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LIQUOR LIABILITY AND BLAME-SHIFTING DEFENSES: DO THEY MIX?

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INTRODUCTION

Recent years have witnessed an increasing rejection of the old common law rule that one injured by an intoxicated person has no redress against an overly generous bartender or social host. The proffered reason for the old rule—that it is the drinking, not the serving, that is the proximate cause of the injuries—has been worn thin by changing concepts of causation in tort cases[1] and an increasing awareness of the startling numbers of alcohol-related deaths on the highways each year.[2]

State by state, courts are rejecting the outdated immunity for servers of alcohol, recognizing as beyond dispute that it is reasonably foreseeable that an overserved patron or guest, particularly one who drives a car, is likely to be injured or to cause injury to others. Some courts struggle to make limiting distinctions: vendors, but not social hosts, should be subject to liability;[3] liability should be allowed for service to minors, but not intoxicated adults;[4] "innocent" third parties can recover for injuries, but not those who have been injured as a

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1. *See, e.g.*, Garcia v. Hargrove, 46 Wis. 2d 724, 731, 176 N.W.2d 566, 569 (1970). The Wisconsin Supreme Court discarded the much criticized "proximate cause" rationale for the rule of nonliability in liquor cases but determined nevertheless, that as a matter of public policy, liability should not be permitted. *Id. Garcia* and the nonliability cases on which it was based were overruled in Sorensen v. Jarvis, 119 Wis. 2d 627, 648, 350 N.W.2d 108, 119 (1984) and Koback v. Crook, 123 Wis. 2d 259, 264, 366 N.W.2d 857, 859 (1985). *See also* Vesely v. Sager, 95 Cal. Rptr. 623, 630, 486 P.2d 151, 158 (1971).

2. *See* Demoulin & Whitcomb, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED. INS. COUNS. Q. 349, 349 (1977).

3. *See* Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (1975).

4. *See, e.g.*, Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983) (social host/adult guest — liability not permitted); Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973).

result of their own intoxication or who have actively contributed to the offender's intoxicated state.[5]

Other courts have liberally applied negligence principles to render social hosts[6] and even other bar partrons[7] liable for overserving intoxicated adults—a result that sends chills down the spine of the liquor and insurance industries and that, in some instances, has triggered immediate legislative responses to abolish or limit liability.[8] The imposition of liquor liability may be based upon state dram shop acts that expressly create a cause of action,[9] liquor control statutes that have been adopted by courts to establish negligence per se[10] or common-law negligence, without regard to the existence of a statute.[11]

Although there is a decided trend toward imposing civil liability on sellers of alcohol, there is some resistance to applying the same rule to social hosts. This is most evident in those jurisdictions where seller liability is based on the violation of

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See discussion in Wiener v. Gamma Phi Chapter, 258 Or. 632, __, 485 P.2d 18, 21 nn.3-4; Coulter v. Superior Court, 145 Cal. Rptr. 534, 577 P.2d 669 (1978).

5. *See, e.g.*, Robinson v. Lamott, 289 N.W.2d 60 (Minn. 1979); Harris v. Hurlburt, 83 Misc. 2d 626, 373 N.Y.S.2d 480 (1975); *see also* cases cited in Annot., 26 A.L.R.3D 1112 (1969).

6. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1985).

7. Ashlock v. Norris, __ Ind. App. __, 475 N.E.2d 1167 (1985).

8. *See* CAL. BUS. & PROF. CODE § 25602(b), (c) (West 1984) and CAL. CIV. CODE § 1714(b), (c) (abrogating the judicial creation of liability and reluctantly upheld in Cory v. Shierloh, 174 Cal. Rptr. 500, 629 P.2d 8 (1981), against a constitutional challenge). *See also* 1985 Wis. Laws 47.

9. See 12 AM. JUR. 2D *Trials* § 2 (1966) for a listing of those jurisdictions with dram shop acts. Such acts are often narrowly construed to apply only to vendors of alcohol and not social hosts. *See* Comment, *Imposition of Liability on Social Hosts in Drunk Driving Cases: A Judicial Response Mandated by Principles of Common Law and Common Sense*, 69 MARQ. L. REV. __ (1986).

10. All states have some kind of liquor control statute which prohibits the sale, furnishing or "giving away" of alcoholic beverages to minors or intoxicated persons. In Wisconsin, the current statute is WIS. STAT. § 125.07(1), (2) (1983-84). Wisconsin has also recently enacted legislation to limit liability to those circumstances where a person is forced to consume alcohol or a third person is injured as a result of the conduct of an underaged person served alcohol by one who knew or should have known that the underaged person was under the legal drinking age. 1985 Wis. Laws 47.

