Approved 3/3/83
Date

MINUTES OF THE House COMMITTEE ON Federal & State Affairs

The meeting was called to order by Rep. Neal D. Whitaker
Chairperson at

1:30 ~~x~~ a.m. p.m. on February 21, 1983 in room 526-S of the Capitol.

All members were present except:
Rep. Peterson, who was excused.

Committee staff present:
Russ Mills, Legislative Research
Mary Torrence, Revisor of Statutes Office
Nora Crouch, Committee Secretary

Conferees appearing before the committee:

Rep. Robert H. Miller
Kathleen Gilligan Sebelius, Kansas Trial Lawyers Association
Jim Clark, County & District Attorney's Association
Dan Lykins, Kansas Trial Lawyers Association
Ron Eisenbarth, Kansas Citizens Advisory Committee on Alcohol & Other Drug Abuse
Glenn Leonardi, President, Kansas Alcoholism Counselors Association
Reverend Richard Taylor, Kansans for Life at Its Best
Bob W. Storey, Kansas Beer Retailers Association
Jack Milligan, Kansas Association of Private Clubs
T. L. Green, Kansas Retail Liquor Dealers Association
Joe Burger, Manager, Topeka Moose Lodge
Ace Johnson, Sanctuary, Lawrence, Kansas
Tom Kennedy, Director, Alcoholic Beverage Control

Chairman Whitaker called the meeting to order and announced that HB 2150 was on hearing status.

Rep. R. H. Miller appeared to explain the provisions of the bill stating that it a bill to give some rights to victims. He stated that over 20 states have passed legislation to protect those harmed by a drunk or by those sharing the responsibility of providing the alcohol. The lives and dollars lost at the hands of a drunk are astounding. We must think of the victim and the cost to them in health and financial burdens. (See Attachments A and B)

Kathleen Gillian Sebelius, Kansas Trial Lawyers Association, appeared in support of HB 2150 stating she represents approximately 850 members who work in primarily two areas. Mrs. Sebelius handed the Committee a sheet showing members the states who currently have dram shop legislation. (See Attach. C)

Dan Lykins, Vice-President, Kansas Trial Lawyers Association, appeared in support of HB 2150 stating that he primarily practices personal injury law meaning he represents people who are injured in an accident. Presently liquor stores have no incentive not to sell to minors. With this act the store owner could be held responsible. The dram shop bill is not to punish the shop owner as anyone who operates in a legal, honest manner will not be prosecuted. The innocent victims of our state deserve some action from the Legislature to protect them.

Jim Clark, Director, Kansas County & District Attorneys Association, appeared in support of HB 2150 stating those he represents are responsible for prosecuting the cases. The state recognized the terrible problem of the drinking driver but left it to the court system to deal with the problem. The courts cannot do it alone. HB 2150 goes a long way toward dealing with the problem.

Chairman Whitaker announced to the Committee that Attorney General Bob Stephan was unable to attend the meeting but had supplied testimony for their information. (See Attachment D)

Glenn Leonardi, President, Kansas Alcoholism Counselors Association, appeared in favor of HB 2150 as it is responsive to the problems associated with alcoholic beverages. (See Attachment E)

A handout from Ron Eisenbarth, Chairperson, Kansas Citizens Advisory Committee on Alcohol and other Drug Abuse, was presented to the Committee for their information. (See Attachment F)

Reverend Richard Taylor, Kansans for Life at Its Best, appeared in support of HB 2150 stating it is product liability legislation to correct very serious problems facing everyone today. (See Attachment G)

Dr. Loren Phillips appeared in support of HB 2150 stating a concept such as this dram shop bill could have a strong deterrent affect on shop owners who sell to minors or others. There are a lot of real concerned people in the state that think the problem of victim's rights should be addressed.

Bob W. Storey, Kansas Beer Retailers Association, appeared in opposition to HB 2150 citing grounds of constitutionality and discrimination against the licensee, retailer, or tavern owner. Mr. Storey pointed out that the act would be unenforceable because no statute definition of an "intoxicated person" exists. There would be confusion as to the definition of an intoxicated person. The bill would be a nightmare to law enforcement officials and would burden the courts with lawsuits for damages. (See Attachment H)

Jack Milligan, Kansas Association of Private Clubs in Kansas, appeared in opposition to HB 2150 stating the legislation is discriminatory and would create liability on store owners for the actions of their employees. It would cause a dramatic raise in insurance rates for these businesses resulting in higher prices to consumers. (See Attachment I)

Tom Green, Kansas Retail Liquor Dealers Association, appeared in opposition to HB 2150 stating the language creates liability of the licensee whether the minor has consumed any alcohol or not and that since there is no statute definition of an intoxicated person how can an business determine whether a patron is intoxicated or not. (See Attachment J)

Joe Burger, Manager, Topeka Moose Lodge, appeared in opposition to HB 2150 stating the bill would create a tremendous hardship on the small units in small communities. There is a fellowship among members. We do not want our members getting in trouble, getting drunk, and getting picked up or having an accident. Mr. Burger stated that 20% of the alcohol sold in Kansas is sold to private clubs, the remaining 80% is sold to individuals. This bill addresses itself only to the clubs and there are 4 times more drunks in the private sector. He further stated that Kansas needs stronger laws for youngsters with false ID's. It is almost impossible to tell the age of a person, especially when they have a false ID.

