20-X-6-.02 and, therefore, there was no law making it unlawful to serve alcohol to individuals who appeared intoxicated. The court also found a common law cause of action in *Putnum v. Cromwell*, 475 So.2d 524 (Ala. 1985), where the statutory language was not clear regarding selling versus providing liquor to a minor. These decisions, however, were followed by *Ward v. Rhodes, Hammonds and Beck, Inc.*, *supra*, and *Martin v. Watts*, 508 So.2d 1136 (Ala. 1987), which held that there was no common law cause of action. The court in *Ward* rejected the notion that *Buchanan* created a new cause of action for negligently dispensing alcoholic beverages. 511 So.2d at 165. The *Ward* decision essentially held *Buchanan* and *Putnum* were limited to their facts. *See also*, *Williams v. Reasoner*, *supra*; *Krupp Oil Co., Inc. v. Yeargan, et al.*, 665 So.2d 920, 924 (Ala. 1995).

3. STATUTE OF LIMITATIONS

All actions for negligence causing death or personal injury must be brought within two years. ALA. CODE §6-2-38 (2018).

[1] Regulation of the Alcoholic Beverage Control Board.

4. PROPER PLAINTIFFS

The intoxicated person does not have a cause of action under the Dram Shop Act against anyone who unlawfully serves him alcoholic beverages. *Ward v. Rhoads, Hammonds and Beck, Inc.*, *supra*. This is also true if the intoxicated person is a minor. *Maples v. Chinese Palace, Inc.*, 389 So.2d 120 (Ala. 1980). In *Ward*, the Alabama Supreme Court specifically held that only innocent third parties injured by an intoxicated person have a cause of action against the server of alcohol.

The minor also does not have a cause of action under the Civil Damages Act. The Civil Damages Act only grants a cause of action to the minor's parents or guardian. In *Maples*, the court held that in a case where a minor is furnished alcohol and dies in an accident proximately caused by the consumption of the alcohol, the parent is the proper party to bring the lawsuit and that lawsuit is brought under the Civil Damages Act and not under the wrongful death statute. 389 So.2d at 123–24.

With regard to the statutory language "every wife, child, parent or other person . . .," the court in *Ward* held that the legislature must have intended the wife, child and parent of the innocent party injured by the intoxicated person, to be the proper party plaintiff in such an action. *Ward*, 511 So.2d at 164. However, in *Maples*, a plurality opinion, the court had previously allowed the parents of the intoxicated minor to recover under the same language. The Alabama trial courts had conflicting cases on this issue of whether a spouse, parent or child of a deceased intoxicated person has a cause of action against the bar. This issue was addressed by the Alabama Supreme Court in *James v. Brewton Motel Mgmt.*, 570 So.2d 1225 (Ala. 1990), which held the minor children of a deceased intoxicated person had a right of action even where the intoxication was voluntary. *Id*. at 1230. Following a thorough analysis of the preceding case law, the court found they were also in the class of protected persons. *Id*.

In respect of "other person(s)" who are able to bring civil claims under the Act, the court in *Ward* held that this includes anyone "who is proximately injured in person, property or liens of support by any intoxicated person or in the consequence of the intoxication of any person." 511 So.2d at 164. This is broad language and allows any innocent third party who is proximately injured by the intoxicated person to recover damages. In *McIsaac v. Monte Carlo Club, Inc.*, 587 So.2d 320, 324 (Ala. 1991), the court held the phrase "other person" would not be limited only to innocent third parties because the purpose of the statute is to deter drunk driving and protect the public from tortious conduct. *McIsaac* involved a passenger who was at the bar with his friend who then became intoxicated and drove. *Id*. at 321.

5. AFFIRMATIVE DEFENSES

The court in *Ward* held the statute imposes strict liability on the seller of alcoholic beverages and, therefore, there can be no defense of contributory negligence. *See also*, *McIsaac*, *supra*. The defense of assumption of the risk is, however, available. *Ward*, 511 So.2d at 164. In order to raise assumption of the risk, it must be supported by the facts. Assumption of the risk disregards a party's innocence or fault and focuses on whether he knew there was a risk involved. *McIsaac*, 587 So.2d at 324.

6. DAMAGES

The court in *Maples v. Chinese Palace, Inc.*, 389 So.2d 120, 128 (Ala. 1980), held that since the legislature did not enact a uniform statute for civil penalties, it was up to the jury to assess damages that they found were appropriate. The Dram Shop Act allows recovery for "all damages actually sustained, as well as exemplary [punitive] damages." The Courts have stated that the Act "is penal in nature and is intended to punish the owners of establishments that continue to serve customers after they have become intoxicated." *Duckett v. Wilson Hotel Mgmt. Co., Inc.*, 669 So.2d 977 (Ala. Civ. App. 1995).

The Alabama Supreme Court directly addressed this provision in *Life Ins. Co. v. Smith*, 719 So.2d 797 (1998), where it held that a jury verdict specifically awarding either compensatory damages or nominal damages is required for an award of punitive damages to be upheld. *Id.* at 806. Under the *Smith* rule, the jury's verdict must include a monetary award of compensatory damages, or if appropriate, only an award of nominal damages. *Big 3 Motors, Inc. v. Hawie*, 895 So.2d 349, 354 (Ala. Civ. App. 2004) (citing *Smith*, *supra*).

If compensatory damages are no longer necessary by reason of payments already made or awarded, the plaintiff should be entitled to nominal damages pursuant to proper instructions from the trial court. *Big 3 Motors, Inc.*, *supra*. Where the award of nominal damages "fully compensates the plaintiff to the extent that the defendant is, or could have been, liable," an award of punitive damages based on the nominal award must withstand scrutiny. *Smith*, 719 So.2d at 806. Punitive damages may be awarded in wrongful death actions. ALA. CODE §6-5-410 (2018). Pursuant to Ala. Code §6-11-21 (2018), in all civil actions in Alabama where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages may exceed three times the compensatory damages of the party claiming punitive damages or $500,000, whichever is greater. If the defendant is a small business (defined as having a net worth of $2 million or less), no award of punitive damages may exceed $50,000 or 10 percent of the business's net worth, whichever is greater. §6-11-21 (b).

7. JURISDICTIONAL ISSUES

The United States District Court for the Northern District of Alabama, in *Butler v. Beer Across America*, 83 F.Supp.2d 1261 (N.D. Ala. 2000), held that a seller of alcoholic beverages over the internet was not immune from suit under the Civil Damages Act (where plaintiff had purchased beer over the internet from an out-of-state corporation).

ALASKA

1. STATUTE

Under the Dram Shop Statute, Alaska Statute §04.21.020, a person who provides alcoholic beverages to another person is immune from civil liability for damages caused by the intoxication of that person, unless the provider is licensed to dispense such beverages and the person to whom the beverages is provided is a "drunken person" or a minor unless the purveyor obtains specific identification in good faith that identifies the minor as 21 years old. A "drunken person" includes two elements: (1) substantial impairment of the person's physical or mental conduct; and (2) that such impairment be "plain and easily observed or discovered." *Kalenka v. Jadon, Inc.*, 305 P.3d 346, 350 (AK 2013). Thus, the provider's liability depends on whether the provider served the purchaser when the purchaser was visibly impaired through intoxication. *Id.*

AS §04.21.020 (2018) provides as follows (in pertinent part):

(1) the alcoholic beverages are provided to a person under the age of 21 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 (b), that indicates that the person is 21 years of age or older . . . ALASKA STAT. §04.21.020 (2018).

2. COMMON LAW CAUSE OF ACTION

Common law liability appears to be abrogated by AS §4.21.020. *See, Gonzales v. Safeway Stores*, 882 P.2d 389 (AK. 1994).

3. STATUTE OF LIMITATIONS

The statute of limitations for bodily injury to a person is two years. ALASKA STAT §09.10.070 (2016).

4. PROPER PLAINTIFFS

It appears from the statute that the inebriated person may recover against the purveyor who violates AS §4.21.020. *See* ALASKA STAT. §04.21.020(C).

5. AFFIRMATIVE DEFENSES

The defense of comparative fault is available to the licensee regardless if the alcohol was served to a person under the age of 21. *See Sowinski v. Walker*, 198 P.3d 1134, 1155-56 (AK 2009); ALASKA STAT. §09.17.060 (2018).

6. DAMAGES

AS §09.17.060 provides a cap on compensatory damages to the extent that the claimant can be charged with contributory fault. Specifically, the provision states that in actions based on fault seeking to recover damages for injury or death to a person or harm to property, "contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery." ALASKA STAT. §09.17.060(2018).

In 2008, the Alaska Supreme Court held that under the state's system of comparative negligence with pure and several liability, a dram shop is only liable for the percentage of fault in actions between the shop and the minor's use of alcohol. *Sowinksi v. Walker,* 198 P.3d 1134 (AK 2008).[2] Therefore, Alaska's law of pure and several liability trumps the state dram shop law and thus, a bar that violates the dram shop law is liable only for its own percentage of fault as allocated to it by the jury. *H & J Corp. v. Murfitt,* 2009 Alas. LEXIS 147.

7. BURDEN OF PROOF

The statute provides the plaintiff need only prove that the recipient being under the influence substantially contributed to the recipient causing the damage. In other words, the defendant's intoxication, and not the particular sale of intoxicants to a drunken person, must be a proximate cause of the accident. *Kavorkian v. Tommy's Elbow Room*, 711 P.2d 521 (Alaska 1985).

[2] Superseding by statute, *Loeb v. Rasmussen*, 822 P.2d 914 (Alaska 1991) (holding the bar fully liable under the state's dram shop law for injuries caused by the drunk patron whom the bar negligently served).

ARIZONA

1. STATUTE

Arizona Code §4-311 provides:

(A) A licensee is liable for property damage and personal injuries or is liable to a person who may bring an action for wrongful death pursuant to §12-612, or both, if a court or jury finds all of the following:

(1) The licensee sold spirituous liquor either to a purchaser who was obviously intoxicated, or to a purchaser under the legal drinking age without requesting identification containing proof of age or with knowledge that the person was under the legal drinking age, and

(2) The purchaser consumed the spirituous liquor sold by the licensee, and

(3) The consumption of spirituous liquor was a proximate cause of the injury, death or property damage.

(B) No licensee is chargeable with knowledge of previous acts by which a person becomes intoxicated at other locations unknown to the licensee unless the person was obviously intoxicated. If the licensee operates under a restaurant license, the finder of fact shall not consider any information obtained as a result of a restaurant audit conducted pursuant to §4-213 unless the court finds the information relevant.

(C) For the purposes of Subsection A, paragraph 2 of this section, if it is found that an underage person purchased spirituous liquor from a licensee and such underage person incurs or causes injuries or property damage as a result of the consumption of spirituous liquor within a reasonable period of time following the sale of the spirituous liquor, it shall create a rebuttable presumption that the underage person consumed the spirituous liquor sold to such person by the licensee.

(D) For the purposes of this section "obviously intoxicated" means inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction that would have been obvious to a reasonable person. ARIZ. REV. STAT. ANN §4-311 (2018).

Arizona Code §4-312 provides:

> (A)[3] A licensee is not liable in damages to any consumer or purchaser of spirituous liquor over the legal drinking age who is injured or whose property is damaged, or to survivors of such a person, if the injury or damage is alleged to have been caused in whole or in part by reason of the sale, furnishing or serving of spirituous liquor to that person. A licensee is not liable in damages to any other adult person who is injured or whose property is damaged, or to the survivors of such a person, who was present with the person who consumed the spirituous liquor at the time the spirituous liquor was consumed and who knew of the impaired condition of the person, if the injury or damage is alleged to have been caused in whole or in part by reason of the sale, furnishing or serving of spirituous liquor.
>
> (B)[4] Subject to the provisions of Subsection A of this section and except as provided in section 4-311, a person, firm, corporation or licensee is not liable in damages to any person who is injured, or to the survivors of any person killed, or for damage to property which is alleged to have been caused in whole or in part by reason of the sale, furnishing or serving of spirituous liquor. ARIZ. REV. STAT. ANN. §4-312 (2018).

2. COMMON LAW CAUSE OF ACTION

The Supreme Court of Arizona, in *Petoclicchio v. Santa Cruz County Fair & Rodeo Assn.*, 866 P.2d 1342 (Ariz. 1994), a case where alcohol was stolen by the defendant-restaurant's employee, held that the §4-312 immunizes *only* licensees and their associates while conducting a transaction permitted under a license for the "sale, furnishing, or serving" of alcohol. Because the court found that defendant liquor licensee had notice that minors had access to liquor and were stealing it, the defendant-restaurant had no immunity under the act. In fact, the court asserted that the restaurant had a duty to take reasonable precautions for the safety of the general public. In short, the theft of the alcohol was not an intervening cause that broke the chain of proximate causation because the subsequent chain of events leading to the accident was foreseeable. Consequently, notwithstanding the immunity of the statute, a cause of action under common law was established.

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[3] A.R.S. §4-312(A) held unconstitutional by *Schwab v. Matley*, 793 P.2d 1088 (Ariz. 1990) (held to be mere codification of the doctrine of contributory negligence and assumption of the risk, and therefore in violation of article 18, §5 of the Arizona Constitution which provides for a state constitutional right to have defenses of contributory negligence and assumption of the risk decided by a jury).

[4] A.R.S. §4-312(B) held unconstitutional by *Young Through Young v. DFW Corp.*, 908 P.2d 1 (Ariz. Ct. App. 1995) (holding that §4-312(B) unconstitutionally abrogates the general negligence cause of action recognized in ONTIVEROS, contrary to article 18, §6 of the Arizona Constitution.)

3. PROPER PLAINTIFFS

While there has not been a case specifically re-establishing the premise outlined in *Ontiveros*, the viability of its principle remains; liability may attach if the service of alcohol creates an unreasonable risk or harm to others who may be injured on or off the premises. *Ontiveros v. Boraks*, 667 P.2d 200, 212–13 (Ariz. 1983).

The legislature has foreclosed liability for anyone, other than a licensee and his or her employees, for injuries resulting from the serving or furnishing of alcohol. In *Callender v. MCO Properties*, 885 P.2d 123 (Ariz. Ct. App. 1994), the Court of Appeals of Arizona declared that *only those who actually dispense liquor* are in a position to gauge the age or state of intoxication of a customer. Extending liability under §4-311 to one who is merely associated with a licensee but who does not control the sale, service, furnishing or supplying of alcohol by the licensee is unwarranted. In this case, the court concluded that dram shop liability did not apply to a landlord because it did not actually perform or control the service, sale, or supplying of liquor to an underaged or obviously intoxicated person.

4. AFFIRMATIVE DEFENSES

The leading case in this area is *Ontiveros v. Borak*, *supra*. In this case, the court recited the common law principle that "a tavern owner is not liable for injuries sustained off-premises by third persons as the result of the acts of an intoxicated patron," even though the tavern owner's negligence in serving that patron was a contributing cause of the accident. The court, however, did state that "where the negligent conduct of the first actor increases the foreseeable risk of a particular harm occurring through the conduct of a second actor, the 'fact that the harm is brought about through the intervention of another force does not relieve the [first] actor of liability.'" *Id*.

In essence, *Ontiveros* currently remains good law. A.R.S. §4-312(A) previously superseded the *Ontiveros* holding in part until 1990. *See* ARIZ. REV. STAT. ANN. §4-312(A); *Schwab v. Matley*, 793 P.2d 1088 (Ariz. 1990). However, in *Schwab*, the Supreme Court held A.R.S. §4-312(A) unconstitutional. Section 4-312(A) stated that a "licensee cannot be held liable for his or her negligence in furnishing alcohol to any customer who was served, or to any person accompanying the customer who was served and who knew of the customer's impaired condition." *Id*. at 1090. In short, the statute declared that if the injured claimant engaged in a certain kind of conduct—e.g. "drinking or being present with one who drank"—the injured person may not recover from the licensee. *Id*. However, Article 18, §5 of Arizona's Constitution assures its citizens that the defenses of contributory negligence and assumption of the risk will be heard by a jury. In light of this section, the Arizona Supreme Court found A.R.S. §4-312(A) in violation of the Constitution. *Id* at 1092.

In *Schwab v. Matley*, the court stated that under Article 18, §5 of the Arizona Constitution, "[t]he defense of contributory negligence or assumption of risk shall, in all cases whatsoever, be question of fact and shall, at all times, be left to the jury." 793 P.2d 1088. Therefore, these defenses are available in liquor liability cases in Arizona.

5. STATUTE OF LIMITATIONS

There is a two-year limitation for personal injury. ARIZ. REV. STAT. ANN. §12-542 (2018).[5] Section 12-541(5) provides a one-year statute of limitations where liability would not exist but for a statute. *See* ARIZ. REV. STAT. ANN. §12-541(5) (2018); *see also Andrews ex rel. Woodward v. Eddie's Place, Inc.,* 16 P.3d 801 (Ariz. App. Div. 2000). The Arizona Court opined in *Murdock v. Belle* that when "either a common law or statutory cause of action may be maintained, and the elements of the common law cause of action are different than the elements of the statutory cause of action, different limitation statutes apply to each." *See Alaface v. National Inv. Co.*, 892 P.2d 1375 (Ariz. App. Div. 1994) (citing *Murdock v. Balle*, 696 P.2d 230, 232–33 (Ariz. App. Div. 1985)).

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages to Arizona's Dram Shop Laws.

[5] *But see*, *Anson v. American Motors Corp.*, 747 P.2d 581 (Ct. App. 1987) (holding the two-year period of limitations set forth in §12-542 for wrongful death actions, providing for accrual at time of death, violates equal protection and other state constitutional provisions, and discovery rule applies in those actions).

ARKANSAS

Prior to 1999, Arkansas did not have a Dram Shop Act and thus in *Shannon v. Wilson*, 947 S.W.2d 349 (Ark. 1997) the Arkansas Supreme Court decided to depart from the common law rule of no liability and allowed for an exception. A common law cause of action was created where the vendor knowingly sells alcohol to a minor. In order to prevail in a negligence claim, the plaintiff must show that the vendor failed to exercise proper care by knowingly furnishing or selling alcohol to minor and that act was the proximate cause of the subsequent alcohol-related injury to the minor or a third party. *Id*. Following the decision in SHANNON, the Arkansas Supreme Court interpreted the higher duty the legislature had created for licensees under Act 695[6] of 1989 to include a prohibition against selling alcohol to an intoxicated person. SEE JACKSON V. CADILLAC COWBOY, INC., 986 S.W.2d 410 (Ark. 1999).

In response to and to clarify *Shannon* and *Jackson*, the Arkansas legislature enacted provisions into the Arkansas Code that provide for civil liability for the sale of alcohol to minors and visibly intoxicated persons. ARK. CODE ANN. §16-126-101 (2018).

The relevant statutory provisions are as follows:

> In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a minor or sold under circumstances where such retailer reasonably should have known such purchaser was a minor, a civil jury may determine whether or not such knowing sale constituted the proximate cause of any injury to such minor, or to a third person, caused by such minor. ARK. CODE ANN. §16-126-103 (2018).
>
> In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a person who was clearly intoxicated at the time of such sale or sold under circumstances where the retailer reasonably should have known the person was clearly intoxicated at the time of the sale, a civil jury may determine whether or not the sale constitutes a proximate cause of any subsequent injury to other persons. For purposes of this section, a person is considered clearly intoxicated when the person is so obviously intoxicated to the extent that, at the time of such sale, he presents a clear danger to others. It shall be an affirmative defense to civil liability under this section that an alcoholic beverage retailer had a

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[6] Act 695 stated in pertinent part: (a) It is the specifically declared policy of the General Assembly of the State of Arkansas that all licenses issued to establishments for the sale or dispensing of alcoholic beverages are privilege licenses, and the holder of such privilege license is to be held to a high duty of care in the operation of the licensed establishment. (b) It is the duty of every holder of an alcoholic beverage permit issued by the State of Arkansas to operate the business wherein alcoholic beverages are sold or dispensed in a manner which is in the public interest, and does not endanger the public health, welfare, or safety. Failure to maintain this duty of care shall be a violation of this act and grounds for administrative sanctions being taken against the holder of such permit or permits.

ARK. CODE ANN. §3–3–218(a) & (b).

reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle while in the impaired state. ARK. CODE ANN. §16-126-104 (2018).

However, the legislature followed those two sections with §16–126–105, which provides the rule that, "except in the knowing sale of alcohol to a minor or to a clearly intoxicated person, consumption of any alcoholic beverage, rather than the furnishing of the same, is the proximate cause of injuries or property damage inflicted by a legally intoxicated person", and §16–126–106, prohibiting a social host, or other person who does not hold an alcoholic beverage vendor's permit, from being held liable for providing alcoholic beverages to a person who can lawfully possess them. *Archer v. Sigma Tau Gamma Alpha Epsilon, Inc.*, 362 S.W.3d 303, 308 (Ark. 2010). In *Archer*, the court stated that, "[i]t seems clear that the legislature intentionally limited liability to alcoholic beverage retailers and, even then, only under two specific fact situations." *Id.* Ultimately in *Archer,* the court held that a fraternity chapter that charged admission fee for party at which food, alcohol and entertainment was provided was not an "alcoholic beverage retailer" for purposes of the Dram Shop Act and, therefore, the injured Plaintiff did not state facts upon which relief could be granted under the §16-126-104. Section 16-126-106 applied to this case and, therefore, the fraternity chapter could not be held liable for Plaintiff's injuries.

Evidence of a violation of Arkansas Code §3-3-202, prohibiting the sale of alcohol to a minor by a licensed vendor, may be presented to the jury as evidence of negligence. *Shannon*, 329 Ark. 143 at 358.

The statute of limitations in Arkansas is three years. ARK. CODE ANN. §16-56-105 (2018).

1. STATUTE OF LIMITATIONS

CALIFORNIA

1. STATUTE

California's Business and Professions Code §25602 provides as follows:

§25602. Sales to habitual drunkards; Civil Liability; Consumption of alcoholic beverages as proximate cause of injuries inflicted upon another by intoxicated person

(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* (21 Cal.3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person. CAL. BUS. & PROF. CODE §25602 (2018).

§25602.1 Supplying of alcoholic beverage to intoxicated minor; cause of action

Notwithstanding subdivision (b) of §25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed, pursuant to §23300, or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage, and any other person who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person. CAL. BUS. & PROF. CODE §25602.1 (2018).

California Civil Code, obligations imposed by law

§1714. Responsibility for willful acts or negligence; Proximate cause of injuries resulting from furnishing alcohol to intoxicated person; Liability of social host; Provision of alcoholic beverages to persons under 21 years of age

(a) Everyone is responsible, not only for the result of his or her willful acts, but also for injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary

care, brought the injury upon himself or herself. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section. The extent of liability in these cases is defined by the Title on Compensatory Relief.

(b) It is the intent of the Legislature to abrogate the holdings in cases such as *Vesely v. Sager* (1971) 5 Cal.3d 153, *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, and *Coulter v. Superior Court* (1978) 21 Cal.3d 144 and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

(c) Except as provided in subdivision (d), no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages.

(d)(1) Nothing in subdivision (c) shall preclude a claim against a parent, guardian, or another adult who knowingly furnishes alcoholic beverages at his or her residence to a person whom he or she knows, or should have known, to be under 21 years of age, in which case, notwithstanding subdivision (b), the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death.

(d)(2) A claim under this subdivision may be brought by, or on behalf of, the person under 21 years of age or by a person who was harmed by the person under 21 years of age. CAL. CIV. CODE §1714 (2018).

2. COMMON LAW CAUSE OF ACTION

Following the passage of §25602 and §1714, the California courts have consistently held that any supplier of alcoholic beverages enjoys a general immunity from civil liability as a result of injuries sustained by either the consumer or third parties. The specific language of §25602 has effectively eliminated the common law cause of action in such cases. *See Leong v. San Francisco Parking, Inc.*, 1 Cal. Rptr. 2d 41 (Ct. App. 1991) (affirming defendant's demurrer to complaint alleging defendants liable for decedent's death and holding that §25602 of the Business and Professions Code bars suit against those who simply permit consumption of alcoholic beverages on their premises as well as against those who supply alcohol. Decedent was struck and killed by a vehicle driven by a patron attending a Giants baseball game after drinking in the parking lot before and after the game); *see also Sakiyama v. AMF Bowling Centers, Inc.*, 1 Cal. Rptr. 3d 762 (Ct. App. 2003) (holding owners of party facility owed no duty of care to party guests who were subsequently injured and killed in an automobile accident while driving home from an all-night party at the facility).

In determining whether a liquor licensee was liable for serving alcohol to an obviously intoxicated minor, a jury is required to consider whether there were outward manifestations of obvious intoxication including:

incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment or argumentative behavior. *Jones v. Toyota Motor Co.*, 243 Cal. Rptr. 611, 615 (Ct. App. 1988).

3. STATUTE OF LIMITATIONS

The statute of limitations for personal injury actions in California is two years. CAL. CIV. PROC. §335.1 (2018).

4. PROPER PLAINTIFFS

The exceptions to general immunity are articulated under §1714 and 25602.1. These exceptions include where: 1) one sells or provides alcohol to an obviously intoxicated minor and; 2) where a parent, guardian, or another adult who knowingly furnishes alcoholic beverages at his or her residence to a person whom he or she knows, or should have known, to be under 21 years of age. California adopted the social host liability exception under §1714(d)(1) in 2011.

The exception under §25602.1 regarding sales of alcohol to minors is rather narrow. No civil liability may be imposed on one who furnishes alcohol to a minor who is not obviously intoxicated. *Strang v. Cabrol*, 691 P.2d 1013 (Cal. 1984). Notwithstanding the recent passage of §1714(d)(1), California courts have held that unlicensed parties who sell liquor to obviously intoxicated minors are not civilly liable for injuries to third parties caused by that minor. *Zieff v. Weinstein*, 236 Cal. Rptr. 536 (Ct. App. 1987). In addition, a store that sold liquor to an obviously intoxicated minor was not liable under §25602.1 for injuries resulting when minor supplied liquor to his drinking companion, and companion was involved in collision with third party. The third party's injuries did not proximately result from sale. *Salem v. Superior Court*, 259 Cal. Rptr. 447 (Ct. App. 1989).

5. AFFIRMATIVE DEFENSES

Our research has not revealed any affirmative defenses addressed by the courts.

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages to California's Dram Shop Laws.

7. DUTY OF CARE

Although California provides a broad exemption from civil liability for vendors of alcoholic beverages, they still have a duty of care to protect patrons from reasonably foreseeable criminal or tortious conduct of third parties. *Cantwell v. Peppermill, Inc.*, 31 Cal. Rptr. 2d 246 (Ct. App. 1994). However, the duty to protect patrons does not include a duty to arrange or provide transportation for intoxicated customers. *Andrews v. Wells*, 251 Cal. Rptr. 344 (Ct. App. 1988) *but see distinguishing opinion Morris v. De La Torre*, 4 Cal, Rptr. 3d 568 (Ct. App. 2003), opinion superseded by *Morris v. De La Torre*, 113 P.3d 1182 (Cal. 2005) (reversing the appellate court's holding, the Supreme Court held that the owner of a restaurant had a duty to take preventative measures when a victim was stabbed in the parking lot with a knife from the restaurant).

The franchiser of a convenience store has no statutory duty to provide specific safeguards or precautions with respect to the sale of alcoholic beverages to an intoxicated minor in its role as franchiser. *Wickham v. Southland Corp.*, 213 Cal. Rptr. 825 (Ct. App. 1985).

The Court of Appeals of California, Second District, in *Elizarraras v. L.A. Private Security Services, Inc.*, 133 Cal. Rptr.2d 302 (Ct. App. 2003), held that a security company hired by a restaurant did not breach its duty under the statute by failing to prevent minors from consuming alcohol on the premises because the statute requires "an affirmative act directly related to the sale of alcohol, which necessarily brings about . . . the furnishing of alcohol to a minor" (quoting *Hernandez v. Modesto Portuguese Pentecost Assoc.*, 48 Cal. Rptr.2d 229 (Ct. App. 1995)).

COLORADO

1. STATUTE

Colorado's Dram Shop statute provides that:

(1) The general assembly hereby finds, determines, and declares that this section shall be interpreted so that any common law cause of action against a vendor of alcohol beverages is abolished and that in certain cases the consumption of alcohol beverages rather than the sale, service, or provision thereof is the proximate cause of injuries or damages inflicted upon another by an intoxicated person except as otherwise provided in this section.

(2) As used in this section, "licensee" means a person licensed under the provisions of this article 3 or article 4 or 5 of this title 44 and the agents or servants of such person.

(3)(a) No licensee is civilly liable to any injured individual or his or her estate for any injury to the individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to such person, except when:

(I) It is proven that the licensee willfully and knowingly sold or served any alcohol beverage to the person who was under the age of 21 years or who was visibly intoxicated; and

(II) The civil action is commenced within one year after such sale or service.

(b) No civil action may be brought pursuant to this Subsection (3) by the person to whom the alcohol beverage was sold or served or by his or her estate, legal guardian, or dependent.

(c) In any civil action brought pursuant to this Subsection (3), the total liability in any such action shall not exceed $150,000.

(4)(a) No social host who furnishes any alcohol beverage is civilly liable to any injured individual or his or her estate for any injury to such individual or damage to any property suffered, including any action for wrongful death, because of the intoxication of any person due to the consumption of such alcohol beverages, except when:

(I) It is proven that the social host knowingly served any alcohol beverage to such person who was under the age of 21 years or knowingly provided the person under the age of 21 a place to consume an alcoholic beverage; and

(II) The civil action is commenced within one year after such service.

(b) No civil action may be brought pursuant to this Subsection (4) by the person to whom such alcohol beverage was served or by his or her estate, legal guardian, or dependent.

(c) The total liability in any such action shall not exceed $150,000.

(5) An instructor or entity that complies with §18-13-122 (5)(c), shall not be liable for civil damages resulting from the intoxication of a minor due to the minor's unauthorized consumption of alcohol beverages during instruction in culinary arts, food service, or restaurant management pursuant to §18-13-122 (5)(c).

(6)(a) The limitations on damages set forth in Subsections (3)(c) and (4)(c) of this section shall be adjusted for inflation as of January 1, 1998, and January 1, 2008. The adjustment made on January 1, 1998, and January 1, 2008, shall be based on the cumulative annual adjustment for inflation for each year since the effective date of the damages limitations in Subsections (3)(c) and (4)(c) of this section. The adjustment made pursuant to this Subsection (6)(a) shall be rounded upward or downward to the nearest ten-dollar increment.

(b) As used in this Subsection (6), "inflation" means the annual percentage change in the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

(c) The secretary of state shall certify the adjusted limitation on damages within 14 days after the appropriate information is available, and:

(I) the adjusted limitation on damages as of January 1, 1998, shall be the limitation applicable to all claims for relief that accrue on or after January 1, 1998, and before January 1, 2008; and

(II) the adjusted limitation on damages as of January 1, 2008, shall be the limitations applicable to all claims of relief that accrue on and after January 1, 2008. COLO. REV. STAT. §44-3-801 (2018).

2. COMMON LAW CAUSE OF ACTION

Colorado's Dram Shop Statute expressly abolishes any common law cause of action against a vendor of alcoholic beverages. COLO. REV. STAT. §44-3-801 (2018).

3. STATUTE OF LIMITATIONS

The statute of limitations is one year from the date of sale or service. COLO. REV. STAT. §44-3-801 (3)(a)(II) (2018).

4. PROPER PLAINTIFFS

Colorado allows only third-party claims. No civil action may be brought by the person to whom the alcoholic beverages were sold or served, or by his estate, legal guardian or dependent. COLO. REV. STAT. §44-3-801 (2018); *Westin Operator LLC v. Groh*, 347 P.3d 606, 617–18 (Co. 2015).

5. AFFIRMATIVE DEFENSES

A vendor may assert the comparative negligence doctrine as a defense, and the total damage award will be reduced by the percentage of negligence attributable to the plaintiff. *Brown v. Hollywood Bar and Cafe*, 942 P.2d 1363 (Colo. App. 1997).

6. DAMAGES

Colorado law imposes a one hundred and fifty thousand dollar ($150,000) limit on liability. COLO. REV. STAT. §44-3-801 (2018). This limit is applicable only as between one plaintiff and one defendant. *Brown,* 942 P.2d 1363.

7. BURDEN OF PROOF

The plaintiff must prove that the vendor willfully and knowingly sold or served an alcoholic beverage to either a visibly intoxicated person or a minor to prevail in his cause of action. COLO. REV. STAT. §44-3-801 (2018). Circumstantial evidence and inferences from the evidence may be relied upon to prove willfully and knowingly. *Brown*, 942 P.2d 1363

CONNECTICUT

1. STATUTE

The Connecticut Dram Shop Act, Conn. Gen. Stat. §30-102, provides as follows:

§30-102. Dram Shop Act; liquor seller liable for damage by intoxicated person. No negligence cause of action for sale to person 21 years of age or older.

If any person, by such person or such person's 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, up to the amount of $250,000, or to persons injured in consequence of such intoxication up to an aggregate amount of $250,000, to be recovered in an action under this section, provided the aggrieved person or persons shall give written notice to such seller within 60 days of the occurrence of such injury to person or property of such person's or persons' intention to bring an action under this section. Such notice shall be given (1) within 120 days of the occurrence of such injury to person or property, or (2) in the case of the death or incapacity of any aggrieved person, within 180 days of the occurrence of such injury to person or property. 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 or whose property was damaged, and the time, date and place where the injury to person or property occurred. No action under the provisions of this section shall be brought but within one year from the date of the act or omission complained of. Such injured person shall have no cause of action against such seller for negligence in the sale of alcoholic liquor to a person 21 years of age or older. CONN. GEN. STAT. §30-102 (2018).

Notes:

The 1959 act limited recovery to $25,000 and extended the notice period from 60 to 90 days; 1961 act reduced recoverable amount to $20,000 and notice period to 60 days and placed $50,000 limitation on aggregate amount recoverable; P.A. 74-144 specified factors to be considered in computing 60-day period; P.A. 86-338 added Subsec. (b) establishing a rebuttable presumption that the last seller is solely liable; P.A. 87-227 deleted provision added in 1986 which established a rebuttable presumption that the last seller is solely liable; P.A. 03-91 made technical changes for the purpose of gender neutrality, raised damages limits to $250,000 for injured person or persons and prohibited negligence action against seller for sale of alcoholic liquor to person 21 years of age or older, effective June 3, 2003; P.A. 06-69 extended notice period from 60 to 120 days and deleted provision re time excluded from computation of 60-day period, effective October 1, 2006, and applicable to causes of action arising on or after that date; P.A. 07-165 repositioned existing provision re written notice within 120 days of occurrence of injury as Subdiv. (1) and added provision re notice in case of death or incapacity of aggrieved person as Subdiv. (2), effective July 1, 2007, and applicable to causes of action arising on or after that date.

The Superior Court of Connecticut, in *Fusco v. The Packy, Inc.*, 1999 Conn. Super. LEXIS 3025 (1999), held that the Dram Shop Act applied similarly to sellers of packaged liquor as it did to sellers of liquor to be consumed on the premises. According to the court, both are liable under the Act for injuries caused by an intoxicated person to whom they sold liquor at a time when the purchaser was already intoxicated.

2. COMMON LAW CAUSE OF ACTION

The Supreme Court of Connecticut, in *Craig v. Driscoll*, 813 A.2d 1003 (Conn. 2003),[7] held that the Dram Shop Act was not the exclusive remedy when a tavern (or other provider of alcohol) negligently serves a patron. The court stated that a separate cause of action sounding in negligence may be asserted to supplement plaintiff's recovery. Subsequently, the Connecticut legislature passed Public Act No. 03–91, which barred any common-law cause of action in negligence against a seller of alcohol to an intoxicated person 21 years of age or older. Public Act No. 03–91 therefore eliminated any common law negligence causes of action by individuals entitled to recover under the Dram Shop Act, making action pursuant to the Act the exclusive remedy for a seller's negligence. *Poulin v. Laboy*, 2011 Conn. Super. LEXIS 813 (Conn. Super. Ct. Mar. 31, 2011).

3. STATUTE OF LIMITATIONS

The statute specifically provides for a one-year statute of limitations. CONN. GEN. STAT. §30-102 (2018).