11. *See Gwinnell*, 96 N.J. 538, 476 A.2d. 1219; *Gamma Phi Chapter*, 258 Or. 632, 485 P.2d. 18 (court expressly declined to interpret the state's liquor control statute as imposing a duty with respect to third persons but concluded that common law tort principles apply to the service of alcohol).

liquor control statutes.[12] Some courts reason that while such statutes prohibit "giving away" alcohol to intoxicated persons or minors, the legislative intent was nevertheless to regulate licensed businesses and not to set a standard of care for social hosts.[13] Other courts have refused to scrutinize liquor control statutes with such a narrow focus. These courts have concluded that the legislative purpose is to protect the public and, specifically, intoxicated minors or persons *themselves* from the harm threatened by the service of alcohol to such persons regardless of whether the alcohol is served or sold by a bartender, a liquor store or a social host.[14]

The resolution of the vendor/social host issue only begins the liquor liability analysis. Once liability is recognized and the potentially liable parties defined, the courts must still decide whether all of the defenses generally available in negligence actions apply in the liquor liability context. Is contributory negligence a defense to an action brought by an intoxicated minor or adult? Should the negligence of the intoxicated minor or adult even be considered in comparative fault jurisdictions? Should recovery be allowed only for injuries to third parties and not to the injured inebriate himself? Does it make a difference if the injured inebriate is a minor? Should a drinking companion, as opposed to an "innocent" third party, be barred from recovery?

This article will address these blame-shifting questions in light of the purposes for imposing liability on providers of alcohol. The conflicting approaches of some of the courts which have faced these issues will be discussed and cases in analogous areas will be reviewed. Finally, a proposal will be made for an alternative way to accommodate the competing policies in liquor liability cases.

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12. *See generally Comment, supra* note 9, at nn.24-46. *But see Koback*, 123 Wis. 2d 259, 366 N.W.2d 857 (Wisconsin Supreme Court determined that the liquor control statute by its terms and pursuant to its underlying policy applied to social hosts as well as vendors).

13. *See generally* Comment, *supra* note 9.

14. *See, e.g.*, Congini v. Portersville Valve Co., 504 Pa. 157, 47 A.2d 515 (1983); *Koback*, 123 Wis. 2d at 276, 366 N.W.2d at 864.

I. CONTRIBUTORY NEGLIGENCE

In addressing the contributory negligence defense, the cases run the gamut from finding the defense a complete bar to recovery to finding it to be no defense at all. On which end of the spectrum a case falls depends on where the court focuses its attention. Some courts focus on the plaintiff's culpability and take a hardened view, finding, in effect, that those who become intoxicated deserve whatever injuries they get as a result, notwithstanding the fact that the provider may have acted illegally in providing the alcohol. When a court focuses on the underlying purposes of liquor liability, it is far more likely to determine that the injured plaintiff falls within the class sought to be protected from inability to exercise self-protective care and to conclude that it would be anomalous to consider this negligence.[15]

A. Contributory Negligence as a Complete Defense

Some courts still adhere to vestiges of the old rationale that it is the drinking, not the provision of alcohol, that is the proximate cause of the injuries and thus conclude that intoxicated persons cannot recover for their own injuries. In *Folda v. City of Bozeman*[16] the Montana Supreme Court determined that a seventeen year old girl's voluntary intoxication constituted contributory negligence barring the wrongful death claim brought against the bar that had illegally served her.

> Voluntary intoxication will not excuse the degree of care that a person must take for his or her own safety. We think the evidence supports a conclusion that Mary Folda [plaintiff's deceased daughter] voluntarily became intoxicated, that she disregarded her duty to use due care for her own safety, and that this was a proximate cause of her death.[17]

The deceased patron's contributory negligence in becoming intoxicated was also held to preclude recovery from the bar owners in *Swartzenberger v. Billings Labor Temple*.[18] In that case the decedent drank for several hours at the defendant's bar and became visibly intoxicated. While leaving the

15. *See* RESTATEMENT (SECOND) OF TORTS § 483 comments c-e (1965).
16. 177 Mont. 537, 582 P.2d 767 (1978).
17. *Id.* at __, 582 P.2d at 772 (citation omitted).
18. 179 Mont. 145, 586 P.2d 712 (1978).

bar, he fell down the stairs and sustained injuries which resulted in his death. Although recognizing that the service of alcohol to an intoxicated person in violation of state liquor control statutes may well have constituted negligence per se, the court determined that the plaintiff's actions also violated state law prohibiting public intoxication and constituted contributory negligence that "intervened and became the proximate cause of his death," barring the claim against the seller.[19] Although this reasoning would bar even a third party's claim against the alcohol provider, the court in *Swartzenberger* distinguished a previous federal case[20] on the ground that the plaintiff in that case was an innocent third party.[21]

Other courts refuse to rely on the proximate cause rationale for rejecting an intoxicated person's claim. Rather, the courts directly assert that those who fail to exercise moderation and temperance can find no solace in the courts for injuries they've inflicted upon themselves. Accordingly, New York recognizes a dram shop cause of action for an injured third party, but not for the intoxicated person. In *Allen v. Westchester*,[22] the court denied the claim of a widow who sought damages for the conscious pain and suffering of her deceased husband who became intoxicated, fell and sustained fatal injuries at a bar owned by the defendant. The court's quotation from the reasoning of a California case[23] aptly illustrates the disdain that underlies the court's distinction between "innocent" third parties and the imbiber in dram shop cases:

> The inestimable gift of reason and self-control cries out for preservation in every person, and the duty of its preservation devolves upon each member of the public. When the restraint of reason and the ability to care for one's self are per-

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19. *Id.* at __, 586 P.2d at 715.

20. Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969).

21. *Swartzenberger*, 179 Mont. at __, 586 P.2d at 715. The significance of this distinction is questionable. Later, in Runge v. Watts, 180 Mont. 91, 589 P.2d. 145 (1979), the Montana Supreme Court held that the sanctions for violating state liquor control laws did not create a cause of action in favor of third persons injured when a minor was served intoxicants. Although this case arguably applies only to social hosts, its dicta indicates that the court is wedded to the notion that the "proximate cause" is the act of the imbiber, not the act of the seller. *Id.* at __, 586 P.2d at 147.

22. 109 A.D.2d 475, 492 N.Y.S.2d 772 (1985).

23. Kindt v. Kauffman, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

> verted by a conscious, self-indulgent act of voluntary intoxication which temporarily casts off those powers, no societal or personal wrong, nor violation of public or social policy is accomplished or violated if the actor is alone held answerable for his injury . . . .
>
> Governmental paternalism protecting people from their own conscious folly fosters individual irresponsibility and is normally to be discouraged. To go yet another step and allow monetary recovery to one who knowingly becomes intoxicated and thereby injures himself is in our view morally indefensible.[24]

The same result was more circuitously reached by the Ohio Court of Appeals in *Tome v. Berea Pewter Mug, Inc.*[25] There, two minors became intoxicated at the defendant's bar and were subsequently injured when one of them drove their car into a pole. The court held that an intoxicated person would be held to the same standard of care as a sober person and is subject to the contributory negligence defense in a negligence action against a tavernkeeper. At the time of the accident, Ohio's comparative negligence statute, had not yet been enacted, and contributory negligence would have been a complete bar. In an apparent effort to avoid the harshness of this rule, the plaintiffs alleged that the tavernkeeper's conduct in serving the minors went beyond mere negligence and constituted "willful and wanton misconduct," to which contributory negligence is not a defense under Ohio law. The court of appeals determined, however, that such willful and wanton behavior does not vitiate the assumption of risk defense and that the plaintiffs "assumed the risk of injury when they drove away in an intoxicated state."[26] The assumption of risk defense is available "even though [the] person's capacity to appreciate the risk is diminished because of voluntary intoxication."[27]

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24. *Id.* at 855-56, 129 Cal. Rptr. at 610 (citations omitted).

25. 4 Ohio App. 3d 98, 446 N.E.2d 848 (1982).

26. *Id.* at __, 446 N.E.2d at 855 (citing Kellerman v. J.S. Durig Co., 176 Ohio St. 320, 199 N.E.2d 562 (1964)).

27. *Tome*, 4 Ohio App. 3d at __, 446 N.E.2d at 853.

B. Contributory Negligence as No Defense

In the seminal liquor liability case, *Rappaport v. Nichols*,[28] the New Jersey Supreme Court noted that minors have "very special susceptibilities" which are exacerbated when they "partake of alcoholic beverages."[29] Similarly, in *Christiansen v. Campbell*[30] the South Carolina Court of Appeals remarked that the state's liquor control statutes prohibit the sale of liquor to intoxicated persons "to protect intoxicated persons from their own incompetence and helplessness. The statute represents the legislature's judgment that an intoxicated person is a menace to himself."[31]

Neither the *Rappaport* nor the *Christiansen* case discuss the applicability of the contributory negligence defense in liquor liability cases. However, it is but a short step from their reasoning in support of liability to a determination that an injured inebriate's contributory negligence should not be considered a defense in an action against the providers of alcohol. The foundation for such a defense-barring rule can be found in cases in other areas where there are safety statutes designed to protect individuals against their inability to exercise self-protective care, including members of such particular groups as construction workers, child labor factory workers and consumers using dangerous products.[32]

1. Safety Statute Violation Cases

Some safety statutes such as the Safety Appliance Act[33] and the Boiler Inspection Act[34] specifically state that the contributory negligence defense is not available.[35] In these cases, the legislative intent is clear and will be honored. More often than not, however, a safety statute or other protective legisla-