Ace Johnson, Sanctuary, Lawrence, Kansas, appeared in opposition to HB 2150 stating he thought it was time to have from an owner. The bill is discriminatory and would cause tremendous insurance problems. He stated that there needs to be stiffer laws for anyone carrying a fake ID. He stated that it is amazing the things people can come up with for an ID.

Tom Kennedy, Director, Alcoholic Beverage Control, appeared stating they were neither a proponent or opponent of the bill but stated that the bill needs amended to provide verification that cereal malt beverage retailers have liability insurance coverage in an amount deemed as appropriate. (See Attachment K)

The meeting adjourned.

GUEST LIST

FEDERAL & STATE AFFAIRS COMMITTEE

DATE 2-21-83

(PLEASE PRINT) NAME	ADDRESS	WHO YOU REPRESENT
Todd Epp	301 W. Waverly, Topeka	KTWU
Richard Taylor	Topeka	Help our Best
Bob Stacey	Manhattan	SRS / ADAS
Stan Leonardi	1319 Lincoln - Topeka	KHCK
Joan Ellen Knight	Topeka	Governor's office
Nancy Kepley		Manhattan
Kathleen Selsellus	Top	KTLA
Don Fyler	Topeka	KTGS
Mr + Mrs	Topeka	WIBW
Dennis [illegible]	"	KAPC
T. Dren	"	Ks Retail Liquor Dealers
T. Regan	"	" " " "
D. Rand	Manhattan	[illegible]
T Coleman	Topeka	A.B.C.
TOM KENNEDY	Topeka	ABC
JIM CLARK	Topeka	KCDAA
LARRY RHODES	TOPEKA	ACLU
Henry Lawrence	Goessel	
Ralph K Weber	Inman	
Vernon Lohrentz	North Newton	
George A. Black	Topeka	V.F.W.

STATE OF KANSAS

ROBERT H. MILLER
HOUSE OF REPRESENTATIVES
Sumner County

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIRMAN RULES AND JOURNAL
LEGISLATIVE POST AUDIT COMMITTEE
FEDERAL AUDIT COMMITTEE
MEMBER WAYS AND MEANS
PENSIONS, INVESTMENTS AND BENEFITS
NATIONAL CONFERENCE OF STATE LEGISLATURES COMMITTEE ON AGRICULTURE, FOOD AND NUTRITION

It is a pleasure to appear before this committee this afternoon. Having been a member of the Federal and State Affairs Committee for nine years, I was pleased that this bill was assigned to this committee.

Before I tell you what this bill is, I would like to tell you what it is not. It is not one of the so-called liquor issues you are also dealing with this session. It is not a wet-dry issue. It is a bill to give some rights to victims. Some of you were on this committee when we dealt with crime victims reparations. All of us have heard our constituents say that government guarantees everyone their rights, except the victims. We are constantly being asked to put some fairness back in the system, to help the victims.

The concept contained in this bill is not a new one. It originated in English common law which gave the responsibility of supporting the children of an habitual drunkard to the tavern keeper who served the parent. It was then refined in this country. Now over twenty state legislatures have enacted laws to protect anyone harmed by a drunk by sharing the liability with the person who provides alcohol. A number of other states now have this concept imposed by the judicial system. Most recent was just two weeks ago. The Missouri Court of Appeals ruled the tavern

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owner liable for damages when a policeman was run down by a drunk. The driver had left that tavern earlier in the evening.

Since this decision was handed in by a neighboring state that does not have a law similar to the one I'm proposing, I think the opinion filed on February 8, 1983, is very useful in this discussion. I would like to quote briefly from that opinion. "One would have to be a hermit to be unaware of the carnage caused by drunken motorists. The problem was aptly described nearly twenty years ago. Our highway safety problems have been greatly increased. Death and destruction stalk our roads. The peaceful Sunday afternoon family drive through the hills has been abandoned by many as a result of brushes with near death at the hands of half-baked morons drunkenly weaving in and out of the traffic at 80 or 90 miles per hour."

"What should be emphasized is that if the intoxicated driver is financially irresponsible and the tavern owner is immunized from liability, the burden will be borne by a party completely without fault, i.e. the innocent victim. The question is not simply whether the dispenser's liability will be greater than his culpability but rather whether requiring the tavern owner to bear liability will be a more just allocation of the burden than merely leaving the innocent victim to shoulder the loss."

This opinion is very interesting to read and I would be glad to make it available to anyone wishing a copy. Before turning to the bill before you, I would like to quote one more sentence from this opinion. "Questions of public policy, it is said, are better left to the Legislative Branch of Government."

Kansas, like Missouri, does not have a Dram Shop Act. Do we as legislators want to set public policy in Kansas or do we wish to leave this up to the courts? When you think about this bill, and whether to support it or to oppose it, think about the public policy we as legislators are charged with setting.