4. PROPER PLAINTIFFS

An innocent third party is clearly within the protective class under the Dram Shop Statute. *Sanders v. Officers Club of Connecticut, Inc.*, 493 A.2d 184 (Conn. 1985).

The courts previously held the intoxicated person or any party who "participated" in the intoxication was barred from recovery. *Cookinham v. Sullivan*, 179 A.2d 840 (Conn. 1962).

However, in *Passini v. Decker*, 467 A.2d 442 (Conn. Super. Ct. 1983), the court held the purpose of the statute is 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. A third party accompanying the intoxicated driver is a member of the public at large, and therefore, a protected party under the statute. *Passini* held further that the statutory language was clear and unambiguous and revealed no legislative intent to limit recovery to "innocent" third parties. Participation by the injured party, for example through purchasing drinks for the intoxicated person, is no longer a valid defense to the Dram Shop Act. *Id*. Those injured persons may now bring valid claims.

[7] Superseded by Statute as stated in *Raymond v. Duffy*, 2005 WL 407655, 38 Conn.L.Rptr. 698 (Conn. Super. 2005)("…an injured person may sue a social host for the negligent service of alcohol to a visibly intoxicated guest, when that guest subsequently injures the third party or his property. This Court so holds").

5. AFFIRMATIVE DEFENSES

Connecticut courts are becoming more restrictive in allowing defenses. As discussed *infra*, an intoxicated person/defendant asserting the defense of participation of a plaintiff who assisted in purchasing drinks for the intoxicated person against whom plaintiff is asserting a claim is no longer permitted. The court has also held the statute is a form of strict liability and the intent is to protect the public from intoxicated rivers. *Sanders*, *supra*; *Passini*, *supra*.

Contributory negligence is not a valid defense to an action under the Dram Shop Act. *Belanger v. Fitch Village Pub I, Inc.*, 603 A.2d 1173, 1178 (Conn. App. Ct. 1992); *Sanders v. Officers Club of Connecticut*, *supra*., at 186. *See also Zucker v. Vogt*, 329 F.2d 426, 429–30 (2d Cir. 1964) (holding that the state of Connecticut had not directly addressed this issue, but all indications in the case law were the state would follow the general rule and hold contributory negligence is not a defense).

The Connecticut Superior Court in *Passini* held the defense of the assumption of the risk is not applicable in Connecticut because the statute was enacted to protect the public at large. Two years later, the Connecticut Supreme Court in *Sanders* held that the Dram Shop statute could be classified as a form of strict liability which reflects the strong public policy to protect the public regardless of reasonable care on behalf of the vendor.

However, the *Sanders* court then went on to say the defense of assumption of the risk could not be maintained by a defendant in the specific circumstances where there was no evidence to indicate any awareness by the plaintiff of the intoxicating condition of the driver of the car that struck him. 493 A.2d at 191–92. *Sanders*, in dicta, stated that it was not going to decide on the facts before the court at the time, whether assumption of the risk could never be asserted as a defense to a statutory violation although the court did note the defense is not valid in any negligence action. *Id*. at 192. There are some Superior Court opinions that held the assumption of the risk is applicable. *See Nolan v. Schuster*, 1998 WL 950989, at *3 (Conn. Super. Ct. Dec. 4, 1998) (denying the plaintiff's motion to strike the defense of assumption of the risk by defendant vendor and alleged intoxicated driver).

6. DAMAGES

Under Connecticut's Dram Shop Act, there is a damage limitation of up to $250,000. CONN. GEN. STAT. 30-102 (2018).

7. BURDEN OF PROOF

To establish a violation of the Dram Shop Act, three elements must be proven:

(1) sale of intoxicating liquor,

(2) to an intoxicated person,

(3) who, in consequence of such intoxication, causes an injury to the person or property of another.

O'dell v. Kozee, 53 A.3d 178, 196 (Conn. 2012). It appears to also be an element of the cause of action that the age of the person to whom the defendant dram shop sold alcoholic liquor was under 21 years. *Id*. at 211. The court stated that the plaintiff need not prove that the purchaser consumed the liquor, but only that the purchaser was visibly or otherwise perceivably intoxicated at the time of purchase. *Id.* at 180.

8. NOTICE

The statute provides that the seller must receive notice within 120 days of occurrence, or in the case of incapacity or death, 180 days from the date of the occurrence. CONN. GEN. STAT. 30-102 (2018).

9. INTOXICATION

Intoxication was described in *Sanders* as:

> An abnormal mental or physical condition due to the influence of intoxicating liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions and energies. When it is apparent that a person is under the influence of liquor, when his manner is unusual or abnormal and is reflected in his walk or conversation, when his ordinary judgment or common sense are disturbed or his usual willpower temporarily suspended, when these or similar symptoms result from the use of liquor and as manifest, a person may be found to be intoxicated. He need not be 'dead-drunk.' It is enough if by the use of intoxicating liquor he is so affected in his acts or conduct that the public or parties coming in contact with him can readily see and know this is so. 493 A.2d 194.

DELAWARE

Delaware does not have a Dram Shop statute and the courts have consistently held that the different sections of the Alcoholic Beverage Control Act, Del. Code Ann. Tit. 4, §§721, 722 and 903(2),[8] do not form the basis for civil liability of the seller of alcohol to a visibly intoxicated person. *Acker v. S.W. Cantinas, Inc.*, 586 A.2d 1178, 1179 (Del. 1991).

The courts have also consistently held that there is no common law liability under Delaware law. *Id*. at 1180. The courts' reasoning has been that the creation of a cause of action against one who is "licensed to sell alcoholic beverages, under the circumstances alleged . . . involves public policy considerations which can best be considered by the general assembly." *Id*. (citing *Wright v. Moffitt*, 437 A.2d 554, 556 (Del. 1981)). *See also Shea v. Matassa*, 918 A.2d 1090 (Del. 2007). Delaware law is very clear that there is neither common law nor statutory liability for commercial servers of alcohol.

Instead of enacting legislation relating to dram shop liability, the General Assembly enacted statutes regulating the use and sale of alcohol in Delaware in recent years, including lowering the blood alcohol legal limit and creating a certification and renewal training program for alcoholic beverage service and provided for the implementation and enforcement of the legislation. *Shea v. Matassa*, 918 A.2d 1090, 1094 (Del. 2007) (citing the Delaware Responsible Alcoholic Beverage Server Training Program, Del. Code Ann. Tit. 4, §1201 (2018)). The Delaware legislature has also passed §§706 and 708 concerning serving minors and intoxicated patrons.

§706. Sale or service of alcoholic liquors to intoxicated person

Any licensee, employee of a licensee, or person in charge of a licensed premises shall refuse to sell or serve alcoholic liquors to any individual if such individual is intoxicated or appears to be intoxicated. Such licensee, employee of a licensee or person in charge of the licensed premises shall not be liable to any individual for damages claimed to arise from the refusal to sell alcoholic liquors if such refusal is based upon this section. DEL. CODE ANN. Tit. 4, §706 (2018).

§708. Prohibition of sales to certain persons

(a) No person or licensee shall sell any alcoholic liquor to any:

(1) Individual who has not reached the age of 21 years, except that in any prosecution for an offense under this paragraph it shall be an affirmative defense that the individual, who has not reached the age of 21 years, presented to the accused identification, with a photograph of such individual affixed thereon, which identification sets forth information which would lead a reasonable person to believe such individual was 21 years of age or older;

[8] These provisions provide criminal liability for someone who serves alcoholic beverages to a visibly intoxicated person or an underage person. Twenty-seven states have statutes creating criminal liability in addition to those states with dram shop statutes which create civil liability.

(2) Person to whom such sale is prohibited;

(3) Individual who habitually drinks alcoholic liquor to excess, or to whom the Commissioner and/or Division has, after investigation, decided to prohibit the sale of such liquor because of an appeal to the Commissioner and/or Division by the husband, wife, father, mother, brother, sister, employer or other person depending upon, employing or in charge of such individual, or by the mayor or other competent representative of any city, town, or other incorporated place; the interdiction in such case shall last until removed by the Commissioner and/or Division.

(b) No sale made to any person mentioned in this section, other than an individual who has not reached the age of 21 years, shall constitute a misdemeanor unless the Commissioner and/or Division has informed the seller, by registered letter, that it is forbidden to sell to such person or unless the fact is otherwise known to the seller. DEL. CODE ANN. Tit. 4, §708 (2018).

These statutes do not create dram shop liability, and the Delaware Supreme Court, after the passing of these statutes, has consistently continued to refuse to recognize common law dram shop liability and social host liability, continually stating that it is the province of the legislature to make such an important decision about state policy. *Riedel v. ICI Ams Inc.,* 968 A.2d 17 (Del. 2009); *Shea v. Matassa*, 918 A.2d 1090 (Del. 2007).

DISTRICT OF COLUMBIA

1. STATUTE/COMMON LAW CAUSE OF ACTION

The District of Columbia Code, §25-781 codifies the law regarding the sale of alcoholic beverages to minors or intoxicated persons. Section 25-781 provides the following:

§25-781. Sale to minors or intoxicated persons prohibited.

(a) The sale or delivery of alcoholic beverages to the following persons is prohibited:

(1) A person under 21 years of age, either for the person's own use or for the use of any other person, except as provided in §25-784(b);

(2) An intoxicated person, or any person who appears to be intoxicated; or

(3) A person of notoriously intemperate habits.

(b) A retail licensee shall not permit at the licensed establishment the consumption of an alcoholic beverage by any of the following persons:

(1) A person under 21 years of age;

(2) An intoxicated person or any person who appears to be intoxicated; or

(3) A person of notoriously intemperate habits.

(c) A licensee or other person shall not, at a licensed establishment, give, serve, deliver, or in any manner dispense an alcoholic beverage to a person under 21 years of age, except as provided in §25-784(b).

(d) A licensee shall not be liable to any person for damages claimed to arise from refusal to sell an alcoholic beverage or refusal to permit the consumption of an alcoholic beverage in its establishment under the authority of this section.

(e) A person alleged to have violated this section may be issued a citation under §23-1110(b)(1). The person shall not be eligible to forfeit collateral.

(f) Upon finding that a licensee has violated Subsection (a), (b), or (c) of this section in the preceding four years, the penalties shall be the following:

(1) Upon the first violation, the Board shall fine the licensee not less than $2,000, and not more than $3,000, and suspend the licensee for five consecutive days; provided, that the five-day suspension may be stayed by the Board for one year if all employees who serve alcoholic beverages in the licensed establishment complete an alcohol training program within three months;

(2) Upon the second violation, the Board shall fine the licensee not less than $3,000, and not more than $5,000, and suspend the licensee for 10 consecutive days; provided, that the Board may stay up to six days

of the 10-day suspension for one year if all employees who serve alcoholic beverages in the licensed establishment complete an alcohol training program within three months;

(3) Upon the third violation, the Board shall fine the licensee not less than $5,000, and not more than $10,000, and suspend the licensee for 15 consecutive days, or revoke the license; provided, that the Board may stay up to five days of the 15-day suspension for one year if all employees who serve alcoholic beverages in the licensed establishment complete an alcohol training program within three months; and

(4) Upon the fourth or subsequent violation, the Board may revoke the license or impose a fine of no less than $30,000; and

(5) Upon the fifth or subsequent violation in four years, the Board shall revoke the license.

D.C. CODE §25-781 (2018).

While not itself providing a cause of action against tavern keepers by injured third parties, the District of Columbia Court of Appeals, in *Jarrett v. Woodward Bros., Inc.*, 751 A.2d 972 (D.C. 2000), held that the statute does supply the standard of care by which tavern keepers' conduct is measured under the common law. In other words, violation of an ordinance that is intended to promote safety can give rise to a negligence action. The court stated that the violation of statutes that prohibit sale of alcoholic beverages to intoxicated persons or to minors is the most common basis upon which courts have found breach of the duty of care that is necessary for imposing tort liability on tavern keepers for resulting injuries. Therefore, the unexcused violation of this statute by a tavern keeper renders the tavern keeper negligent per se, and, where injuries are proximately caused to a member of the public by that violation, the tavern keeper may be liable in damages. *Id*.

2. STATUTE OF LIMITATIONS

The statute of limitations for statutory penalty, assault or battery, or death by wrongful act is one year. The statute of limitations for other actions is three years. *See Morfessis v. Baum*, 281 F.2d 938 (D.C. Cir. 1960); D.C. CODE §12-301 (2018).

3. PROPER PLAINTIFFS

According to *Jarrett*, in order to establish a cause of action against the tavern, the plaintiff must be a member of the class to be protected by the statute, and the defendant must be a person upon whom the statute imposes specific duties. *Jarrett*, 751 A.2d 972. The D.C. statute allows first-party claims in addition to third-party claims.

Where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff's position or to prevent the type of accident that occurred and the plaintiff can establish his relationship to the statute, an unexplained violation of that standard renders the defendant negligent as a matter of law. *Richardson v. Gregory*, 281 F.2d 626 (D.C. Cir. 1960).

4. AFFIRMATIVE DEFENSES

The court in *Jarrett* stated that the common law defense of contributory negligence is not available to defeat liability for negligent conduct that contravenes a statutory mandate because statutes and regulations should not be overborne by the common law. *Jarrett*, 751 A.2d 972. The court also held that:

> [A]ssumption of the risk is inapplicable to relieve a licensee who has violated the statutory standard of liability because its necessary premise that a plaintiff have knowingly and voluntarily encountered a known risk is antithetical to the legislative policy determination that underage and intoxicated persons need to be protected from their choice when it comes to the consumption of alcohol, which is prohibited by the statute. *Id.* at 987.

5. DAMAGES

Our research has not revealed case law pertaining to caps on damages to District of Columbia's Dram Shop Laws.

FLORIDA

1. STATUTE

Florida Statute §768.125 limits dram shop liability but provides an exception for liability if a bar negligently serves minors or habitual drunkards. The statute specifically states:

> 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. §768.125 (2018).

The Florida Supreme Court in *Bankston v. Brennan* held that §768.125 does not create social host liability for serving alcohol to minors, that there was no such cause of action at common law in Florida, and the statute, which limits the liability of vendors, would not be deemed at the same time to create a new cause of action against social hosts. *Bankston v. Brennan*, 507 So.2d 1385 (Fla. 1987). The Court noted that:

> [I]t would . . . be anomalous and illogical to assume that a statute enacted to limit preexisting vendor liability would simultaneously create an entirely new and distinct cause of action against a social host, a cause of action previously unrecognized by the common law, and which has heretofore been unrecognized by statute or judicial decree. *Id.* at 1387.

2. COMMON LAW CAUSE OF ACTION

There is no common law cause of action. *Publix v. Austin*, 658 So.2d 1064 (Fla. Dist. Ct. App. 1995); *rev. den'd, Wurtz v. Pulix Supermarkets, Inc.*, 666 So.2d 146 (Fla. 1995).

3. STATUTE OF LIMITATIONS

All actions founded on either negligence or statutory liability have a four-year statute of limitations. FLA. STAT. §95.11 (2018).

4. PROPER PLAINTIFFS

The Florida statute allows first-party claims in addition to third-party claims. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991).

5. DAMAGES

Our research has not revealed case law pertaining to caps on damages to Florida's Dram Shop Laws.

6. BURDEN OF PROOF

In cases regarding minors, the plaintiff must prove willfulness and unlawfulness. Mere negligence is insufficient. *Publix*, *supra*. In cases regarding habitual drunkards, the plaintiff must prove knowledge. *Ellis*, *supra*. In both instances, the plaintiff must also prove the damages suffered were proximately caused by the sale of alcohol.

7. MINORS

The plaintiff must prove the sale was willful and unlawful. A "willful" sale requires knowledge that the recipient is not of lawful drinking age. *Case v. Newman*, 154 So.3d 1151, 1153 (Fla. 1st DCA 2016). There is a cause of action for negligently selling alcoholic beverages to a minor when the minor or third party's injuries are proximately caused by the vendor's sale. *Ellis*, 586 So.2d at 1047. Demonstrating that the minor was not asked for identification is insufficient by itself to demonstrate the vendor's willingness to sell alcoholic beverages to a minor. *Tuttle v. Miami Dolphins, Ltd.*, 551 So.2d 477, 481 (Fla. Dist. Ct. App. 1988), *rev. den'd*, 563 So.2d 635 (Fla. 1990).

However, a single conclusory allegation that the vendor willfully and unlawfully served a minor and that the vendor had a duty to ensure proper identification before the sale has been completed will probably suffice to preclude a motion for summary judgment. *French v. City of W. Palm Beach*, 513 So.2d 1356, 1358 (Fla. Dist. Ct. App. 1987); *see also* Fla. Stat. Ann. §562.11(c) (2017). Moreover, failing to demonstrate the minor's age appearance at the time of the sale may be fatal to the minor's cause of action. *Id.*; *Tuttle,* 551 So.2d at 481 (the evidence showed a minor and his two friends had six to seven beers and had not been required to show identification, but there was no evidence of the minor's appearance at the time of the incident.).

8. HABITUAL DRUNKARD

A habitual drunkard has been defined as someone "whose habit of indulgence in strong drink is so fixed that he cannot resist getting drunk anytime the temptation is offered. Inebriety must be frequent, excessive and be the dominant passion." *Todd v. Todd*, 56 So.2d 441, 442 (Fla. 1951).

The central issue is whether the seller knew the patron was a habitual drunkard. In *Ellis*, *supra*, the court averred that the plaintiff is required to show that the seller knowingly served a habitual drunkard. The court held knowledge could be shown by circumstantial evidence. *Id*. at 1048-9. Unfortunately, the court did not delineate what would constitute sufficient circumstantial evidence to establish knowledge on the part of the vendor. However, most courts will hold that a person who has multiple drinks on multiple occasions is a habitual drunkard. *Evans v. McCabe 415, Inc.*, 168 So.3d 238 (Fla. 5th DCA 2015).

a. Defendant's Motion for Summary Judgment Denied

In *Peoples Restaurant v. Sabo*, 591 So.2d 907 (Fla. 1991), the driver testified he was an alcoholic, consumed a case of beer per day for two years on the job and drank hard liquor in the evenings at a restaurant. He testified the bartenders knew him well, never refused to serve him, and often poured his favorite drink as soon as he walked in the door. On the night in question, he was served 20 shots of hard liquor and did not remember leaving the bar. A motion for summary judgment was denied.

In *Roster v. Moulton*, 602 So.2d 975 (Fla. Dist. Ct. App. 1992),[9] the drunkard was in the defendant's bar for the first time and, therefore, had no history of prior excessive drinking on those premises. Despite that, the court held that his substantial consumption of alcohol, ten beers and two shots over one and one-half hours, combined with the fact he did not appear to be impaired, would have put a reasonable liquor vendor on notice that he was habitually addicted to alcohol. Therefore, a question of fact for the jury existed and summary judgment was precluded. *Id*. at 976. This case seems to hold bartenders accountable for closely monitoring the intake of all customers and then cutting them off even if they do *not* exhibit signs of intoxication.

In *Fritsch v. Rocky Bayou Country Club,* 799 So.2d 433 (Fla. Dist. Ct. App. 2001), a case involving a country club that was being sued after one of its club members shot and killed another member after the country club had served the perpetrator alcohol, the Court of Appeals of Florida denied a motion for summary judgment. The court stated that where evidence is presented such that a jury could find that the seller of alcohol knowingly served a person habitually addicted to alcohol and evidence is presented from which a jury could find that by knowingly serving this person a foreseeable zone of danger was created, then the seller could be held liable for the resulting injuries, including the resulting homicide.

b. Defendant's Motion for Summary Judgment Granted

In the wrongful death case of *Russo v. Plant City Moose Lodge No. 1688*, 656 So.2d 957, 958 (Fla. Dist. Ct. App. 1995), the plaintiff relied on *Roster* in asserting liability existed. However, in *Roster,* two expert witnesses stated the behavior exhibited by the plaintiff would have put the vendor on notice of habitual addiction. *Id*. at 958. The court did not find the testimony of *Russo* as compelling as in the *Roster* or *Sabo* cases. The testimony revealed the intoxicated person visited the bar two to eight times a month and consumed three to seven beers per visit. On the night in question, the bartender stopped serving him alcohol and began serving coffee and soda. Numerous people, including the intoxicated person and his wife, testified he was not an alcoholic and did not have that reputation. *Id*. at 959. The court stated that

> [t]he evidence presented by Russo was insufficient as a matter of law to create a genuine issue of material fact as to Haynes' habitual addiction to the use of alcoholic beverages and as to the Moose Lodge's knowledge of that addiction when serving Haynes. Therefore, summary judgment was properly granted by the trial court. *Id*.

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[9] R*ev. den'd, Italia, Inc. v. Roster*, 613 So.2d 5 (Fla. 1992).

The courts have also refused to extend the statute so far as to construe knowledge of a habitual drunkard when the individual purchased packaged beverages for consumption off the premises several times over the course of the year. *Persen v. Southland Corp., et al.*, 640 So.2d 1228, 1229 (Fla. Dist. Ct. App. 1994), *aff'd*, 656 So.2d 453 (Fla. 1995). The court's reasoning was that the statutory language refers to one who "knowingly serves," not one who "sells or furnishes."

In *Fleuridor v. Surf Cafe*, 775 So.2d 411 (Fla. Dist. Ct. App. 2001), held that a restaurant bar could be not be liable under the statutory provision of "knowingly serving a person habitually addicted to the use of any alcoholic beverage" merely because the bartender served three to four drinks and the patron did not appear drunk. Absent additional evidence, such as being a regular at the establishment and/or being known to the staff, the bartender had no reason to believe the patron was addicted to alcohol. Moreover, the court also considered it important that the bartender did not know that others had been purchasing drinks for the patron during the night in question.

GEORGIA

1. STATUTE

The Georgia Dram Shop Act, Ga. Code Ann. §51-1-40, states as follows:

51-1-40. Liability for acts of intoxicated persons[10].

(a) The General Assembly finds and declares that the consumption of alcoholic beverages, rather than the sale or furnishing or serving of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person, except as otherwise provided in Subsection (b) of this Code section.

(b) A person who sells, furnishes or serves alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury, death, or damage caused by or resulting from the intoxication of such person, including injury or death to other persons; provided, however, a person who willfully, knowingly and unlawfully sells, furnishes or serves alcoholic beverages to a person who is not of lawful drinking age, knowing that such person will soon be driving a motor vehicle, or who knowingly sells, furnishes or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such minor or person when the sale, furnishing or serving is the proximate cause of such injury or damage. Nothing contained in this Code section shall authorize the consumer of any alcoholic beverage to recover from the provider of such alcoholic beverage for injuries or damages suffered by the consumer.

(c) In determining whether the sale, furnishing or serving of alcoholic beverages to a person not of legal drinking age is done willfully, knowingly and unlawfully as provided in Subsection (b) of this Code section, evidence that the person selling, furnishing or serving alcoholic beverages had been furnished with and acted in reliance on identification as defined in Subsection (d) of Code §3-3-23 showing that the person to whom the alcoholic beverages were sold, furnished, or served was 21 years of age or older shall constitute rebuttable proof that the alcoholic beverages were not sold, furnished or served willfully, knowingly and unlawfully.

(d) No person who owns, leases or otherwise lawfully occupies a premises, except a premises licensed for the sale of alcoholic beverages, shall be liable to any person who consumes alcoholic beverages on the premises in the absence of and without the consent of the owner, lessee, or lawful occupant or to any other person, or to the estate or survivors of either, for any injury or death suffered on or off the premises, including damage to property, caused by the intoxication of the person who consumed the alcoholic beverages. GA. CODE ANN. §51-1-40 (2018).

[10] Proposed Legislation, 2015 Ga. HB 896 which was proposed to create a negligence standard and add Social Host liability.

2. COMMON LAW CAUSE OF ACTION

The Georgia courts have interpreted the Dram Shop Act as the exclusive remedy and no common law liability for negligence exists. *Kappa Sigma Int'l. Frat. v. Tootle*, 473 S.E.2d 213, 215-16 (Ga. Ct. App. 1996); *Riley v. H&H Operations, Inc.*, 436 S.E.2d 659 (Ga. 1993).

3. STATUTE OF LIMITATIONS

Claims for injury or death have a two-year statute of limitations in Georgia. GA. CODE ANN. §9-3-33 (2017).

4. PROPER PLAINTIFFS

An intoxicated person cannot recover for his injuries against the seller of alcoholic beverages. *Riverside Enterprises, Inc. v. Rahn*, 320 S.E.2d 595 (Ga. 1984).

5. AFFIRMATIVE DEFENSES

In Georgia there is the defense of contributory negligence available in Dram Shop Act actions. *Price v. Rogers*, 422 S.E.2d 7, 8 (Ga. Ct. App. 1992); *See Stukes v. Trowell*, 168 S.E.2d 616 (Ga. Ct. App. 1969); *See also Menendez v. Jewett*, 396 S.E.2d 294 (Ga. Ct. App. 1990).

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages to Georgia's dram shop laws. Georgia statutes provide for unlimited punitive damages in the following situation:

> (f) In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol . . . or to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tortfeasor but such damages shall not be the liability of any defendant other than an active tortfeasor.

GA. CODE ANN. §51-12-5.1(f)(2018).

7. EVIDENCE

a. Minors

Most of the case law authored by the Georgia courts pertains to claims involving minors. The word "soon" in Subsection (b) has been held to be sufficiently certain in meaning and a seller can be held liable for injuries occurring 4½ hours after the sale of alcohol to a minor. *Riley v. H & H Operations, Inc.*, 436 S.E.2d 659 at 600 (Ga. 1993). Actual knowledge the buyer is a minor and will be driving soon is not required. *Id.* It is sufficient if the seller should have known and will be deemed to have knowledge of the fact. *Id.*

However, constructive knowledge is insufficient and where there is no evidence the cashier knew of another minor's presence, the cashier could not be said to have "willingly or knowingly" furnished the group with alcohol or known of their imminent driving. *Jaques v. Lever*, 831 F. Supp. 881 (S.D. Ga. 1993), *aff'd*, 43 F.3d 628 (11th Cir. 1995).

If alcoholic beverages are sold to a minor, the seller can not be held liable for the negligent acts of a second minor intoxicated by those beverages where the seller had no knowledge of the second minor's presence or affiliation with the first. *Perryman v. Lufran, Inc.*, 434 S.E.2d 112 (Ga. Ct. App. 1993), *Riley v. H & H Operations Inc.*, *supra*.

Finally, the Dram Shop Act does not preclude a cause of action pursuant to §51-1-18, providing a right of action for custodial parents against any person who sells alcoholic beverages to their child, *Leach v. Braswell*, 804 F. Supp. 1551 (S.D. Ga. 1992). However, the right of action outlined in *Leach* exists only in situations where the sale of alcoholic beverages is to an underage child, is for the child's use, and is sold without the permission of the parent. *Id*.

b. Intoxicated Persons

In *Northside Equities, Inc. v. Hulsey*, 567 S.E.2d 4 (Ga. 2002), the Supreme Court of Georgia held that where plaintiff produces expert testimony pertaining to blood alcohol content, and this evidence is able to support an inference that a seller/server was on notice of a consumer's intoxication at the time the consumer was served, summary judgment is improper. In this case, evidence of blood alcohol content, together with evidence as to the time that the consumer was last served by the establishment, allowed for an inference that the consumer was intoxicated at the time he was served. This case is distinguishable from prior cases where circumstantial proof of subsequent intoxication, such as witness statements that the patron appeared intoxicated at the accident scene, was unable to overcome a summary judgment when there was uncontradicted evidence that the consumer did not appear intoxicated at the time of service.

c. The sale of packaged alcohol can lead to liability

The Georgia statute uses the terms "sells, furnishes, or serves" alcohol in the disjunctive; as such it is clear that it was intended to encompass the sale of an alcoholic beverage at places other than only a dram shop. *Flores v. Exprezit! Stores 98-Georgia, LLC.*, 713 S.E.2d 368, 369 (2011). If a convenience store sells alcohol to a customer where it is foreseeable that the customer was noticeably intoxicated and would be driving soon, and in fact does drive and injure an innocent third party, the convenience store will be held liable if the plaintiff can prove that such sale of alcohol was a proximate cause of any injuries. *Id*. at 371.

8. ESTOPPEL

When factual allegations permit a legal conclusion on default that a defendant has violated the Dram Shop Act, the defendant will be estopped from litigating whether its service of alcohol was the proximate cause of the plaintiff's injuries. *Freese II, Inc. v. Mitchell*, 318 Ga. App. 662, 734 S.E.2d 491 (2012).

HAWAII

1. STATUTE

Although Hawaii does not have a specific Dram Shop Act, HRS §663-41 provides the following codified law regarding minors:

(a) Any person 21 years or older who:

(1) Sells, furnishes, or provides alcoholic beverages to a person under the age of 21 years; or

(2) Owns, occupies, or controls premises on which alcoholic beverages are consumed by any person under 21 years of age, and who knows of alcohol consumption by persons under 21 years of age on such premises, and who reasonably could have prohibited or prevented such alcohol consumption shall be liable for all injuries or damages caused by the intoxicated person under 21 years of age.

(b) This section shall not apply to sales licensed under chapter 281.

(c) An intoxicated person under the age of 21 years who causes an injury or damage shall have no right of action under this part. HAW. REV. STAT. §663-41 (2018).

2. COMMON LAW CAUSE OF ACTION

While Hawaii does not have a Dram Shop Act, HRS §281-78, the law setting forth various prohibitions concerning the sale or furnishing of liquor has been cited as basis for establishing a duty in tort in favor of persons injured by inebriated customers. *Ono v. Applegate*, 612 P.2d 533 (Haw. 1980).

That section reads in pertinent part as follows:

(b) At no time under any circumstances shall any licensee or its employee:

(1) Sell, serve, or furnish any liquor to, or allow the consumption of any liquor by:

(A) Any minor;

(B) Any person at the time under the influence of liquor;

(C) Any person known to the licensee to be addicted to the excessive use of intoxicating liquor; or

(D) Any person for consumption in any vehicle that is licensed to travel on public highways; provided that the consumption or sale of liquor to a minor shall not be deemed to be a violation of this subsection if, in making the sale or allowing the consumption of any liquor by a minor, the licensee was misled by the appearance of the minor and the attending

> circumstances into honestly believing that the minor was of legal age and the licensee acted in good faith; and provided further that it shall be incumbent upon the licensee to prove that the licensee so acted in good faith; . . .
>
> HAW. REV. STAT. §281-78 (2018).

The courts have refused to extend liability beyond the public policy set forth in HRS §281-78. *Winters v. Silver Fox Bar*, 797 P.2d 51 (Haw. 1980). The court in *Winters* "emphatically reject[ed] the contention that intoxicated liquor consumers can seek recovery from the bar or tavern which sold them alcohol. Drunken persons who harm themselves are solely responsible for their voluntary intoxication and cannot prevail under a common law or statutory basis." WINTERS, 797 P.2d at 53 (quoting BERTELMANN V. TAAS ASSOC., 735 P.2d 930 (Haw. 1987)).

3. STATUTE OF LIMITATIONS

HRS §657-7 provides two years for an injury to a person. HAW. REV. STAT. §657-7 (2018).

4. PROPER PLAINTIFFS

Persons who sustain injuries due to their own voluntary intoxication cannot recover from the bar that sold them the liquor. *Bertelmann v. Taas Assocs.*, 735 P.2d 930 (Haw. 1987).

However, the Supreme Court of Hawaii has held that "the §281-78(a)(2)(A)[11] duty includes the situation where an innocent third party has been injured by an intoxicated minor other than the minor to whom the liquor was sold, subject to determinations by the trier of fact on the issue of reasonable foreseeability." *Reyes v. Kuboyama*, 870 P.2d 1281 (Haw. 1994) (emphasis added).

5. AFFIRMATIVE DEFENSES

Our research has not revealed any affirmative defenses addressed by the courts.

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to Hawaii's Dram Shop laws.

[11] HRS §281-78(a)(2)(A) is currently replaced by HRS §281-78(a) (No person shall, except as permitted in §291-3.4, consume any liquor on any public highway or any public sidewalk).

7. BURDEN OF PROOF

The plaintiff must prove the inebriated person was under the influence of alcohol at the time the person was served by the purveyor (or that the person was under 21 years old). *Ono, supra*.

8. MINORS

Minors who sustain injury as a result of their own intoxication may not recover from the purveyor, *Winters, supra*; however, this holding was criticized in a dissenting opinion in *Reyes*, *supra*. Additionally, while an intoxicated minor who causes injury or damage has no right of action, there is no bar against an action by the intoxicated minor against a host when the minor's injury is inflicted directly upon minor by the host through the provision of alcohol. *Ah Mook Sang v. Clark*, 130 Haw. 282, 308 P.3d 911 (2013). The claim must only be between the minor and the host. *Id*.

IDAHO

1. STATUTE

I.C. §23-808 (Legislative finding and intent—cause of action), enacted in 1988, provides:

(1) The legislature finds that it is not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons and it is the intent of the legislature, therefore, to limit dram shop and social host liability; provided, that the legislature finds that the furnishing of alcoholic beverages may constitute a proximate cause of injuries inflicted by intoxicated persons under the circumstances set forth in Subsection (3) of this section.

(2) No claim or cause of action may be brought by or on behalf of any person who has suffered injury, death or other damage caused by an intoxicated person against any person who sold or otherwise furnished alcoholic beverages to the intoxicated person, except as provided in Subsection (3) of this section.

(3) A person who has suffered injury, death or any other damage caused by an intoxicated person, may bring a claim or cause of action against any person who sold or otherwise furnished alcoholic beverages to the intoxicated person, only if:

(a) The intoxicated person was younger than the legal age for the consumption of alcoholic beverages at the time the alcoholic beverages were sold or furnished and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known at the time the alcoholic beverages were sold or furnished that the intoxicated person was younger than the legal age for consumption of the alcoholic beverages; or

(b) The intoxicated person was obviously intoxicated at the time the alcoholic beverages were sold or furnished, and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known that the intoxicated person was obviously intoxicated.

(4) (a) No claim or cause of action pursuant to Subsection (3) of this section shall lie on behalf of the intoxicated person nor on behalf of the intoxicated person's estate or representatives.

(b) No claim or cause of action pursuant to Subsection (3) of this section shall lie on behalf of a person who is a passenger in an automobile driven by an intoxicated person nor on behalf of the passenger's estate or representatives.

(5) No claim or cause of action may be brought under this section against a person who sold or otherwise furnished alcoholic beverages to an intoxicated person unless the person bringing the claim or cause of action notified the person who sold or otherwise furnished alcoholic beverages to the intoxicated person within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail that the claim or cause of action would be brought.

> (6) For the purposes of this section, the term "alcoholic beverage" shall include alcoholic liquor as defined in §23-105, Idaho Code, beer as defined in §23-1001, Idaho Code, and wine as defined in §23-1303, Idaho Code. IDAHO CODE ANN. §23-808 (2018) (emphasis added).

Because much of the Idaho case law in this area is based on a theory of negligence per se, developed prior to the Dram Shop Act, it is important to note that Idaho Code §23-603 (Dispensing to a person under the age of 21 years), amended effective March 21, 2007**,** provides:

> Any person who is eighteen (18) years of age or older who shall sell, give, or furnish, or cause to be sold, given, or furnished, alcohol beverage, including any distilled spirits, beer or wine, to a person under the age of twenty-one (21) years shall be guilty of a misdemeanor and upon conviction thereof may be punished by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000) per violation, or by imprisonment in the county jail for a period not to exceed one (1) year, or by both such fine and imprisonment. A second or subsequent violation of this section by the same defendant shall constitute a misdemeanor and upon conviction thereof the defendant shall be punished by a fine of not less than one thousand dollars ($1,000) nor more than two thousand dollars ($2,000) per violation, or imprisonment in the county jail for a period not to exceed one (1) year, or by both such fine and imprisonment. Notwithstanding the provisions of §19-4705, Idaho Code, moneys received pursuant to such fines shall be deposited in the substance abuse treatment fund, as created in §23-408, Idaho Code. Upon conviction of any person for a violation of the provisions of this section, the court shall notify the director of the Idaho State Police. The director shall review the circumstances of the conviction, and if the dispensing took place at a licensed establishment or other retailer or distributor, the director may take administrative action he considers appropriate against the licensee or business including suspension of the license for not to exceed six (6) months, a fine, or both such suspension and fine. IDAHO CODE ANN. §23-603 (2018).

and §23-605 (Dispensing to drunk) states:

> Any person who sells, gives, or dispenses any alcohol beverage, including any distilled spirits, beer or wine, to another person who is intoxicated or apparently intoxicated shall be guilty of a misdemeanor. IDAHO CODE ANN. §23-605 (2018).