28. 31 N.J. 188, 156 A.2d 1 (1959).
29. *Id.* at __, 156 A.2d at 8.
30. 328 S.E.2d 351 (S.C. Ct. App. 1985).
31. *Id.* at 354 (citations omitted).
32. D.L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983); *see also* Woods, *The Negligence Case: Comparative Fault*, in COMPARATIVE NEGLIGENCE AND STATUTORY VIOLATIONS § 10:3 (1978) [hereinafter cited as Woods, *Comparative Fault*]; Prosser, *Contributory Negligence as Defense to Violation of a Statute*, 32 MINN. L. REV. 105 (1948).
33. 45 U.S.C. §§ 1-16 (1982).
34. *Id.* at §§ 22-23.
35. *Id.* at § 53.

tion will be silent on contributory negligence, and the courts must determine whether contributory negligence should bar or diminish the plaintiff's right to recovery. Certain types of statutes, such as child labor statutes and laws banning the sale of firearms to minors, are enacted to protect children against their own negligent propensities.[36] When statutes of this type are involved, the contributory negligence defense has been rejected, even in comparative negligence jurisdictions where such a defense would not necessarily prevent, but only diminish, recovery.[37] The prohibition of the defense has consistently been applied in child labor cases:[38]

> The very purpose of the statute is to protect the child under 14 years of age from the consequences of imprudence, negligence or lack of care and caution, which on account of the immaturity of youth and the lack of experience, discretion and judgment is characteristic of children within the prohibited age; and to hold that a child employed in violation of this statute is chargeable with contributory negligence would defeat the very purpose of the statute.[39]

The same reasoning has been applied to the sale of a gun to a minor in violation of state statute when the minor is subsequently injured by an accidental discharge.[40] Similarly, the Minnesota Supreme Court refused to recognize a comparative negligence defense where the defendant sold glue to a thirteen year old child in violation of a statute designed to prevent glue-sniffing tragedies. The child's minor companion drowned as a result of glue-sniffing intoxication.[41]

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36. *See* Prosser, *supra* note 32; RESTATEMENT (SECOND) OF TORTS § 483 comment (1977).

37. Woods, *Comparative Fault*, *supra* note 32, at § 10:3.

38. *See, e.g.*, Terry Dairy Co. v. Nalley, 147 Ark. 448, 225 S.W. 887 (1920); Hartwell Handle Co. v. Jack, 149 Miss. 465, 115 So. 586 (1928); D. L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983).

39. *Hartwell Handle Co.*, 149 Miss. at ___, 115 So. at 588.

40. *See, e.g.*, Tamiami Gun Shop v. Klein, 109 So. 2d 189 (Fla. Dist. Ct. App.), *cert. dismissed*, 116 So. 2d 421 (Fla. 1959). *But see* Arrendondo v. Duckwall Stores, Inc., 227 Kan. 842, ___, 610 P.2d 1107, 1113 (1980) (Kansas Supreme Court held state's comparative negligence act applied where the defendant was alleged to have violated the statute prohibiting sales of explosives to minors).

41. Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973). *See also* Van Gaasbeck v. Webatuck Cent. School Dist. No. 1, 21 N.Y.2d 239, 234 N.E.2d 243, 287 N.Y.S.2d 77 (1967) (contributory negligence of a child is not to be considered when safety procedures on school buses are not followed).

It is not only children who are given special protection from the contributory negligence defense. Adults who are deemed particularly vulnerable, usually by a dangerous working environment, have also been given special treatment in some cases. Very recently, in a case involving an Illinois safety statute designed to protect construction workers, the Illinois Supreme Court reiterated its absolute fidelity to the stringent requirements of the act by refusing to allow the comparative fault affirmative defense.[42] In *Prewein v. Caterpillar Tractor Co.*,[43] an ironworker brought an action for injuries sustained when the hydraulic lift he was using for support toppled. The plaintiff alleged numerous violations of the Illinois Structural Work Act.[44] In response the defendants urged that any damage award must be reduced, pursuant to the state's comparative negligence law, by the plaintiff's contributory fault. The Illinois Supreme Court held that the purpose of the Act was to afford complete protection for construction workers and should not be weakened by allowing the comparative negligence defense.[45]In contrast to the above approach, other courts, in cases involving adults and in the absence of a clearly implied legislative intent to preclude the contributory negligence defense, have generally permitted the defense notwithstanding the violation of a safety statute.[46]

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42. *See* Prewein v. Caterpillar Tractor Co., 108 Ill. 2d 141, 483 N.E.2d 224 (1985).

43. *Id.*

44. ILL. REV. STAT. ch. 48, §§ 60-69 (1981).

45. *Prewein*, 108 Ill. 2d at __, 483 N.E.2d at 225 (1985). *See also* Simmons v. Union Electric Co., 104 Ill. 2d 444, 473 N.E.2d 946 (1984); Evans v. Nab Const. Corp., 80 A.D.2d 841, 436 N.Y.S.2d 774 (1981) (comparative fault not a partial defense to action againt contractor for injuries caused by defective scaffolding since New York Labor Law imposes absolute liability for injuries to workmen resulting from defective scaffolding).