We are all aware of the increased awareness of the problems caused by the drinking driver and increased support for stiffer penalties. Missouri is just the latest state to decide that protecting the victims is good public policy.

The question before you is, should this policy be set by the Legislature or be left up to the courts? As legislators we can set up the rules, the guidelines, the perimeters. If we leave it up to the courts, we have done exactly that - left it up to the courts.

We in the Legislature are used to listening to experts talk to us about legislation. I will leave the legal explanation to the legal experts. We in the Legislature are also used to being given reams of statistics about the legislation we are considering. I'm sure that any that I would give you, would be repetitious. The lives and dollars that are lost at the hands of a drunk can be tallied on paper and the totals in both colums are astounding. Each of us is appalled at the numbers and the rate at which they are growing in our society today.

What many of us do not think about is the plight of the victims and the survivors of the actions of the drunk, the pain, the loss of a loved one, the loneliness, or the financial burden not covered by insurance. With God's blessing, few of us will ever be awakened from sleep to the nightmare of reliving the horror

of the incident, or with the gnawing fear that our loved one killed at the hands of a drunk, felt pain before death. Few of us will spend days, even months, rehabilitating injuries caused by a crime committed by someone who was intoxicated, but there are many people across this state who have lived with these and many other tragic circumstances caused by the drunk. No law that we can pass will prevent all of these horrible events from occurring but perhaps we can reduce the numbers and go one step further, forcing someone other than the innocent victim to take the responsibility into their hands.

any alcoholic liquor by means of handbills; (2) for any person to advertise any alcoholic liquor by means of billboard along public highways, roads and streets, or for any owner or occupant of any property to permit any billboard advertising alcoholic liquor to remain on such property; (3) for any retailer of alcoholic liquor to have more than one sign on the licensed premises and said one sign shall contain nothing except the license number, the name of the retail dealer and the words "Retail Liquor Store" and no letter or figure in any such sign shall be more than four inches in height or more than three inches in width, and if more than one line is used the lines shall not be more than one inch apart and shall be placed on the corner of a window or on the door; (4) for any licensee to display alcoholic liquor in any window of the licensed premises.

The director may adopt such rules and regulations as he shall deem necessary regulating and controlling the advertising, in any form, and display of alcoholic liquor, and nothing contained in this section shall be construed as limiting his power to make such rules and regulations not in conflict with this act.

History: L. 1949, ch. 242, § 77; March 9.

Research and Practice Aids:

Intoxicating Liquors⇐146(2).
C.J.S. Intoxicating Liquors §§ 238, 267.

41-715. Unlawful acts by minors in connection with purchases or possession of alcoholic liquor; procurement of alcoholic liquor for incapacitated persons unlawful, penalties. No minor shall represent that he is of age for the purpose of asking for, purchasing or receiving alcoholic liquor from any person except in cases authorized by law. No minor shall attempt to purchase or purchase alcoholic liquor from any person. No minor shall possess alcoholic liquor. **No person shall knowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any person who is an incapacitated person, or any person who is physically or mentally incapacitated by the consumption of such liquor. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two hundred dollars ($200) or by imprisonment for not to exceed thirty (30) days, or both such fine and imprisonment in the discretion of the court.**

History: L. 1949, ch. 242, § 78; L. 1963, ch. 267, § 1; L. 1965, ch. 277, § 8; June 30.

Research and Practice Aids:

Intoxicating Liquors⇐159(1).
Hatcher's Digest, Intoxicating Liquors §§ 81, 120, 121½.
C.J.S. Intoxicating Liquors § 259.

Law Review and Bar Journal References:

Liability to third persons of one selling or furnishing liquor discussed, Lawrence A. Dimmitt, 6 W.L.J. 535, 536, 538 (1967).

CASE ANNOTATIONS

1. Revocation of retail liquor license for violation of section upheld. Smith v. Herrick, 172 K. 65, 66, 69, 238 P.2d 557.

2. Discussed; licensee held responsible for acts of employee; regulation of director upheld. Chambers v. Herrick, 172 K. 510, 515, 519, 241 P.2d 748.

3. Discussed; no knowledge of liquor in vehicle; defendant not guilty under 41-804. City of Hutchinson v. Weems, 173 K. 452, 459, 249 P.2d 633.

41-716.

History: L. 1949, ch. 242, § 79; Repealed, L. 1975, ch. 250, § 1; March 12.

41-717. Sale on credit or for goods or services forbidden. No person shall sell or furnish alcoholic liquor at retail to any person on credit or on a passbook, or order on a store, or in exchange for any goods, wares or merchandise, or in payment for any services rendered; and if any person shall extend credit for such purpose, the debt thereby attempted to be created shall not be recoverable at law. No retailer of alcoholic liquor shall accept a check for payment of alcoholic liquors sold by him other than the personal check of the person making such purchase.

History: L. 1949, ch. 242, § 80; March 9.

Cross References to Related Sections:

Similar provision as to cereal malt beverages, see 41-2706.