2. COMMON LAW CAUSE OF ACTION

There is very little case law interpreting §23-808 (Dram Shop Act). Most of what the Idaho courts have said with regard to dram shop liability involves §§23-603 and 605 and a common law cause of action.

The Idaho Supreme Court, in *Fischer v. Cooper*, 775 P.2d 1216 (Idaho 1989), stated that §§23-603 and 605 form the basis of imposing civil liability on those who serve obviously intoxicated persons and minors. *See also Slade v. Smith's Mgmt. Corp.*, 808 P.2d 401, 408 (Idaho 1991) (stating that a violation of §§23-603 and 605 constituted negligence per se).

The Idaho Supreme Court explicitly held that a common law cause of action existed against a licensed vendor for negligently serving alcoholic beverages to an obviously intoxicated person. *See Bergman v. Henry*, 766 P.2d 729 (Idaho 1988); *See also Alegria v. Payonk*, 101 Idaho 617 (Idaho 1980) (imposing liability for serving a minor). *Bergman* has not been overruled despite the enactment of §23-808 (Dram Shop Act).

3. STATUTE OF LIMITATIONS

There is a two-year statute of limitations on any action pursuant to Idaho Code §23-808. *See Bergman*, 766 P.2d 729; IDAHO CODE ANN. §5-219(4).

4. PROPER PLAINTIFFS

The Idaho Supreme Court, in *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999), stated that an intoxicated person may not bring a cause of action, under the Dram Shop Act, against the liquor dispenser for injuries sustained as a result of the dispensing of alcohol to that intoxicated person. *Coghlan*, 987 P.2d at 394-95 (declaring §23-808(4) constitutional).

The *Bergman* court allowed a wife to bring a common law cause of action (negligence per se) as both the personal representative of her husband's estate and as guardian ad litem for her minor son, where the husband/father was killed by an intoxicated driver.

5. AFFIRMATIVE DEFENSES

The defense of comparative negligence applies in actions brought pursuant to Dram Shop Act. IDAHO CODE ANN. §§23-808 and 6-803. *See also Idaho Dept. of Labor v. Sunset Marts, Inc.*, 91 P.3d 1111 (Idaho 2004).

Summary judgment is appropriate for a defendant where that defendant does not engage in any "affirmative conduct" to protect an inebriated party and did not provide that party alcohol. *Compare Rogers v. Sigma Chi Int'l Fraternity*, 9 N.E.3d 755, 763 (Ind. Ct. App. 2016), *with Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999).

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to Idaho's Dram Shop Laws.

7. NOTICE

The Idaho legislature enacted a dram shop and social host liability act in 1986 and pursuant to §23-808. The legislative finding and intent with regard to the cause of action under the Dram Shop Act requires the following:

> (5) No claim or cause of action may be brought under this section against a person who sold or otherwise furnished alcoholic beverages to an intoxicated person unless the person bringing the claim or cause of action notified the person who sold or otherwise furnished alcoholic beverages to the intoxicated person within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail that the claim or cause of action would be brought. IDAHO CODE ANN. §23-808.

See Bergman, 766 P.2d 729.

8. DEFENDANTS

In *Fischer v. Cooper*, a tavern owner was operating under the prior tavern owner's liquor license at the time the intoxicated patron was served. 775 P.2d at 1217. The Supreme Court of Idaho applied *Bergman* and held that a common law cause of action existed against the unlicensed tavern operator. In addition, the court held that the license holder, even though no longer involved in the operation of the tavern, was still liable under a negligence per se theory. *See also Slade v. Smith's Mgmt. Corp.*, 808 P.2d 401 (Idaho 1991) (holding that a non-licensed alcohol provider was negligent per se under §23-605 and that this ruling is consistent with the newly enacted Dram Shop Act if the Act applied retroactively).

9. EVIDENCE

In *State v. Cacavas*, 44 P.2d 1110 (Idaho 1935), the defendant had been prosecuted under a statute making it a felony to furnish alcoholic beverages to a minor. The Supreme Court of Idaho held that the testimony of the minors need not be corroborated in order to support a verdict against the defendant. In short, the minor's uncorroborated testimony that the defendant provided them with alcohol was sufficient to reach the jury.

ILLINOIS

1. STATUTE

The Illinois Dram Shop Act states as follows:

Sec. 6-21. (a) Every person who is injured within this State, in person or property, by any intoxicated person has a right of action in his or her own name, severally or jointly, against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor, within or without the territorial limits of this State, causes the intoxication of such person. Any person at least 21 years of age who pays for a hotel or motel room or facility knowing that the room or facility is to be used by any person under 21 years of age for the unlawful consumption of alcoholic liquors and such consumption causes the intoxication of the person under 21 years of age, shall be liable to any person who is injured in person or property by the intoxicated person under 21 years of age. Any person owning, renting, leasing or permitting the occupation of any building or premises with knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused the intoxication of any person, shall be liable, severally or jointly, with the person selling or giving the liquors. However, if such building or premises belong to a minor or other person under guardianship the guardian of such person shall be held liable instead of the ward. A married woman has the same right to bring the action and to control it and the amount recovered as an unmarried woman. All damages recovered by a minor under this Act shall be paid either to the minor, or to his or her parent, guardian or next friend as the court shall direct. The unlawful sale or gift of alcoholic liquor works a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises where the unlawful sale or gift takes place. All actions for damages under this Act may be by any appropriate action in the circuit court. An action shall lie for injuries to either means of support or loss of society, but not both, caused by an intoxicated person or in consequence of the intoxication of any person resulting as hereinabove set out. "Loss of society" means the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection. "Family" includes spouse, children, parents, brothers, and sisters. The action, if the person from whom support or society was furnished is living, shall be brought by any person injured in means of support or society in his or her name for his or her benefit and the benefit of all other persons injured in means of support or society. However, any person claiming to be injured in means of support or society and not included in any action brought hereunder may join by motion made within the times herein provided for bringing such action or the personal representative of the deceased person from whom such support or society was furnished may so join. In every such action the jury shall determine the amount of damages to be recovered without regard to and with no special instructions as to the dollar limits on recovery imposed by this Section. The amount recovered in every such action is for the exclusive benefit of the person injured in loss of support or society and shall be distributed to such persons in the proportions determined by the verdict rendered or judgment entered in the action. If the right of action is settled by agreement with the personal representative of a deceased person from whom support or society was furnished, the court having jurisdiction of the estate of the deceased person shall

distribute the amount of the settlement to the person injured in loss of support or society in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person. For all causes of action involving persons injured, killed, or incurring property damage before September 12, 1985, in no event shall the judgment or recovery under this Act for injury to the person or to the property of any person as hereinabove set out exceed $15,000, and recovery under this Act for loss of means of support resulting from the death or injury of any person, as hereinabove set out, shall not exceed $20,000. For all causes of action involving persons injured, killed, or incurring property damage after September 12, 1985 but before July 1, 1998, in no event shall the judgment or recovery for injury to the person or property of any person exceed $30,000 for each person incurring damages, and recovery under this Act for loss of means of support resulting from the death or injury of any person shall not exceed $40,000. For all causes of action involving persons injured, killed, or incurring property damage on or after July 1, 1998, in no event shall the judgment or recovery for injury to the person or property of any person exceed $45,000 for each person incurring damages, and recovery under this Act for either loss of means of support or loss of society resulting from the death or injury of any person shall not exceed $55,000. Beginning in 1999, every January 20, these liability limits shall automatically be increased or decreased, as applicable, by a percentage equal to the percentage change in the consumer price index-u during the preceding 12-month calendar year. "Consumer price index-u" means the index published by the Bureau of Labor Statistics of the United States Department of Labor that measures the average change in prices of goods and services purchased by all urban consumers, United States city average, all items, 1982–84 = 100. The new amount resulting from each annual adjustment shall be determined by the Comptroller and made available via the Comptroller's official website by January 31 of every year and to the chief judge of each judicial circuit. The liability limits at the time at which damages subject to such limits are awarded by final judgment or settlement shall be utilized by the courts. Nothing in this Section bars any person from making separate claims which, in the aggregate, exceed any one limit where such person incurs more than one type of compensable damage, including personal injury, property damage, and loss to means of support or society. However, all persons claiming loss to means of support or society shall be limited to an aggregate recovery not to exceed the single limitation set forth herein for the death or injury of each person from whom support or society is claimed.

Nothing in this Act shall be construed to confer a cause of action for injuries to the person or property of the intoxicated person himself, nor shall anything in this Act be construed to confer a cause of action for loss of means of support or society on the intoxicated person himself or on any person claiming to be supported by such intoxicated person or claiming the society of such person. In conformance with the rule of statutory construction enunciated in the general Illinois saving provision in §4 of "An Act to revise the law in relation to the construction of the statutes," approved March 5, 1874, as amended [5 ILCS 70/4], no amendment of this Section purporting to abolish or having the effect of abolishing a cause of action shall be applied to invalidate a cause of action accruing before its effective date, irrespective of whether the amendment was passed before or after the effective date of this amendatory Act of 1986.

Each action hereunder shall be barred unless commenced within one year next after the cause of action accrued.

However, a licensed distributor or brewer whose only connection with the furnishing of alcoholic liquor which is alleged to have caused intoxication was the furnishing or maintaining of any apparatus for the dispensing or cooling of beer is not liable under this Section, and if such licensee is named as a defendant, a proper motion to dismiss shall be granted.

(b) Any person licensed under any state or local law to sell alcoholic liquor, whether or not a citizen or resident of this State, who in person or through an agent causes the intoxication, by the sale or gift of alcoholic liquor, of any person who, while intoxicated, causes injury to any person or property in the State of Illinois thereby submits such licensed person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State for a cause of action arising under Subsection (a) above. 235 ILL. COMP. STAT. 5/6-21 (2018).

2. COMMON LAW CAUSE OF ACTION

In Illinois, there is no common law cause of action and the statute is an exclusive remedy. *Charles v. Seigfried*, 651 N.E.2d 154 (Ill. 1995), affirmed by *Wakulich v. Mraz,* 785 N.E.2d 843 (Ill. 2003), (upholding the *Charles* decision by declining to recognize a cause of action against social hosts for serving alcohol to minors who are substantially injured).

3. STATUTE OF LIMITATIONS

Actions brought under the Dram Shop Act have a one-year statute of limitations. 235 ILL. COMP. STAT. 5/6-21 (2018).

4. PROPER PLAINTIFFS

The Dram Shop Act is limited to third parties, including passengers, unless those passengers contributed in producing or furnishing alcohol for the intoxicated person as discussed, infra. *See Gora v. 7-11 Food Stores*, 440 N.E.2d 279 (Ill. App. Ct. 1982); *Maras v. Bertholdt*, 467 N.E.2d 599 (Ill. App. Ct. 1984).[12] There is no cause of action for a first-party claimant, whether a minor or adult, or the estate of a first party. *See Gora*, *supra*; *Matter v. Sedam*, 547 N.E.2d 1040 (Ill. App. Ct. 1989).

[12] Abrogation recognized by *GMB Financial Group Inc. v. Marzano,* 899 N.E.2d 298, 326 (Ill. App. Ct. 2008).

5. AFFIRMATIVE DEFENSES

In general, there are no issues of negligence in an action alleging violation of the Illinois Dram Shop Statute and, therefore, contributory negligence is not available as an affirmative defense. *Merritt v. Chonowski*, 373 N.E.2d 1060 (Ill. App. Ct. 1978).

However, there is a line of cases holding that a person who participates in or directly procures alcohol for the intoxicated person cannot recover under the Act.

In *Parson v. Veterans of Foreign Wars Post 6372*, 408 N.E.2d 68 (Ill. App. Ct. 1980),[13] the plaintiff sought to recover for loss of support from the death of her husband under the act even though she drank with him and saw him fall off his motorcycle as he was attempting to leave the facility where alcohol was furnished. A verdict was rendered for the defendant and the plaintiff appealed based on the jury instruction given for complicity. *Id*. at 70. The court discussed this doctrine at length and found that the Dram Shop Act imposes no-fault liability and the complicity doctrine is of judicial origin. *Id*. at 71. The court further stated that complicity is not a variance of the contributory negligence or assumption of the risk doctrines, and noted the state follows the rule that "only one who actively contributes to or procures the intoxication of the inebriate is precluded from recovery." *Id*. The court did discuss and find that this has been an area of confusion in the trial courts leading to inconsistent opinions. *Id*.

In *Taylor v. Hughes*, 149 N.E.2d 393 (Ill. App. Ct. 1958), an assault case, the court held that a jury instruction that the plaintiff's intoxication caused or contributed to his own injuries was improper. The court found that whether the plaintiff was intoxicated was irrelevant. *Id*. What was relevant was whether the plaintiff was an active and willing agent in procuring the intoxication of the injuring party and the absence of provocation. *Id*. at 396. The court held this is a fact question for the jury. *Gilman v. Kessler*, 548 N.E.2d 1371 (Ill. App. Ct. 1989). This line of cases is not applicable where the injured party did not contribute to the intoxication of another, drink with him, or provoke an attack. *Quatrano v. Marrocco*, 208 N.E.2d 632, 639 (Ill. App. Ct. 1964).

Recently, an Illinois appellate court held that the inherent risk doctrine does not apply to bar a dram shop action. *Olle v. C House Corp.*, 967 N.E.2d 886, 890 (Ill. App. Ct. 2012). The court stated that unlike the judicially created affirmative defenses of the Dram Shop Act, complicity and provocation, the inherent risk doctrine is not an affirmative defense in that it does not presuppose the existence of an otherwise valid cause of action; rather, when the doctrine applies, an essential element of the cause of action is negated. *Id.* Additionally, the inherent risk doctrine is premised on the concept of assumption of the risk, which is a common-law doctrine, and the supreme court of Illinois has stated that statutes in derogation of common law will not be found to abrogate common-law affirmative defenses unless it plainly appears that the intent of the statute is to impose strict liability, such as the Dram Shop Act. *Id.*

[13] Disagreed with by *Walter v. Carriage House Hotels, Ltd.*, 646 N.E.2d 599 (Ill. 1995) (affirming the trial court's decision to refuse to sever battery action against inebriate from dram shop action bar owner).

6. DAMAGES

Under the Dram Shop Act, the maximum amount of recovery allowed changes annually for the various types [of] damages using a formula that is discussed in 235 ILL. COMP. STAT. 5/6-21(a), *supra*.

7. BURDEN OF PROOF AND EVIDENCE

In order to establish a prima facie case against defendant owners or operator of the tavern involved, the plaintiff must prove that intoxicating liquor was served at the respective taverns to the person injuring the plaintiff, that such person became intoxicated, that the liquor so served contributed to his intoxication, and that the plaintiff's injury resulted from the intoxication, and the evidence presented at the trial established such a prima facie case. *Dunkelberger v. Hopkins*, 200 N.E.2d 905 (Ill. App. Ct. 1964). These elements must be proven by a preponderance of the evidence. *Sagle v. McClellan*, 132 N.E.2d 596 (Ill. App. Ct. 1956).

Consumption of the alcohol together with evidence of unusual behavior must be proven in order for a jury to conclude a person was intoxicated. *Nakis v. Amabile*, 431 N.E.2d 1255 (Ill. App. Ct. 1981). A person's blood alcohol level may be admissible under the usual evidentiary rules and standards. *Mulhern v. Talk of Town*, 486 N.E.2d 383 (Ill. App. Ct. 1985). Experts can testify regarding oxidation rates of alcohol. *Craft v. Accord*, 313 N.E.2d 515 (Ill. App. Ct. 1974).

INDIANA

1. STATUTE

The Indiana Dram Shop Act is set forth in Ind. Code §7.1-5-10-15.5 as follows:

7.1-5-10-15.5; Liability of person furnishing alcoholic beverage to intoxicated person.

(a) As used in this section, 'furnish' includes barter, deliver, sell, exchange, provide or give away.

(b) A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

(1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and

(2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury or damage alleged in the complaint.

(c) If a person who is a least twenty-one (21) years of age suffers injury or death proximately caused by the person's voluntary intoxication, the:

(1) person;

(2) person's dependents;

(3) person's personal representative; or

(4) person's heirs;

may not assert a claim for damages for personal injury or death against a person who furnished an alcoholic beverage that contributed to the person's intoxication, unless Subsections (b)(1) and (b)(2) apply. BURNS IND. CODE ANN. §7.1-5-10-15.5 (2018).

2. COMMON LAW CAUSE OF ACTION

In Indiana, common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving the breach of a statutory duty. *Weida v. Dowden*, 664 N.E.2d 742, 747-48 (Ind. Ct. App. 1996); *See also Thompson V. Ferdinand Sesquicentennial Comm., Inc.,* 637 N.E.2d 178 (Ind.Ct.App.1994).

3. STATUTE OF LIMITATIONS

The Indiana statute of limitations for personal injury claims is two years. BURNS IND. CODE ANN. §34-11-2-4 (2018).

4. PROPER PLAINTIFFS

Third parties are able to bring a claim under the Dram Shop Act. *Buffington v. Metcalf*, 883 F. Supp. 1190 (S.D. Ind. 1994). First party can also bring a claim under the Dram Shop Act. *Ward v. D & A Enterprises of Clark County, Inc.*, 714 N.E.2d 728 (Ind. Ct. App. 1999).

5. AFFIRMATIVE DEFENSES

Under the comparative fault act, no degree of negligence on the part of the plaintiff, including that which may be characterized as willful and wanton, may operate to bar recovery. *Gray v. D & G, Inc.*, 938 N.E.2d 256, 260–61 (Ind. Ct. App. 2010). *See also* BURNS IND. CODE ANN. §34-6-2-45(b).

Cases decided prior to the comparative fault act had held that driving while intoxicated "constituted a complete defense to any action by the intoxicated driver against the provider of the alcohol consumed." *Booker Inc. v. Morrill,* 639 N.E.2d 358, 361 (Ind. Ct. App. 1994). While this may have been true under the common law doctrine of contributory negligence, this is no longer the law under the comparative fault scheme. *Gray v. D & G, Inc.*, 938 N.E.2d 256, 261 f.n. 3 (citing *Booker,* 639 N.E.2d at 361).

In *Vanderhoek v. Willy,* 728 N.E.2d 213 (Ind. Ct. App. 2000), the Indiana Court of Appeal stated that the Dram Shop Act does not distinguish between the acts of a gratuitous server and a tavern. Therefore, cases may arise such that independent acts of both a gratuitous server and a tavern can create genuine issues of material facts as to the liability of one or both. These cases may arise in situations where the consumer was furnished alcoholic drinks by a tavern and a gratuitous server during the same period of intoxication.

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to Indiana's Dram Shop Act.

7. BURDEN OF PROOF

The statute sets out the fundamental elements which must be proven by plaintiff. *Buffington*, *supra*. The provider's knowledge is a fact issue and, in order to survive summary judgment, the plaintiff must provide some evidence that the provider had actual knowledge the person was intoxicated. If the plaintiff meets this burden, mere testimony from the provider that it had no knowledge of the patron's intoxication is insufficient without additional corroborating evidence. *Id*.

If the Dram Shop Act's duty of omission is breached and damages are caused by the intoxicated person, the provision of alcohol may be considered to be a proximate cause of ensuing damage; however, it need not be the only proximate cause. Therefore, whether a defendant's conduct is a proximate cause of the plaintiff's injury, presents a question of fact for the jury. *Pierson ex rel. Pierson v. Serv. Am. Corp.*, 9 N.E.3d 712 (Ind. Ct. App. 2016).

IOWA

1. STATUTE

Section 123.92 Civil liability for dispensing or sale and service of beer, wine, or intoxicating liquor (Dram Shop Act) — liability insurance — underage persons.

1.

a. Subject to the limitation amount specified in paragraph "c," if applicable, any third party who is not the intoxicated person who caused the injury at issue and who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person, has a right of action for damages actually sustained, severally or jointly, against any licensee or permittee, whether or not the license or permit was issued by the division or by the licensing authority of any other state, who sold and served any beer, wine, or intoxicating liquor directly to the intoxicated person, provided that the person was visibly intoxicated at the time of the sale or service.

b. If the injury was caused by an intoxicated person, a permittee or licensee may establish as an affirmative defense that the intoxication did not contribute to the injurious action of the person.

c. The total amount recoverable by each plaintiff in any civil action for noneconomic damages for personal injury, whether in tort, contract, or otherwise, against a licensee or permittee, shall be limited to two hundred fifty thousand dollars for any injury or death of a person, unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained.

2.

a. Every liquor control licensee, class "B" beer permittee, and class "C" native wine permittee, except a class "E" liquor control licensee, shall furnish proof of financial responsibility by the existence of a liability insurance policy in an amount determined by the division. If an insurer provides dram shop liability insurance at a new location to a licensee or permittee who has a positive loss experience at other locations for which such insurance is provided by the insurer, and the insurer bases premium rates at the new location on the negative loss history of the previous licensee or permittee at that location, the insurer shall examine and consider adjusting the premium for the new location not less than thirty months after the

insurance is issued, based on the loss experience of the licensee or permittee at that location during that 30-month period of time.

b. A dram shop liability insurance policy may be written on an aggregate limit basis.

c. The purpose of dram shop liability insurance is to provide protection for members of the public who experience damages as a result of licensees or permittees serving patrons beer, wine, or intoxicating liquor to a point that reaches or exceeds the standard set forth in law for liability. Minimum coverage requirements for such insurance are not for the purpose of making the insurance affordable for all licensees or permittees regardless of claims experience. A dram shop liability insurance policy obtained by a licensee or permittee shall meet the minimum insurance coverage requirements as determined by the division and is a mandatory condition for holding a license or permit.

3.

a. Notwithstanding §123.49, Subsection 1, any person who is injured in person or property or means of support by an intoxicated person who is under legal age or resulting from the intoxication of a person who is under legal age, has a right of action for all damages actually sustained, severally or jointly, against a person who is not a licensee or permittee and who dispensed or gave any beer, wine, or intoxicating liquor to the intoxicated underage person when the non-licensee or non-permittee who dispensed or gave the beer, wine, or intoxicating liquor to the underage person knew or should have known the underage person was intoxicated, or who dispensed or gave beer, wine, or intoxicating liquor to the underage person to a point where the non-licensee or non-permittee knew or should have known that the underage person would become intoxicated.

b. If the injury was caused by an intoxicated person who is under legal age, a person who is not a licensee or permittee and who dispensed or gave beer, wine, or intoxicating liquor to the underage person may establish as an affirmative defense that the intoxication did not contribute to the injurious action of the underage person.

c. For purposes of this paragraph, “dispensed” or “gave” means the act of physically presenting a receptacle containing beer, wine, or intoxicating liquor to the underage person whose actions or intoxication results in the sustaining of damages by another person. However, a person who dispenses or gives beer, wine, or intoxicating liquor to an underage person shall only be liable for any damages if the person knew or should have known that the underage person was under legal age.

> 4. The division shall biennially conduct an evaluation concerning minimum coverage requirements of dram shop liability insurance. In conducting the evaluation, the division shall include a comparison of other states' minimum dram shop liability insurance coverage and any other relevant issues the division identifies. By January 31, 2019, and every two years thereafter, the division shall submit a report, including any findings and recommendations, to the general assembly as provided in chapter 7A. IOWA CODE §123.92 (2018).

The "sold or served" language in the statute has been narrowly construed by the courts as meaning sold to customers. In *Summerhays v. Clark*, the court held that a licensee providing alcohol at a holiday work party did not constitute sufficient "quid pro quo" to attach liability. The term "served" requires more than employee assistance. *Summerhays v. Clark*, 509 N.W.2d 748 (Iowa 1993), *rehearing denied*. However, "sold" does not apply only to direct sales, third party beneficiaries fall within the rubric of a sale for the purposes of 123.92. *Sanford v. Fihenworth*, 863 N.W.2d 286, 294 (Iowa 2015).

> §123.93 Limitation of Action, provides:
>
> Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's or permittee's insurance carrier of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury. Such six months' period shall be extended if the injured party is incapacitated at the expiration thereof or unable, through reasonable diligence, to discover the name of the licensee, permittee, or person causing the injury or until such time as such incapacity is removed or such person has had a reasonable time to discover the name of the licensee, permittee or person causing the injury. IOWA CODE §123.93 (2018).

Also applicable here are certain provisions of the Iowa Code §123.49.

> 1. A person shall not sell, dispense, or give to an intoxicated person, or one simulating intoxication, any alcoholic beverage.
>
> > a. A person other than a person required to hold a license or permit under this chapter who dispenses or gives an alcoholic beverage, in violation of this subsection is not civilly liable to an injured person or the estate of a person for injuries inflicted on that person as a result of intoxication by the consumer of the alcoholic beverage.
> >
> > b. The general assembly declares that this subsection shall be interpreted so that the holding of CLARK V. MINCKS, 364 N.W.2d. 226 (Iowa 1985) is 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 injury inflicted upon another by an intoxicated person.

> 2. A person or club holding a liquor control license or retail wine or beer permit under this chapter, and the person's or club's agents or employees, shall not do any of the following: . . .
>
> * * *
>
> h. Sell, give, or otherwise supply any alcoholic beverage, wine, or beer to any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, or permit any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, to consume any alcoholic beverage . . .
>
> 3. A person under legal age shall not misrepresent the person's age for the purpose of purchasing or attempting to purchase any alcoholic beverage from any liquor control licensee or wine or beer permittee. If any person under legal age misrepresents the person's age, and the licensee or permittee establishes that the licensee or permittee made reasonable inquiry to determine whether the prospective purchaser was over legal age, the licensee or permittee is not guilty of selling alcoholic beverages to a person under legal age. IOWA CODE §123.49 (2018).

2. COMMON LAW CAUSE OF ACTION

The Dram Shop Act preempts common law remedies specially set forth in the act. *Dorrian v. Hazel's Blue Sky Diner*, 653 N.W.2d 609, 610-11 (Iowa 2002).

The act does not preempt those acts contemplated by the Act, such as protecting patrons from unsafe conditions. *Hoth v. Meisner*, 548 N.W.2d 152 (Iowa 1996).

If an underage drinker caused the injury, the dispenser of the alcohol will only be liable if he or she "knew or should have known that the underage person was under legal age." IOWA CODE §123.92 (2018). The dispenser may also show, similar to an injury involving an intoxicated individual, that the "intoxication did not contribute to the injurious action of the underage person." *Id*.

3. STATUTE OF LIMITATIONS

Iowa's Dram Shop Act contains a notice provision which requires diligence by a claimant to provide notice of an intent to file a claim against a dram shop. *Shasteen v. Sojka*, 260 N.W.2d 48 (Iowa 1977). Section 123.93 provides that a claimant must notify a licensee's or permittee's insurance carrier of a claim. Such length of time may be extended if the plaintiff has difficulty in ascertaining the name of the person who caused the injury or the name of the licensee or permittee.

In *Shasteen*, the court ruled the provision is not a "condition precedent" to filing suit and the plaintiff may be allowed to pursue her cause of action. Despite actively pursuing a cause of action against the inebriate, the *Shasteen* plaintiff had no way of knowing that the inebriate had been drinking at a tavern and, therefore, reasonable

minds could differ as to whether she had exercised "reasonable diligence" in pursuing her claim. *Shasteen*, 260 N.W.2d at 52.

In addition, if the plaintiff is incapacitated, he or she may be allowed additional time to report. "Incapacitated" includes being a minor. Therefore, a minor does not need to give notice until six months after reaching adulthood. *Ehlinger v. Mardorf*, 285 N.W.2d 27 (Iowa 1979).

4. PROPER PLAINTIFFS

A cause of action under the Dram Shop Act survives the death of a potential plaintiff. An administratrix may bring an action on the deceased's behalf. *Kendall v. Gauthier*, 149 N.W.2d 286 (Iowa 1967). *See* IOWA CODE ANN. §§611.20, 611.22.[14]

Iowa courts have recognized a parent's right to sue for the loss of a child's consortium which classifies as "property" under the Act. *Thorp v. Casey's General Store, Inc.*, 446 N.W.2d 457 (Iowa 1989). Parents have also sued for medical bills after an intoxicated individual injured a child. *Atkins v. Baxter*, 423 N.W.2d 6 (Iowa 1988). However, the *Atkins* decision was distinguished in *Counts v. Hospitality Employees*, where the Iowa Supreme Court explained that a parent's right to sue for the expenses of caring for an injured child applies only if the child is a legal minor and thus the complainant was legally liable for care. *See Counts v. Hospital Employees*, 518 N.W.2d 358 (Iowa 1994). Where a child over the age of 18 has been injured by an intoxicated individual, the child's parents have no rights to sue under the Dram Shop statute. *Id*.

5. AFFIRMATIVE DEFENSES

The statute provides that if an intoxicated person caused the injury, a permittee or licensee may establish as an affirmative defense that the intoxication did not contribute to the injurious action of the person. If there is not a sufficient link between the act of the intoxicated person and the intoxication, the dram shop may escape liability.

The Dram Shop Act does not apply to those selling alcohol but not actually serving it on their premises. *Eddy v. Casey's General Store, Inc.*, 485 N.W.2d 633 (Iowa 1992).

If the injured party was somehow complicit in the encouragement or service of alcoholic beverages to the injuring party, the injured party will not be able to recover under the statute. *Cox v. Rolling Acres Golf Course Corp.*, 532 N.W.2d 761 (Iowa 1995).

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[14] *See* IOWA CODE ANN. §611.22 Any action contemplated in §§611.20 and 611.21 may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if the deceased had survived. If such is continued against the legal representative of the defendant, a notice shall be served on the legal representative as in case of original notices.

KANSAS

1. STATUTE/COMMON LAW CAUSE OF ACTION

Kansas does not recognize Dram Shop liability either by statute or at common law against a commercial vendor who, in violation of state law, sells alcoholic beverages to an individual whose actions result in injury to another.

The Kansas Supreme Court held in *Ling v. Jan's Liquor*, 703 P.2d 731 (Kan. 1985), that "no redress exists against a person selling, giving, or furnishing intoxicating liquor for resulting injuries or damages due to the acts of intoxicated persons, either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence." *See also Bland v. Scott*, 112 P.3d 941 (Kan. 2005); *Noone v. Chalet of Wichita, LLC*, 96 P.3d 674, 675 (Kan. App. 2004).

KENTUCKY

1. STATUTE

The Kentucky Revised Statute Annotated §413.241 states as follows:

413.241. Legislative finding—Limitation on liability of licensed sellers or servers of intoxicating beverages—Liability of intoxicated person.

(1) The general assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person. **[Unconstitutional; see below]**

(2) Any other law to the contrary notwithstanding, no person holding a permit under KRS 241 to 244, nor any agent, servant or employee of such a person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.

(3) The intoxicated person shall be primarily liable with respect to injuries suffered by third persons.

(4) The limitation of liability provided by this section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.

(5) This section shall not apply to civil actions filed prior to July 15, 1988.

KY REV. STAT. §413.241(2018).

In *Taylor v. King*, the Kentucky Court of Appeals held that KRS 413.241(1) is unconstitutional for the following two reasons. First, the statute violates the jural rights doctrine that flows from subsections within the Kentucky Constitution. *Taylor v. King*, 345 S.W.3d 237, 242 (Ky. Ct. App. 2010). The jural rights doctrine states that the General Assembly has no authority to abolish or restrict a common law right of recover for personal injury or wrongful death. *Id.* Here, the court stated that the General Assembly's prohibition on recovering punitive damages against a dram shop based on its gross negligence or reckless action is unconstitutional based on the jural rights doctrine. *Id.* at 243. Second, the Court held the statute unconstitutional based on the separation-of-powers provisions of the Kentucky Constitution. *Id.* at 242. Specifically, the legislature stripped the judicial branch of fact finding ability, here preventing a fact-finder from determining whether an injury was a foreseeable consequence of a dram shop's improper service of alcohol, which violates the Kentucky Constitution. *Id.* at 243-44.

The relevant sections of KRS 413.241 "imposing liability upon a dram shop or its creation of a priority of liability between the dram shop and the intoxicated tortfeasor[,]" however, remain unchanged. *Carruthers v. Edwards*, 395 S.W.3d 488 (Ky. Ct. App. 2012). The statute still imposes a duty upon a dram shop and its employees, before selling or serving alcohol to a person, to use their powers of observation to perceive readily visible warning signs that a person is intoxicated, and to refrain from serving or selling alcohol to that patron. KRS 413.241(2). *Id.* If the dram shop or its employees fail to perceive, or simply ignore, those warning signs, the dram shop may be held liable pursuant to KRS 413.241 provided the dram shop's negligent conduct is also the proximate cause of the plaintiff's injuries. ID.; SEE TAYLOR, 345 S.W.3d at 244.

The Supreme Court of Kentucky, in *DeStock #14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999),[15] held that, in cases where an intoxicated driver causes injuries to third person, the driver is primarily liable and the dram shop is secondarily liable for those injuries.

2. COMMON LAW CAUSE OF ACTION

Common law was pre-empted by statute, however the establishment of proximate cause or punitive damages under the Dram Shop Act is left to the discretion of the courts. *Taylor*, 345 S.W.3d at 244. Dram shop actions must amount to gross negligence, fraud, oppression, or malice for common law recourse. *Id*.

3. STATUTE OF LIMITATIONS

Kentucky has a one-year statute of limitation for personal injury or death. KY. REV. STAT. ANN. §413.140 (2018). Kentucky has a two-year limitations period for personal property. KY. REV. STAT. ANN. §413.125 (2018).

4. PROPER PLAINTIFFS

When a third party is injured, the driver is primarily liable and the dram shop is secondarily liable for those injuries. *DeStock #14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999); *see also Butt v. Independence Club Venture, Ltd.*, 453 S.W.3d 189 (Ky. App. 2014).

5. AFFIRMATIVE DEFENSES

Once a jury determines that the elements under the Dram Shop Act are satisfied such that multiple dram shops could be held secondarily liable for injuries suffered by plaintiff as a result of actions of intoxicated tortfeasor, secondary liability among the dram shops is properly apportioned under comparative fault principles; in so doing, the jury should determine to what degree the sale or service of alcohol by each dram shop was a substantial factor in causing the tortfeasor's intoxication at the time of the accident. *Jackson v. Tullar*, 285 S.W.3d 290 (Ky. App. 2007).

[15] Superseded by statute as stated in *Jenkins v. Best*, 250 S.W.3d 680 (Ky. Ct. App. 2007) (holding that "universal duty" is narrowly tailored. Also, for there to be liability there first must exist circumstances that give rise to a relationship in which one party owed a duty to another particular party).

6. DAMAGES

The holding in *Taylor v. King* created an opportunity to recover punitive damages in dram shop cases. The court emphasized that "a recovery of punitive damages in such a case must be based on the actions of the dram shop, not of the intoxicated tortfeasor." *Taylor*, 345 S.W.3d at 244. While the liability of the intoxicated tortfeasor remains relevant to determine the dram shop's liability for compensatory damages, it is not relevant to an award of punitive damages against the dram shop. *Id.* The court then stated that the factual determination is whether the dram shop's violation of its common law and statutory duties amounted to gross negligence, fraud, oppression, or malice. *Id.* The trial court may determine the sufficiency of the evidence on this issue and on any issues relating to legal causation. *Id.* However, if the trial court determines that there are genuine issues of material fact on these issues, the matters must be submitted to the jury. *Id.*

7. GENERAL LIABILITY EXCLUSION PROVISIONS

An insured racetrack owner was "in the business of" selling alcohol, within the meaning of a liquor liability exclusion in the racetrack's commercial general liability (CGL) policy, which excluded liability arising out of the sale of alcoholic beverages. Even though the persons serving alcoholic beverages were not the owner's employees and the racetrack did not have a liquor license, the insurer did not owe a duty to indemnify the racetrack in wrongful death actions by the estate of a patron. *KSPED LLC v. Virginia Sur. Co.*, 567 F. App'x 377 (6th Cir. 2014) (*citing Auto-Owners Ins. Co. v. Veterans of Foreign Wars Post 5906*, 276 S.W.3d 298, 301-02 (Ky. App. 2009)) .