46. *See* Long v. Forest - Fehlhaber, 55 N.Y.2d 154, 433 N.E.2d 115, 448 N.Y.S.2d 132 (1982); Duva v. Flushing Hosp. & Medical Center, 108 Misc. 2d 900, 439 N.Y.S.2d 268 (1981); Brons v. Bischoff, 89 Wis. 2d 80, 277 N.W.2d 854 (1979) (violation of safe place statute and its presumption of causation does not establish as a matter of law that defendant's negligence was greater than the plaintiffs' negligence); Lovesee v. Allied Dev. Corp., 45 Wis. 2d 840, 173 N.W.2d 196 (1970) (comparative negligence applied to safe place statute violation cases); *see also* Hardy v. Monsanto Enviro-Chem. Sys. Inc., 414 Mich. 29, __, 323 N.W.2d 270, 273 (1982) and Brown v. Unit Prod. Corp., 123 Mich. App. 157, 333 N.W.2d 204 (1983) (comparative negligence is available in an action involving inherently dangerous activities in the work place). *But see* Bennett Drug Stores, Inc. v. Mosely, 67 Ga. App. 347, 20 S.E.2d 208 (1942) (Georgia Court of Appeals refused to permit consideration of contributory negligence when the defendant drug store violated a statute in failing to warn intoxicated purchaser of carbolic acid of

2. Liquor Liability Cases

In the liquor liability area, the availability of the contributory negligence defense is a crucial question, particularly in jurisdictions where contributory negligence is a complete bar to recovery. Permitting the defense is effectively the same as holding that there is no cause of action on behalf of persons injured as a result of their own intoxication. It would be rare for a jury to find that the plaintiff, injured as a result of self-intoxication, was not contributorily negligent. However, in some courts' view, it is precisely because of the intoxicated person's or the minor's diminished capacity that serving alcohol to such a person violates the statute and common sense. Such persons are presumptively incapable of appreciating the consequences of their actions and acting in accordance with reasoned judgment.[47] The few courts that have squarely framed the issue in these terms have often concluded that contributory negligence is not a defense.

New Jersey and Pennsylvania took the early lead in this area.[48] In *Soronen v. Olde Milford Inn, Inc.*,[49] a case decided before comparative negligence was adopted in New Jersey, the New Jersey Superior Court rejected the contributory negligence defense, stating:

> The accountability [of the vendor of alcohol] may not be diluted by the fault of the patron for that would tend to nullify

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its poisonous character; purchaser held to be within the class designed to be protected by the statute).

47. This is the reasoning of the disability or diminished capacity cases that have rejected the contributory negligence defense. Most of these cases involve very small children. *See* Toetschinger v. Ihnot, 312 Minn. 59, 250 N.W.2d 204 (1977); Yun Jeong Koo v. St. Bernard, 89 Misc. 2d 775, 392 N.Y.S.2d 815 (1977); Woods, *Comparative Negligence*, *supra* note 32, at § 12. Other courts have dealt with the issue by giving a special child standard of care instruction, which calls upon the jury of adults to imagine what a "reasonably prudent" child of the same age, experience, and intelligence would have done.

Under the Wisconsin view, the child's age, experience and capacity is considered first in determining whether the child was negligent and again in comparing the negligence of the parties. Metcalf v. Consolidated Badger Coop. 28 Wis. 2d 552, 137 N.W.2d 457 (1965).

48. Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966). *See also* Galvin v. Jennings, 289 F.2d 15, 18-19 (3d Cir. 1961); Buckley v. Pirolo, 190 N.J. Super. 491, 464 A.2d 1136 (1983) (contributory negligence could be a defense *unless* the plaintiff was so intoxicated as to be unable to exercise self-protective care); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).

49. 46 N.J. 582, 218 A.2d 630.

> the very aid being afforded. Since the patron has become a danger to himself and is in no position to exercise self-protective care, it is right and proper that the law view the responsibility as that of the tavern keeper alone.[50]

The *Soronen* court rejected out of hand the argument that the imposition of responsibility for serving an intoxicated person imposes an undue burden, "for the tavern keeper may readily protect himself by the exercise of reasonable care."[51]

Subsequently, in *Rhyner v. Madden*,[52] a case decided after New Jersey adopted comparative negligence, the defendants argued that the *Soronen* rule should no longer apply because contributory negligence would not necessarily bar, but only diminish, recovery. The court rejected this argument:

> That argument ignores the fact that the conduct of the negligent tavern, in violating the regulations by serving visibly intoxicated patrons, is creating or contributing to the very condition which the tavern urges as the basis of a claim of plaintiff's negligence: that of being intoxicated. It is illogical to hold that a defendant tavern has a duty not to serve an intoxicated patron, but it may escape liability by breaching that duty in serving the patron and then alleging that the plaintiff was negligent in rendering himself intoxicated.[53]