Research and Practice Aids:

Hatcher's Digest, Intoxicating Liquors §§ 120, 124.

CASE ANNOTATIONS

1. Extension of credit held to constitute nuisance; injunctive relief by state proper. State, *ex rel.*, v. Hines, 178 K. 142, 145, 283 P.2d 472.

41-718. Sale only in original package; refilling forbidden. No person, except a manufacturer, distributor or wholesaler, shall fill or refill, in whole or in part, any original package of alcoholic liquor with the same or any other kind or quality of alcoholic liquor; and it shall be unlawful for any

Atch. B

rectly: (1) sell, supply, furnish, give or pay for, or loan or lease, any furnishing, fixture or equipment on the premises of a place of business of another licensee authorized under this act to sell alcoholic liquor at retail; (2) pay for any such license, or advance, furnish, lend or give money for payment of such license; (3) purchase or become the owner of any note, mortgage or other evidence of indebtedness of such licensee or any form of security therefor; (4) be interested in the ownership, conduct or operation of the business of any licensee authorized to sell alcoholic liquor at retail; or (5) be interested, directly or indirectly, or as owner, part owner, lessee or lessor thereof, in any permises upon which alcoholic liquor is sold at retail: *Provided,* that any person having any such interest as described above shall not be eligible to receive or to hold a salesman, representative or agent's permit for a manufacturer, distributor or wholesaler. (Authorized by K.S.A. 41-211, K.S.A. 1969 Supp. 41-210; effective, E-69-22, Sep. 16, 1969; effective Jan. 1, 1970.)

Articles 10 to 15.—RESERVED

Article 16.—LICENSES; SUSPENSION, REVOCATION

14-16-1. Director may revoke licenses for violations of act or rules and regulations; citation to licensees; hearing. If it is found by the director that any licensee is violating any provisions of the Kansas liquor control act or the rules of the director promulgated thereunder, or is failing to observe in good faith the provisions and purposes of the act, the license of such licensee may be suspended or revoked by the director after due citation and opportunity to be heard at a public hearing. (Authorized by K.S.A. 41-209, 41-211, 41-320, 41-702, 41-709, K.S.A. 1965 Supp. 41-210; effective Jan. 1, 1966.)

14-16-2. Cities and townships may file complaints with director against licensees violating act; hearing; notices. The governing body of any city or the township board of any township may file a complaint with the director stating that any licensee has been, or is violating the provisions of the act or the rules and regulations issued pursuant thereto. Such complaint shall be in writing and shall specifically state the violations complained of or the rules and regulations violated. Upon receipt of such a complaint, the director shall cause an investigation to be made, and if the director finds that there are reasonable grounds to believe that such licensee has violated the provisions of the act or the rules and regulations promulgated thereunder, he shall set the matter for hearing by issuing and serving a citation on the licensee. The governing body making such complaint shall also be notified of such hearing and may appear and offer evidence in support of such charges or complaints. (Authorized by K.S.A. 41-211, K.S.A. 1965 Supp. 41-210; effective Jan. 1, 1966.)

14-16-3. Proceedings for suspension or revocation of licenses; notice to licensee of time and place of hearing; right of licensee to appear at hearing. All proceedings and hearings for the suspension or revocation of licenses shall be before the director or deputy director upon a citation issued by the director or deputy director and under the seal of the director. The citation shall be in writing and shall state the charges or complaints the licensee is called upon to answer. Said citation shall be served upon the licensee by mailing the same, by registered mail, properly addressed to the licensee at the address of the licensed premises or may be served upon such licensee by the director or any agent or employee of the director or by a sheriff of the county in which the licensed premises are situated in the manner provided by the code of civil procedure for the service of summons in civil actions. Said citation shall state the date, time and place where said proceeding and hearing will be held, which date shall be not less than ten days from the date of the mailing or service of the citation. The licensee may appear in person and by counsel at said proceeding and hearing and produce such witnesses and evidence as he deems necessary or advisable in the protection of his interests. (Authorized by K.S.A. 41-211, 41-320, K.S.A. 1965 Supp. 41-201, 41-210; effective Jan. 1, 1966.)

14-16-4. Notice to certain state, county, city and township officers when license suspended or revoked. Upon the suspension or revocation of a license, if the licensed premises are within an incorporated city, the governing body of such city shall be notified of such suspension or revocation and, if said