LOUISIANA

1. STATUTE/COMMON LAW CAUSE OF ACTION

§9:2800.1 Limitation of liability for loss connected with sale, serving, or furnishing of alcoholic beverages

A. The legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person.

B. Notwithstanding any other law to the contrary, no person holding a permit under either Chapter 1 or Chapter 2 of Title 26 of the Louisiana Revised Statutes of 1950 , nor any agent, servant, or employee of such a person, who sells or serves intoxicating beverages of either high or low alcoholic content to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served.

C. (1) Notwithstanding any other law to the contrary, no social host who serves or furnishes any intoxicating beverage of either high or low alcoholic content to a person over the age for the lawful purchase thereof shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were served or furnished.

(2) No social host who owns, leases, or otherwise lawfully occupies premises on which, in his absence and without his consent, intoxicating beverages of either high or low alcoholic content are consumed by a person over the age for the lawful purchase thereof shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person who consumed the intoxicating beverages.

D. The insurer of the intoxicated person shall be primarily liable with respect to injuries suffered by third persons.

E. The limitation of liability provided by this Section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol. LA. REV.STAT. ANN. §9:2800.1 (2018).

This immunity does not apply to one who sells or serves alcohol to a minor. *Edson v. Walker*, 573 So.2d 545 (La. Ct. App. 1991).

Claims for liability against an alcohol vendor are usually based on Louisiana's civil code which states "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." LA. CIV. CODE ANN. art. 2315 (2018).

2. STATUTE OF LIMITATIONS

The statute of limitations is one year. LA. CIV. CODE ANN. art. 3492 (2018).

3. PROPER PLAINTIFFS

Consumers over the legal age and any third person injured by the consumer due to the effects of alcohol cannot bring a cause of action against the alcohol provider. *Hopkins v. Sovereign Fire & Casualty Ins. Co.*, 626 So.2d 880 (La. Ct. App. 1993). Minors and third parties injured by a minor due to breach of the vendor's duty in providing alcohol to a minor can bring a cause of action. *Id*.

4. AFFIRMATIVE DEFENSES

The defense of immunity from tort liability (by statute) is an affirmative defense for Dram Shop claims. *Aucoin v. Rochel*, 5 So.3d 197, 199 (La. App. 1st Cir. 2008).

5. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to Louisiana's Dram Shop laws. Louisiana does allow for punitive damages against an intoxicated driver per Louisiana Civil Code article 2315.4, which states the following:

> In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.

LA. CIV. CODE ANN. art. 2315.4 (2018).

The Supreme Court of Louisiana, in *Berg v. Zummo*, clarified the punitive damages statute and held that La. C.C. art 2315.4 does not allow the imposition of punitive damages against persons who have allegedly contributed to the driver's intoxication. *Berg v. Zummo*, 786 So.2d 708, 718 (La. 2001).

6. BURDEN OF PROOF

In determining whether liability exists, the court must determine whether the bar owner violated general negligence principles, applying the traditional duty/risk analysis. *Bertrand v. Kratzer's Country Mart*, 563 So.2d 1302 (La. Ct. App. 1990). In BERG, the court determined that the plaintiff must prove the following five elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's

substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and, (5) actual damages (the damages element). *Berg* 786 So.2d at 715.

The vendor's duty is to "avoid affirmative acts which increase the risk of peril to an intoxicated person." *Edson*, 573 So.2d 545. The burden of establishing proximate cause in a dram shop case is satisfied by showing that the risk and harm allegedly encountered falls within the scope of protection of the duty owed by the provider to a patron. *Pence v. Ketchum*, 326 So.2d 831 (La. 1976).[16]

[16] Overruled on a separate point by *Thrasher v. Leggett*, 365 So. 2d 1149 (La. 1978) (holding that bar owner is not responsible for harm to patron caused simply by patron's inebriated condition).

MAINE

1. STATUTE

The Maine Liquor Liability Act, Me. Rev. Stat. Tit. 28-A, §2501, *et seq*., is based on the Model Alcoholic Beverage Retail Licensee Liability Act of 1985 ("Model Act").[17]

The act defines "visibly intoxicated" as a "state of intoxication accompanied by a perceptible act, a series of acts or the appearance of an individual which clearly demonstrates a state of intoxication." ME. REV. STAT. tit 28-A, §2503(7). Sections 2506 and 2507 provide liability for both the negligent service of liquor and the reckless service of liquor as follows:

Section 2506.

1. Negligent service to a minor. A server who negligently serves liquor to a minor is liable for damages proximately caused by that minor's consumption of the liquor.

2. Negligent service to a visibly intoxicated individual. A server who negligently serves liquor to a visibly intoxicated individual is liable for damages proximately caused by that individual's consumption of the liquor.

3. Negligent conduct. Service of liquor to a minor or to an intoxicated individual is negligent if the server knows or if a reasonable and prudent person in similar circumstances would know that the individual being served is a minor or is visibly intoxicated.

4. Server's knowledge of an individual's consumption. A server is not chargeable with knowledge of an individual's consumption of liquor or other drugs off the server's premises unless the individual's appearance and behavior or other facts known to the server would put a reasonable and prudent person on notice of such consumption. ME. REV. STAT. Tit. 28-A, §2506 (2018).

Section 2507.

1. Reckless service to a minor. A server who recklessly provides liquor to a minor is liable for damages proximately caused by that minor's consumption of the liquor.

[17] New Hampshire and Rhode Island have also based their liquor liability laws on the model act. These states have many similarities, but also have some distinct differences with regard to their liquor liability laws. The model act was formulated as a guideline for states to follow in their enactment of dram shop legislation. It represents the culmination of an 18-month research project conducted by the Prevention Research Group (PRG) and funded by the National Institute on Drug Abuse and Alcoholism. The research found the legal system had not established clear guidelines for civil liquor licensee liability. The heart of the Model Act contains two concepts of liability, one for the negligent service of alcoholic beverages and the other for the reckless service of alcohol.

2. Reckless service to a visibly intoxicated individual. A server who recklessly serves liquor to a visibly intoxicated individual is liable for damages proximately caused by that individual's consumption of the liquor.

3. Reckless conduct. Service of liquor is reckless if a server intentionally serves liquor to an individual when the server knows that the individual being served is a minor or is visibly intoxicated and the server consciously disregards an obvious and substantial risk that serving liquor to that individual will cause physical harm to the drinker or to others. For purposes of this act, the disregard of the risk, when viewed in light of the nature and purpose of the server's conduct and the circumstances known to the server, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

4. Evidence of reckless conduct. Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(a) Active encouragement of intoxicated individuals to consume substantial amounts of liquor;

(b) Service of liquor to an individual who is under 18 years of age when the server has actual or constructive knowledge of the individual's age; and

(c) Service of liquor to an individual that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning. ME. REV. STAT. Tit. 28-A, §2507 (2018).

The statute contains a provision that written notice of a violation of the state's statute must be given to the defendants within 180 days. ME. REV. STAT. Tit. 28-A, §2513 (2018). The statute also provides a two-year statute of limitations. ME. REV. STAT. Tit. 28-A, §2514 (2018). Finally, the statute sets forth a limit on damages which can be awarded. ME. REV. STAT. Tit. 28-A, §§2508-2509 (2018). Specifically, an award for damages, except medical expenses and treatment, is limited to $350,000 for all claims arising out of a single occurrence. This provision has also survived a constitutional challenge. *Peters v. Saft*, 597 A.2d 50 (Me. 1991).

The statute further provides for several, but not joint, liability in §2512(2). This has also survived constitutional challenge. *See Peters*, *supra*. Section 2512(a) states that no third-party action may be maintained against the server unless the intoxicated tortfeasor is also named as a defendant in the lawsuit *and* retained in the action until the complete conclusion of the litigation. In *Swan v. Sohio Oil Co.*, 618 A.2d 214 (Me. 1990), the case against the bar was dismissed because the driver settled and was released before suit filed.

The Supreme Court of Maine, in *Beaulieu v. Aube Corp.*, 796 A.2d 683 (Me. 2002), held that while evidence of a person's later intoxication may be relevant to whether the person was visibly intoxicated when served, there necessarily must be some factual link between the two points in time. The court reiterated that to set forth a prima facie case for negligent service of liquor, a plaintiff must establish: (1) the defendant server provided liquor to an intoxicated individual by sale, gift, or any other means of furnishing liquor; (2) at the time of service, the individual was visibly intoxicated; (3) the server actually knew or a "reasonable and prudent person in similar circumstances would know" that the person served was visibly intoxicated; and (4) the plaintiff's injuries were proximately caused

by the negligent service of liquor to the intoxicated individual. *Id.* at 690; *citing* ME. REV. STAT. Tit. 28-A, §§2503, 2506 (2018) (emphasis added).

2. COMMON LAW CAUSE OF ACTION

Me. Rev. Stat. Tit. 28-A, §2511 states the act is the exclusive remedy against servers. *See Swan*, *supra* at 219-20. This provision was enacted in 1986 and prior to that a common law cause of action was available but, as a result of the statute, the common law claim has been abrogated. *See Klingerman v. SOL Corp. of Maine*, 505 A.2d 474 (Me. 1986).

3. STATUTE OF LIMITATIONS

The statute specifically provides for a two-year statute of limitations. ME. REV. STAT. Tit. 28-A, §2514 (2018).

4. PROPER PLAINTIFFS

Me. Rev. Stat. Tit. 28-A, §2504(2) specifically states that if the intoxicated individual is at least 18 when served then neither that individual nor his estate has a cause of action against the server. *See also*, *Klingerman v. SOL Corp. of Maine*, 505 A.2d 474 (Me. 1986).

5. AFFIRMATIVE DEFENSES

The statute provides that the usual defenses to tort actions based on negligence and recklessness may be asserted. ME. REV. STAT. Tit. 28-A, §2510 (2018).

Evidence of the server's responsible serving practices is admissible to show the server was not negligent or reckless. ME. REV. STAT. Tit. 28-A, §2515 (2018). Responsible serving practices include attendance at a server education training course and responsible management policies and procedures. *Id*. These responsible policies and procedures are not defined further in the statute. Moreover, there is no case law further defining a "responsible serving practice."

Additionally, a defendant may assert the Maine Liquor Liability Act as an affirmative defense when a plaintiff asserts that injury was proximately caused by the negligence of the server other than the serve of alcoholic beverages. *Thibodeau v. Slaney*, 755 A.2d 1051, 1056 (Me. 2000). In such a case, the defendant would contend that, if there was any negligence by the defendant which proximately caused plaintiff's injury, it was in the service of alcoholic beverages, not in the breach of some other duty. *Id.* The defendant would have the burden of proof to demonstrate that the plaintiff's injuries were caused by negligent serve of alcohol, rather than some other cause asserted by the plaintiff. *Id.* Because of the recklessness standard, a non-licensed server, successfully asserting that affirmative defense, would be excused from any negligence based liability for plaintiff's injuries. *Id.*

6. DAMAGES

An award for damages, except medical expenses and treatment, is limited to $350,000 for all claims arising out of a single occurrence. ME. REV. STAT. Tit. 28-A, §2509.

MARYLAND

Under Maryland law, there is no statute imposing liability on a vendor of alcoholic beverages for injuries caused by a purchaser of such beverages. *Warr v. JMGM Group. LLC*, 70 A.3d 347, 363-64 (Md. 2013). Additionally, the courts have recognized no right of action against vendors under common law. *Id*. However, it appears that Maryland's courts and legislature are moving towards creating the liability through statute and through case law; although no current enumerated (or otherwise) cause of action exists. It appears that the Court of Appeals of Maryland is moving in the direction of imposing liability based on a 2016 case that imposed liability on social hosts depending on the circumstances. *See Kiriakos v. Phillips*, 448 Md. 440 (2016). In *Kirakos*, the court held that an adult who violates the statute prohibiting adults from allowing underage persons to drink alcohol on their property (MD. CRIM. LAW §10-117) may owe a civil duty to persons injured as a result of such drinking, including the underage persons consuming the alcohol. *Id*. at 475. While it appears that the court is moving toward the imposition of liability, it intentionally limited its decision of imposing civil liability to a social host who knowingly and willfully allows the underage person to drink, explaining that they are not expanding this new standard to dram shops (as it was not an issue in the case). *Id*. at 478. *See Also Hansberger v. Smith*, 229 Md. App. 1 (2016).

In addition to the *Kiriakos* decision, the legislature enacted several statutes relating to serving alcohol in 2016, but none specifically impose a civil liability on the server of alcohol.

MD. CRIMINAL LAW CODE Ann. §10-117. Furnishing for or Allowing Underage Consumption

(a) Furnishing Alcohol. – Except as provided in Subsection (c) of this section, a person may not furnish an alcoholic beverage to an individual if:

(1) the person furnishing the alcoholic beverage knows that the individual is under the age of 21 years; and

(2) the alcoholic beverage is furnished for the purpose of consumption by the individual under the age of 21 years.

(b) Allowing possession or consumption of alcohol. – Except as provided in Subsection (c) of this section, an adult may not knowingly and willfully allow an individual under the age of 21 years actually to possess or consume an alcoholic beverage at a residence, or within the curtilage of a residence that the adult owns or leases and in which the adult resides.

(c) Exceptions. –

(1) The prohibition set forth in Subsection (a) of this section does not apply if the person furnishing the alcoholic beverage and the individual to whom the alcoholic beverage is furnished:

(i) are members of the same immediate family, and the alcoholic beverage is furnished and consumed in a private residence or within the curtilage of the residence; or

(ii) are participants in a religious ceremony.

(2) The prohibition set forth in Subsection (b) of this section does not apply if the adult allowing the possession or consumption of the alcoholic beverage and the individual under the age of 21 years who possesses or consumes the alcoholic beverage:

(i) are members of the same immediate family, and the alcoholic beverage is possessed and consumed in a private residence, or within the curtilage of the residence, of the adult; or

(ii) are participants in a religious ceremony.

(d) Operation of motor vehicle. – A person may not violate Subsection (a) or (b) of this section if the violation involves an individual under the age of 21 years who:

(1) the person knew or reasonably should have known would operate a motor vehicle after consuming the alcoholic beverage; and

(2) as a result of operating a motor vehicle while under the influence of alcohol or while impaired by alcohol, causes serious physical injury or death to the individual or another.

MD. CRIMINAL LAW CODE ANN. §10-117 (2018).

MD. ANN. CODE art. AB, §6-304. Selling or Providing Alcoholic Beverages to Individuals Under the Age of 21 years

A license holder or an employee of the license holder may not sell or provide alcoholic beverages to an individual under the age of 21 years.

MD. ANN. CODE art. AB, §6-304 (2018)

MD. ANN. CODE art.. AB, §6-306. Defense to Prosecution For Sale To Underage Individuals

The establishment of the following facts by a seller of alcoholic beverages to an underage individual is prima facie evidence of innocence and a defense to a prosecution for serving alcoholic beverages to an underage individual:

(1) the purchaser falsely represented in writing and supported with other documentary evidence that the purchaser was of legal age to purchase alcoholic beverages;

(2) on the basis of the appearance of the purchaser, an ordinary and prudent individual would believe the purchaser to be of legal age to purchase alcoholic beverages; and

(3) the sale was made in good faith and in reliance on the written representation and appearance of the purchaser.

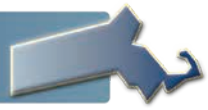
MD. ANN. CODE art. AB, §6-306 (2018)

MD. ANN. CODE art. AB, §6-307. Selling or Providing Alcoholic Beverages to Intoxicated Individuals

A license holder or an employee of the license holder may not sell or provide alcoholic beverages to an individual who, at the time of the sale or delivery, is visibly under the influence of an alcoholic beverage.

MD. ANN. CODE art. AB, §6-307 (2018)

MASSACHUSETTS



1. STATUTE

The Massachusetts Dram Shop Act, Mass Ann Laws ch. 231, §85T, states as follows:

> In any action for personal injuries, property damage or consequential damages caused by or arising out of the negligent serving of alcohol to an intoxicated person by a licensee properly licensed under chapter 138 or by a person or entity serving alcohol as an incident of its business but for which no license is required, no such intoxicated person who causes injuries to himself, may maintain an action against the said licensee or person or entity in the absence of willful, wanton or reckless conduct on the part of the licensee or such person or entity. MASS ANN LAWS CH. 231, §85T (2018).

The statute essentially protects a licensed provider of alcohol from first-party actions unless the server engages in reckless conduct. The statute has been held to apply to a hotel owner where space was rented for a private party, but where the hotel did not follow its policy of providing bartenders. *Manning v. Nobile*, 582 N.E.2d 942 (Mass. 1991). However, the court held this policy failure did not constitute willful, reckless or wanton conduct. *Id*.

The cases involving liquor liability also frequently cite Mass Ann Laws ch. 138, §69, which states "No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." MASS ANN LAWS CH. 138, §69 (2018). This statute was amended in 1987 and previously provided there could be no sale of liquor beverages to an intoxicated person, a person known to be a drunkard or to have been intoxicated within the past six months.

A violation of Mass Ann Laws ch. 138, §69, carries criminal penalties; the statute does not expressly or implicitly grant an independent ground for civil liability. *Bennett v. Eagle Brook Country Store, Inc.*, 557 N.E.2d 1166, 1168 (Mass. 1990). Any liability on the defendant's part in such a situation must be grounded in the common law of negligence. *Id.* The court stated that the clear rule in the Commonwealth is that violation of a statute does not by itself establish a breach of duty, for it does not constitute negligence per se. *Id.* Rather, violation of a statute such as §69 is only "some evidence" of the defendant's negligence as to all consequences the statute was intended to prevent. *Id.* A finding that there was a violation of law is not always decisive on the issue of negligence, for a jury may properly find that it did not constitute negligence in the circumstances attending the accident. *Id.* at 1169. Cases with incidents occurring after the statutory changes have held this evidence is insufficient by itself to show negligence and proximate cause. *Swift v. United States*, 866 F.2d 507 (1st Cir. 1989).

2. COMMON LAW CAUSE OF ACTION

A common law cause of action based on a violation of the criminal statute was permissible prior to passage of the Dram Shop Act. *Adamian v. Three Sons, Inc.*, 233 N.E.2d 18 (Mass. 1968); *Michnick v. Gordon's Liquor*, 453 N.E.2d 430 (Mass. 1983). The Supreme Judicial Court has held that the Massachusetts Dram Shop Act standard of willfull, wanton, or reckless conduct does not apply to a minor who has been served alcohol. *Tobin v. Norwood Country Club, Inc.*, 661 N.E.2d 627 (1996). Thus, general principles of negligence will apply to an action

by a minor to recover for injuries against an establishment that served alcohol to the minor. *Id*. In a civil action against a licensed commercial establishment for injuries sustained by an adult (over age 18), but underage (under age 21), patron as consequence of the establishment's furnishing of alcoholic beverages to the patron, the underage patron need not prove willful, wanton, or reckless conduct on the part of the establishment, as would be required under the Dram Shop statute, and instead, the patron may prevail on a showing that the establishment was negligent in serving the alcohol to the patron. *Nunez v. Carrabba's Italian Grill, Inc.,* 859 N.E.2d 801 (2007).

3. STATUTE OF LIMITATIONS

Massachusetts has a three-year statute of limitations. MASS. ANN LAWS ch. 260, §§2A, 4 (2018).

4. AFFIRMATIVE DEFENSES

The defenses of contributory negligence and assumption of the risk are permitted and are the defendant's burden to prove. *See Tobin v. Norwood Country Club*, 661 N.E.2d 627 (Mass. 1996); *Sweeney v. 162 State Street*, 281 N.E.2d 280 (Mass. 1972).

5. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to Massachusetts Dram Shop Act.

6. BURDEN OF PROOF

It is unnecessary for the plaintiff to prove that the defendant solicited the motoring public, or that many of the patrons were drivers, or that there were any special circumstances alerting the defendant to the knowledge that a risk existed that a particular patron would probably drive improperly and thereby injure someone on the highway. Without such evidence, a jury may infer that a tavern keeper of ordinary caution recognizes that an intoxicated patron may drive an automobile, thus creating a risk of injury to highway travelers, and that such a person's response to that recognition ought to be to refrain from serving liquor to the patron. A jury may also infer that service of liquor to an intoxicated patron is the proximate cause of injuries sustained by a traveler, who suffers direct injury by reason of a vehicle being operated by the patron in a manner that is affected by his intoxication. The ultimate question for the jury is whether the service of liquor by the defendant tavern keeper to the intoxicated patron was a failure to exercise that degree of care for the safety of travelers that ought to be exercised by a tavern keeper of ordinary prudence in the same or similar circumstances. *Cimino v. Milford Keg, Inc.*, 431 N.E.2d 920, 926 (Mass. 1982).

7. PROXIMATE CAUSE

The Appeals Court of Massachusetts in *Westerback v. Harold F. LeClair Co.*, 735 N.E.2d 1256 (Mass. App. Ct. 2000), held that plaintiff's injuries, sustained when she left the tavern in an intoxicated state and was picked up by two men who raped and beat her, were not proximately caused by the tavern owner's selling her alcohol while she was intoxicated because rape could not have been foreseen and guarded against.

8. DEFINITION OF INTOXICATION

Direct evidence of obvious intoxication is not necessarily an essential part of a plaintiff's proof. *Vickowski v. Polish American Citizens Club*, 664 N.E.2d 429 (Mass. 1996). In *Hopping v. Whirlaway, Inc.*, 637 N.E.2d 866 (Mass. App. Ct. 1994), the court held that where there was evidence the customer "looked like he had a few" and seemed to be "feeling pretty good," the bartender should have recognized intoxication. Also, evidence of subsequent intoxication at the scene of the accident can bolster evidence of obvious intoxication at the bar. *Vickowski*, 664 N.E.2d at 433. However, in the same case the court found that consuming four to five beers over two hours did not warrant the inference of obvious intoxication based on excessive consumption. *Id*.

Finally, in *Gottlin v. Graves*, 662 N.E.2d 711 (Mass. App. Ct. 1996), the court held that evidence of obvious intoxication at the scene 20 minutes after leaving a bar can bolster evidence of intoxication when served. In this case there was additional evidence from a witness who observed the Graves at the bar as intoxicated. Also, there was evidence that Graves drank several draft beers and two shots of whiskey. The court found that from this testimony a rational juror would have been able to conclude that the bartender should have known that Graves was drunk prior to being served his last beer. *Id*. at 715.

9. MINORS

In *Tobin v. Norwood Country Club*, the court held that where an intoxicated minor is served, liability is not precluded under the statute even where there is no willful, wanton or reckless conduct because the statutory regulations refer to two classes of people: intoxicated persons and minors. 661 N.E.2d 627. With regard to intoxicated persons, the court held they voluntarily put themselves in that condition. *Id*. at 633. Minors, on the other hand, are more susceptible and less able to make decisions about how much alcohol they can safely consume. *Id*.

In *Tobin*, the minor was at a country club where evidence showed teenagers were frequently known to be present. The court held minors getting intoxicated was a foreseeable risk and that the country club had a duty to control or reduce that risk. *Id*. The court further stated "the triggering of the duty is not limited to the circumstance of hand to hand selling or serving of alcohol . . . The duty is breached when the establishment knew or should have known that it was furnishing alcohol to minors." *Id*.

MICHIGAN

1. STATUTE

The prior Michigan Dram Shop statute, MCL. §436.22, was repealed on April 14, 1998. MCL §436.1801 became effective on April 14, 1998. The newer version of Michigan's Dram Shop Act is essentially the same as the previous act. It provides:

(1) Except as otherwise provided in this act, before the approval and granting, or renewal, of a license, the following licensees or applicants for that license shall make, execute, and deliver to the commission a bond executed by a surety company authorized to do business in the state or, in the discretion of the commission, by approved personal surety running to the people of the state, in the following amounts:

(a) A manufacturer of beer, a manufacturer of wine, a mixed spirit drink manufacturer, an out-of-state seller of beer, an out-of-state seller of mixed spirit drink, and an out-of-state seller of wine, a bond in an amount equal to 1/12 of the total beer, mixed spirit drink, or wine excise taxes paid to the state in the last calendar year or a bond in the sum of $1,000.00, whichever is greater, for the faithful performance of the conditions of the license issued and for compliance with this act. A surety shall not cancel a bond issued under this subdivision except upon 30 days' written notice to the commission.

(b) A special license authorizing the sale of beer, mixed spirit drink, wine, or spirits for consumption on the premises, a bond in the sum of $1,000.00. A bond issued under this subdivision shall remain in effect for 60 days after the expiration of the special license. A bond is not required for a church or school.

(2) A retail licensee shall not directly, individually, or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a minor except as otherwise provided in this act. A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.

(3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.

(4) An action under this section shall be instituted within two years after the injury or death. A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants that did not receive that notice unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days. In the event of the death of either party, the right of action under this section shall survive to or against his or her personal representative. In each action by a husband, wife, child, or parent, the general reputation of the relation of husband and wife or parent and child shall be prima facie evidence of the relation, and the amount recovered by either the husband, wife, parent, or child shall be his or her sole and separate property. The damages, together with the costs of the action, shall be recovered in an action under this section. If the parents of the individual who suffered damage or who was personally injured are entitled to damages under this section, the father and mother may sue separately, but recovery by one is a bar to action by the other.

(5) An action under this section against a retail licensee shall not be commenced unless the minor or the alleged intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement.

(6) Any licensee subject to the provisions of Subsection (3) regarding the unlawful selling, furnishing, or giving of alcoholic liquor to a visibly intoxicated person shall have the right to full indemnification from the alleged visibly intoxicated person for all damages awarded against the licensee.

(7) All defenses of the alleged visibly intoxicated person or the minor shall be available to the licensee. In an action alleging the unlawful sale of alcoholic liquor to a minor, proof that the defendant retail licensee or the defendant's agent or employee demanded and was shown a Michigan driver license or official state personal identification card, appearing to be genuine and showing that the minor was at least 21 years of age, shall be a defense to the action.

(8) There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under Subsection (3).

(9) The alleged visibly intoxicated person shall not have a cause of action pursuant to this section and a person shall not have a cause of action pursuant to this section for the loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of the alleged visibly intoxicated person.

(10) This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor to a minor intoxicated person.

(11) Except as otherwise provided for under this section and §815, a civil action under Subsection (3) against a retail licensee shall be subject to the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947. MICH. COMP. LAWS §436.1801 (2018).

The following sections of the Act pertain to liability insurers:

§803.

(1) Before the renewal or approval and granting of a retail license, a retail licensee or applicant for a retail license shall file with the commission proof of financial responsibility providing security for liability under §801(3) of not less than $50,000.00. The proof of financial responsibility may be in the form of cash, unencumbered securities, a policy or policies of liquor liability insurance, a constant value bond executed by a surety company authorized to do business in this state, or membership in a group self-insurance pool authorized by law that provides security for liability under §801.

(2) A licensee may furnish proof of financial responsibility that exceeds the requirements of this section.

(3) An insurer under a policy or policies of liquor liability insurance or a surety under such a bond shall not be named as a defendant in an action brought against the insured or bonded licensee for liability under §801. Bankruptcy of the insured shall not discharge an insurer or surety under this section from liability. Insurance policies and bonds issued for purposes under this section shall continue from year to year unless sooner canceled by the insurer.

(4) An insured retail licensee shall not cancel a liquor liability insurance except upon 30 days' prior written notice to the commission and unless new proof of financial responsibility complying with this section is procured by the retail licensee and delivered to the commission before the expiration of the 30-day period.

(5) This section does not apply to a special licensee or applicant for a special license.

(6) The commission shall promulgate rules under the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to implement and enforce this section. MICH. COMP. LAWS §436.1803 (2018).

§807.

The insurer shall file with the commission, at Lansing, Michigan, at least 30 days before the effectiveness of any termination or cancellation of the contract or policy, a notice giving the date at which it is proposed to terminate or cancel the contract or policy. Any termination of the contract or policy shall not be effective as far as the insured covered by the policy is concerned until 30 days after such notice of the proposed termination or cancellation is received by the commission. MICH. COMP. LAWS §436.1807 (2018).

§811.

The insurance policy described in this chapter shall cover the liability imposed by §801 and shall contain the following conditions:

> That no condition, provision, stipulation or limitation contained in the policy, or any other endorsement thereon, shall relieve the insurer from liability (within the statutory limits provided by §803 of the Michigan liquor control code of 1998), for the payment of any claim for which the insured may be held legally liable under §801 of said act. MICH. COMP. LAWS §436.1811 (2018).

2. COMMON LAW CAUSE OF ACTION

"The dram shop act is in derogation of the common law, provides the exclusive remedy against a 'retail licensee' regarding selling, furnishing, or giving alcoholic beverages to a minor or visibly intoxicated person, and may not be expanded beyond its plain terms by common law legal theories to reach non-licensees." *Auto-Owners Ins. Co. v. Olympia Entm't, Inc.*, 871 N.W.2d 530, 549 (Mich. App. 2015); *See also* MICH. COMP. LAWS §436.1801(10) (2018).

3. STATUTE OF LIMITATIONS

An action shall be instituted within two years after the injury or death. MICH. COMP. LAWS §436.1801(4) (2018). There is also a 120-day notice provision triggered by the plaintiff meeting with an attorney to discuss whether to proceed with an action. *Id.*

4. PROPER PLAINTIFFS

In *LaGuire v. Kain*, 487 N.W.2d 389 (Mich. 1992), the court held that even a minor illegally sold or furnished alcohol by a licensed retailer could not recover for his or her own injuries. The Michigan Supreme Court has held that the 1986 amendments of the Dram Shop Act bar both a minor's estate and the family of that minor from recovery under the act. *See LaGuire v. Kain*, 487 N.W.2d 389 (Mich. 1992).

A long line of cases has held that no cause of action may be pursued by a person who has actively participated in the events leading to the intoxication of the individual responsible for his/her allegedly related injuries. Therefore, someone who furnishes drinks, participates in buying rounds of alcohol with the intoxicated person, or contributes to a pool of money to buy drinks, has no cause of action, no matter whether an adult or minor. *Craig v. Larson*, 439 N.W.2d 899 (Mich. 1989); *Plamondon v. Matthews*, 385 N.W.2d 273 (Mich. Ct. App. 1985); *Goss v. Richmond*, 381 N.W.2d 776 (Mich. Ct. App. 1985).

In *Larrow v. Miller*, 548 N.W.2d 704 (Mich. Ct. App. 1996), the court further defined the non-innocent party doctrine and held that it required "active" participation in the facilitation of the intoxicated person's drinking. The court acknowledged that although the non-innocent party doctrine is not found in the common law, that it was the intent of the Legislature that those who actively contributes to another's intoxication would not be able to sue under the Dram Shop Act. *Id.* at 320. The court stated that the mere presence, encouragement, or drinking with the

alleged intoxicated person without actually supplying drinks or providing money for drinks did not bar recovery. In this case, an issue of fact regarding the level of participation was raised and summary judgment was precluded.

5. AFFIRMATIVE DEFENSES

The liquor licensee defendant has "all defenses of the alleged visibly intoxicated person or the minor. . ." pursuant to §436.801(7). Comparative negligence and the No-Fault Insurance Act threshold are viable defenses, but comparative negligence may only be pled by a Dram shop defendant "where it could be asserted by the allegedly intoxicated person or minor and where it does not involve negligence in bringing about the intoxication." *Lyman v. Bavar Co.*, 356 N.W.2d 28 (Mich. Ct. App. 1984); *see also Heyler v. Dixon*, 408 N.W.2d 121 (Mich. Ct. App. 1987). The negligence of an intoxicated minor can not be imputed to innocent parents. *Rodriguez v. Solar of Mich., Inc.*, 478 N.W.2d 914 (Mich. Ct. App. 1991).

A "non-innocent" plaintiff, one who actively participates in the intoxication of the alleged intoxicated person, will be barred from recovering under a Dram Shop action. *Id.* (*quoting Craig v. Larson*, 439 N.W.2d 899 (Mich. 1989)).

Participation is also a defense as discussed in Proper Plaintiffs section, *supra*. Merely accompanying and drinking with an intoxicated person does not, as a matter of law, bar recovery, but may raise a question of fact on the issue. *Todd v. Biglow*, 214 N.W.2d 733 (Mich. Ct. App. 1974). In order for recovery to be barred, the injured party must play a much more active role than companion.

Section 436.801(8) creates a rebuttable presumption that only the last bar to serve the intoxicated person did so while he was visibly intoxicated. This amendment to the statute was added in 1986.

Michigan also provides, statutorily, a responsible business practices defines, which states as follows:

> §815. (1) In defense of a civil action under §801, a retail licensee may present evidence that, at the time of the selling, giving, or furnishing of the alcoholic liquor, the retail licensee was adhering to responsible business practices. Responsible business practices are those business policies, procedures, and actions which an ordinarily prudent person would follow in like circumstances. The compensating of an employee of an on-premises retail licensee on a commission basis constitutes an unreasonable business practice for purposes of this section.
>
> (2) The compensation of an employee of an on-premises retail licensee shall not be on a commission basis.

MICH. COMP. LAWS §436.1815 (2018).

6. DAMAGES

Under the Civil Damages Act, the amount of damages is substantially up to jury. *Ruediger v. Klink*, 78 N.W.2d 248 (Mich. 1956). Under a former statute, minor children were permitted to recover for the loss of their mother's love, affection, and companionship, in an action under the dram shop provision for damages resulting from her death. *Podbielski v. Argyle Bowe, Inc.,* 220 N.W.2d 397 (Mich. 1974). However, where the love or companionship lost is that of the intoxicated person, no recovery is permitted. MICH. COMP. LAWS §436.1801. Our research has not revealed case law pertaining to caps on damages.

7. BURDEN OF PROOF

A plaintiff injured by a visibly intoxicated adult must prove three elements to maintain a cognizable cause of action under the statute:

(1) that he or she was injured by the wrongful or tortious conduct of a visibly intoxicated person;

(2) that the alleged intoxicated person was sold, given or furnished intoxicating liquor while visibly intoxicated by the defendant liquor licensee; and

(3) that the intoxication was a proximate cause of the injuries or damages.

Visible intoxication can be proven by circumstantial evidence, but mere consumption of alcohol is insufficient.

In the case of a plaintiff injured by a minor who has consumed alcohol, the plaintiff needs to prove:

(1) the plaintiff was injured by a minor;

(2) the defendant liquor licensee gave or furnished alcohol directly to the minor;

(3) the minor was under 21 when given or sold the alcohol; and

(4) the selling of the alcohol was a proximate cause of the injury or damages. Essentially, with regard to a minor, there is no requirement the minor be intoxicated, but there must be proof of a direct sale to the minor.

The Court of Appeals of Michigan, in *Shorecrest Lanes & Lounge, Inc. v. Mich. Liquor Control Comm'n*, 652 N.W.2d 493 (Mich. Ct. App. 2002), held that, where illegal service of alcohol to a minor occurred at a licensee's establishment in an undercover operation, the statute did not require law enforcement action be taken against the server in order to charge the licensee with a violation. Thus, licensee could be liable under the Dram Shop Act without facing criminal penalties.

8. EVIDENCE

Intoxication of the guest at the time of service can be proven by circumstantial evidence. It can also be proven by the testimony of a qualified expert, a toxicologist or medical expert, that consumption of a particular amount of alcohol would cause a certain effect, or that the results of a blood alcohol test can be extrapolated back to the time the alleged intoxicated person was in the tavern. Lay witnesses can generally testify concerning their opinion as to whether a driver was intoxicated when he was last served at the tavern based on physical observations. *Heyler v. Dixon*, 408 N.W.2d 121 (Mich. Ct. App. 1987).