In *Schelin v. Goldberg*,[54] the Pennsylvania Superior Court addressed the effect of the repeal of the dram shop civil liability act which the state court had construed to prohibit the contributory negligence defense.[55] Although a liquor law still existed which prohibited the sale of liquor to minors and the visibly intoxicated, the vendor urged that the judicial rule barring the contributory negligence defense should have expired with the repealed legislation explicitly providing for civil dram shop liability.[56] The court determined that, notwithstanding the repeal of the civil liability act, the violation of the surviving liquor control statute was negligence. The court concluded that the pre-existing rule prohibiting the contributory negligence defense was linked not to the civil liability statute

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50. *Id.* at __, 218 A.2d at 636.
51. *Id.* at __, 218 A.2d at 637.
52. 188 N.J. Super. 544, 457 A.2d 1243 (1982).
53. *Id.* at __, 457 A.2d at 1246 (citation omitted).
54. 188 Pa. Super. 341, 146 A.2d 648 (1958).
55. *Id.* at 346-48, 146 A.2d 650-52.
56. *Id.* at 344-46, 146 A.2d at 650-51.

but to the liquor control statute which made it unlawful to sell alcohol to intoxicated persons or minors. Therefore, the rule prohibiting application of the contributory negligence defense survived the repeal of the civil liability act.[57]

Some courts have taken a different route to the same end and avoided the contributory negligence defense by determining that the provider's conduct is inherently more culpable than the drinker's conduct.[58] This route is an application of the general rule that contributory negligence is not a defense if the defendant's conduct is willful or wanton. This willful or wanton exception evolved as a way to avoid the harshness of the rule that contributory negligence is a complete bar to recovery.[59]

With the advent of comparative negligence, some jurisdictions abolished the willful or wanton exception,[60] although it remained intact in others.[61] In the few liquor liability cases that activated the somewhat dormant willful, wanton exception, the facts were particularly tragic. In *Ewing v. Cloverleaf Bowl*,[62] a bar owner was sued for the wrongful death by acute alcohol poisoning of a young patron who had just turned twenty-one years old. The bartender served the patron ten straight shots of 151-proof rum, a vodka collins and two beer chasers in less than an hour and a half. The patron died the next day, leaving two small children. The trial court granted the defendant's non-suit motion finding as a matter of law that the drinking patron's conduct constituted contributory negli-

57. *Id. See also* Majors v. Brodhead, 416 Pa. 265, 205 A.2d 873 (1965).

58. *See, e.g., Jennings*, 289 F.2d at 19; Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978); Davies v. Butler, 95 Nev. 763, 602 P.2d 605 (1979).

59. Woods, *Comparative Fault*, *supra* note 32, at § 7.

60. *See generally id. See also* Bielski v. Schulze, 16 Wis. 2d 1, 14-16, 114 N.W.2d 105, 111-13 (1962) in which the court states that the negligence of tortfeasors should be decided only on a relative fault basis and suggests that under Wisconsin's comparative negligence laws there is no room for different degrees of negligence.

61. *See* Ryan v. Foster & Marshall, Inc., 556 F.2d 460 (9th Cir. 1977); Sorensen v. Allred, 112 Cal. App. 3d. 717, 169 Cal. Rptr. 441 (1980); Montag v. Board of Educ. 112 Ill. App. 3d 1039, 446 N.E.2d 299 (1983) (adoption of comparative negligence in Illinois has not led to an elimination of the willful and wanton standard); Randall v. Harold, 121 Mich. App. 212, 328 N.W.2d 622 (1982); Derenberger v. Lutey, 674 P.2d 485 (Mont. 1983); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979) (when defendant is guilty of willful and wanton misconduct, the plaintiff's contributory negligence should not reduce his damages).

62. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13.

gence and that the bartender's conduct did not constitute willful misconduct. The California Supreme Court disagreed, finding that a jury could conclude that the bartender's conduct met the willful misconduct standard "sufficiently lacking in consideration for the right of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose . . . ."[63]

Although Nevada had enacted a comparative negligence statute that subsumed "gross negligence," the Nevada Supreme Court in *Davies v. Butler*[64] held that wanton and willful misconduct was still qualitatively different from, and could not be diminished by, the plaintiff's contributory negligence. John Davies died of alcohol poisoning after a day engaged in defendant's "drinking club's" membership initiation activities which consisted mostly of drinking, some of it allegedly forced.