DRAM SHOP ACT -- H.B. 2150
Kansas Trial Lawyers Association
February 21, 1983

STATE	DRAM SHOP ACT	CASE LAW
ALABAMA	YES	YES
ALASKA	NO	NO
ARIZONA	NO	NO
ARKANSAS	NO	NO
CALIFORNIA	YES	NO
COLORADO	YES	YES
CONNECTICUT	YES	YES
DELAWARE	NO	YES
DISTRICT OF COLUMBIA	YES	???
FLORIDA	NO	NO
GEORGIA	YES	NO
HAWAII	NO	YES
IDAHO	NO	YES
ILLINOIS	YES	YES
INDIANA	NO	YES
IOWA	YES	YES
KANSAS	NO	NO
KENTUCKY	NO	YES
LOUISIANA	NO	YES
MAINE	YES	YES
MARYLAND	NO	NO
MASSACHUSETTS	NO	YES
MICHIGAN	YES	YES
MINNESOTA	YES	YES
MISSISSIPPI	NO	YES
MISSOURI	NO	YES
MONTANA	NO	NO
NEBRASKA	NO	NO
NEVADA	NO	NO
NEW HAMPSHIRE	NO	YES
NEW JERSEY	NO	YES
NEW MEXICO	NO	NO
NEW YORK	YES	YES
NORTH CAROLINA	NO	NO
NORTH DAKOTA	YES	YES
OHIO	YES	YES
OKLAHOMA	NO	NO
OREGON	NO	NO
PENNSYLVANIA	NO	NO
RHODE ISLAND	YES	NO
SOUTH CAROLINA	NO	NO
SOUTH DAKOTA	NO	NO
TENNESSEE	NO	YES
TEXAS	NO	NO
UTAH	YES	NO
VERMONT	YES	YES
VIRGINIA	NO	NO
WASHINGTON	NO	YES
WEST VIRGINIA	NO	NO
WISCONSIN	YES	NO
WYOMING	YES	NO

SUMMARY: 19 states have some form of dram shop legislation.
14 additional states have court decisions either imposing liability or leaving that option open for future cases.

Att. C

In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

SUE ANN CARVER, Individually and JAMES RICHARD REIFSCHNEIDER, a minor, MICHAEL EDWARD REIFSCHNEIDER, a minor, and KIM MARIE REIFSCHNEIDER, a minor, by SUE ANN CARVER, Natural Parent and Guardian, Plaintiffs-Appellants, vs. WILLIAM MICHAEL SCHAFER, and MICHAEL G. MEHIOLS, Defendants, and FRANCES C. ROBERTS, Defendant-Respondent.	No. 44983 Appeal from the Circuit Court of St. Louis County Hon. Edward L. Sprague, Judge OPINION FILED: February 8, 1983

This is an appeal from a judgment of the Circuit Court of the County of St. Louis, which dismissed appellant's petition for failure to state a cause of action. The petition sought damages for a wrongful death from a tavern keeper who appellants alleged sold drinks to an already intoxicated person, who caused the death of appellant's decedent. In Count III, plaintiffs-appellants relied on the Illinois Dram Shop Act, Ill. Ann. State., ch. 43, § 135 (Smith-Hurd 1944, 1982-83 Cum Supp.), and in Count V they asked the court to hold the tavern keeper liable under Missouri common law. The judgment is reversed and remanded in part and affirmed in part.

Appellants alleged that William M. Schafer was liable to appellant for the negligent operation of his motor vehicle which resulted in the

wrongful death of James R. Reifschneider, and that defendants Frances C. Roberts and Michael G. Mehiols were also liable for the wrongful death of Mr. Reifschneider because Mr. Schafer, shortly before the accident, had consumed intoxicating beverages served at taverns owned by Ms. Roberts and Mr. Mehiols, when Mr. Schafer was already intoxicated. Mr. Reifschneider was the spouse of appellant Sue Ann Carver and the father of the minor children who are also appellants. Service of process was never obtained on Mr. Mehiols and he was dismissed from the lawsuit. Appellant reached a settlement with Mr. Schafer. Thus, the only remaining defendant is respondent Roberts, who has not filed a brief with this court.

Appellants charge the trial court erred in dismissing the petition because appellants stated a cause of action under both the Illinois Dram Shop Act and the Missouri common law.

The scope of review of a motion to dismiss requires an appellate court to treat all facts alleged by the petition as true, to construe the allegations favorably to appellants and to determine whether, upon that basis, the petition invokes principles of substantive law. McCoy v. Liberty Foundry Co., 635 SW2d 60, 61-62[2,3] (Mo. App. 1982). "A pleading should not be adjudged insufficient . . . if the averments of the petition, accorded every reasonable and fair intendment, state a claim which can call for the invocation of principles of substantive law which may entitle [appellants] to relief." Kersey v. Horbin, 591 SW2d 745, 749[3] (Mo. App. 1979).

The facts as alleged in appellant's petition may be briefly stated. On the date in question, Schafer, who is a resident of Missouri, drove his automobile into the State of Illinois. While in Illinois, Schafer patronized two taverns where he was served intoxicating liquors. The taverns were known as The Little Dover Inn and The Ten Pin Lounge, owned and operated by respondent Roberts and Michael G. Mehiols, respectively. The service of the intoxicating liquors led to the intoxication of Schafer or added to his previously existing state of intoxication. After imbibing the intoxicating liquors, Schafer returned to the State of Missouri, operating his automobile under the influence of the in-

toxicating liquors. Appellants' decedent, James R. Reifschneider, a police officer employed by St. Louis County, was struck and killed by the automobile operated by Schafer as Officer Reifschneider was standing on the shoulder of Interstate Highway 270 issuing a traffic violation summons to another motorist.

The only issue is whether appellants have a cause of action for negligence against respondent Roberts. This court holds that they do.