9. "NAME AND RETAIN REQUIREMENT"

MCL §436.801(5) requires that a lawsuit name the minor or the alleged intoxicated person as a defendant and that defendant must be retained in the action until the litigation is concluded by trial or settlement. If the allegedly intoxicated person settles with the dram shop prior to the completion of the trial, then they are not "retained" long enough to satisfy name and retain provision of the statute. *Putney v. Haskins*, 324 N.W.2d 729 (Mich. 1982). The courts have held this is a mandatory rule and that it will be strictly enforced. *Id*. When a plaintiff entered into an agreement with the alleged intoxicated defendant that the intoxicated defendant would not object to the admission of results of the blood alcohol test in exchange for an agreement not to seek to collect anything more than the insurance policy limits, a violation of the "name and retain rule" was found. *Riley v. Richards*, 404 N.W.2d 618 (Mich. 1987).

10. INDEMNIFICATION

MCL §436.1801(6) gives the liquor licensee a right of full indemnification from the alleged visibly intoxicated person for any damages awarded. MICH. COMP. LAWS §436.1801(6) (2018).

11. LICENSEES

The Court of Appeals of Michigan, in *Tennille v. Hackney*, 570 N.W.2d 130 (Mich. Ct. App. 1997), interpreting the former Dram Shop Act (§436.22), held that the intent of Michigan legislature was to limit the application of the exclusive remedy provision of the Dram Shop Act to retail licensees. *See also Clifton v. Wegrecki*, 2001 Mich. App., LEXIS 2574 (holding that Dram Shop Act is limited to retail licensees, but stated in dicta wholesale licensees could be subject to common law negligence claims, but it is not a Tort under Michigan law to sell alcohol to persons of age). Accordingly, in *Tennille*, the court concluded that the statute did not apply to wholesale licensees.

MINNESOTA

1. STATUTE

Minnesota Statute 340A.801[18] provides for strict liability against a dram shop where the sale of alcohol is "illegal," or, in other words, violates a provision of the Liquor Act and is substantially related to the purpose of the Civil Damage Act. *Englund v. MN CA Partners/MN Joint Ventures*, 555 N.W.2d 328 (Minn. Ct. App. 1996). Issues of superseding cause are inappropriate in strict liability actions. *J.B. v. Mounds Vista, Inc.*, 2001 Minn. App. LEXIS 1365 (Minn. Ct. App. 2001).

The statute reads as follows:

> Subdivision 1. Right of action. A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.
>
> Subd. 2. Actions. All suits for damages under this section must be by civil action in a court of this state having jurisdiction.
>
> Subd. 3. Comparative negligence. Actions under this section are governed by §604.01.
>
> Subd. 3a. Defense. The defense described in §340A.503, subdivision 6, applies to actions under this section.
>
> Subd. 4. Subrogation claims denied. There shall be no recovery by any insurance company against any liquor vendor under subrogation clauses of the uninsured, underinsured, collision, or other first party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or part under this section. The provisions of §65B.53, subdivision 3, do not apply to actions under this section.
>
> Subd. 5. Repealed
>
> Subd. 6. Common law claims. Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years. MINN. STAT. §340A.801 (2018).

[18] Proposed Bill 2015 MN S.F. 2046 to change the legal drinking age in Minnesota to 19; sent to Commerce committee with no further actions since.

The Liquor Act is broad in scope and may impose strict liability under the Dram Shop Act in a number of situations. For example, since it is illegal under the Liquor Act to sell alcohol on certain prohibited days and certain prohibited hours, violation of those provisions will impose strict liability under the Dram Shop Act, even if the defendant had no way of knowing the drinker was intoxicated. *Englund,* 555 N.W.2d at 331. Another common violation of the Liquor Act that has resulted in strict liability under the Dram Shop Act is the sale of liquor by a club to a non-club member. *Rogers v. Ponti-Peterson Post No. 1720 Veterans of Foreign Wars*, 495 N.W.2d 897 (Minn. Ct. App. 1993).

Minnesota courts have analyzed liability under the act pursuant to a four-part test: first, was the sale in violation of the Liquor Act; second, was the violation substantially related to purposes sought to be achieved by the act; third, was the illegal sale the cause of the intoxication; and, fourth, was the intoxication the cause of the injuries. *Rambaum v. Swisher*, 435 N.W.2d 19 (Minn. 1989).

In a Dram Shop action in which there was no direct evidence that a customer displayed any outward signs of intoxication, the summary judgment was properly granted in favor of the bar because the totality of the evidence was insufficient to create a material issue of fact regarding whether the customer was obviously intoxicated at the time he was served. *Hollerman v. River Roost*, 1999 Minn. App. LEXIS 990 (Minn. App. 1999).

2. COMMON LAW CAUSE OF ACTION

There is no common law action against one selling alcoholic beverages. The Dram Shop Act provides the sole remedy. *Strand v. Village of Watson*, 72 N.W.2d 609 (Minn. 1955). However, a common law cause of action *will* be permitted in circumstances where the Dram Shop Act does not apply, such as where an innocent third party plaintiff is injured by the illegal sale of beer not covered by the liquor liability act. *Robinson v. Lamott*, 289 N.W.2d 60, 64 (Minn. 1979)[19]; *see e.g., Trail v. Christian*, 213 N.W. 2d 618 (Minn. 1973).[20]

The statute provides that the act does not preempt existing common law claims against individuals over 21 years old who provide or furnish—as opposed to sell—alcoholic beverages to underage drinkers. MINN. STAT. §340A.801 (2018).

3. STATUTE OF LIMITATIONS

Minn. Stat. §§340A.801–802 contains a special statute of limitations providing that no action may be maintained unless commenced within two years after the injury. *Whitener v. Dahl*, 612 N.W.2d 188 (Minn. Ct. App. 2000). But in *Brua v. Olson*, the two-year statute of limitations in the Civil Damages Act governing direct actions against liquor vendor for injury sustained as a result of intoxication of another, did not apply to third-party contribution and indemnity claim brought against bar owner by drinking companion who was sued by snowmobile driver for injuries

[19] Overruled by *Johnson v. Helary, Inc.*, 342 N.W.2d 146 (Minn. 1984) (holding persons who have been fully compensated for damages caused by violations of state's liquor laws may not receive additional recovery).

[20] Superseded by statute as stated in *Wollan v. Jahnz*, 656 N.W.2d 416 (Minn. Ct. App. 2003) *see* Act of March 22, 1982, C.528, §7, 1982 Minn. Laws 978.

sustained when companion's snowmobile collided with driver. *Brua v. Olson*, 621 N.W.2d 472 (Minn. Ct. App. 2001). The companion was required only to comply with provision of Act requiring notice to bar owner within 120 days of injury. *Id.*

4. PROPER PLAINTIFFS

Third parties that are not entirely "innocent" in an incident may be precluded from bringing an action against a dram shop. For example, in *Nelson v. Larson*, the plaintiff driver struck an intoxicated pedestrian and sued the dram shop that illegally sold liquor to the pedestrian. The court ruled plaintiff could not bring the action because he was partly at fault for the accident. *Nelson v. Larson*, 405 N.W.2d 455 (Minn. Ct. App. 1987).

One Minnesota court has found that a spouse of an intoxicated person who was injured after consuming illegally sold liquor could maintain a cause of action because the spouse was an "innocent third party." *Hannah v. Chmielewski*, *Inc.,* 323 N.W.2d 781 (Minn. 1982).

Where a former wife was an innocent third person who lost her means of support due to a bar's alleged illegal sale of alcohol to her former husband, who died in a single-vehicle automobile accident after purchasing alcohol from the bar, his blood alcohol level having been over .22, she had standing to sue the bar under Minnesota's Dram Shop Act, notwithstanding that she had no legal relationship with the decedent. This is in direct contrast to Minnesota's Wrongful Death Act, which expressly limited the class of potential plaintiffs to the surviving spouse or one of the next of kin. *Skelly v. Mount*, 620 N.W.2d 566 (Minn. Ct. App. 2000).

Since the statute is a strict liability statute, the fireman's rule that applies the assumption of the risk doctrine to injuries incurred by police officers and firemen in the course of their duties does not bar police officers or firemen from bringing actions under the Dram Shop Act. *Chmielewski, supra.*

The act was not intended to protect persons from their own voluntary intoxication. Therefore, the intoxicated individuals may not pursue a cause of action against a dram shop for their injuries, even where the sale of liquor was illegal. *Hannah v. Jenson*, 298 N.W.2d 52 (Minn. 1980).[21] The same rule applies to minors. *See Sather v. Woodland Liquors, Inc.*, 597 N.W.2d 295 (Minn. Ct. App. 1999).

An insurer was <u>not</u> a proper plaintiff in an action brought under Minnesota's Dram Shop Act to recover medical benefits paid when its insured was injured in an accident after a bar served her alcohol; the insurer was a subrogee of a voluntarily intoxicated person who could not bring the action in her own right. *Line Constr. Ben. Fund (Lineco) v. Skeates*, 563 N.W.2d 757 (Minn. Ct. App. 1997).

[21] Superseded by statute as stated in *McCaw v. T & L Operations. Inc.,* 550 N.W.2d 852 (Mich. Ct. App.. 1996).

5. AFFIRMATIVE DEFENSES

The statute specifically provides that in the serving of alcohol to underage drinkers, it shall be a safe harbor defense for the defendant if it, in good faith, relied upon the representations of proof of age via a valid driver's license or Minnesota identification card. MINN. STAT. §§340A.503, 340A.801 (2018).

6. DAMAGES

Our research has not revealed any case law indicating a cap on damages relative to Minnesota's Dram Shop Act.

Where husband and wife brought a Dram Shop action following the wife's injury as a result of being hit by a car driven by a person who had been drinking at defendants' bar, the district court did not err by including in the judgment against the bar owners damages to the husband for pecuniary loss. The court held that the term "pecuniary loss" within the statute was not limited to "death" cases. *Desanti v. Youngs*, 2003 Minn. App. LEXIS 51 (Minn. Ct. App. 2003). Although the Dram Shop Act allows recovery for pecuniary loss, the Minnesota financial responsibility statute does not require liquor liability policies to provide coverage for pecuniary loss. *Brua v. Minnesota Joint Underwriting Ass'n*, 778 N.W.2d 294 (Minn. 2010).

Summary judgment in favor of the bar's insurer was proper, as the statute does not provide coverage for the claimant's loss of means of support claim; these claims are limited to dependents. *Britamco Underwriters, Inc. v. A & A Liquors*, 649 N.W.2d 867 (Minn. Ct. App. 2002).

7. PROXIMATE CAUSE

There must be a connection between the illegality of the sale of the liquor and the circumstances surrounding the consumption of the liquor. For example, where liquor was sold illegally on Thursday but the accident did not occur until early Saturday morning, and the intoxicated person had achieved sobriety at some point in between, there was no causal connection between the illegal sale and the accident. *Trail v. Village of Elk River*, 175 N.W.2d 916 (Minn. 1970).

8. EVIDENCE

Courts have looked at blood alcohol content to determine whether the intoxicated party was obviously intoxicated so as to make the sale of alcohol illegal. For instance, in *Harden v. Seventh Rib, Inc.*, where the alleged intoxicated individual was accustomed to drinking, had been in the tavern for one and one half hours, and had a blood alcohol content of .18%, the court held the plaintiff did not have a prima facie case of violation of the Liquor Act. 247 N.W.2d 42 (Minn. 1976).

On the other hand, where the plaintiff presented evidence that the alleged intoxicated party had a blood alcohol content of .28%, the court found the plaintiff had established a strong prima facie case of obvious intoxication. *Jaros v. Warroad Mun. Liquor Store*, 227 N.W.2d 376 (Minn. 1975).

MISSISSIPPI

1. STATUTE

The Mississippi Dram Shop Act, Miss. Code Ann. §67-3-73, states as follows:

Immunity from liability of person who lawfully furnished or sold intoxicating beverages to one causing damage

(1) The Mississippi Legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person.

(2) Notwithstanding any other law to the contrary, no holder of an alcoholic beverage, beer or light wine permit, or any agent or employee of such holder, who lawfully sells or serves intoxicating beverages to a person who may lawfully purchase such intoxicating beverages, shall be liable to such person or to any other person or to the estate, or survivors of either, for any injury suffered off the licensed premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served.

(3) Notwithstanding any other law to the contrary, no social host who serves or furnishes any intoxicating beverage to a person who may lawfully consume such intoxicating beverage shall be liable to such person or to any other person or to the estate, or survivors of either, for any injury suffered off such social host's premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were served or furnished. No social host who owns, leases or otherwise lawfully occupies a premises on which, in his absence and without his consent, intoxicating beverages are consumed by a person who may lawfully consume such intoxicating beverage shall be liable to such person or to any other person or to the estate, or survivors of either, for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person who consumed the intoxicating beverages.

(4) The limitation of liability provided by this section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol, or to any holder of an alcoholic beverage, beer or light wine permit, or any agent or employee of such holder when it is shown that the person making a purchase of an alcoholic beverage was at the time of such purchase visibly intoxicated. MISS. CODE ANN. §67-3-73 (2018).

The statute is clear in precluding any cause of action for the negligent service of alcoholic beverages to an allegedly intoxicated person; except in instances where liquor was forced upon the person, or where the server falsely represents the alcohol content of the beverage. MISS. CODE ANN. §67-3-73. On the contrary, the statute codifies the state legislature's declaration that it is the consumption of alcohol by the individual—and not the service

of alcohol by a licensee—that constitutes the proximate cause of any injury, death or property damage. MISS. CODE ANN. §67-3-73(1).

2. COMMON LAW CAUSE OF ACTION

In *Bryant v. Alpha Entertainment Corp.*, 508 So.2d 1094, 1097-9 (Miss. 1987), the intoxicated driver was a person under the age of 18. Pursuant to Miss. Code §67-3-53, which prohibits the sale of alcohol to a minor, this was negligence per se regardless of whether the establishment exercised reasonable care in determining whether patron were 18 years of age or older. The trial court erred in refusing to grant a jury instruction to that effect. This case was decided prior to the enactment of the Dram Shop Act.

Subsequently, the Mississippi Supreme Court held that the illegal sale of alcohol to minors has been found to establish negligence *per se* for civil liability in Mississippi under the Dram Shop Act. *Delahoussaye v. Mary Mahoney's, Inc.,* 783 So.2d 666, 671 (Miss. 2001). Additionally, in *Moore v. K & J Enterprises*, the court held that actionable negligence per se claim creating strict civil liability did not lie for bar's sale of intoxicants to minor who ordered alcohol after presenting plausible identification, but for purposes of negligence per se liability, when a reasonable bartender would know that lawfully ordered drinks are to be consumed by more than just the buyer, then the drinks are being furnished to the others within the meaning of the Dram Shop statute prohibiting furnishing of alcohol to minors. *Moore v. K & J Enterprises*, 856 So. 2d 621 (Miss. Ct. App. 2003).

3. STATUTE OF LIMITATIONS

The statute of limitations in Mississippi is three years. MISS. CODE ANN. §15-1-49(2018).

4. PROPER PLAINTIFFS

The Public, e.g., a third party whether minors or adults, is protected under the statute from the negligent acts of an intoxicated person and has a claim against a person or business furnishing alcoholic beverages in violation of the statute. *Bridges v. Park Place Entertainment*, 860 So.2d 811, 814 (Miss. 2003) (*citing Cuevas v. Royal D'Iberville Hotel*, 498 So.2d 346, 348–49 (Miss.1986)). However, the Court continues to hold that the legislature did not intend to include adults who voluntarily become intoxicated and subsequently injure themselves as a result of the intoxication. *Bridges*, 860 So.2d at 818 (*citing* Miss. Code Ann. §67-3-73).

5. AFFIRMATIVE DEFENSES

Under Mississippi Law, there is no liability if intoxicating beverages are lawfully sold, unless sold to a person visibly intoxicated or under 21 years of age. *Bridges supra*. Proof of an adult's voluntary consumption will preclude liability but should be pled as an affirmative defense. *Id*. at 819 (McRae, P.J., dissenting).

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to Mississippi's Dram Shop Act.

7. EVIDENCE OF INTOXICATION

Evidence must be sufficient so that a reasonable jury could conclude that a patron was visibly intoxicated. *Robinson Property Group, Ltd. Partnership v. McCalman*, 51 So.3d 946, 949–50 (Miss. 2011). The Court held in this case that a patron who is at a casino for 16 hours, drinking alcohol with no food consumption, and subsequently seen driving at 180 mph when leaving the premises, was sufficient evidence to prove that the patron was visibly intoxicated. *Id*.

MISSOURI

1. STATUTE

Under the Missouri Dram Shop Law, only entities licensed to sell alcohol "by the drink for consumption on the premises" may be liable for injuries to a third party due to alcohol consumption.

The statute provides the following:

§537.053.[22] Sale of alcoholic beverage may be proximate cause of personal injuries or death – requirements – (Dram Shop Law)

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933–34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in §1.010 RSMo, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. Notwithstanding Subsection 1 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises when it is proven by clear and convincing evidence that the seller knew or should have known that intoxicating liquor was served to a person under the age of 21 years or knowingly served intoxicating liquor to a visibly intoxicated person.

3. For purposes of this section, a person is "visibly intoxicated" when inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction. A person's blood alcohol content does not constitute prima facie evidence to establish that a person is visibly intoxicated within the meaning of this section, but may be admissible as relevant evidence of the person's intoxication.

[22] Recognized unconstitutional in part by *Piskorski v. Larice*, 70 S.W.3d 573 (Mo. Ct. App. 2002) (the Missouri Supreme court decision in *Kilmer v. Mun,* which invalidated part of "dram shop" act requiring criminal conviction or plea of guilty as prerequisite to maintaining a cause of action against liquor licensee under that statute, applied retrospectively to children's "dram shop" suit against liquor licensee for wrongful death of their mother who was killed by licensee's patron in vehicle collision, and thus prosecutor's failure to bring criminal charges against licensee did not bar children's action; licensee suffered no injustice as a result of alleged reliance on statute. Mo. Rev. Stat. §537.053.3).

4. Nothing in this section shall be interpreted to provide a right of recovery to a person who suffers injury or death proximately caused by the person's voluntary intoxication unless the person is under the age of 21 years. No person over the age of 21 years or their dependents, personal representative, and heirs may assert a claim for damages for personal injury or death against a seller of intoxicating liquor by the drink for consumption on the premises arising out of the person's voluntary intoxication.

5. In an action brought pursuant to Subsection 2 of this section alleging the sale of intoxicating liquor by the drink for consumption on the premises to a person under the age of 21 years, proof that the seller or the seller's agent or employee demanded and was shown a driver's license or official state or federal personal identification card, appearing to be genuine and showing that the minor was at least 21 years of age, shall be relevant in determining the relative fault of the seller or seller's agent or employee in the action.

6. No employer may discharge his or her employee for refusing service to a visibly intoxicated person. MO. REV. STAT. §537.053 (2018).

Through the statute, only dram shops that sell individual drinks and whose patrons drink the beverages in the dram shop will risk liability. For example, in *Childress v. Sams,* 736 S.W.2d 48 (Mo. Ct. App. 1987), the court found that the social host, the seller, was not selling alcohol "by the drink" and excluded them from dram shop law liability. *Id*. at 50.

2. COMMON LAW CAUSE OF ACTION

The statute provides that Missouri will follow the English common law rule that furnishing alcohol beverages will not give rise to liability under any common law theory, including negligence. It further states that it is the policy of Missouri to "prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons."

3. STATUTE OF LIMITATIONS

It appears that liability under the Dram Shop Act would fall under limitation of actions §516.120 which provides for a five–year statute of limitation for a liability created by statute other than a penalty or forfeiture. MO. REV. STAT. §516.120 (2018).

4. PROPER PLAINTIFFS

A civil cause of action may arise from a first-party minor injured as a result of being intoxicated on liquor sold by an establishment covered by the dram shop law. *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. Ct. App. 1980). A third party may also bring a claim against the dram shop as result of being injured by an intoxicated person who the dram shop served. *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000).

5. AFFIRMATIVE DEFENSES

Limited to Licensees: Missouri courts follow the English common law rule that no liability will attach unless the defendant is an individual licensed to sell alcohol and falls under the dram shop law. *Shelter Mut. Ins. v. White*, 930 S.W.2d 1 (Mo. Ct. App. 1996), *rehearing denied*. In *Shelter*, the court ruled passengers in an automobile owed no duty to third parties to refrain from supplying the driver with beer. *Id*. at 2.

Selling to a Minor – "Good Faith" Safe Harbor: If a seller requests, is shown, and reasonably relies on altered identification or where the seller had seen the altered license in the past and relied upon those inspections of the identification, the seller will not be liable under the act. *Withers v. Supervisor of Liquor Control*, 655 S.W.2d 857 (Mo. Ct. App. 1983).

Contributory Negligence: Where a minor may have been contributorily negligent in an auto accident after having been served drinks by a cocktail bar, contributory negligence would bar any recovery under the Missouri Dram Shop Law. *Sampson v. W.F. Enterprises, Inc.,* 611 S.W.2d 333 (Mo. Ct. App. 1980).[23]

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to Missouri Dram Shop Law.

[23] Superseded by statute as stated in *Von Ruecker v. Holiday Inns, Inc.*, 775 S.W.2d 295 (Mo. Ct. App. 1989) (holding that a limited exception to no dram shop liability existed only where a tavern owner had been convicted or received a suspended imposition of sentence for the sale of intoxicating beverages to a person under the age of 21 or to an obviously intoxicated person, and then only if the sale was the proximate cause of the personal injury or death).

MONTANA

1. STATUTE

The Montana Dram Shop statute provides as follows:

(1) The purpose of this section is to set statutory criteria governing the liability of a person or entity that furnishes an alcoholic beverage for injury or damage arising from an event involving the person who consumed the beverage.

(2) Except as provided in §16-6-305, a person or entity furnishing an alcoholic beverage may not be found liable for injury or damage arising from an event involving the consumer wholly or partially on the basis of a provision or a violation of a provision of Title 16.

(3) Furnishing a person with an alcoholic beverage is not a cause of, or grounds for, finding the furnishing person or entity liable for, injury or damage wholly or partly arising from an event involving the person who consumed the beverage unless:

(a) the consumer was under the legal drinking age and the furnishing person knew that the consumer was underage or did not make a reasonable attempt to determine the consumer's age;

(b) the consumer was visibly intoxicated; or

(c) the furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol.

(4) A jury or trier of fact may consider the consumption of an alcoholic beverage in addition to the sale, service, or provision of the alcoholic beverage in determining the cause of injuries or damages inflicted upon another by the consumer.

(5) A civil action may not be brought pursuant to Subsection (3) by the consumer or by the consumer's estate, legal guardian, or dependent unless:

(a) The consumer was under the legal age and the furnishing person knew or should have known that the consumer was under age; or

(b) The furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol while knowing that it did contain alcohol.

(6) A civil action may not be commenced under this section against a person who furnished alcohol unless the person bringing the civil action provides notice of an intent to file the action to the person who furnished the alcohol by certified mail within 180 days from

the date of sale or service. The civil action must be commenced pursuant to this section within two years after the sale or service.

(7) In any civil action brought pursuant to this section, the total liability for noneconomic damages may not exceed $250,000.

(8) In any civil action brought pursuant to this section, the total liability for punitive damages may not exceed $250,000.

(9) Evidence of intentional or criminal activity by a person causing injury in connection with any event or injury commenced pursuant to this part is admissible in any action brought pursuant to this section. MONT. CODE ANN. §27-1-710 (2017).

2. STATUTE OF LIMITATIONS

Pursuant to the Dram Shop statute, a plaintiff has two years to bring a statutory action against a party who has furnished alcohol to an individual who injures a third party as a result of the alcohol consumption. MONT. CODE ANN. §27-1-710 (2017).

3. COMMON LAW CAUSE OF ACTION

There may be an action premised on common law negligence. *Flip v. Jordan*, 344 Mont. 402 (2008).

4. PROPER PLAINTIFFS

First-party and third-party claims are allowed pursuant to Mont. Code Ann. §27-1-710 (3), (5) (2017).

5. AFFIRMATIVE DEFENSES

Dram shop owners are able to assert the defense of comparative negligence where it is the role of the jury, not judges, to determine to what degree an accident was caused by the imbiber of alcohol and to what degree it was caused by those who provided alcohol to the imbiber. *Bissett v. DMI, Inc.*, 717 P.2d 545 (Mont. 1986).

6. DAMAGES

Per the Dram Shop statute, the total liability for noneconomic damages may not exceed $250,000. Also, the total liability for punitive damages may not exceed $250,000.

7. EVIDENCE

Violations of the statutory provisions prohibiting the sale of alcohol to underage drinkers, or to any intoxicated persons or anyone apparently under the influence, would be evidence of negligence rather than negligence per se. Instead, such violations are evidence of the failure to exercise due care. *Bissett v. DMI, Inc.*, 717 P.2d 545 (Mont. 1986).

8. PROXIMATE CAUSE

In order for a seller's service of alcohol to be considered proximate cause for damages incurred, it must be a cause in fact, or actual cause of the damages. *Cusenbary v. Mortensen*, 987 P.2d 351, 355 (Mont. 1999). Subsequent acts that are foreseeable do not break this chain of causation. *Id*. Therefore, if the negligent service of alcohol creates a greater risk of a particular harmful result occurring, and the harmful result occurs, the service could be the proximate, as long as it is the actual cause of the injury. *Id*.

NEBRASKA

1. STATUTE

Nebraska has no statute imposing liability on a vendor of alcohol.

In *Arant v. G.H., Inc,.* 428 N.W.2d 631 (Neb. 1988), the Nebraska Supreme Court ruled dram shop liability would not be imposed where the legislature had repealed the laws regarding dram shop liability and had not reenacted the laws. *Id*. at 632.

In *Pelzek v. Am. Legion,* 463 N.W.2d 321 (Neb. 1990), the court held that just because the law prohibits the sale of alcohol to a minor, the law does not create a concomitant duty of care to that minor if he drinks and drives. *Id*. at 322–23.

Nebraska does have a Minor Alcoholic Liquor Liability Act which provides the following cause of action:

> Any person who sustains injury or property damage, or the estate of any person killed, as a proximate result of the negligence of an intoxicated minor shall have, in addition to any other cause of action available in tort, a cause of action against:
>
> > (1) A social host who allowed the minor to consume alcoholic liquor in the social host's home or on property under his or her control;
> >
> > (2) Any person who procured alcoholic liquor for the minor, other than with the permission and in the company of the minor's parent or guardian, when such person knew or should have known that the minor was a minor; or
> >
> > (3) Any retailer who sold alcoholic liquor to the minor. The absolute defenses found in §53-180.07 shall be available to a retailer in any cause of action brought under this section. NEB. REV. STAT. §53-404 (2018).

The Minor Alcoholic Liquor Liability Act has a statute of limitations of four years, a defense that the intoxication did not contribute to the negligent conduct, and a limit that the cause of action is not available to the intoxicated person and his or her estate. NEB. REV. STAT. §§53-405; 53-408 (2018).

2. COMMON LAW CAUSE OF ACTION

There is no common law liability for a liquor vendor. *Holmes v. Circo*, 244 N.W.2d 65 (Neb. 1976); *Kraus v. Schroeder*, 182 N.W. 364 (Neb. 1921).

NEVADA

Nevada does not have a Dram Shop Act nor does the common law provide a cause of action. *See Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800 (Nev. 1992). In 1995, the Nevada Legislature passed Nev. Rev. Stat. §41.1305 which provides:

> §41.1305 Liability of person who serves, sells or furnishes alcoholic beverages for damages caused as a result of consumption of alcoholic beverage: No liability of person served is 21 years of age or older; liability in certain circumstances if person is under 21 years of age; exception to liability; damages, attorney's fees and costs.
>
> 1. A person who serves, sells or otherwise furnishes an alcoholic beverage to another person who is 21 years of age or older is not liable in a civil action for any damages caused by the person to whom the alcoholic beverage was served, sold or furnished as a result of the consumption of the alcoholic beverage.
>
> 2. Except as otherwise provided in this section, a person who:
>
>   (a) Knowingly serves, sells or otherwise furnishes an alcoholic beverage to an underage person; or
>
>   (b) Knowingly allows an underage person to consume an alcoholic beverage on premises or in a conveyance belonging to the person or over which the person has control,
>
>   Is liable in a civil action for any damages caused by the underage person as a result of the consumption of the alcoholic beverage.
>
> 3. The liability created pursuant to Subsection 2 does not apply to a person who is licensed to serve, sell or furnish alcoholic beverages or to a person who is an employee or agent of such a person for any act or failure to act that occurs during the course of business or employment and any such act or failure to act may not be used to establish proximate cause in a civil action and does not constitute negligence per se.
>
> 4. A person who prevails in an action brought pursuant to Subsection 2 may recover the person's actual damages, attorney's fees and costs and any punitive damages that the facts may warrant.
>
> 5. As used in this section, "underage person" means a person who is less than 21 years of age. NEV. REV. STAT. §41.1305 (2017).

In *Rodriguez v. Primadonna Co.,* 216 P.3d 793 (Nev. 2009) the Nevada Supreme Court addressed the liability of a hotel for injuries that occurred in an automobile accident after the hotel employees evicted intoxicated persons from the hotel premises. The court held that hotel proprietors have the statutory right to evict anyone from the premises who acts in a disorderly manner or who causes a public disturbance in or upon the premises. *Id.* at 798 (citing Nev. Rev. Stat. Ann. §651.020). The court further stated that in Nevada, commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron, which are sustained by either the intoxicated patron or a third party, including when the intoxicated patron is a minor. *Id.* The court reaffirmed that Nevada "subscribes to the rationale underlying the nonliability principle—that individuals, drunk or sober, are responsible for their torts." *Id.*

NEW HAMPSHIRE

1. STATUTE

New Hampshire follows the model act in N.H. Rev. Stat. Ann. §507-F:1, *et seq*., and provides for both the negligent service of alcohol and the reckless service of alcohol as follows:

507-F:4 Negligent Service of Alcoholic Beverages.

1. A defendant who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this chapter.

2. Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances would know that the person being served is a minor or is intoxicated.

3. Proof of service of alcoholic beverages to a minor without request for proof of age as required by RSA 179:8 shall be admissible as evidence of negligence.

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

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

6. A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises, when the person misrepresents such consumption or the amount of such consumption, unless the defendant's service to such person qualifies as reckless under RSA 507-F:5.

7. A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge. N.H. REV. STAT. ANN. §507-F:4 (2018).

507-F:5 Reckless Service of Alcoholic Beverages.

1. A person who becomes intoxicated may bring an action against a defendant for serving alcoholic beverages only when the server of such beverages is reckless. The service of alcoholic beverages is reckless when a defendant intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in hi position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

2. A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

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

(a) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages.

(b) Service of alcoholic beverages to a person, 16 years of age or under, when the server knows or should reasonably know the patron's age.

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

(d) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required, and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle. N.H. REV. STAT. ANN. §507-F:5 (2018).

2. COMMON LAW CAUSE OF ACTION

N.H. Rev. Stat. Ann. §507-F:8 provides the statute is the exclusive remedy to an injured party. Regarding the liability of a social host, the New Hampshire Supreme Court held that a plaintiff who is injured as a result of a social host's service of alcohol may maintain an action against that social host, so long as the plaintiff can allege that the service was reckless. *Hickingbotham v. Burke*, 662 A.2d 297, 301 (1995). A social host's service of alcohol would be reckless if the host "consciously disregard[ed] a substantial and unjustifiable risk" of a high degree of danger. *Id.* (citing *Black's Law Dictionary* 1270 (6th ed. 1990)). The risk that the host disregards must be "of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to [the actor], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Hickingbotham* 662 A.2D 297 AT 301. The traditional elements of a common law tort action shall apply to an action based on social host liability. *Id.*

3. STATUTE OF LIMITATIONS

All personal actions in New Hampshire have a three-year statute of limitations. N.H. REV. STAT. ANN. §508:4 (2018).

4. PROPER PLAINTIFFS

N.H. Rev. Stat. Ann. §507-F:2 provides that only third-party suits may be maintained. The intoxicated person himself has no cause of action under the statute. Under the statute, a third party only needs to prove negligence of the seller or provider of alcohol, while a patron injured by the allegedly intoxicated person must prove recklessness. *Hickingbotham*, 662 A.2d 297 at 302.

5. AFFIRMATIVE DEFENSES

Because the statute provides for negligence or recklessness, the state's comparative fault provisions impact claims for violation of the statute. N.H. REV. STAT. ANN. §§507:7-d - 507:7-j, 507:8. In *Ramsey v. Anctil*, 211 A.2d 900, 902 (N.H. 1965), the court held an injured party's contributory negligence was a defense to an action against a licensee and operates to reduce the liability by apportioning the relative degrees of fault proximately causing the incident. *Ramsey* was decided prior to New Hampshire's adoption of a comparative negligence statute in 1986, but *Hickingbotham* cited *Ramsey* affirmatively in 1995, after the current Dram Shop Act and the comparative negligence statute were passed.

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to New Hampshire's Dram Shop laws.

7. RESPONSIBLE BUSINESS PRACTICE DEFENSE

In addition to the defense of contributory negligence, the seller has the defense of maintaining responsible business practices. N.H. Rev. Stat. Ann. §507-F:6 provides as follows:

507-F:6 Responsible Business Practices Defense

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

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

3. With respect to service to intoxicated persons, evidence of responsible business practices may include, but is not limited to, comprehensive training of the defendant and the defendant's employees and agents who are present at the time of service of alcoholic beverages and responsible management policies, procedures and actions which are in effect at the time of such service.

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

5. With respect to service to intoxicated persons, evidence of responsible management policies, procedures and actions may include, but is not limited to, those policies, procedures and actions which:

(a) Encourage persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises.

(b) Promote availability of nonalcoholic beverages and food.

(c) Promote safe transportation alternatives other than driving while intoxicated.

(e) Prohibit employees and agents of defendant from consuming alcoholic beverages while acting in their capacity as employee or agent.

(e) Establish promotions and marketing efforts which publicize responsible business practices to the defendant's customers and community.

(f) Implement comprehensive training procedures.

(g) Maintain an adequate number of trained employees and agents for the type and size of defendant's business.

6. With respect to service to minors, evidence of responsible business practices may include, but is not limited to:

(a) Management policies which assure the examination of proof of age as required by RSA 179:8, for all persons seeking service of alcoholic beverages who may reasonably be suspected to be minors.

(b) Comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

7. Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and the nature of the defendant's previous contacts with the intoxicated person or minor who is served. Evidence of the existence or omission of one or more elements of responsible business practices does not conclusively provide or disprove the responsible business practices defense. N.H. REV. STAT. ANN. §507-F:6 (2018).

Our research has not found any case law interpreting this section of the dram shop law on responsible business practices.

NEW JERSEY

1. STATUTE

New Jersey's Dram Shop Act, the New Jersey Alcoholic Beverage Servers Fair Liability Act, N.J.S.A. 2A:22A-1, *et seq*., was passed in 1987. The Act provides that liability only attaches to the server if they serve someone who is "visibly intoxicated." This term is defined by statute in N.J.S.A. 2A:22A-3 as "intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication." Liability also attaches if the server of alcohol serves a minor he or she had reason to believe was underage.

N.J.S.A. §2A:22A-5, Conditions for recovery of damages, specifically states as follows:

> (a) A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:
>
> (1) The server is deemed negligent pursuant to Subsection b. of this section; and
>
> (2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and
>
> (3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.
>
> (b) A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor. N.J. STAT. ANN. §2A: 22A-5 (2018).

It is unclear how far New Jersey courts will extend dram shop liability vis-à-vis the casino industry. Earlier cases held that extending common law dram shop liability into an area so fully regulated without the necessary legislative intent is not a predictable extension of common law tort principles. *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291 (3d Cir. 1995). In *Hakimoglu*, the plaintiff brought common law actions to recoup over $2,000,000 in gambling losses he suffered which he claimed where caused by the casino serving him free alcohol while visibly intoxicated. However, the plaintiff was not successful in this claim.

There has been no New Jersey appellate decision on the existence of a common law cause of action against a casino for damages resulting from serving or extending credit to an intoxicated patron, or allowing an intoxicated patron to continue gambling. *Annitto v. Trump Marina Hotel Casino*, 2006 N.J. Super. Unpub. LEXIS 1769, at 5 (App. Div. July 25, 2006). Whether there is such a viable common law action in New Jersey for compensatory damages, including both economic loss and emotional distress, remains to be determined in an appropriate case. *Id*.