> The evidence in the instant case supports an instruction regarding willful or wanton misconduct of the respondents. The jury could conclude that the intent of respondents was to administer dangerous quantities of alcohol to Davies within a short period of time. 190-proof alcohol was deliberately chosen to be administered, as it had been on previous occasions, and respondents were fully aware of its nature. Further, they were aware that retention of large amounts of alcohol in the system can be highly dangerous, as an initiate had had to be hospitalized the year before.[65]

Under these circumstances, the *Davies* court determined that comparative negligence was not intended to abolish the rule that contributory negligence is not a defense to willful or wanton conduct.[66]

Particularly where minors are involved, the willful or wanton exception to the contributory negligence defense may prove to be crucial to survival beyond pre-trial motions of claims by those injured through their own intoxication. Minors are generally viewed as being far less equipped to handle the effect of alcohol than adults. Add to this their relative inexperience at driving and there is an even greater likelihood

63. *Id.* at 402, 572 P.2d at 1161, 143 Cal. Rptr. at 20.
64. 95 Nev. 763, 602 P.2d 605 (1979).
65. *Id.* at __, 602 P.2d at 611.
66. *Id.*

of injury. An adult who knowingly serves alcohol to a minor, to the point of intoxication, may have to do little more to be found to have acted willfully and wantonly.

II. COMPARATIVE NEGLIGENCE

Most states have adopted some form of comparative negligence theory,[67] which generally ameliorates the harshness of the rule that contributory negligence is a complete bar to recovery. Even in comparative negligence jurisdictions, courts must still evaluate whether, as a matter of policy, the application of comparative fault in liquor liability cases should be prohibited where the injured person and the intoxicated person fall within the same protected class. In *Soronen* and *Rhyner*, discussed above, the New Jersey court determined that the application of comparative negligence theory in liquor liability cases would be improper. Only a few other courts have addressed this question and the trend seems to be in favor of applying comparative negligence.[68]

For example, the Minnesota Court of Appeals has determined that the definition of fault in the state's comparative fault statute is expansive enough to include liquor liability actions because such actions are predicated on strict liability, which was expressly included in the definition of fault.[69] In *Munford, Inc. v. Peterson*,[70] the Mississippi Supreme Court, with very little discussion, found reversible error in the trial court's instruction to the jury that the plaintiff's minor decedent could not be charged with any negligence or fault and

67. *See* Woods, *Comparative Fault*, *supra* note 32, at § 4.

68. *See, e.g.*, Herrly v. Muzik, 355 N.W.2d 452 (Minn. Ct. App. 1984) (drinking companion claimant's negligence will be compared to providers' negligence); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979) (where the defendant violated the law by selling intoxicants to a group of minors, one of whom was later killed in a one-car accident, the defendant was negligent as a matter of law, but the trial court erred in failing to instruct on comparative negligence). Dynarski v. U-Crest Fire District, 112 Misc. 2d 314, 447 N.Y.S.2d 86 (1981) (minor decedent's negligence is not a bar to recovery but will be compared with that of social host). *But see* Buckley v. Pirolo, 190 N.J. Super. 491, 464 A.2d 1136 (1983) (comparative negligence applies apparently only because the plaintiffs did not contend that they were also intoxicated or their judgments impaired at the time of the accident).

69. *Muzik*, 355 N.W.2d at 452.

70. 368 So. 2d 213 (Miss. 1979).

determined that the usual comparative negligence scheme should have been applied.

Wisconsin has not yet addressed the question of whether comparative negligence applies in liquor liability cases.[71] Comparative negligence theory has, however, consistently been applied to all types of actions in Wisconsin, even to strict liability actions.[72]

III. THE COMPLICITY DEFENSE

Should the drinking companion who is later injured by the intoxicated conduct of a cohort be barred from recovery because of complicity? It appears that there will be the same split of authorities on this issue as there is on the contributory negligence question when the plaintiff is the intoxicated person seeking recovery from the dram shop.[73]

The rationale of the complicity defense is that wrongdoers should not benefit from their own wrongs by "voluntarily and affirmatively participat[ing] in inducing the intoxication of a person . . . ."[74] Essentially, the complicity defense is a species of assumption of risk.[75] In Minnesota, where comparative fault has been adopted, complicity has been treated as a type of contributory negligence which is included in the comparative fault analysis.[76] Where the person acting in complicity is also within a protected class (such as a minor or intoxicated person), however, it would be expected that the courts that

71. Wisconsin's new civil liability law, 1985 Wis. Laws 47, generally limits recovery to claims of third persons injured by underage persons; the contributory negligence issue still exists where the injured third person also falls within the protected class: intoxicated persons or minors.

72. *See, e.g.*, Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

73. The case law runs both ways. Morris v. Farley Enterprises, Inc., 661 P.2d 167, 171 (Alaska 1983) (complicity not to be considered when plaintiff is within the protected class); Bakke v. Rainbow Club, Inc., 306 Minn. 99, 235 N.W.2d 375 (1975) (decedent assumed the risk of his own injury and death by furnishing intoxicating liquor to companion); Heveron v. Village of Belgrade, 288 Minn. 395, 401, 181 N.W.2d 692, 695 (1970) (complicity as a defense); Muzik v. Herrly, 355 N.W.2d 452 (Minn. Ct. App. 1984).

74. *Heveron*, 288 Minn. at 401, 181 N.W.2d at 695.

75. *See Muzik*, 355 N.W.2d at 454.