Actionable negligence consists of three elements: a duty owed by the defendant to the plaintiff, a breach of that duty by the defendant, and an injury to the plaintiff which is caused by the breach of the duty. Nicholas v. Blake, 418 SW2d 188, 191[5,6] (Mo. 1967).

The first question is whether Roberts, a tavern owner, owed a duty to prevent the death of appellants' decedent. Here the tavern owner, according to the petition, sold alcoholic beverages to a person the tavern owner knew or should have known to be intoxicated. The tavern owner's patron subsequently caused the death of the decedent.

The common law rule was that a tavern owner could not be held liable for injuries to third persons which were caused by an intoxicated patron. The reason usually given was that the injuries were proximately caused by the imbibing of the intoxicating liquor by the patron and not by the sale of the beverages. Carr v. Turner, 385 SW2d 656, 657 (Ark. 1965); Garcia v. Hargrove, 176 NW2d 566, 568 (Wis. 1970); Parsons v. Jow, 480 P. 2d 396, 397[1] (Wyo. 1971); 45 Am. Jur. 2d, Intoxicating Liquors § 553 (1969); 130 A.L.R. 352, 366 (1941).

In the context of the present case, to say that the decedent's death was not proximately caused by the sale of the intoxicating liquor would be the functional equivalent of stating that the tavern owner owed no duty to the decedent. See W.L. Prosser, Law of Torts § 42 (4th Ed. 1971). Although stating the issue in terms of duty rather than proximate cause does not resolve the issue, " . . . it does serve to direct attention to the policy issues which determine the extent of the original obligation . . ." Id.

In some states, the common law rule has been abrogated by so called

"dram shop [illegible][1] On the other hand, some jurisdictions have declined invitations to hold a tavern owner liable for injuries to a third person caused by an intoxicated patron.[2]

Missouri [illegible][3] The question is whether this court will judicially recognize that a tavern owner owes a duty to third parties to refuse to sell liquor to an intoxicated person.

"The law imposes upon each individual, in all human activities, the duty to exercise ordinary care . . . for the safety of others, and this degree of care appertains to every human act, unless a different degree of care is prescribed by statute." Ward v. City of Portageville, 106 SW2d 497, 503[22,24] (Mo. App. 1937). Ordinary care requires the exercise of such precautions as are commensurate with the dangers reasonably to be anticipated under the circumstances. De Mariano v. St. Louis Public [illegible], 340 SW2d [illegible], 745[7-10] (Mo. 1960). "The standard of care exacted by the law is an external and objective one . . ." Funcher v. Southwest Missouri Truck Center, Inc., 618 SW2d 271, 274[3,4] (Mo. App. 1981).

Under the circumstances of the case under review, the question is to what extent is it reasonably to be anticipated that an intoxicated person who is served alcoholic beverages at a tavern will leave there, drive a motor vehicle while still intoxicated, and cause an accident? Travelling by car to and from a tavern is commonplace in current times.

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[1] See e.g., Ill. Ann. Stats. ch. 43 § 135 (Smith-Hurd 1944, 1982-83 Cum. Supp.); N.Y. General Obligations Law § 11-101 (McKinney 1979). In other states, the rule has been judicially overturned. Nazareno v. Urie, 638 P. 2d 671 (Alaska 1981); Ono v. Applegate, 612 P. 2d 533 (Haw. 1980); Alegria v. Payonk, 619 P. 2d 135 (Idaho 1980); Elder v. Fisher, 217 NE 2d 847 (Ind. 1966); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979); Rappaport v. Nichols, 156 A. 2d 1 (N.J. 1959); Miller v. City of Portland, 604 P. 2d 1261 (Or. 1980).

[2] Lewis v. Wolf, 596 P. 2d 705 (Ariz. App. 1979); Carr v. Turner, supra; Keaton v. Kroger Co., 237 SE 2d 443 (Ga. App. 1977); Felder v. Butler, 438 A. 2d 494 (Md. App. 1981); Holmes v. Circo, 244 NW2d 65 (Neb. 1976); Hamm v. Carson City Nuggett, Inc., 450 P. 2d 358 (Nev. 1969); Marchiondo v. Roper, 563 P. 2d 1160 (N.M. 1977); Olsen v. Copeland, 280 NW2d 178 (Wis. 1979); Parsons v. Jow, supra.

[3] Until 1934 Missouri had a dram shop act which granted a civil right of action to any person who was injured by an intoxicated person against the party who caused the intoxication. § 4487 RSMo. 1929. The dram [illegible] repealed in 1934 concurrently with the adoption of the [illegible]. Laws 1933-34, Extra Session, page 77.

Rappaport v. Nichols, supra at 8[7,8].

Drunken drivers are involved in a large percentage of the fatal automobile accidents in this country. "Drinking is indicated to be a factor in at least half of the fatal motor-vehicle accidents . . ." National Safety Council, "Accident Facts," at 52 (1981 edition). Statistics in Missouri also lend credence to the view that the drunken driver is a factor in more than his fair share of the fatal accidents. "In 1981, of the 95,331 accident involved drivers, 10% were reportedly drinking and of the 1,135 fatal accident involved drivers, 20% were reportedly drinking." Mo. Highway and Transportation Department, Division of Maintenance and Traffic, "Missouri State Highway System Traffic Accident Statistics," at 27 (1981 edition).