2. COMMON LAW CAUSE OF ACTION

The New Jersey statute was enacted in 1987 because the court held in *Rappaport v. Nichols*, 156 A.2d 1 (N.J. 1959), that innocent third parties had a common law cause of action. The court later applied *Rappaport* to first-party cases. *Soronen v. Olde Milford Inn*, 202 A.2d 208 (N.J. Super. Ct. App. Div. 1964). The court wanted to limit the liability and eliminate the common law cause of action. N.J.S.A. §2A:22A-4 states the Act provides the exclusive civil remedy.[24]

3. STATUTE OF LIMITATIONS

The statute of limitations for personal injury is two years.

4. PROPER PLAINTIFFS

Under the statute, a first party can still bring a suit, subject to the defenses of contributory and comparative negligence. N.J. STAT. ANN. §2A:22A-6; *Steele v. Kerrigan*, 689 A.2d 685 (N.J. 1997) (specifically calls for application of the Comparative Negligence Act). A review of legislative history shows that the then governor of New Jersey banned the original version of the bill which had a complete ban on first-party suits. The final version of the statute was essentially a political compromise. *New Jersey Law Journal*, June 21, 1993, at p. 33.

The scope of the Act, however, is unclear. In *Lee v. Kiku Restaurant*, 603 A.2d 503 (N.J. 1992), three people were at the bar in the restaurant and drove together afterwards. The defendants argued the negligence of the passengers in becoming drunk, and also in accepting a ride from a drunk driver, contributed to their injuries. The court held the passenger plaintiffs' own degree of negligence was evidence of his comparative negligence, but did not bar the claim.

Thus, the order of proof in a claim will be consideration of the patron's negligence in becoming intoxicated. The court *in dicta* stated there is a "compelling public policy that those who voluntarily become intoxicated must be held responsible for their own behavior." *Id*. at 182. However, the court then equivocated on the extent to which those persons would be held liable for their own negligence.

The court stated it would continue its adherence to the principle "that a tavern cannot escape all liability for its negligence in serving an intoxicated patron by blaming the patron for unreasonable conduct caused wholly or in

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[24] Nonetheless, in circumstances in which the service of alcohol is not directly at issue, the courts have recognized common law causes of action, such as negligent supervision. *See*, *e.g.*, *Steele v. Kerrigan, 148 N.J. 1, 7-8, 35, 689 A.2d 685 (1997)* (in action for injuries caused by assault in bar, recognizing cause of action for negligent supervision); *Kuehn v. Pub Zone, 364 N.J. Super. 301, 313, 835 A.2d 692 (App. Div. 2003)* (recognizing duty on part of bar to take reasonable precautions against the dangers posed by a motorcycle gang known for random violence), certif. denied, sub nom, *Kuehn v. Kerkoulas, 178 N.J. 454, 841 A.2d 92 (2004)*; *Martin v. Prime Hospitality Corp., 345 N.J. Super. 278, 288, 785 A.2d 16 (App. Div. 2001)* (finding cause of action for negligent security or supervision against hotel bar, which allegedly failed to reasonably guard against off-premises rape of customer by another bar patron); *Truchan v. Sayreville Bar and Restaurant, Inc. 731 A.2d 1218* (recognizing viability of common law claims, but finding none available because all the claims that the plaintiff sought to assert arose out of the negligent service of alcoholic beverages); *Popow v. Wink Assocs., 269 N.J. Super. 518, 520-31, 636 A.2d 74 (App. Div. 1993)* (finding evidence of negligent supervision sufficient to support the jury's verdict on that ground).

part for the tavern's actions." *Id*. at 185. Essentially, the court held there is comparative negligence for a person's own voluntary decision to consume alcohol to the point of intoxication, but that the patron's negligence is then distinguished from their subsequent negligence for actions and inactions undertaken once they become intoxicated. *Id*. at 193.

The court went on to create a rebuttable presumption that an intoxicated person was no longer able to recognize the same standards of due care that would be apparent to him when sober. The court held that the defendant had the burden to show the plaintiffs retained some ability to appreciate the risks of their conduct to then have the comparative negligence evidence apply. *Id*. at 184.

Two years later the New Jersey Superior Court held a trial court's jury instructions were prejudicial to the plaintiff-pedestrian because they improperly focused on the minor's being 100% responsible for the accident instead of addressing the tavern's responsibility for serving him when he was visibly intoxicated, and could not be held accountable for making the decision to drive. *Benson v. Brown*, 648 A.2d 499 (N.J. Super. Ct. App Div. 1994).

The court again confirmed the presumption established in *Lee* in *Steele*, *supra*. The court held the presumption that if a tavern negligently served a patron after the patron reached the point of intoxication, the patron thereafter lacked the capacity to appreciate the risks of their subsequent actions, and that this can be used in apportioning fault between the tavern and patron only for those portions of the injuries attributable to the patron's negligence caused by intoxication. *Steele*, 689 A.2d at 693.

5. AFFIRMATIVE DEFENSES

The statute absolved joint and several liability. N.J. STAT. ANN. §2A:22A-6(b). The statute states "Notwithstanding . . . any . . . law to the contrary, in any case where a licensed alcoholic beverage server or any other party to a suit instituted pursuant to the provisions of this act is determined to be a joint tortfeasor the licensed alcoholic beverage server or other party shall be responsible for no more than that percentage share of the damages which is equal to the percentage of negligence attributable to the server or other party." *Id*.

In *Lee v. Kiku Restaurant*, *supra.*, the court held the jury should apportion the fault between the intoxicated tortfeasor and the restaurant. In considering the tortfeasor's fault, the jury could consider the extent to which the plaintiff's injuries were caused by the tortfeasor's drinking to the point of intoxication and the extent to which the restaurant's actions in continuing to serve the tortfeasor after obviously intoxicated.

6. DAMAGES

Our research has not revealed case law pertaining to caps on damages relative to New Jersey's Dram Shop Act.

NEW MEXICO

1. STATUTE

New Mexico's Liquor Liability Law provides as follows:

41-11-1. Tort liability for alcoholic liquor sales or service.

A. No civil liability shall be predicated upon the breach of §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;

(2) it was reasonably apparent[25] 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 was intoxicated.

B. No person who was sold or served alcoholic beverages while intoxicated shall be entitled to collect any damages or obtain any other relief against the licensee who sold or served the alcoholic beverages unless the licensee is determined to have acted with gross negligence and reckless disregard for the safety of the person who purchased or was served the alcoholic beverages.

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

D. As used in this section:

(1) "licensee" means a person licensed under the provisions of the Liquor Control Act and the agents or servants of the licensee; and

(2) "intoxicated" means the impairment of a person's mental and physical faculties as a result of alcoholic beverage use so as to substantially diminish that person's ability to think and act in a manner in which an ordinary [ordinarily] prudent person, in full possession of his faculties, would think and act under like circumstances.

[25] In New Mexico, the Legislature intended the reasonably-apparent prong to require an objective standard of proof. *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 274 P.3d 97, 102 (N.M. 2012).

E. 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.

F. A licensee may be civilly liable for the negligent violation of §§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 §§60-7B-1 and 60-7B-1.1 NMSA 1978.

G. A licensee shall not be held civilly liable pursuant to the provisions of Subsection F of this section except when:

(1) it is demonstrated by the preponderance of the evidence that the licensee knew, or that a reasonable person in the same circumstances would have known, that the person who received the alcoholic beverages was a minor; and

(2) licensee's violation of §60-7B-1 or 60-7B-1.1 NMSA 1978 was a proximate cause of the plaintiff 's injury, death or property damage.

H. No person may seek relief in a civil claim against a licensee or a social host for injury or death or damage to property which was proximately caused by the sale, service or provision of alcoholic beverages except as provided in this section.

I. Liability arising under this section shall not exceed fifty thousand dollars ($50,000) for bodily injury to or death of one person in each transaction or occurrence or, subject to that limitation for one person, one hundred thousand dollars ($100,000) for bodily injury to or death of two or more persons in each transaction or occurrence, and twenty thousand dollars ($20,000) for property damage in each transaction or occurrence. N.M. STAT. ANN. §41-11-1 (2018).

2. COMMON LAW CAUSE OF ACTION

In *Murphy v. Tomada Enters.*, 819 P.2d 1358 (N.M. Ct. App. 1991), the court addressed the issue of whether §41-11-1(B) precluded a patron from recovering when an injury is caused by another intoxicated patron. The court held that this section relates only to injury to a patron to the extent that it is proximately caused by the patron's own intoxication, not by the intoxication of another person. The court reasoned that under common law, the plaintiff would be entitled to raise such a cause of action against the tavern owner and the adoption of Subsection B was to expand upon common law liability, not restrict it.

3. STATUTE OF LIMITATIONS

The statute of limitations for personal injury is three years. N.M. STAT. ANN. §37-1-8 (2018).

4. AFFIRMATIVE DEFENSES

In *Baxter v. Noce*, 752 P.2d 240 (N.M. 1988), the court addressed the issue of whether a patrons willful and voluntary consumption of alcohol to any material degree precludes recovery under section B. The court held that jurors must be allowed to apply the doctrine of comparative negligence when weighing the faults of the parties involved. As a result, the court stated that "contributory negligence was abolished only as a complete bar to recovery in New Mexico; it still exists to diminish or deny the claimant's recovery in proportion to his relative fault, and it is thus governed by the comparative negligence rule." *Id.* at 243.

5. DAMAGES

Liability arising under this section shall not exceed fifty thousand dollars ($50,000) for bodily injury to or death of one person in each transaction or occurrence or, subject to that limitation for one person, one hundred thousand dollars ($100,000) for bodily injury to or death of two or more persons in each transaction or occurrence, and twenty thousand dollars ($20,000) for property damage in each transaction or occurrence. N.M. STAT. ANN. §41-11-1 (2018).

NEW YORK

1. STATUTE

The New York Dram Shop Act is codified at N.Y. Gen. Oblig. Law §11-101 and states as follows:

> 1. 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 unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and any such action such person shall have a right to recover actual and exemplary damages.
>
> 2. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either a husband, wife or child shall be his or her sole and separate property.
>
> 3. Such action may be brought in any court of competent jurisdiction.
>
> 4. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other. N.Y. GEN. OBLIG. LAW §11-101 (2018).

This statute must be read in conjunction with N.Y. Alcohol Beverage Control Law §65 which prohibits the sale of alcoholic beverages to "any visibly intoxicated persons." N.Y. ALCO. BEV. CONT. LAW §65 (2018).

In *Fox v. Clare Rose Bev., Inc.*, 692 N.Y.S.2d 658 (N.Y. App. Div. 1999), the court concluded that, where defendant was a company that sold beer to hosts of a party, defendant's motion for summary judgment was properly granted because defendant merely delivered beer to host and had no opportunity to supervise dispensing of beer or decedent's consumption of beer at party.

2. COMMON LAW CAUSE OF ACTION

The licensee may be liable for negligence in certain circumstances. In *Brosnan v. Poco Cafe, Inc.*, 602 N.Y.S.2d 891, 892 (N.Y. App. Div. 1993), the plaintiff alleged the bar negligently failed to remove a highly intoxicated patron who assaulted him. The trial court erred in not charging the jury on the bar's potential liability under common law negligence. In *Stevens v. Spec., Inc.*, 637 N.Y.S.2d 979, 981 (N.Y. App. Div. 1987), a patron was struck in the face with a beer bottle. The court held the defendants owed the plaintiff a common law duty to control the conduct of persons on their premises to prevent harm, but this duty was limited to conduct they had an opportunity to control and were reasonably aware of and did not extend to extraordinary occurrences. The court went on to say that "when there is no commercial sale of alcohol for profit, there can be no cause of action under the Dram Shop Act." *Id.*

3. STATUTE OF LIMITATIONS

A three-year statute of limitations period applies to claims brought pursuant to the New York Dram Shop Act. *Bongiorno v. D.I.G.I., Inc.*, 529 N.Y.S.2d 804 (N.Y. App. Div. 1988).

4. PROPER PLAINTIFFS

A minor who became intoxicated and was subsequently injured had no cause of action against a bar either under principles of common law negligence or the statute, but his parents in an individual capacity could sue under the statute as parties suffering a loss resulting from the injury of an intoxicated person. *Reuter v. Flobo Enterprises, Ltd.*, 503 N.Y.S.2d 67 (N.Y. App. Div. 1986). *See also*, *Powers v. Niagara Mohawk Power Corp.*, 516 N.Y.S.2d 811 (N.Y. App. Div. 1986). This general rule applies to adult first parties as well as minors. *Coughlin v. Barker Ave.*, 609 N.Y.S.2d 646 (N.Y. App. Div. 1994).

New York also does not allow recovery for an individual who assists in procuring alcohol for the intoxicated person. Where a husband placed at least some drink orders for his wife and provided funds, his cause of action against the restaurant for injuries sustained in a car accident were dismissed. *Slocum v. D'S & Jayes Valley Restaurant & Cafe, Inc.*, 563 N.Y.S.2d 1022 (N.Y. App. Div. 1990), *aff'd.*, 582 N.Y.S.2d 544 (N.Y. App. Div. 1992). However, recovery is only barred if the person is more than just a drinking companion and plays a more affirmative role. *Russell v. Olkowski*, 535 N.Y.S.2d 187 (N.Y. App. Div. 1988); *French v. Cliff's Place, Ltd.*, 508 N.Y.S.2d 577 (N.Y. App. Div. 1986).

5. DAMAGES

An injured party who brings a claim under New York's Dram Shop Act has a right to recover both actual and exemplary damages. N.Y. GEN. OBLIG. LAW §11-101. However, the injured party is not able to recover damages for loss of services, affection, and companionship under the Dram Shop Act. *McCauley v. Carmel Lanes Inc.*, 577 N.Y.S.2d 546 (N.Y. App. Div. 1991). In *Winje v. Cavalry Veterans of Syracuse, Inc.*, 497 N.Y.S.2d 291 (N.Y. Sup. Ct. 1985), the court held that damages for mental anguish, unaccompanied by any physical injury, were recoverable under the Dram Shop Act.

6. EVIDENCE

The courts have insisted that third-party plaintiffs prove that the tortfeasor appeared intoxicated. The courts have rejected objective evidence such as the wrongdoer's blood alcohol level, in favor of testimonial or other evidence, relating the intoxicated person's outward behavioral manifestations. The courts have held that it is simply not enough that the wrongdoer say that they felt intoxicated at the time when they were last served at the bar. *Nehme v. Joseph*, 554 N.Y.S.2d 642 (N.Y. App. Div. 1990). In *Terbush v. Buchman*, 537 N.Y.S.2d 916 (N.Y. App. Div. 1989), the court ruled that a blood alcohol level of .14 at the time of the accident does not raise the inference of intoxication while served at the bar. *Id.* at 828. Additionally, the court held in *Senn v. Scudieri*, 567 N.Y.S.2d 665 (N.Y. App. Div. 1991), that evidence a person has consumed alcohol and has odor on their breath is not conclusive evidence of intoxication to prove dram shop liability as the effects of alcohol differ greatly from person to person, and even the slurring of speech in and of itself is insufficient. *Id.* at 350.

In 1996, the court permitted expert testimony using objective criteria such as the blood alcohol level to establish that a tortfeasor was so intoxicated that there must have been outward behavioral modifications at the time the liquor establishment served the tortfeasor. However, the court held that the expert testimony alone was insufficient to prove that a tortfeasor was so intoxicated that they were visibly intoxicated at the time they were last served liquor. *Romano v. Stanley*, 684 N.E.2d 19 (N.Y. 1997).

With respect to visible intoxication, the court in *Wasserman v. Godoy*, 523 N.Y.S.2d 597 (N.Y. App. Div. 1988), held an issue of fact existed as to whether an individual was served while "visibly intoxicated" when he was described as intoxicated by two police officers 30 minutes after leaving the restaurant. However, where there was no admissible evidence that a person had been served or even been on the premises, then no summary judgment was precluded. *Campbell v. Lorenzo's Pizza Parlor, Inc.*, 567 N.Y.S.2d 832 (N.Y. App. Div. 1991).

The court in *Bregartner v. Southland Corp.*, 683 N.Y.S.2d 286 (N.Y. App. Div. 1999), granted summary judgment because there was no evidence of a direct sale of alcohol by the convenience store to the minor who was driving the car at the time of the collision.

7. CAUSATION

In *Cantania v. 124 In-To-Go Corp.*, 731 N.Y.S.2d 207 (N.Y. App. Div. 2001), the jury found that the defendant establishment sold alcoholic beverages to a visibly intoxicated person who then assaulted plaintiff and that the sale caused or contributed to the assailant's intoxication. Notwithstanding these findings, the court stated that, given the uncontradicted testimony that assailant's behavior became increasingly aggressive as he continued to drink, no valid line of reasoning permitted a conclusion other than that there was a reasonable connection between the assailant's intoxication and the assault.

In *McNeill v. Rugby Joe's, Inc.*, 751 N.Y.S.2d 241 (N.Y. App. Div. 2002), the court stated that summary judgment was properly denied where a reasonable connection existed between the sale of alcohol (by some of the parties related to the pub) and the decedent's injuries.

In *Carver v. P.J. Carney's*, 962 N.Y.S.2d 3 (N.Y. App. Div. 2013), the tavern's potential liability, under the Dram Shop Act, for assault committed by a patron whom the tavern had served while he was visibly intoxicated would not be severed if assault was intentional.

NORTH CAROLINA

1. STATUTE

North Carolina Gen. Stat. §18B-305 states:

(a) **Sale to Intoxicated Person.**—It shall be unlawful for a permittee or his employee or for an ABC [Alcohol Beverage Control][26] store employee to knowingly sell or give alcoholic beverages to any person who is intoxicated;

(b) **Discretion for Seller.**—Any person authorized to sell alcoholic beverages under this Chapter may, in his discretion, refuse to sell to anyone. It shall be unlawful for any person to knowingly buy alcoholic beverages for someone who has been refused the right to purchase under this subsection.

(c) Notwithstanding Subsection (b) of this section, no permittee may refuse to sell alcoholic beverages to a person solely based on that person's race, religion, color, national origin, sex, or disability. N.C. GEN. STAT. §18B-305 (2018).

N.C. Gen. Stat. §18B-121, the North Carolina Dram Shop Act, states as follows:

Any aggrieved party has a claim for relief for damages against a permittee or local Alcoholic Beverage Control Board if:

(1) The permittee or his agent or employee or the local board or its agent or employee negligently sold or furnished any alcoholic beverage to an underage person; and

(2) The consumption of the alcoholic beverage that was sold or furnished to an underage person caused or contributed to, in whole or in part, an underage driver's being subject to an impairing substance within the meaning of G.S. 20-138.1 at the time of the injury; and

(3) The injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while so impaired. N.C. GEN. STAT. §18B-121 (2018).

2. COMMON LAW CAUSE OF ACTION

Under the Dram Shop Act, §18B-128 states that "[t]he creation of any claim for relief by this Article may not be interpreted to abrogate or abridge any claims for relief under the common law, but this Article does not authorize double recovery for the same injury." N.C. GEN STAT. §18B-128 (2018). Under §18B-305, previously codified at N.C.G.S. 18A-34(a), the North Carolina courts allow persons injured by an intoxicated tavern customer the right to

[26] The Alcohol Beverage Control Board is the state-licensing agency that grants permits to business establishments enabling them to sell liquor and alcoholic beverages.

recover from the tavern that provided liquor to the customer upon proof of the tavern owner's negligence. *Hutchens v. Hankins*, 303 S.E.2d 584, 591 (N.C. Ct. App. 1983). The elements of a common law negligence claim must be shown for this claim to succeed in North Carolina. *Id.*

3. STATUTE OF LIMITATIONS

The statute of limitations for an action brought under the Dram Shop Act is one year. N.C. GEN STAT. §18B-126 (2018). The statute of limitations for personal injury in North Carolina is three years. N.C. GEN. STAT. §1-52 (2018). In *Estate of Mullis by Dixon v. Monroe Oil Co., Inc.*, where the intoxicated driver was under the age of 21, the court held that the Dram Shop Act, N.C. Gen. Stat. §18B-120, provided the sole cause of action available to the deceased's estate. *Estate of Mullis by Dixon v. Monroe Oil Co., Inc.*, 488 S.E.2d 830, 833 (N.C. Ct. App. 1997) *aff'd* 505 S.E.2d 131 (1998). Having failed to timely file an action under that statute, the estate could not obtain relief under the wrongful death statute because the deceased could not have maintained an action against defendants either under a theory of negligence *PER SE* or common law negligence, had she lived. *Id.*

4. PROPER PLAINTIFFS

In *Storch v. Winn-Dixie Charlotte, Inc.*, the court of appeals held that a parent of an underage driver injured or killed as a result of such underage driver's negligent operation of a motor vehicle due to impairment resulting from the consumption of alcohol may be an "aggrieved party" within the meaning of G.S. §18B–120(1) so as to have standing to maintain an action under the Dram Shop Act if such parent suffers an *injury* as a proximate result of the negligent selling of alcoholic beverages to the underage person. *Storch v. Winn-Dixie Charlotte, Inc.*, 560 S.E.2d 881, 883 (N.C. Ct. App. 2002). In order for the parents of an underage person to bring a claim, they must suffer an injury as the proximate result of the negligent selling of alcoholic beverages to an underage person. "The term 'injury' under the statute includes, but is not limited to, personal injury, property loss, loss of means of support, or death." *Id*.

Prior to *Storch*, the court in *Clark* held that because the underage person is expressly excluded from the definition of "aggrieved party" in G.S. §18B–120(1), his personal representative is also excluded and may not maintain an action for wrongful death under the Dram Shop Act, since the personal representative may only bring a claim which could have been brought by the decedent if he had lived. *Clark v. Inn West,* 379 S.E.2d 23 (N.C. Ct. App. 1989).

5. AFFIRMATIVE DEFENSES

A violation of §18B-305 constitutes negligence per se, but does not alter the effect of the plaintiff's contributory negligence which is admissible at trial. *Brower v. Robert Chappell & Associates*, 328 S.E.2d 45, *cert. den'd*, 335 S.E.2d 313 (N.C. Ct. App. 1985). "Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care concurring and cooperating with some negligent act or omission on the part of the defendant as makes the act or omission of the plaintiff a proximate cause or occasion of the injury complained of." *Adams v. Bd. of Educ.*, 103 S.E.2d 854, 857 (N.C. 1958). In *Brower*, the defendant was entitled to summary judgment based on the plaintiff's contributory negligence where the plaintiff drank 11 beers, 2 glasses of wine and 1 mixed drink from noon until 10:00 p.m. before going to the defendant's bar and having 5 mixed drinks in 1½ hours. *Brower*, 328 S.E.2d at 46.

A plaintiff's wrongful death claim against a provider of alcohol alleging willful and wanton negligence for serving the visibly intoxicated decedent alcohol after being requested to refrain from serving him was barred by the decedent's own actions in driving his vehicle while visibly intoxicated. *Sorrells v. MYB Hospitality Ventures*, 423 S.E.2d 72 (N.C. 1992).

The Dram Shop Act also allows the defense of proof of good practices, such as the training of employees, enforcement techniques, etc., as a defense. N.C. GEN. STAT. §18B-122 (2018).

6. JOINT AND SEVERAL LIABILITY

North Carolina allows for joint and several liability with a right of contribution, but not a right of indemnification. N.C. GEN. STAT. §18B-124 (2018).

7. DAMAGES

No more than $500,000 per occurrence can be recovered. If there is more than one claim, then that amount must be proportional. N.C. GEN. STAT. §18B-123 (2018); *Stutts v. Adair,* 380 S.E.2d 411 (N.C. Ct. App. 1989).

8. MINORS

An aggrieved party has a cause of action if the alcoholic beverage was sold to an underage person and the consumption of that alcohol then caused or contributed to an injury that was proximately caused by the underaged driver's negligent operation of a vehicle while impaired. The server does not have a defense of contributory negligence with regard to a minor under this statute, §18B-121. In *Clark v. Inn West*, 379 S.E.2d 23 (N.C. 1989), the court held that an "aggrieved party" cannot be the underaged person or their estate.

However, under §18B-305 of the Act, the defense of contributory negligence does exist where a minor is not involved. *See* discussion of defenses, *infra*.

9. BURDEN OF PROOF

The plaintiff has the burden of proof to show:

(1) that the patron was intoxicated; and

(2) that the licensee knew or should have known the patron was in an intoxicated condition at the time he or she was served.

Harshbarger v. Murphy, 368 S.E.2d 450 (N.C. Ct. App. 1988).

NORTH DAKOTA

1. STATUTE

Under §5-01-06.1[27], North Dakota law exempts dram shops from liability for serving alcohol, but provides exceptions for any obviously intoxicated person, any person under 21, or an incompetent:

1. Every spouse, child, parent, guardian, employer, or other individual who is injured by any obviously intoxicated individual has a claim for relief for fault under §32-03.2-02 against any person who knowingly disposes, sells, barters, or gives away alcoholic beverages to an individual under 21 years of age or to an incompetent or an obviously intoxicated individual, and if death ensues, the survivors of the decedent are entitled to damages defined in §32-21-02. If a retail licensee is found liable under this section and exemplary damages are sought, the finder of fact may consider as a mitigating factor that the licensee provided to an employee alcohol server training that addressed intoxication, drunk driving, and underage drinking.

2. If a retail licensee provided to an employee alcohol server training that addresses intoxication, drunk driving, and underage drinking, a person with a claim for relief under this section may not use the fact that the retail licensee provided this training to prove culpability.

3. A claim for relief under this section may not be had on behalf of the intoxicated individual nor on behalf of the intoxicated individual's estate or personal representatives, nor may a claim for relief be had on behalf of an adult passenger in an automobile driven by an intoxicated individual or on behalf of the passenger's estate or personal representatives.

ND CENT. CODE §5-01-06.1 (2017).

The claim for relief under the act applies to both dram shop and private individuals. *Born v. Mayers*, 514 N.W.2d 687 (N.D. 1994).

2. COMMON LAW CAUSE OF ACTION

The North Dakota Dram Shop Act does not exempt a dram shop from common law liability to protect patrons from reasonably foreseeable injury at the hands of other patrons. *Zueger v. Carlson*, 542 N.W.2d 92 (N.D. 1996). In light of the *Zueger* court's holding, it appears that common law liability may still attach to a bar owner or any other individual. In 2009, the District of North Dakota affirmed and applied the holding in *Zueger* and stated that the dram shop law is not the exclusive remedy in North Dakota. *Hoff v. Elkhorn Bar*, 613 F. Supp. 2d 1146, 1155 (D.N.D. 2009).

[27] Proposed Legislation 2017 N.D. S.B. 2319 to change alcohol server training requirements.

Subsequently in 2012 the Supreme Court of North Dakota affirmed that negligence remains a separate theory from dram shop liability. *Forsman v. Blues, Brews & Bar-B-Ques, Inc.*, 820 N.W.2d 748, 753 (2012). The court stated that "[a]n actionable negligence consists of a duty on the part of an allegedly negligent party to protect the plaintiff from injury, a failure to discharge that duty, and a resulting injury proximately caused by the breach of the duty." *Id.* The Court also stated, "For dram shop actions, 'knowingly' means acting voluntarily and not because of mistake or inadvertence. Generally, whether a person act[s] knowingly is a question of fact. Obvious intoxication is also generally a question of fact and requires that the person's intoxication be reasonably discernible or evident to a person of ordinary experience." *Id.* at 752.

3. STATUTE OF LIMITATIONS

Section 28-01-16 provides a six-year statute of limitation for those causes of action created by statute. N.D. CENT. CODE §28-01-16 (2017).

4. PROPER PLAINTIFFS

Every "spouse, child, parent, guardian, employer, or other person who is injured" by the intoxicated individual may sue. ND CENT. CODE §5-01-06.1(1) (2017). The intoxicated individual or any adult riding with the intoxicated individual has no cause of action under the Act. N.D. CENT. CODE §5-01-06.1(3) (2017).

5. AFFIRMATIVE DEFENSES

Complicity is not an affirmative defense. *Aanenson v. Bastien*, 438 N.W.2d 151 (N.D. 1989). On the other hand, comparative fault among all those who "contributed to the injury" may help lessen liability on the part of a dram shop owner. *Stewart v. Ryan*, 520 N.W.2d 39 (N.D. 1989).

6. DAMAGES

Our research has not revealed any cases law regarding caps on damages applicable to the North Dakota Dram Shop Act.

7. BURDEN OF PROOF

It is sufficient for a plaintiff to prove that a defendant, who is engaged in the business of selling alcoholic beverages, sold, bartered, or gave away an alcoholic beverage contrary to law and that the damages complained of resulted from the intoxication of the person who was sold, bartered, or given the alcoholic beverage. *Wanna v. Miller*, 136 N.W.2d 563, 570 (N.D. 1965).

1. STATUTE

OHIO REV. CODE ANN §4399.18, with amendments and changes effective January 27, 1997, states as follows:

> §4399.18 Limitations on Liability for acts of intoxicated persons.
>
> Notwithstanding division (A) of §2307.60 of the Revised Code and except as otherwise provided in this section, no person, and no executor or administrator of the person, who suffers personal injury, death, or property damage as a result of the actions of an intoxicated person has a cause of action against any liquor permit holder or an employee of a liquor permit holder who sold beer or intoxicating liquor to the intoxicated person unless the personal injury, death, or property damage occurred on the permit holder's premises or in a parking lot under the control of the permit holder and was proximately caused by the negligence of the permit holder or an employee of the permit holder. A person has a cause of action against a permit holder or an employee of a permit holder for personal injury, death, or property damage caused by the negligent actions of an intoxicated person occurring off the premises or away from a parking lot under the permit holder's control only when both of the following can be shown by a preponderance of the evidence:
>
> (A) The permit holder or an employee of the permit holder knowingly sold an intoxicating beverage to at least one of the following:
>
> (1) A noticeably intoxicated person in violation of division (B) of §4301.22 of the Revised Code;
>
> (2) A person in violation of §4301.69 of the Revised Code.
>
> (B) The person's intoxication proximately caused the personal injury, death, or property damage.
>
> Notwithstanding sections 4399.02 and 4399.05 of the Revised Code, no person, and no executor or administrator of the person, who suffers personal injury, death, or property damage as a result of the actions of an intoxicated person has a cause of action against the owner of a building or premises who rents or leases the building or premises to a liquor permit holder against whom a cause of action may be brought under this section, except when the owner and the permit holder are the same person. OHIO REV. CODE ANN. §4399.18 (2018).

In *Lesnau v. Andate Enterprises, Inc.*, 756 N.E.2d 97 (Ohio 2001), the Supreme Court of Ohio held that the dram shop statute imposes liability upon a liquor permit holder for the negligent actions of an intoxicated person occurring off premises if it can be shown by a preponderance of the evidence that the permit holder (or an employee) knowingly sold an intoxicating beverage to an underage person, an act that would constitute a violation of the criminal prohibition in §4301.69. OHIO REV. CODE ANN. §4301.69 (2018). Further, the court stated that, when read

together with the criminal statute, the word "knowingly," as applied in the Dram Shop Act, encompasses the standard "know or have reason to know."

The Supreme Court of Ohio in *Klever v Canton Sachsenheim, Inc.*, 715 N.E.2d 536 (Ohio 1999), ruled that there is no cause of action against a liquor permit holder for self-inflicted injury or death due to being intoxicated by a voluntarily intoxicated patron (or his representative) who is "underage" (as defined in the criminal code), but who has attained the age of majority.

2. COMMON LAW CAUSE OF ACTION

The statute provides the exclusive remedy. *Cummins v. Rubio*, 622 N.E.2d 700 (Ohio Ct. App. 1993).

3. STATUTE OF LIMITATIONS

The statute of limitations for bodily injury is two years. OHIO REV. CODE ANN. §2305.10 (2018).

4. PROPER PLAINTIFFS

The courts have ruled the intoxicated person cannot maintain a cause of action against a server as a matter of public policy. *Fifer v. Buffalo Cafe*, 601 N.E.2d 601 (Ohio Ct. App. 1991), *Hosom v. Eastland Lanes, Inc.*, 595 N.E.2d 534 (Ohio Ct. App. 1991). This also extends to derivative claims filed by the administrator of a decedent's estate. *Id*.

5. AFFIRMATIVE DEFENSES

In *Great Central Ins. Co. v. Tobias*, 524 N.E.2d 168 (Ohio 1988), one patron paid the decedent $100 to drink 10 shots. The widow brought suit and settled with the patron. In the subsequent contribution action, the court held a server not liable for a patron providing drinks to another patron when the patron buying the drinks was not visibly intoxicated. *Id*. at 171.

Both contributory negligence and assumption of the risk may be asserted as defenses. *Tome v. Berea Pewter Mug, Inc.*, 446 N.E.2d 848 (Ohio Ct. App. 1982). Intoxication does not relieve a person from the responsibility for his or her own negligent acts. *Id*. at 852. But where the server is charged with willful and wanton misconduct, then the defense of assumption of the risk may be asserted, but not the defense of contributory negligence. *Id*. at 853.

6. DAMAGES

Our research has not revealed any cases law regarding caps on damages applicable to the Ohio's Dram Shop Act.

OKLAHOMA

1. STATUTE/COMMON LAW CAUSE OF ACTION

Oklahoma's Dram Shop Rule is based on the common law action of negligence or negligence per se. A commercial vendor can be held liable for selling or furnishing liquor, for the purpose of on premises consumption, to a person who by previous intoxication may lack full capacity or self-control to operate a motor vehicle and may subsequently injure a third party. *Brigance v. Velvet Dove Rest., Inc.,* 725 P.2d 300 (Okla. 1986).

2. STATUTE OF LIMITATIONS

Actions for negligence are governed by a two-year statute of limitations. OKL. STAT, Tit. 12, §95 (2018).

3. PROPER PARTIES

a. Third Parties

Oklahoma protects only innocent third parties. *Ohio Casualty Ins. Co. v. Todd*, 813 P.2d 508 (Okla. 1991). An adult customer who voluntarily becomes intoxicated cannot recover under the Dram Shop Rule. *Esther v. Wiemer*, 859 P.2d 1140 (Okla. Civ. App. 1993).

b. First-Party Minors

Commercial vendors can be held liable when they sell alcoholic beverages for consumption by minors. *Mansfield v. Circle K. Corp.,* 877 P.2d 1130 (Okla. 1994).

4. AFFIRMATIVE DEFENSES

a. Comparative Negligence

A commercial vendor may assert the negligence of the injured party, whether a minor or adult, as a defense under Oklahoma's comparative negligence doctrine. *Tomlinson v. Love's Country Stores*, 854 P.2d 910, 917 (Okla. 1993). However, if the conduct of the vendor actions is found to be willful, wanton or intentional, then fault must not be apportioned between the parties. *Id.*

b. Rebuttal

The duty for a commercial vendor not to sell alcoholic beverages to a minor may be rebutted by demonstrating that the purchaser appeared to be of age and that the vendor used reasonable means of identification to ascertain his age. *Id*. at 912.

5. DAMAGES

Our research has not revealed case law regarding caps on damages relative to Oklahoma's Dram Shop Laws.

6. BURDEN OF PROOF

a. Negligence

The common law duty is to exercise ordinary care in providing alcohol to an individual. The jury will determine whether the vendor should have reasonably foreseen that the purchaser was intoxicated and could cause injury to themselves or others. *Tomlinson*, 854 P.2d at 915–16.

b. Negligence Per Se

A vendor can be held liable for negligence per se for failure to comply with the following statute:

(1) No person shall:

(a) Knowingly sell, deliver, or furnish alcoholic beverages to any person under twenty-one (21) years of age;

(b) Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person or to any person who has been adjudged insane or mentally deficient.

OKLA. STAT. Tit. 37A, §6-601 (2018)[28].

To prevail in a negligence per se action, the plaintiff must establish that: 1) the injury was caused by a statutory violation; 2) the injury was a type to be prevented by the statute; and 3) the injured party was of the class meant to be protected by the statute. *Busby v. Quail Creek Golf and Country Club*, 885 P.2d 1326 (Okla. 1994).

[28] This version of the act became effective October 1, 2018.