76. *Id.* at 454-55.

reject the contributory negligence defense in actions by the drinker would also reject the complicity defense.[77]

Consider *Morris v. Farley Enterprises, Inc.*,[78] where the defendant taverns argued that the minor decedents' complicity in contributing to the minor driver's intoxication should bar their claims. The court rejected the defense, essentially because the minor decedents were also members of the class that the liquor control statute was designed to protect and

> [i]t would run counter to the purpose on which we have acted in adopting the statute as a negligence standard, and thus to the policy of the statute itself, to hold that a minor is barred from maintaining an action by his own illegal role in the liquor's acquisition. As between the seller and the minor, it is the seller who is the responsible party in the transaction.[79]

Although the court found that complicity did not bar the action, the court failed to decide the question of whether comparative negligence might be asserted as a partial defense.[80]

IV. A CONCLUDING PROPOSAL

Although some courts have held that liquor control statutes are designed only to protect "innocent" members of the general public from the dangers posed by intoxicated persons, the more reasoned view of liquor liability in today's world is that such statutes demonstrate a legislative recognition of the commonly-known fact that intoxicated adults or minors are not fully able to exercise reasonable care. They are apt to make poor judgments, are likely to be physically impaired by their intoxication and are certainly not likely to be able to operate an automobile carefully. They pose a risk of harm not just to the general public, but to themselves, which may be avoided if servers of alcohol refuse to pour that "one more for the road" and refuse to serve underage persons.

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77. *Cf. Buckley*, 190 N.J. Super. 491, 464 A.2d 1136 (court suggested that if the injured party was too intoxicated to exercise self-protective care, his negligence in exposing himself to the risk posed by the intoxicated companion would not be considered).

78. 661 P.2d 167 (Alaska 1983).

79. *Id.* at 171.

80. *Id.* at 171 n.7.

In jurisdictions where contributory negligence is a complete bar to recovery, alcohol providers should not be permitted to avoid their responsibility by asserting the minor's or intoxicated person's voluntary consumption as a complete defense. In those jurisdictions, where one party must bear the entire burden, it should be the provider because to hold otherwise would defeat the deterrence rationale used to support imposition of liability in the first place. At the very least, the willful, wanton exception, which is a way of comparing relative degrees of fault, should be liberally applied in the liquor liability context.

In comparative negligence jurisdictions, there is an understandable reluctance to totally absolve drinkers of responsibility for their own injuries. Nevertheless, the liquor provider has the last clear chance to prevent a potentially fatal situation since the intoxicated adult or minor is not as equipped to soberly evaluate the risks in further drinking. The liquor provider, therefore, is in effect entrusted with the greater duty to reasonably control the flow of alcohol. The imposition of liquor liability is designed to deter liquor providers from neglecting this responsibility. However, if the usual comparative negligence analysis is applied, liquor providers will attempt to shift all responsibility to the drinker. To the extent that they are successful, especially in actions brought by the drinker for his or her own injuries, the deterrence purpose of imposing liability will be frustrated.

This result could be avoided without totally absolving the drinker. One who was causally negligent in serving alcohol to an intoxicated adult or minor should be held as a matter of law, as between the drinker and the provider, to be more negligent than the drinker whose intoxication resulted in injury. This rule would apply both with respect to a drinker's actions for his or her own injuries and with respect to the provider's right to contribution from the drinker in a third-party action.

In an action brought by a drinker for his or her own injuries, a jury would assess percentages of causal negligence between them as in any other negligence action. However, if the jury's assessment attributed a greater amount of negligence to the drinker, the court would change the percentage to assess the provider with fifty-one percent of the negligence as a mat-

ter of law. If the jury attributed a greater amount of negligence to the provider, the percentages would not be changed.

In an action brought by a third party, the jury's assessment of negligence would dictate the third party's right to recover as against each of the defendants, as in any other negligence action. However, as between the provider and the drinker, the provider must bear the greater burden and would have to be ultimately responsible for at least fifty-one percent of the award.

This approach would satisfy most of the policy concerns in liquor liability cases. The deterrence purpose for imposing liability on providers would be served because providers would not be able to pass off all of the responsibility for intoxicated torts on to the drinker and would have to bear the largest burden of the damages. The policy of protecting intoxicated adults and minors from their own foreseeable negligence would be served because they would be assured, in an action for their own injuries, of recovering at least fifty-one percent of their damages. The concern with totally absolving intoxicated persons of responsibility for their actions would be met because such persons would ultimately bear up to forty-nine percent of the responsibility for their own injuries and damages (or, in a third-party action, up to forty-nine percent in contribution). Yet, an injured third-party's rights would not be affected because the percentages would be changed only for purposes of determining contribution rights between the defendants.

The alternative is to make all-or-nothing choices between competing policies. The tragedy of intoxicated torts present unique liability problems. It can only be effectively addressed by unique solutions, not rigid applications of pre-existing rules.