Indeed, one would have to be a hermit to be unaware of the carnage caused by drunken motorists. The problem was aptly described nearly twenty years ago:

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

Crull v. Gleb, 382 SW2d 17, 23 (Mo. App. 1964).

Thus, it is foreseeable that a patron of a tavern would drive an automobile to and from the tavern. It is also foreseeable that a drunken driver would be more likely to be involved in an accident than a sober driver.

Despite the foreseeable consequences of selling intoxicating liquors to an intoxicated purchaser, many jurisdictions refuse to impose upon the tavern owner a common law duty not to sell liquor to a customer who is intoxicated.

One reason for courts refusing to do so is the legislature's failure to alter the old common law rule barring a tavern owner's liability when the legislature has had ample time to consider the question. Felder v. Butler, supra at 499. In Felder v. Butler, the Maryland Court of Appeals noted that thirty years had passed since the common law rule had been stated and that the state legislature had

done nothing to change the rule. Id.; see also State v. Hatfield, 78 A. 2d 754 (Md. App. 1951).

The [illegible] which imposed no duty on the tavern keeper has never been [illegible]. See Skinner v. Hughes, 13 Mo. 446 (1850).

Another reason given for denying a cause of action against a tavern [illegible] liable would shift the burden of the loss from the intoxicated driver to the dispenser, which result " . . . [illegible] sound public policy." Olsen v. Copeland, supra at 181. However, the burden would not necessarily shift from the intoxicated driver to the tavern owner. Both parties contributed to the accident and suffer, assuming the negligence of both, they are joint tortfeasors. See Gibler v. Sharpe, 233 SW 419, 424[10,11] (Mo. banc [illegible] contribution from the drunken driver [illegible] Mo. v. Whitehead and Kales Co., 566 SW2d 466 (Mo. banc [illegible].

The court in Olsen v. Copeland also raises the point that if the intoxicated [illegible] financially irresponsible, the dispenser of the alcohol [illegible] the entire judgment. "In such a situation the dispenser . . . will certainly be bearing a burden wholly out of proportion to his culpability." 280 NW2d at 181.

What should be emphasized is that if the intoxicated driver is financially irresponsible and the tavern owner [illegible] liability, the burden will be borne by a party completely without fault, i.e., the innocent victim.

The question is not simply whether the dispenser's liability will be greater than his culpability, but rather whether requiring the tavern owner to bear liability will be a more just allocation of the burden than merely leaving the innocent victim to shoulder the loss.

It has also been said that "[t]he imposition of a common law duty of due care would create a situation rife with uncertainty and difficulty. If the [illegible] vendor is liable for negligence, does the host at a social gathering [illegible] duty to prospective victims of guests?" Holmes v. Circle [illegible] (D. C. 1976).

First, this court is not concerned with the question of imposing liability upon hosts at social gatherings. A court does not rule on hypothetical [illegible] which may weigh in favor of not imposing liability on "the host of a social gathering." The sole concern is the dispensing of justice and the resolution of conflicts between the [illegible].

Furthermore, the mere existence of possible legal issues arising out of other conceivable fact situations should not deter this court from [illegible] applicable to appellants. Resolution of [illegible] on a case by case basis should prove no more difficult [illegible] of the liability of a dispenser of intoxicating liquor than in other areas of the law of torts.

[illegible] have denied recovery have also cited problems of [illegible], especially the difficulty of recognizing when a patron is intoxicated. See Holmes v. Circo, supra at 70. "A jury of 12 will [illegible] opinions on this question." Olsen v. Copeland, supra [illegible] of proof are not any different [illegible] other cases.

> The plaintiff will have to prove by a preponderance of the evidence that the person in question was, at the time, obviously, actually and apparently intoxicated in order to prove by a preponderance of the evidence that the bartender knew, or should have known, such fact. Furthermore, to be successful upon such a cause of action, the plaintiff would have to prove by a preponderance of the evidence that serving the additional intoxicating liquor, after the subject person was already obviously, actually and apparently intoxicated, was a contributing proximate cause of the ensuing injuries. Such proof is not outside of the competence of our judicial system.

Lewis v. Wolf, supra at 746.

Lastly, most courts that have refused to recognize a cause of action against a tavern owner have stated that this type of case is more suitable for legislative than judicial action. Carr v. Turner, supra at 658[2]; Keaton v. Kroger, Co., supra at 448[5]; Felder v. Butler, supra at 499; Holmes v. Circo, supra at 70[6]; Hamm v. Carson City Nugget, Inc., supra at 359; Marchiondo v. Roper, supra; Olsen v. Copeland, supra at 181; Parsons v. Jow, supra at 397-398[3]. Questions of public policy, it is said, are better left to the legislative branch of

government. See, e.g., Holmes v. Circo, supra at 70[6]; Hamm v. Carson City Nugget, Inc., supra at 359.