OREGON

1. STATUTE

Oregon revised its liquor liability law by act effective January 1, 2002.

O.R.S. §471.565[29]. Liability for providing or serving alcoholic beverages to intoxicated person; notice of claim.

(1) A patron or guest who voluntarily consumes alcoholic beverages served by a person licensed by the Oregon Liquor Control Commission, a person holding a permit issued by the commission or a social host does not have a cause of action, based on statute or common law, against the person serving the alcoholic beverages, even though the alcoholic beverages are served to the patron or guest while the patron or guest is visibly intoxicated. The provisions of this subsection apply only to claims for relief based on injury, death or damages caused by intoxication and do not apply to claims for relief based on injury, death or damages caused by negligent or intentional acts other than the service of alcoholic beverages to a visibly intoxicated patron or guest.

(2) A person licensed by the Oregon Liquor Control Commission, person holding a permit issued by the commission or social host is not liable for damages caused by intoxicated patrons or guests unless the plaintiff proves by clear and convincing evidence that:

(a) The licensee, permittee or social host served or provided alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated; and

(b) The plaintiff did not substantially contribute to the intoxication of the patron or guest by:

(A) Providing or furnishing alcoholic beverages to the patron or guest;

(B) Encouraging the patron or guest to consume or purchase alcoholic beverages or in any other manner; or

(C) Facilitating the consumption of alcoholic beverages by the patron or guest in any manner.

(3) Except as provided in Subsection (4) of this section, an action for damages caused by intoxicated patrons or guests off the premises of a person licensed by the Oregon Liquor Control Commission, a person holding a permit issued by the commission or a social host may be brought

[29] Proposed Legislation, 2017 OR H.R. 2198, proposed to add the sale of marijuana to the dram shop liability act.

only if the person asserting the claim has given the licensee, permittee or social host the notice required by Subsection (5) of this section within the following time periods:

(a) If a claim is made for damages arising out of wrongful death, notice must be given within one year after the date of death, or within one year after the date that the person asserting the claim discovers or reasonably should have discovered the existence of a claim under this section, whichever is later.

(b) If a claim is made for damages for injuries other than wrongful death, notice must be given within 180 days after the injury occurs, or within 180 days after the person asserting the claim discovers or reasonably should have discovered the existence of a claim under this section, whichever is later.

(4) The time provided for the giving of notice under Subsection (3) of this section does not include any period during which:

(a) The claimant is under 18 years of age;

(b) The claimant is unable to give notice by reason of the injury or by reason of being financially incapable, as defined in ORS 125.005, or is incapacitated, as defined in ORS 125.005; or

(c) The claimant is unable to determine that the licensee, permittee or social host is liable because the patron or guest who caused the damages asserts a right against self-incrimination and cannot be compelled to reveal the identity of the licensee, permittee or social host, or cannot be compelled to reveal facts that would establish the liability of the licensee, permittee or social host.

(5) A licensee, permittee or social host shall be considered to have been given notice for the purposes of this section if:

(a) The licensee, permittee or social host is given formal notice in the manner specified in Subsection (6) of this section;

(b) The licensee, permittee or social host receives actual notice as described in Subsection (7) of this section;

(c) An action is commenced by or on behalf of the claimant within the period of time specified by Subsections (3) and (4) of this section; or

(d) Any payment on the claim is made to the claimant by or on behalf of the licensee, permittee or social host.

(6) Formal notice of a claim subject to this section must be in writing, must be mailed to the licensee, permittee or social host, or personally served on the licensee, permittee or social host, and must contain all of the following:

(a) A statement that a claim for damages is made against the licensee, permittee or social host.

(b) A description of the time, place and circumstances giving rise to the claim, so far as known to the claimant.

(c) The name of the claimant and mailing address for the claimant to which correspondence regarding the claim may be mailed.

(7) For the purposes of this section, "actual notice" means any communication to a licensee, permittee or social host that gives the licensee, permittee or social host actual knowledge of the time, place and circumstances of the claim, if the communication is such that a reasonable person would conclude that a particular person intends to assert a claim against the licensee, permittee or social host. OR. REV. STAT. §471.565 (2018).

O.R.S. §471.567. Liability for providing alcoholic beverages to a minor; liability of a minor for misrepresentation of age.

(1) Notwithstanding ORS 471.130 and 471.565, no licensee, permittee or social host shall be liable to third persons injured by or through persons under the age of 21 years 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.

(2) A person who is under 21 but at least 18 years of age and who through misrepresentation of age causes an Oregon Liquor Control Commission licensee to be fined or have a license suspended or revoked shall be civilly liable for damages sustained by the licensee. The court may award reasonable attorney fees to the prevailing party in an action under this subsection.

(3) Subsection (2) of this section does not apply to a person under the age of 21 years who is acting under the direction of the Oregon Liquor Control Commission or under the direction of state or local law enforcement agencies for the purpose of investigating possible violations of laws prohibiting sales of alcoholic beverages to persons who are under the age of 21 years.

(4) Subsection (2) of this section does not apply to a person under the age of 21 years who is acting under the direction of a licensee for the purpose of investigating possible violations by employees of the licensee of laws prohibiting sales of alcoholic beverages to persons who are under the age of 21 years. OR. REV. STAT. §471.567 (2018).

2. COMMON LAW CAUSE OF ACTION

No Oregon court has ruled on any of the enacted provisions cited above. However, the plain language of the statute and court decisions under the statute that preceded §§471.565 and 471.567 are instructive.

The language of §471.565 prohibits recovery against vendors of alcoholic beverages by vendees regardless of whether the vendee was "visibly intoxicated." Under the previous statute vendors were not liable to intoxicated vendees injured off premises as a result of their own intoxication. *Sager v. McClenden*, 672 P.2d 697 (Or. 1983).

Section 471.565 now places an additional burden on plaintiffs who bring a common law negligence claim. Third parties injured by intoxicated vendees must overcome a two-part test by "clear and convincing" evidence in order to sustain a cause of action against a vendor.

First they must prove that the vendor served a vendee who was "visibly intoxicated." This requirement remains unchanged. *Hawkins v. Conklin*, 767 P.2d 66 (Or. 1988); s*ee also Deckard v. Bunch*, 370 P.3d 478 (Or. 2016) (holding that statute governing liability of alcohol providers who serve alcohol to a visibly intoxicated person did not provide a right of action independent of a claim for common law negligence). However, §471.565 now requires that the plaintiff must establish by the same clear and convincing standard that they did not substantially contribute to the intoxication of the vendee by furnishing, encouraging or facilitating the consumption of alcohol by the vendee. Research does not reveal any Oregon cases that have defined "furnishing," "encouraging" or "facilitating" in the context of §471.565

3. STATUTE OF LIMITATIONS AND NOTICE

Pursuant to §471.565(3)(a) any claims for wrongful death must be filed within one year after the date of death, or within one year after the date that the person asserting the claim discovers or reasonably should have discovered the existence of a claim under the section, whichever is later.

If the claim is for injuries other than wrongful death, notice must be given within 180 days after the injury occurs or within 180 days after the person asserting the claim discovers or reasonably should have discovered the existence of a claim, whichever is later.

§471.565 (3)(b).

However, the statute provides exceptions to the above stated rules. The statute of limitations period for either wrongful death or injury does not include any period during which:

(a) The claimant is under 18 years of age:

(b) The claimant is unable to give notice by reason of the injury or by reason of being financially incapable or is in incapacitated; or

(c) The claimant is unable to determine that the licensee, permittee or social host is liable because the patron or guest who caused the damages asserts a right against self-incrimination and cannot be compelled to reveal the identity of the licensee, permittee or social host, or cannot be compelled to reveal facts that would establish the liability of the licensee, permittee or social host. §471.565 (4)(a)–(c).

4. PROPER PLAINTIFFS

Under the previous statute only innocent third parties had a cause of action. *Plattner v. VIP's Industries, Inc.*, 768 P.2d 440 (Or. 1989). This case specifically states that first-party actions are prohibited under the statute.

Furthermore, since the intoxicated individual does not have a cause of action for injuries resulting from the alcohol he consumed, his spouse and children also do not have a cause of action for wrongful death. *Hunt v. Evenoff*, 829 P.2d 1051 (Or. Ct. App. 1992).

5. AFFIRMATIVE DEFENSES

Section 471.567 precludes recovery by third parties against vendors or social hosts for injuries sustained from minors under the age of 21. This defense may be defeated if the third party can prove that a reasonable person should have requested identification or that the identification used to obtain the alcohol was altered or did not accurately describe the person to whom the alcohol was served or sold. Again, there are no Oregon cases that discuss or define these standards.

Contributory negligence was an affirmative defense to a violation under the previous statute. In *Smith v. Harms*, 865 P.2d 486 (Or. Ct. App. 1993), a minor who participated in the unlawful purchase of beer that was allegedly a substantial factor in the accident causing his injuries did not have a direct cause of action against the store where the beer was purchased for negligence.

6. DAMAGES

Our research has not revealed case law regarding caps on damages relative to Oregon's Dram Shop Laws. When the "act of serving an intoxicated person is found to meet the requisite disregard of social obligations, an award of punitive damages may be appropriate." *Pfeifer v. Copperstone Restaurant and Lounge*, 693 P.2d 644 (Or. Ct. App. 1985).

7. BURDEN OF PROOF

Under the previous statute "visibly intoxicated" did not have the same meaning as "under the influence." *Chartrand v. Coos Bay Tavern, Inc.*, 683 P.2d 139 (Or. Ct. App. 1985). In *Chartrand*, the court ruled that the appropriate standard under the dram shop statute was "visibly intoxicated" and not "under the influence" as a person could be under the influence but not necessarily visibly intoxicated. *Id.* at 141–42. The court therefore held that testimony from a police officer concerning the blood alcohol level of the defendant was irrelevant to the issue of whether the defendant was visibly intoxicated when she was served. *Id.* In *Blunt v. Bocci,* the court ruled that the term "visibly intoxicated" refers to people intoxicated by controlled substances, alcohol, or a combination of the two. 704 P.2d 534, 536 (Or. Ct. App. 1985).

An additional element under common law negligence action requires that the plaintiff prove "that it was reasonably foreseeable to defendant that its customer, on leaving the tavern, would drive a car." *Id.*

PENNSYLVANIA

1. STATUTE

The Pennsylvania Dram Shop Act, 47 P.S. §4-493, states in part:

It shall be unlawful—

(1) Furnishing liquor or malt or brewed beverages to certain persons. For any licensee or the board, or any employee, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any minor: Provided further, That notwithstanding any other provision of law, no cause of action will exist against a licensee or the board or any employee, servant or agent of such licensee or the board for selling, furnishing or giving any liquor or malt or brewed beverages or permitting any liquor or malt or brewed beverages to be sold, furnished or given to any insane person, any habitual drunkard or person of known intemperate habits unless the person sold, furnished or given alcohol is visibly intoxicated or is a minor. 47 PA. STAT. §4-493 (2018).

Section 4-497 of the Act provides for civil liability 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, malt or brewed beverages by the said licensee or his agent, servant or employee when said customer was visibly intoxicated. 47 PA. STAT. §4-497 (2018).

2. COMMON LAW CAUSE OF ACTION

In Pennsylvania, a plaintiff may also state a claim for common law negligence. *Schuenemann v. Dreemz, LLC*, 34 A.3d 94 (Pa. Super. 2011).

3. STATUTE OF LIMITATIONS

The statute of limitations for personal injury claims is two years. 42 Pa.C.S. §5524 (2018).

4. PROPER PLAINTIFF*S*

A first party may maintain a suit against a liquor licensee in Pennsylvania. The courts have held the purpose of the statute is to protect not only the interest of others, but also to protect the interest of the person intoxicated. *Majors v. Brodhead Hotel*, 205 A.2d 873, 878 (Pa. 1965). *See also*, *Holpp v. Fez, Inc.*, 656 A.2d 147, 149 (Pa. Super. Ct. 1995); *McDonald v. Marriott Corp.*, 564 A.2d 1296 (Pa. Super. Ct. 1989).

5. AFFIRMATIVE DEFENSES

Contributory negligence is not a defense to an action predicated on the violation of a statute. *Majors*, 205 A.2d 876. However, in the context of an underage plaintiff, the question of causal negligence of all defendants, including a minor plaintiff, should be a question left for the jury. *Barrie v. Pennsylvania Liquor Control Bd.*, 1990 Pa. Dist. & Cnty. Dec. LEXIS 335 at 10 (Pa.C.P. 1990). The jury should then apportion the same among the parties. *Id*. This negligence includes any negligence on the part of the beer distributor, and recovery by the plaintiffs against all defendants will be precluded only if the minor plaintiff's negligence exceeds the combined negligence of all defendants. *Id*. (citing *Congini v. Portersville Valve Co.*, 470 A.2d 515 (Pa. 1983), and *Thomas v. Duquesne Light Co.*, 545 A.2d 289 (Pa. Super. Ct. 1988)). This principle was applied to liquor liability cases in Pennsylvania in *Schelin v. Goldberg*, 146 A.2d 648 (Pa. Super. Ct. 1958).

Moreover, in *Zygmuntowicz v. Hospitality Investments, Inc.*, 828 F. Supp. 346 (E.D. Pa. 1993), the United States District Court for the Eastern District of Pennsylvania held that Pennsylvania Dram Shop law does not allow contributory negligence as a defense. *Id*. at 350.

However, liability for damages proximately caused by service of alcoholic beverages to minors is not absolute and/or irrebuttable, and is subject to the licensees' attempt to establish comparative negligence of the actors involved. *Matthews v. Konieczny*, 527 A.2d 508, 512 (Pa. 1987).

The only defense to the violation of the provisions of 47 Pa. Cons. Stat. §4-493(1), relating to service to minors, is compliance with §4-495, which requires presentation by a purchaser of a Liquor Control Board identification card and the signing of another card. *Appeal of Charsuner Bar Corp.*, 449 A.2d 106 (Pa. Commw. Ct. 1982).

6. DAMAGES

Our research has not revealed case law regarding caps on damages relative to Pennsylvania's Dram Shop Act.

7. STANDARDS FOR CIVIL LIABILITY UNDER DRAM SHOP ACT

Violation of Pennsylvania's Dram Shop Act is deemed negligence per se. *Holpp*, 656 A.2d at 149; *Johnson v. Harris*, 615 A.2d 771 (Pa. Super. Ct. 1992). For liability to be imposed under the Dram Shop Act, an injured plaintiff must prove that:

> (1) he/she or the person responsible for the injuries was served alcoholic beverages by a licensee while visibly intoxicated; and
>
> (2) that the violation of the statute was the proximate cause of the injuries.
>
> *Johnson,* 615 A.2d at 775.

Even if a patron is intoxicated at the time he or she is injured or causes injury to another, the tavern owner who provided the alcoholic beverages to the patron will not be held liable unless the patron was served at a time when he or she was visibly intoxicated. *Holpp*, 656 A.2d at 149; *Johnson*, 615 A.2d at 776.

Moreover, the breach of the statutory duty to refrain from serving alcohol to visibly intoxicated persons does not alone establish liability, the plaintiff must also show that the breach was the proximate cause and the cause in fact of the injury. *Holpp*, 656 A.2d at 149–150; *Reilly v. Tiergarten, Inc.*, 633 A.2d 208, 210 (Pa. Super. Ct. 1993). Pennsylvania law merely requires that the licensee's conduct be a substantial factor in causing the harm to another, rather than being the sole cause. *Fandozzi v. Kelly Hotel, Inc.*, 711 A.2d 524, 527 (Pa. Super. 1998).

8. VISIBLE INTOXICATION

Pennsylvania requires that visible intoxication be governed by physical appearances, rather than by medical diagnosis. *Id.* at 528.

Moreover, it is not enough that a patron thought he/she was visibly intoxicated. *McDonald v. Marriott Corp.*, 564 A.2d 1296 (Pa. Super. Ct. 1989). In *McDonald*, a patron brought an action against a tavern which served her alcohol for damages she sustained as a result of a single car accident. *Id*. at 1297. She testified that she believed she was visibly intoxicated because she bumped into a door, missed the ashtray and dropped her purse in addition to getting loud and chatty. *Id*. at 1298. However, she failed to produce evidence that any employee of the tavern witnessed her exhibit this behavior. *Id*. at 1299.

9. CAUSATION

Even if a patron has been served alcoholic beverages while visibly intoxicated, no civil liability will be imposed upon the tavern owner unless the injuries to the patron or a third person were proximately caused by the patron's intoxication. *Conner v. Duffy*, 652 A.2d 372, 373 (Pa. Super. Ct. 1994); *See also McDonald v. Marriott Corp.,* 564 A.2d 1296, 1298 (Pa. Super. Ct. 1989).

For example, if the intoxicated person drank at several different bars, the bars may be able to successfully make a causation argument. However, establishment of the fact that the intoxicated person had been drinking elsewhere does not automatically relieve an individual bar-defendant from liability. *McKinney v. Foster*, 137 A.2d 502, 507 (Pa. 1958). If the defendant tavern can prove that "plaintiff was so intoxicated when defendant illegally served him that the accident would have occurred even if defendant had not illegally served him," he may be relieved from liability. *Majors,* 205 A.2d at 878.

10. SERVICE OF ALCOHOL TO MINORS

An exception to the requirement that a plaintiff prove the patron was visibly intoxicated involves the service of intoxicating liquors to minors. In *Matthews v. Konieczny*, plaintiff's decedent was killed in a one vehicle accident. The driver of the automobile, John Konieczny, a minor, had consumed several beers which were purchased by another minor, Matthew Caprioti, from defendant J-B Beverage Distributors, Inc. 527 A.2d 508, 510 (Pa. 1987).

The court held that J-B Beverage could be held liable to third persons for injuries proximately caused by service of alcohol to a minor, even though the driver of the vehicle was not the minor served. *Id*. at 512. More

importantly, the court held that the statutory immunity from third-party suits for licensees of alcoholic beverages in cases where a customer is served who was not visibly intoxicated was applicable only to "legally competent" customers and did not insulate licensees from liability even though the customer purchasing the alcoholic beverages was not visibly intoxicated at the time of the purchase. *Id*. at 513–14. Therefore, a licensee will be liable for service of alcohol to a minor regardless of visible intoxication.

11. ADMISSIBILITY OF BREATHALYZER/BLOOD ALCOHOL TESTS

Dram shop liability may be proven without direct eyewitness testimony. Specifically, the Superior Court held that that even though the "appellants . . . offered no direct evidence that Shish was served alcohol at a time when he was visibly intoxicated . . . we believe appellants have produced sufficient circumstantial evidence to create a jury question on this issue." *Fandozzi v. Kelly Hotel Inc*., 711 A.2d 524, 527 (Pa. Super. Ct. 1998).

In order to prove intoxication, a breathalyzer or blood alcohol test is admissible when other evidence is shown which tends to prove the individual was drunk.

In *Couts v. Ghion*, 421 A.2d 1184 (Pa. Super. Ct. 1980), the court was presented with testimony regarding the amounts of alcohol consumed, erratic driving, slurred speech, staggering, and odor of alcohol. *Id*. at 1189. The plaintiff had also introduced evidence that defendant Ghion had been drinking at a restaurant/bar operated by additional defendants, and that 45 minutes after leaving the restaurant, Ghion drove his car across the divider line on a highway, struck a pickup truck and fatally injured plaintiff's decedent. *Id*. at 1186.

The plaintiff sought to introduce breathalyzer and blood alcohol tests administered to the decedent about two and one-half hours after the accident to show that defendant was visibly intoxicated at the time he was served the alcohol. *Id*. at 1188. Finding that the results of these tests were improperly excluded by the trial court, the Superior Court held that "evidence of elevated blood alcohol content, when accompanied by other evidence suggesting high degree of intoxication, is admissible." *Id*. at 1189. *See also*, *Cusatis v. Reichert*, 406 A.2d 787 (Pa. Super. Ct. 1979); *Beneshunas v. Independence Life & Acc. Ins. Co.*, 512 A.2d 6, 8 (Pa. Super. Ct. 1986) (results of blood tests are admissible in civil cases in which intoxication of a driver is an issue).

In addition, Pennsylvania courts are wary of the use of "relation back" testimony of an expert to show that a person was "visibly intoxicated" if based on medical testimony of what the average person's reaction might have been by assuming the BAC of the person at the time that person was in the establishment. *Conner v. Duffy*, 652 A.2d 372 (Pa. Super. Ct. 1994). In *Conner*, the court found that relation back testimony by an expert, who opined that based on results of the drivers' blood alcohol test performed following the accident, the driver would have been served while visibly intoxicated, was insufficient to establish that the driver had been visibly intoxicated at the time the baseball stadium's concessionaire allegedly sold him beer in violation of the Dram Shop Act.

RHODE ISLAND

1. STATUTE

The Rhode Island Liquor Liability Act, R.I. Gen. Laws §3-14-1, *et seq*., also follows the model act and includes liability for both negligence and reckless service as follows:

Section 3-14-6. Liability for negligent service of liquor.

(a) A defendant, as described in §3-14-5, who negligently serves liquor to a minor is liable for damages proximately caused by the minor's consumption of the liquor.

(b) A defendant, as defined in §3-14-5, who negligently serves liquor to a visibly intoxicated individual is liable for damages proximately caused by the individual's consumption of the liquor.

(c) Service of liquor to a minor or to an intoxicated individual is negligent if the defendant knows or if a reasonable and prudent person in similar circumstances would know that the individual being served is a minor or is visibly intoxicated.

(d) A defendant is not chargeable with knowledge of an individual's consumption of liquor or other drugs off the defendant's premises unless the individual's appearance and behavior, or other facts known to defendant, would put a reasonable and prudent person on notice of that consumption.

(e) Proof of service of alcoholic beverages to a person under twenty-one (21) years of age without request for identification shall form a rebuttable presumption of negligence. R.I. GEN. LAWS §3-14-6 (2018).

Section 3-14-7. Liability for reckless service of liquor.

(a) A defendant, as defined in §3-14-5, who recklessly provides liquor to a minor is liable for damages proximately caused by that minor's consumption of the liquor.

(b) A defendant, as defined in §3-14-5, who recklessly serves liquor to a visibly intoxicated individual is liable for damages proximately caused by that individual's consumption of the liquor.

(c)

(1) Service of liquor is reckless if a defendant intentionally serves liquor to an individual when the server knows that the individual being served is a minor or is visibly intoxicated, and the server consciously disregards an obvious and substantial risk that serving liquor to that individual will cause physical harm to the drinker or to others.

(2) For purposes of this chapter, the disregard of the risk, when viewed in light of the nature and purpose of the server's conduct and the circumstances known to him, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

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

(1) Active encouragement of intoxicated individuals to consume substantial amounts of liquor;

(2) Service of liquor to an individual who is under twenty-one (21) years old when the server has actual or constructive knowledge of the individual's age; and

(3) Service of liquor to an individual that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning. R.I. GEN. LAWS §3-14-7 (2018).

Visible intoxication is defined in R.I. Gen. Laws §3-14-3(i) as a "state of intoxication accompanied by a perceptible act or a series of acts presenting an apparent sign or signs of intoxication."

2. COMMON LAW CAUSE OF ACTION

Common law claims and/or defenses based on negligence and recklessness are not limited by this statute. R.I. GEN. LAWS §3-14-9 (2018).

3. STATUTE OF LIMITATIONS

The statute also provides for a three-year statute of limitations. R.I. GEN. LAWS §3-14-11 (2018).

4. PROPER PLAINTIFFS

Pursuant to the statute an intoxicated tortfeasor who is at least 21 years old when served or the estate of such a person may not bring suit under the Dram Shop Act. R.I. GEN. LAWS §3-14-4 (2018).

5. AFFIRMATIVE DEFENSES

The usual tort defenses for negligence and recklessness are permitted under this statute. R.I. GEN. LAWS §3-14-9. The statute also provides that proof of the defendant's responsible serving practices is admissible as evidence that the server was not negligent or reckless. Responsible serving practices include server education training courses, responsible management policies, procedures and actions. R.I. GEN. LAWS §3-14-12(a) (2018). However, proof or disproof that the server was following the responsible serving practices is not by itself proof or disproof of negligence or recklessness. R.I. GEN. LAWS §3-14-12(b) (2018).

A defendant may also invoke the "police officer's rule," a common law doctrine which operates to preclude a police officer from recovering from a tortfeasor whose negligence brings him or her to the site at which the injury is sustained, as an affirmative defense in actions brought under this statute. *Smith v. Tully*, 665 A.2d 1333 (R.I. 1995).

6. JOINT AND SEVERAL LIABILITY

The statute permits joint and several liability. R.I. GEN. LAWS §3-14-10(c) (2018). In cases of negligence, the right of contribution exists, but not the right of indemnification. On the other hand, in cases of recklessness, non-reckless defendants have a right of either indemnification or contribution from a reckless defendant. R.I. GEN. LAWS §§3-14-10(d)–(e) (2018). The plaintiff's settlement or release of the intoxicated tortfeasor will not bar potential claims against any other defendant, but the amount paid to the plaintiff in settlement will be offset against all other subsequent judgments. R.I. GEN. LAWS §§3-14-10(a)–(b) (2018).

7. DAMAGES

In *Beaupre v. Boulevard Billiards Club*, 510 A.2d 415 (R.I. 1986), the court held that damages for pain and suffering are recoverable if wrongful death of the decedent is compensable under the Dram Shop Act. Our research has not revealed case law regarding caps on damages relative to Rhode Island's Dram Shop Laws.

SOUTH CAROLINA

1. STATUTE/COMMON LAW CAUSE OF ACTION

South Carolina does not have a Dram Shop Act, but does impose common law liability on those dispensing or selling alcohol. The courts have construed the criminal statute prohibiting the sale of beer or wine to an intoxicated person as providing a private cause of action for civil liability to a third party injured as a result of the violation of that statute. *Daley v. Ward*, 399 S.E.2d 13 (S.C. Ct. App. 1990). The court has held that the criminal statute was designed to promote public safety and to prevent the person from being even more intoxicated so that he is not at greater risk when he leaves the bar. *Id*. *See also*, *Christiansen v. Campbell*, 328 S.E.2d 351 (S.C. Ct. App. 1985). However, the Supreme Court overruled, in part, *Christiansen* and its progeny in *Tobias v. Sports Club*, 504 S.E.2d 318 (S.C. 1998), with respect to their recognition of a first-party cause of action. The court held that South Carolina does not recognize these sorts of "first party" causes of action against tavern owners predicated on alleged violations of S.C. CODE ANN. §61-5-30 and/or §61-9-410. *Tobias*, 504 S.E.2d at 319.

In neither *Daley* nor *Christiansen* is there a discussion of the burden of proof or defenses. *Christiansen* states the plaintiff must allege he was intoxicated and therefore a member of the class protected by the statute. *Christiansen*, 328 S.E.2d at 354. Other than that, both cases just discuss that liability does exist since the violation of a criminal statute can result in civil liability.

A commercial vendor who knowingly sells alcohol to a person under age 21 may be liable to the unlawful purchaser, and to third parties harmed by the purchaser's consumption of the alcohol. *Marcum v. Bowden*, 643 S.E.2d 85 (S.C. 2007).

2. STATUTE OF LIMITATIONS

The South Carolina statute of limitations is three years. S.C. CODE ANN §15-3-535 (2018).

SOUTH DAKOTA

1. STATUTE

The South Dakota statute regarding liquor liability states as follows:

> **Sale of alcoholic beverage to obviously intoxicated person prohibited—Violation as misdemeanor—Civil liability**
>
> No licensee may sell any alcoholic beverage to any person who is obviously intoxicated at the time. A violation of this section is a Class 1 misdemeanor. However, no licensee is civilly liable to any injured person or the injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the intoxication of any person due to the sale or consumption of any alcoholic beverage in violation of the provisions of this section. S.D. CODIFIED LAWS §35-4-78 (2018).

In 1985, the South Dakota Dram Shop Act abrogated the rule that an entity serving alcoholic beverages may contribute to an injury committed by an intoxicated person. The statute provides:

> The Legislature finds that the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted upon another by an intoxicated person. Therefore, the rule in *Walz v. City of Hudson*, 327 N.W. 2d 120 (S.D. 1982) is hereby abrogated. S.D. CODIFIED LAWS §35-11-1 (2018).

Initially, the South Dakota Supreme Court decided that the legislature did not have the authority to abrogate a cause of action against a dram shop in the manner it did, by way of amendment to the statute. *Baatz v. Arrow Bar*, 426 N.W.2d 298 (S.D. 1988).

In 1997, the court performed an about-face and held the statute as amended was the legislature's policy decision to attach no civil liability against a bar for furnishing alcohol to an individual who later causes injury to a third party. *Wildeboer v. South Dakota Junior Chamber of Commerce, Inc.*, 561 N.W.2d 666 (S.D. 1997).

South Dakota statute regarding social hosts states as follows:

> No social host who furnishes any alcoholic beverage is civilly liable to any injured person or injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the intoxication of any person due to the consumption of the alcoholic beverage. S.D. CODIFIED LAWS §35-11-2 (2018).

TENNESSEE

1. STATUTE

Tenn. Code Ann. §57-10-101 states:

Legislative findings; proximate cause.

The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person. TENN. CODE ANN. §57-10-101 (2018).

Tenn. Code Ann. §57-10-102 states as follows:

Proximate cause; standard of proof.

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

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

(2) Sold the alcoholic beverage or beer to a visibly[30] intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer as sold. TENN. CODE ANN. §57-10-102 (2018).

This statute requires a jury finding beyond a reasonable doubt that the sale of alcoholic beverages was a proximate cause of injury or death.

In *Worley v. Weigel's, Inc.*, 919 S.W.2d 589, 591–93 (Tenn. 1996), the plaintiff's son, a minor, was with a friend who purchased beer without being asked to show age identification. Another friend, also a minor, drank the beer and later drove and was involved in an accident. The seller was not liable because the consumer of the beer was not the purchaser.

In *Temlock v. McGinnis,* the court interpreted and applied Tenn.Code Ann. §§57-10-101 and 57-10-102, and stated that "all relevant circumstances must be considered" when making a determination regarding whether a

[30] Previously, the rule was "obviously intoxicated." Revision made by Acts 2009, ch. 492, §2 and provides that this revision shall apply to any cause of action accruing on or after June 23, 2009.

sale of alcoholic beverages had occurred. *Temlock v. McGinnis*, 2006 Tenn. App. LEXIS 481, at 13 (Tenn. Ct. App. 2006). In *Temlock,* the court held that when a customer enters an establishment that sells alcoholic beverages such as beer, places his own alcohol order, has the alcohol he ordered delivered directly to him by the seller with the seller's expectation of payment in return, and the customer who ordered the alcohol consumes that alcohol on the seller's premises, there is a sale to that customer under Tenn. Code Ann. §57-10-102.

2. COMMON LAW CAUSE OF ACTION

There may be a common law cause of action if the plaintiff can prove the statute was designed to impose a duty or prohibit an act for the benefit of a person or the public and that the injured party was within the class of persons the statute was meant to protect. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 937 (Tenn. 1994).

In 2009, a Tennessee court of appeals affirmed the holding in *Cook* and held that the enactment of the Dram Shop Act did not affect the common law rules applicable to first-party actions against a furnisher of an alcoholic beverage or beer. *Montgomery ex rel. Montgomery v. Kali Orexi, LLC*, 303 S.W.3d 281, 288 (Tenn. Ct. App. 2009)

3. STATUTE OF LIMITATIONS

The statute of limitations for injury to a person is one year in Tennessee. TENN. CODE ANN. §28-3-104 (2018).

4. PROPER PLAINTIFFS

Tennessee Code §§57-10-101 and 102 applies to third parties and does not authorize an action against a seller of an "alcoholic beverage or beer" by or on behalf of the supplied, or "first" party. *Montgomery*, 303 S.W.2d at 283. Since the Dram Shop Act does not address first parties, its enactment leaves the law as to first parties as it existed before the Act's enactment. *Id.*

5. AFFIRMATIVE DEFENSES

Contributory negligence is a defense to the Tennessee Dram Shop Act. *Rollins v. Dixie*, 780 S.W.2d 765, 768–69 (Tenn. Ct. App. 1989).

6. DAMAGES

Our research has not revealed case law regarding caps on damages relative to Tennessee's Dram Shop Laws.

TEXAS

1. STATUTE

The Texas Dram Shop Act, Tex. Alco. Bev. Code Ann §2.02, states as follows:

(a) This chapter does not affect the right of any person to bring a common law cause of action against any individual whose consumption of an alcoholic beverage allegedly resulted in causing the person bringing the suit to suffer personal injury or property damage.

(b) Providing, selling or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under §6.01(b) of this code upon proof that:

(1) at the time the provision occurred it was apparent to the provider that the individual being sold, served or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and

(2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

(c) An adult 21 years of age or older is liable for damages proximately caused by the intoxication of a minor under the age of 18 if:

(1) the adult is not:

(A) the minor's parent, guardian, or spouse; or

(B) an adult in whose custody the minor has been committed by a court; and

(2) the adult knowingly:

(A) served or provided to the minor any alcoholic beverages that contributed to the minor's intoxication; or

(B) allowed the minor to be served or provided any of the alcoholic beverages that contributed to the minor's intoxication on the premises owned or leased by the adult. TEX. ALCO. BEV. CODE ANN. §2.02 (2017).

The Texas Court of Appeals has upheld the constitutionality of the Dram Shop Act. *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. App. 1997).

2. COMMON LAW CAUSE OF ACTION

Texas does not allow for a common law cause of action against the server of alcohol and the Dram Shop Act is the exclusive remedy against a server for providing an alcoholic beverage to a person 18 years of age or older. TEX. ALCO. BEV. CODE ANN. §2.03 (2017); *Smith v. Sewell*, 858 S.W.2d 350, 353 (Tex. 1993). However, the injured third party may bring a common law cause of action against the individual whose consumption of alcoholic beverages allegedly resulted in their injuries. TEX. ALCO. BEV. CODE ANN. §2.02(a) (2017).

In *D. Houston, Inc. v. Love*, 92 S.W.3d 450 (Tex. 2002), the Texas Supreme Court held that the Dram Shop Act applies to employees and contractors of alcohol providers, as well as patrons. Further, it held that the Dram Shop Act preempts common law claims against commercial providers/sellers of alcohol. Notwithstanding these conclusions, the court asserted that the statute did not abrogate a commercial seller's common law duties as an "employer" to its employees. In cases where an employer requires its employee or independent contractor to consume alcohol during employment, sufficient to become intoxicated, the employer owes a duty to take reasonable care to prevent the employee/contractor from driving.

3. STATUTE OF LIMITATIONS

The statute of limitations in Texas for personal injury is two years. TEX. CIV. PRAC. & REM. CODE §16.003 (2017).

4. PROPER PLAINTIFFS

The Supreme Court of Texas has held that a first-party individual does have a cause of action against the provider of alcoholic beverages. *Smith*, *supra*, at 350. However, comparative negligence, as well as all other affirmative defenses, apply. *Id*.

5. AFFIRMATIVE DEFENSES

The Texas legislature enacted the Comparative Responsibility Act and the courts have held that comparative negligence is applicable to the Dram Shop causes of action. *Id*. Concerning third-party actions, where there are no allegations of plaintiff's own negligence, a dram shop is responsible for the proportion of damages they caused or contributed to cause. The court ruled that the dram shop owner could not be severed from the drunk driver in the court proceeding. The jury needs to determine the amount of negligence and proportion of responsibility for both the drunk driver and the dram shop owner. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007).

In addition to comparative negligence, the alcoholic beverage code provides a statutory defense for employers in §106.14 known as the "safe harbor" provision. Section 106.14 specifically states:

> (a) For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing or delivery of alcoholic beverages to a minor or an intoxicated person or the consumption of alcoholic beverages by a minor or an intoxicated person, the actions of an employee shall not be attributable to the employer if:

> (1) the employer requires its employees to attend a commission-approved seller training program;
>
> (2) the employee has actually attended such a training program; and
>
> (3) the employer has not directly or indirectly encouraged the employee to violate such a law. TEX. ALCO. BEV. CODE ANN. §106.14 (2017).

This statutory affirmative defense will bar a plaintiff's recovery against an employer when all three components are alleged and proven. In *Pena v. Neal, Inc.*, 901 S.W.2d 663 (Tex. App. 1995), the Appellate Court reversed summary judgment in favor of the defendant based on factual issues and disputes with regard to the third component. In *Pena*, there was no dispute with regard to the first two components of the statute. However, in support of the summary judgment motion, the defendant attached an affidavit merely restating the conclusion that the employer had not encouraged the employee to violate the Dram Shop Act without offering any supportive facts. The court stated this was insufficient to meet the requirements of the third provision. The court agreed with the defendant's argument "that the legislature has provided a safe harbor for the employer who requires his employees to attend the commission-approved seller training programs," but "the statute's words plainly demonstrate the employer must do more than simply require attendance at the training programs. It cannot then turn its back on all actions of the 'trained' seller-employees, safe in the assumption that even if employee violations of the alcoholic beverage code do occur, recovery against the employer will be barred and the employer cannot be held liable." *Id*. at 667.

6. DAMAGES

In *Steak & Ale of Tex., Inc. v. Borneman*, 62 S.W.3d 898 (Tex. App. 2001), the Texas Court of Appeal held that punitive damages are not recoverable under the Dram Shop Act. Our research has not revealed case law regarding caps on damages relative to Texas Dram Shop Law.

7. EVIDENCE

While the Dram Shop Act imposes liability when it is apparent to the provider that a patron is obviously intoxicated, the Texas Court of Appeals did not believe that the statute required evidence that the provider actually witnessed the intoxicated behavior. *See Perseus, Inc. v. Canody*, 995 S.W.2d 202 (Tex. App. 1999).

UTAH

1. STATUTE

On July 1, 2011, Utah repealed their previous liquor liability statute and enacted the Utah Alcohol Product Liability Act. Our research did not yield any cases decided after the new statute was enacted. The newly enacted statute, Utah Code §32B-15-201 provides the following:

Liability for injuries and damage resulting from distribution of alcoholic products.

(1)(a) Except as provided in §§32B-115-202(2) and (3), a person described in Subsection (1)(b) is liable for:

(i.) any and all injury and damage, except punitive damages to:

(A) a third person; or

(B) the heir, as defined in §78B-3-105, of that third person; or

(ii) the death of a third person.

(b) A person is liable under Subsection (1)(a) if:

(i) the person directly gives, sells, or otherwise provides an alcoholic beverage:

(A) to a person described in Subsection (1)(b)(ii); and

(B) as part of the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products;

(ii) those actions cause the intoxication of:

(A) an individual under the age of 21 years;

(B) an individual who is apparently under the influence of intoxicating alcoholic products or drugs;

(C) an individual whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs; or

(D) an individual who is a known interdicted person; and

(iii) the injury or death described in Subsection (1)(a) results from the intoxication of the individual who is provided the alcoholic beverage.

(2)(a) A person 21 years of age or older who is described in Subsection (2)(b) is liable for:

(i) any and all injury and damage, except punitive damages to:

(A) a third person; or

(B) the heir, as defined in §78B-3-105, of that third person; or

(ii) the death of the third person.

(b) A person is liable under Subsection (2)(a) if:

(i) that person directly gives or otherwise provides an alcoholic beverage to an individual who the person knows or should have known is under the age of 21 years;

(ii) those actions caused the intoxication of the individual provided the alcoholic beverage;

(iii) the injury or death described in Subsection (2)(a) results from the intoxication of the individual who is provided the alcoholic beverage; and

(iv) the person is not liable under Subsection (1), because the person did not directly give or provide the alcoholic beverage as part of the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products.

(3) This section does not apply to a business licensed in accordance with Chapter 7, Off-premise Beer Retailer Act, to sell beer at retail for off-premise consumption. UTAH CODE ANN. §32B-15-201 (2018).

2. COMMON LAW CAUSE OF ACTION

Since the repeal of the previous statute and the enactment of the new liquor liability law, there has not been any new case law on this issue. In *Gilger v. Hernandez*, 997 P.2d 305 (Utah 2000), the Supreme Court of Utah held that common law negligence liability is preempted for acts that the Dram Shop Act reaches. *Gilger* applied the previous statute, which has almost identical language to the new statute, and it has not been overruled, thus it appears that this law would still be applicable to the new statute.

3. STATUTE OF LIMITATIONS

The statute of limitations for bodily injury is two years. UTAH CODE ANN. §32B-15-301(3) (2018).

4. PROPER PLAINTIFFS

"[T]he Dram Shop Act gives a cause of action to injured parties, but not to the intoxicated person." *Richardson v. Matador Steak House, Inc.*, 948 P.2d 347, 349 (Utah 1997). The family members of an intoxicated person killed or injured as a result of his or her intoxication are not "third persons" who may recover damages from a provider of alcohol under the Act. *Id* at 350; *Horton v. Royal Order of the Sun*, 821 P.2d 1167 (Utah 1991). The new Alcohol Products Liability Act still only provides for third-person recovery not first-person recovery.

Also, the newly enacted statute provides for employer liability for the actions of its staff in violation of the chapter. UTAH CODE ANN. §32B-15-202 (2018)

5. AFFIRMATIVE DEFENSES

The Dram Shop Liability Act is subject to the provisions of the comparative fault statute and may apply between dram shop defendants so as to allow them to look at fault of other defendants as a protection or shield from liability. *See Red Flame v. Martinez*, 996 P.2d 540, 543 (Utah 2000) (citing *Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989)). The court has held that "the mere fact that the Dram Shop Liability Act prescribes a form of strict liability rather than traditional negligence does not exclude it from application of the comparative fault statute." *Id*. (quoting *S.H. by & ex rel. Robinson v. Bistryski*, 923 P.2d 1376, 1380 (Utah 1996)).

Section 32B-15-302 provides for an action for contribution by the provider of an alcoholic product.

6. DAMAGES

Section 32B-15-301(2) of the Alcohol Product Liability Act provides the following regarding damages.

> The total amount that may be awarded to any person pursuant to a cause of action for injury and damage under this chapter that arises after January 1, 2010, is limited to $1,000,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to $2,000,000. UTAH CODE ANN. §32B-15-301(2) (2018).

Also, the definitions provided in §32B-15-102 provide the following definitions related to damages.

As used in this chapter:

> (1) "Death of a third person" includes recovery for all damages, special and general, resulting from the death, except punitive damages.
>
> (2)(a) "Injury" includes injury in person, property, or means of support.
>
> (b) "Injury" also includes recovery for intangibles such as:
>
> (i) mental and emotional injuries;
>
> (ii) loss of affection; and
>
> (iii)loss of companionship.

UTAH CODE ANN. §32B-15-102 (2018).

In *Adkins v. Uncle Bart's, Inc.*, 1 P.3d 528 (Utah 2000), the Supreme Court of Utah held:

(1) Punitive damages expressly not allowed under the Act.

(2) An action for wrongful death cannot be brought under the Act.

The newly enacted statute still provides that punitive damages are not permitted under the Act, thus it is likely that *Adkins* is still good law.

VERMONT

1. STATUTE

The Vermont Stat. Ann. Tit. 7, §501, states as follows:

§501. Unlawful sale of intoxicating liquors; civil action for damages

(a) Action for damages. A spouse, child, guardian, employer or other person who is injured in person, property or means of support by an intoxicated person, or in consequence of the intoxication of any person, shall have a right of action in his or her own name, jointly or severally, against any person or persons who have caused in whole or in part such intoxication by selling or furnishing intoxicating liquor:

(1) to a minor as defined in §2 this title;

(2) to a person apparently under the influence of alcohol;

(3) to a person after legal serving hours; or

(4) to a person who it would be reasonable to expect would be under the influence of intoxicating liquor as a result of the amount of alcoholic beverages served by the defendant to that person.

(b) Survival of action; joint action. Upon the death of either party, the action and right of action shall survive to or against the party's executor or administrator. The party injured or his or her legal representatives may bring either a joint action against the person intoxicated, the person or persons who furnished the alcoholic beverages, and an owner who may be liable under Subsection (c) of this section, or a separate action against either or any of them.

(c) Landlord liability.

(1) If the intoxicating liquor was sold or furnished to the intoxicated person in a rented building, the owner may be joined as a defendant in the action, and judgment therein may be rendered against the owner, if the owner of the building or in the case of a corporation, its agent, knew or had reason to know that intoxicating liquor was sold or furnished by the tenant:

(A) to minors as defined in §2 this title;

(B) to persons apparently under the influence of alcohol;

(C) to persons after legal serving hours; or

(D) to persons who it would be reasonable to expect would be under the influence of alcoholic beverages as a result of the amount of alcoholic beverages served to them by the tenant.

(2) It shall be an affirmative defense to an action against an owner that the owner took reasonable steps to prevent the sale of alcoholic beverages under the circumstances described in this subsection or to evict the tenant.

(d) Statute of limitations. An action to recover for damages under this section shall be commenced within two years after the cause of action accrues, and not after.

(e) Evidence.

(1) In an action brought under this section, evidence of responsible actions taken or not taken is admissible, if otherwise relevant.

(2) Responsible actions may include, but are not limited to, instruction of servers as to laws governing the sale of alcoholic beverages, training of servers regarding intervention techniques, admonishment to patrons or guests concerning laws regarding the consumption of alcoholic beverages, and inquiry under the methods provided by law as to the age or degree of intoxication of the persons involved.

(f) Right of contribution. A defendant in an action brought under this section has a right of contribution from any other responsible person or persons, which may be enforced in a separate action brought for that purpose.

(g) Social host.

(1) Except as set forth in subdivision (2) of this subsection, nothing in this section shall create a statutory cause of action against a social host for furnishing alcoholic beverages to any person without compensation or profit. However, this subdivision shall not be construed to limit or otherwise affect the liability of a social host for negligence at common law.

(2) A social host who knowingly furnishes alcoholic beverages to a minor may be held liable under this section if the social host knew, or a reasonable person in the same circumstances would have known, that the person who received the intoxicating liquor was a minor.

(h) Definitions. For the purpose of this section:

(1) "Apparently under the influence of alcohol" means a state of intoxication accompanied by a perceptible act or series of actions which present signs of intoxication.

(2) "Social host" means a person who is not the holder of a license or permit under this title and is not required to hold a license or permit under this title. VT. STAT. ANN. Tit. 7 §501 (2018).

2. COMMON LAW CAUSE OF ACTION

This statute provides the exclusive remedy for those cases falling within its scope, and preempts a cause of action in common law negligence. *Winney v. Ransom & Hastings, Inc.*, 542 A.2d 269 (Vt. 1988); *See also Estate of Kelley v. Moguls, Inc.*, 632 A.2d 360 (Vt. 1993). However, when the facts are not those contemplated by the statute, common law redress is available to an injured plaintiff. *Id.* The Dram Shop Act does not preclude a negligence action against the intoxicated person. *Plante v. Johnson*, 565 A.2d 1346 (Vt. 1989).

3. STATUTE OF LIMITATIONS

Section 501(d) provides a two-year statute of limitations. VT. STAT. ANN. Tit. 7 §501(d) (2018). The Supreme Court of Vermont, in *Rodrigue v. VALCO Enterprises, Inc.*, 726 A.2d 61 (Vt. 1999), held that the discovery rule did not require that plaintiff obtain proof of motorist's being over-served in order for dram shop claim to accrue. Instead, the plaintiff's claim accrued once he learned that the motorist had been drinking at defendant's establishment and had been charged with DWI in connection with accident.

4. PROPER PLAINTIFFS

This statute only gives a cause of action to third persons who are injured by an intoxicated person. *Langle v. Kurkul*, 510 A.2d 1301 (Vt. 1986). There is no remedy or cause of action to the intoxicated person. *Id.*

In *Thompson v. Dewey's South Royalton, Inc.*, 733 A.2d 65 (Vt. 1999), the Supreme Court of Vermont concluded that under the plain language of the statute, *relatives* of a deceased have an independent and direct right of recovery. Furthermore, the court stated that because the statutory language expressly included "guardians" among the list of persons entitled to recover under the Act, the intoxicated decedent's father had standing to bring suit against the alcohol vendor. Finally, the court averred that the decedent's unmarried partner and her daughter fell within potential class of claimants enumerated in the Dram Shop Act because the decedent lived with, and provided support to, both of them.

5. AFFIRMATIVE DEFENSES/STRICT LIABILITY

The Dram Shop Act imposes strict liability for injuries to third parties or dram shops that served persons apparently under the influence of intoxicating liquor or where the person is a minor, the person is served after legal serving hours, or where it would be reasonable to expect that the person served would be under the influence of intoxicating liquor as a result of the amount of liquor. *Swett v. Haig's, Inc.*, 663 A.2d 930 (Vt. 1995).

6. DAMAGES

As this is a strict liability statute, punitive damages may be recovered where the plaintiff persuades the fact finder that the defendant acted, at a minimum, with reckless disregard of another's rights. *Clymer v. Webster*, 596 A.2d 905 (Vt. 1991). The Supreme Court of Vermont held that third person claimants were only entitled to recover under the Dram Shop Act for their loss of means of support, not for loss of companionship and loss of parental training and guidance. *See Thompson,* 733 A.2d 65.

7. CONTRIBUTION

The server does have a right of contribution from the intoxicated tortfeasor. *Swett*, *supra*.

8. EVIDENCE

Intoxication may be evidenced circumstantially by prior or subsequent condition of intoxication within such a time that the condition may be supposed to be continuous. *Ackerman v. Kogut*, 84 A.2d 131 (Vt. 1951).

VIRGINIA

Virginia does not have a Dram Shop statute and the case law has held there is no liability. The courts believe it is appropriate for the legislature to decide this issue.

In *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621 (Va. 1986), the court held that a violation of the statute providing that a person who sells any alcoholic beverages to an intoxicated person shall be guilty of a misdemeanor does not furnish a basis for civil action and damages by the person injured by the intoxicated customer. *Id*. at 625. "Moreover, the violation of a statute does not, by that very fact alone, constitute actionable negligence or make the guilty party negligent per se." *Id* at 624.

In *Robinson v. Matt Mary Moran*, 525 S.E.2d 559 (Va. 2000), the court held that a club and its bartender were not negligent per se when they furnished alcoholic beverage to an underage patron since the statutory violation was not the proximate cause of decedent's death. The court said that regardless of the fact that the vehicle driver was not old enough to legally consume alcohol, that the proximate cause of the injury was the consumption of the alcohol. *Id*. at 563.

In 2009, the Virginia Supreme Court held that the service of alcohol to a person is "too remote" to be a proximate cause of injury to a third party. *Kellermann v. McDonough*, 684 S.E.2d 786, 802 (Va. 2009). Neither the courts nor the legislature have imposed civil liability on vendors of intoxicating beverages; however, the legislature has enacted a statute prohibiting certain sales of alcoholic beverages.

§4.1-304. PERSONS TO WHOM ALCOHOLIC BEVERAGES MAY NOT BE SOLD; PROOF OF LEGAL AGE; PENALTY

A. No person shall, except pursuant to subdivisions 1 through 5 of §4.1-200, sell any alcoholic beverages to any individual when at the time of such sale he knows or has reason to believe that the individual to whom the sale is made is (i) less than 21 years of age, (ii) interdicted, or (iii) intoxicated. Any person convicted of a violation of this subsection is guilty of a Class 1 misdemeanor.

B. Any person who sells, except pursuant to subdivisions 1 through 5 of §4.1-200, any alcoholic beverage to an individual who is less than 21 years of age and at the time of the sale does not require the individual to present bona fide evidence of legal age indicating that the individual is 21 years of age or older is guilty of a violation of this subsection. Bona fide evidence of legal age is limited to any evidence that is or reasonably appears to be an unexpired driver's license issued by any state of the United States or the District of Columbia, military identification card, United States passport or foreign government visa, unexpired special identification card issued by the Department of Motor Vehicles, or any other valid government-issued identification card bearing the individual's photograph, signature, height, weight, and date of birth, or which bears a photograph that reasonably appears to match the appearance of the purchaser. A student identification card shall not constitute bona fide evidence of legal age for purposes of this subsection. Any person convicted of a violation of this subsection is guilty of a Class 3 misdemeanor. Notwithstanding the provisions of §4.1-202, the Board shall not take administrative action against a licensee for the conduct of his employee who violates this subsection.

C. No person shall be convicted of both Subsections A and B for the same sale.

VA. CODE ANN. §4.1-304 (2018).

WASHINGTON

1. STATUTE/COMMON LAW CAUSE OF ACTION

Washington does not have a statutory cause of action for alcohol-related activity as it repealed its Dram Shop Act in 1955. The common law of negligence controls civil liability in such matters and there is a distinction between the commercial vendor and the social host.

a. The Commercial Vendor.

RCW 66.44.200(1) prohibits the sale of alcohol to "any person apparently under the influence of liquor." Commercial vendors that violate this statute will face civil liability to third-party victims for damages caused by the intoxicated individual. *Faust v. Albertson,* 222 P.3d 1208 (Wash. 2009) (citing *Barrett v. Lucky Seven Saloon, Inc.*, 96 P.3d 386 (Wash. 2004)). The Washington Supreme Court recognized in *Barrett* that the "apparently under the influence" standard had replaced the old common law standard of "obviously intoxicated" and that these two standards differ meaningfully. *Barrett*, 96 P.3d at 390.

The commercial vendor owes a duty of reasonable care to a minor vendee. *Young v. Caravan Corp.*, 663 P.2d 834 (Wash. 1983); *see also Schooley v. Pinch's Deli Market, Inc.*, 951 P.2d 749 (Wash. 1998) (holding that a vendor who sells alcohol to a minor who subsequently furnishes it to another minor can be held liable for foreseeable alcohol related injuries from the initial sale). However, a commercial vendor does *not* owe a duty of reasonable care to an adult vendee. *Estate of Kelly v. Falin*, 896 P.2d 1245 (Wash. 1995). Commercial vendors have a duty to avoid providing minors with alcohol and as a result, may be sued for injuries resulting from a minor's intoxication. *Purchase v. Meyer*, 737 P.2d 661 (Wash. 1987). In addition, commercial vendors owe a duty of care to third persons foreseeably injured by a minor vendee and the minor vendee's transferee. *Schooley v. Pinch's Deli Market., Inc.*, 951 P.2d 749 (Wash. 1998).

b. The Social Host

Washington courts have been extremely reluctant to impose liability on social hosts for alcohol related injuries. Recent ruling have refused to find social hosts liable to a third party injured by a minor whom a social host had furnished alcohol, *Reynolds v. Hicks*, 951 P.2d 761 (Wash. 1998), and similarly refused to impose liability when a third party was injured by the minor transferee of a minor to whom a social host had supplied alcohol, *Crowe v. Gaston*, 951 P.2d 1118 (Wash. 1998).

The only instance in Washington where the court has found liability on a social host was in *Hansen v. Friend*, 824 P.2d 483 (Wash. 1992). In *Hansen*, the court found that the adult defendants who had provided the minor decedent with alcohol violated both a statutory duty not to furnish alcohol to a minor as well as a common law duty to exercise reasonable care. However, in *Estate of Templeton v. Daffern*, 990 P.2d 968 (Wash. Ct. App. 2000), the court qualified the holding in *Hansen*, ruling "although the social host owes a common law duty of reasonable care to a minor whom the host has knowingly furnished with alcohol, the social host does not owe a common law duty of reasonable care to a minor whom the host has not furnished with alcohol, even if the host permits the minor to consume, on the host's premises, alcohol that the minor obtained elsewhere." *Estate of Templeton*, 990 P.2d at 975.

2. STATUTE OF LIMITATIONS

The statute of limitation for personal injury actions is three years. WASH. REV. CODE §4.16.080 (2018).

3. PROPER PLAINTIFFS

As noted above, Washington differentiates between commercial vendors (bars, restaurants, etc) and social hosts.

a. Commercial Vendors: Adult vendee

Under Washington common law the only plaintiff that may bring an action against a commercial vendor for serving an adult is a third party injured by that adult where the commercial vendor continued to serve the adult while they were "apparently under the influence." *Faust v. Albertson,* 222 P.3d 1208 (Wash. 2009).

The "obviously intoxicated" adult vendee may not recover for self-inflicted injuries. *Estate of Kelly v. Falin*, 896 P.2d 1245 (Wash. 1995).

b. Commercial Vendors: Minor Vendee

Any minor vendee, minor vendee's minor transferee or third party foreseeably injured by a minor vendee has a cause of action against a commercial vendor. *Estate of Templeton*, 990 P.2d 968.

c. Social Hosts

The only plaintiff that may bring a common law negligence action regarding alcohol related injury against a social host are minor vendees to whom the social host has knowingly furnished alcohol. Third parties injured by minors to whom a social host has furnished alcohol may not recover nor may a third party injured by the minor transferee of a minor to whom a social host had supplied alcohol. *Crowe v. Gaston*, 951 P.2d 1118 (Wash. 1998).

4. AFFIRMATIVE DEFENSES

Contributory negligence:

Affirmative defenses are permitted in the common law liquor liability action as would be the case in any common law tort action. In *Shelby v. Keck*, 541 P.2d 365 (Wash. 1975), the court specifically rejected a strict liability standard that measured obvious intoxication solely in terms of blood alcohol content.

The court has relied on the state criminal statutes for illegal service of alcohol to establish negligence in a common law tort action. For example, in *Hansen v. Friend*, 824 P.2d 483 (Wash. 1992), the court relied on Wash. Rev. Code §66.44.270, the criminal statute imposing penalties for providing minors with alcohol. This statute was enacted to protect minors from the dangers of alcohol and therefore, provides a duty of care toward minors. The court held that the parents of a minor child who drowned after becoming intoxicated could use this statute as evidence he was negligently served alcohol. *Id*. at 481.

RCW §5.40.060 states as follows:

(1) Except as provided in Subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of facts finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

(2) In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death whose condition was a proximate cause of the injury or death, Subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death. WASH. REV. CODE §5.40.060 (2018).

The doctrine of superseding cause also serves as a significant limitation on a commercial vendor's liability. A defendant's negligence is a proximate cause of the plaintiff's injuries only if such negligence, unbroken by any new independent cause produces the injury complained of. *Schooley v. Pinch's Deli Market, Inc.*, 951 P.2d 749 (Wash. 1998). If the plaintiff acted negligently, that negligence does not constitute a superseding cause if the defendant at the time of his own negligent conduct "should have realized that a third person might so act." *Michaels v. CH2M Hill, Inc.,* 257 P.3d 532, 613 (Wash. 2011) (citing *Restatement 2d Torts, §447(a)*).

5. DAMAGES

Our research has not revealed case law regarding caps on damages relative to Washington's Dram Shop Law.

6. BURDEN OF PROOF

Because Washington only recognizes a common law cause of action for alcohol-related injury claims, any negligence action is controlled by the duty to exercise "reasonable care." This duty is breached when a defendant fails to exercise ordinary care, or in the alternative, when the defendant fails to exercise as much care as a reasonable person would exercise under the same or similar circumstances. Any such failure is negligence. *Mathis v. Ammons*, 928 P.2d 431 (Wash. Ct. App. 1996).

While a negligence action can involve a statutory duty as well as a common law duty (as for instance the violation of the statute prohibiting the sale of alcohol to minors), violation of the statute will only constitute negligence

if the statute specifying the duty meets the four-part test in the Restatement (Second) of Torts §286 (1965). The test requires that the statute's purpose be:

1. To protect a class of persons that includes the person whose interest is invaded;

2. To protect the particular interest invaded;

3. To protect that interest against the type of harm that resulted; and

4. To protect that interest against the particular hazard from which the harm resulted.

RCW §5.40.050 discusses breach of statutorily-imposed duties and the inference of negligence that one may draw. This statute provides:

> A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to: (1) electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se." WASH. REV. CODE §5.40.050 (2018).

RCW 5.40.050 assumes the existence of a statutory duty, as well as a breach of that duty, but it does not change the legal effect of breaching a statutory duty that applies. By stating that breach of a statutory duty is not negligence, but only evidence of negligence, it provides that a plaintiff must always show the existence and breach of the common law duty of reasonable care. The breach of an applicable statutory duty is admissible but not sufficient to prove negligence. *Estate of Templeton*, 990 P.2d 968.

WEST VIRGINIA

1. STATUTE/COMMON LAW CAUSE OF ACTION

West Virginia has not enacted a dram shop statute, but still recognizes and imposes liability through construction and interpretation of the criminal statute making it illegal for a licensee to sell alcohol to an intoxicated person.

The Supreme Court of West Virginia stated the criminal statute, together with the statute that recognizes a cause of action in tort for the violation of a statute, also creates a tort action against a licensee for personal injuries caused by the licensee's selling alcohol to anyone who is physically incapacitated from drinking. *Bailey v. Black*, 394 S.E.2d 58, 59 (W. Va. 1990).

The court interpreted the "physically incapacitated" language as meaning that the seller must be capable of knowing that the buyer is drunk:

> The standard is that the buyer exhibited some physical sign of drunkenness, such that reasonably prudent serving personnel could have known that the buyer was drunk. The most obvious case is physical staggering. Slurring of words, loud or inappropriate speech, bleary eyes, shaky hands and general sloppiness are other signs a server should look for. The sheer amount of alcohol a patron has been served may make it apparent to the server that the drinker has had too much. *Id*. at 60.

The *Bailey* court also held that this cause of action applies to both first parties and third parties. *Id*. Finally, *Bailey* also held that comparative negligence is a defense and proximate cause must be proven. *Id*. at 60–61.

WISCONSIN

1. STATUTE

The Wisconsin Dram Shop Act precludes liability against a server unless the sale was by force or fraud or was to an underage person. Specifically, Wis. Stat. Ann. §125.035, states:

125.035. Civil liability exemption: furnishing alcohol beverages

(1) In this section, 'person' has the meaning given in s. 990.01(26).

(2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.

(3) Subsection (2) does not apply if the person procuring, selling, dispensing or giving away alcohol beverages causes their consumption by force or by representing that the beverages contain no alcohol.

(4) (a) In this subjection, 'provider' means a person, including a licensee or permittee, who procures alcohol beverages for or sells, dispenses or gives away alcohol beverages to an underage person in violation of s. 125.07(1)(a).

(b) Subsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party. In determining whether a provider knew or should have known that the underage person was under the legal drinking age, all relevant circumstances surrounding the procuring, selling, dispensing or giving away of the alcohol beverages may be considered, including any circumstance under subds. one to four. In addition, sub. (2) does apply if all of the following occur:

1. The underage person falsely represents that he or she has attained the legal drinking age;

2. The underage person supports the representation with documentation that he or she has attained the legal drinking age;

3. The alcohol beverages are provided in good faith reliance on the underage person's representation that he or she has attained the legal drinking age; and

4. The appearance of the underage person is such that an ordinary and prudent person would believe that he or she had attained the legal drinking age.

(5) Subsection (2) does not apply to civil forfeiture actions for violation of any provision of this chapter or any local ordinance in conformity with any provision of this chapter. WIS. STAT. §125.035 (2018).

2. COMMON LAW CAUSE OF ACTION

The Wisconsin courts have refused to create a common law duty that is broader than the duty imposed by the Dram Shop Act. *Miller v. Thomack*, 555 N.W.2d 130, 135-36 (Wis. Ct. App. 1996). The statutory immunity from liability arising from the provision of alcoholic beverages as defined by the statute codifies the common-law rule. *Anderson v. American Family Mut. Ins. Co.*, 671 N.W.2d 651 (Wis. 2003).

3. STATUTE OF LIMITATIONS

The statute of limitations for personal injury in Wisconsin is three years, but the statute of limitations for liability created by statute is six years. WIS. STAT. §§893.54, 893.93 (2018).

4. PROPER PLAINTIFFS

Wisconsin statute §125.035 states that liquor vendors are immune from first-party suits by persons who have been injured by his or her own intoxication. The immunity is lost where the person is a minor and the consumption of the alcoholic beverages was a substantial factor in causing injury to a third party, unless the injured minor is also the provider of the alcohol.

In *Meier v. Champ's Sports Bar & Grill. Inc.*, 623 N.W.2d 94 (Wis. 2001), a minor provided alcohol to another minor. Following consumption by both, an accident injured the providing minor, the accident being substantially related to the alcohol. The Wisconsin Supreme Court held that an individual who provides alcohol to an underage person, where it is substantial factor in causing an accident that ultimately injures the providing individual, the providing individual cannot be a "third party" under the Dram Shop Act and cannot take advantage of the exception to immunity for providers of alcohol in order to pursue an action against other providers.

In *Eckes v. Keith*, 420 N.W.2d 417 (Wis. 1988) an adult plaintiff was injured when she fell off a bar stool when trying to start a fight. The court held the statute controlled and dismissed the plaintiff's complaint. "The public policy reason for non-liability, expressed in *Garcia*, overturned in *Sorensen*, and reinstated in §125.035(2), applies equally to injuries to alcohol consumers and to those injured by alcohol consumers." *Id*. at 215.

In *Doering v. WEA Insurance Group*, 532 N.W.2d 432 (Wis. 1995), the plaintiffs were injured in a motor vehicle accident by an intoxicated adult whom the bar owner knew was drunk, knew had been under the influence of marijuana and who had no driver's license. The lower court denied the defendant's motion for summary judgment on constitutional grounds. The Wisconsin Supreme Court, however, reversed the lower court and held that the statute had a rational basis to the legislative goals. The Supreme Court further stated that the results may be harsh, but the public policy decision is for the legislature to make and not the courts.

5. AFFIRMATIVE DEFENSES

A claim was stated where the complaint against the server alleged that the server was negligent in selling liquor to a minor, which combined with the minor's negligent driving, caused death and injuries. *Sorensen v. Jarvis*, 350 N.W.2d 108 (Wis. 1984). In this case, the server has all the defenses that would be available to him under the criminal statutes and the defense of comparative negligence. *Id*.

6. DAMAGES

Our research has not revealed case law regarding caps on damages relative to Wisconsin's Dram Shop Law.

7. BURDEN OF PROOF

The plaintiff must prove consumption of the alcohol by the minor driver, proof he was intoxicated or that his driving ability was impaired by the consumption of alcohol, and that such impairment caused the accident. *Id*. However, *Sorensen* was decided prior to the enactment of §125.035 in 1987 and it is unclear if these defenses still apply.

8. MINORS

In respect of minors, in *Kwiatkowski v. Capital Indemnity Corp.*, 461 N.W.2d 150 (Wis. Ct. App. 1990) the court held an intoxicated minor did not have a first-party right to bring a claim under the statute.

Finally, in *Sprangers v. Greatway Ins. Co.*, 514 N.W.2d 1 (Wis. 1994), the court upheld a liquor liability exclusion in the insurance policy.

9. INTOXICATED PERSONS

In *Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158 (Wis. 2002), the Wisconsin Supreme Court held that a person who agreed to be a designated driver, freeing a bartender to serve a possibly intoxicated person more alcohol, "procured" the alcohol under the Dram Shop Act, but was immune from liability when he later did not provide a ride and the intoxicated person drove and caused a fatal collision. The important part of this decision, for the purposes of analyzing dram shop law, is the court's assertion that the bartender was free to serve the intoxicated person when the designated driver represented to the bartender that the driver would see the intoxicated person home. The court found that "procure" was defined as "to bring about," encompassing a wider variety of activities then merely giving or providing.

WYOMING

1. STATUTE

The Wyoming Dram Shop Act, Wyo. Stat. §12-8-301, states:

(a) No person who has legally provided alcoholic liquor or malt beverage to any other person is liable for damages caused by the intoxication of the other person.

(b) This section does not affect the liability of the intoxicated person for damages.

(c) This section does not affect the liability of the licensee or person if the alcoholic liquor or malt beverage was sold or provided in violation of title 12 of the Wyoming statutes.

(d) For purposes of this section "licensee" is as defined in W.S. 12-1-101(a)(viii) and includes the licensee's employee or employees. WYO. STAT. ANN. §12-8-301 (2018).

2. COMMON LAW CAUSE OF ACTION

It is unclear whether the statute has abrogated a cause of action based upon common law negligence *where there has **not** been a violation of title 12*, which encompasses all of the state laws concerning sale to minors, habitual drunkards, licensing provisions, taxation, and permissible hours of sale. Where there has been a violation, such as serving a minor, it appears that a common law cause of action still exists. In *Daniels v. Carpenter*, 62 P.3d 555 (Wyo. 2003), the Supreme Court of Wyoming stated that:

> [p]eople who legally provide alcoholic liquor or malt beverages to another person are immunized under (the statute) from damages that may be caused by the intoxication of that other person. Under (the statute), it is illegal to provide alcoholic liquor or malt beverages to minors, except in certain limited circumstances. The statute makes it clear that the immunity provision does not affect liability where the alcoholic liquor or malt beverage is provided in violation of (the statute) … where alcohol is illegally provided to a minor, the person providing the alcohol may become liable for injuries resulting from that minor's resulting intoxication. Consequently, there is no statutory deterrent to a finding by this Court that a common law cause of action for social host liability exists under the appropriate circumstances.

In 2011, the Wyoming Supreme Court held that the word "legally" in §12–8–301(a) was intended by the legislature to mean only the law related to selling or providing alcohol set forth in Title 12. *Baessler v. Freier*, 258 P.3d 720,724 (Wyo. 2011).

3. STATUTE OF LIMITATIONS

Since it appears that the Wyoming cause of action is premised on common law negligence and not statute, pursuant to §1-3-105, the injured party has four years to bring a cause of action. WYO. STAT. ANN. §1-3-105 (2018).

4. PROPER PLAINTIFFS

Under the Wyoming Dram Shop Act there will only be liability to both first and third parties for sale of alcohol to a minor.

5. DAMAGES

Our research has not revealed any case law pertaining to caps on damages relative to Wyoming's Dram Shop Act.

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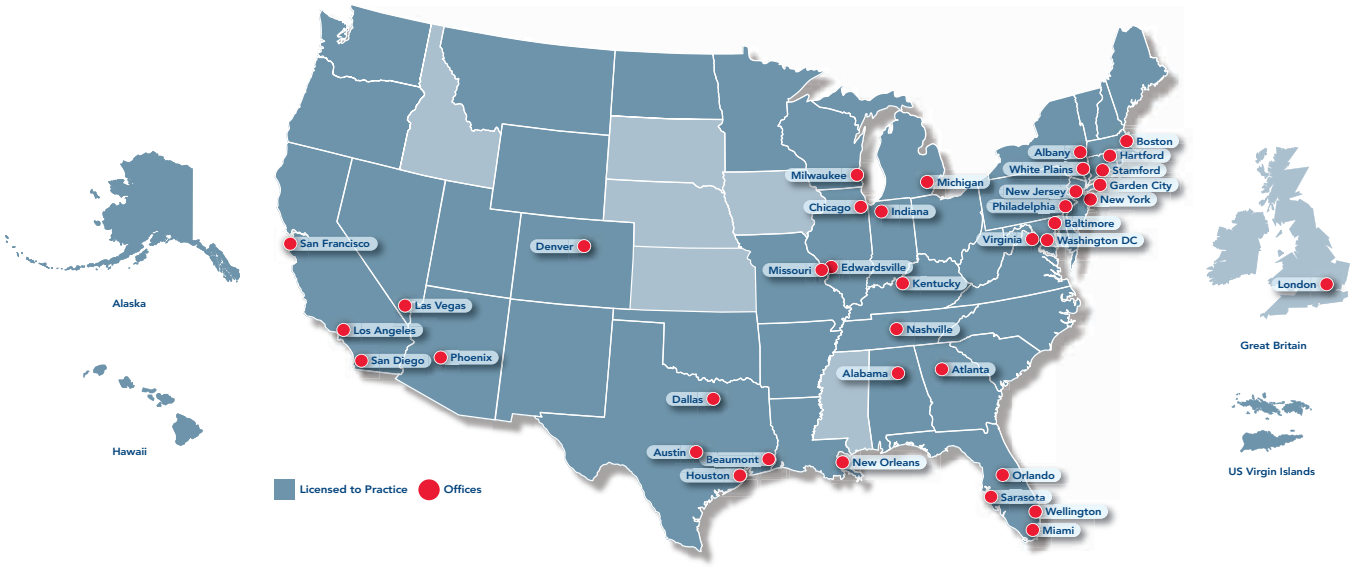

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