The question presented here is arguably one of public policy, but it is also a question of common law negligence which is better resolved by the judiciary considering the long history of the development and refinement of negligence law by the courts.

Although resolution of public policy arguments is primarily a function of the legislature, a court's refusal to decide questions of public policy is a mistaken abdication of the function of a common law judge. "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis." O.W. Holmes, "The Common Law", 35-36 (1881).

The courts which decline to resolve the competing interests of dispensers and those injured by the dispensers' intoxicated patrons, see Holmes v. Circo, supra at 70[6], mistakenly ignore the role of the judiciary. "What else do courts do but balance competing interests? The law of torts is concerned with the allocation of losses arising out of human activities." Lewis v. Wolf, 596 P. 2d at 709.

The public policy of Missouri is that intoxicated persons should not be served alcoholic beverages. Although § 311.310 RSMo. 1978[4] cannot serve as a basis for liability because respondent Roberts is a resident of Illinois, the statute is indicative of Missouri public policy.

An appellate court of this state has already recognized that violation of a statute which forbids serving liquor to a minor may constitute negligence per se. Sampson v. W.F. Enterprises, Inc., 611 SW2d 333,

[4]Section 311.310 RSMo. 1978 reads:

"Any licensee under this chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever . . . to any person intoxicated or any person appearing to be in a state of intoxication . . . shall be deemed guilty of a misdemeanor . . ."

337[1] (Mo. App. 1981); Sampson held that the parents of a minor may recover damages from a tavern owner who served liquor to the minor who died in an automobile accident resulting from the minor's intoxication.

This holding was extended in Nesbitt v. Westport Square, Ltd., 624 SW2d 519 (Mo. App. 1981), where the court allowed a third party a cause of action against a tavern owner for injuries caused by an intoxicated minor who had been served liquor in the tavern.

The question in the case under review is one of simple negligence rather than of negligence per se; however, neither Sampson nor Nesbitt contains an indication that it is the public policy of this state to insulate tavern owners from civil damage suits.

The public policy of this state is expressed even more fundamentally in the general law of torts. Every person is required to take ordinary care against injuries reasonably to be anticipated. The death of Officer Reifschneider, or of any pedestrian entitled to be on the shoulder of a major thoroughfare, was reasonably to be anticipated in light of Mr. Schafer's intoxicated state of mind.

The standard of ordinary care imposed a duty upon respondent Roberts to avoid supplying Mr. Schafer with intoxicating liquor once it became apparent that Mr. Schafer was intoxicated. That the standard of ordinary care imposed such a duty upon Ms. Roberts is supported by the well-documented foreseeability of accidents caused by drunken drivers and the statutory policy expressed by § 311.310 RSMo. 1978. Therefore, Count V of appellant's petition stated a cause of action for simple negligence against respondent.

Appellants argue that Count III of their petition was also erroneously dismissed because Count III states a cause of action under the Illinois Dram Shop Act. Ill. Ann. Stat., ch. 43, § 135 (Smith-Hurd 1944, 1982-83 Cum. Supp.). Under Illinois law, appellants could recover from respondent tavern owner for the wrongful death of appellant's decedent, subject to a $20,000 limit on the amount of the recovery.[5] No such

[5]Illinois has held that its dram shop act has no extra territorial application. Graham v. General U.S. Grant Post No. 2665, V.F.W., 43 Ill. 2d 1, 248 NE 2d 657 (1969). However, this court is not bound by Illinois choice of law decisions. Furthermore, the reasoning of the Graham decision has been criticized as a misapplication of interest analysis. See R. Leflar, Commentary on the Conflict of Laws, 237-239, n. 44 (1974).

limitation has been imposed in Missouri on actions against dram shop owners. cf. Sampson v. W.F. Enterprises, Inc., supra; Skinner v. Hughes, supra. There is also no limitation on recovery for wrongful death in Missouri. See § 537.090 RSMo. 1978 (1982 Cum. Supp.). The laws of the two states are thus in conflict.

Pleading a theory of recovery under Missouri law in one count and another state's law in a separate count raises a choice of law issue. See Kennedy v. Dixon, 439 SW2d 173, 179-180 (Mo. banc 1969). Therefore, this court must make a choice of law between the limitation on recovery imposed by the Illinois Dram Shop Act and the full recovery permitted by Missouri law under the wrongful death statute. § 537.090 RSMo. 1978 (1982 Cum. Supp). The Missouri law should apply.

The Missouri Supreme Court in 1969 adopted the rule set forth in § 145, Restatement (Second) Conflict of Laws and abandoned the long standing lex loci delicti rule for determining conflicts of law. Kennedy v. Dixon, supra at 184[6-8]. Choice of law in the field of torts since then has been resolved by applying the law of the state with the most significant relationship to the occurrence and the parties. The Restatement (Second) of Conflict of Laws sets forth the principles by which the "most significant relationship" is determined. See Kennedy v. Dixon, supra at 181; Griggs v. Riley, 489 SW2d 469 (Mo. App. 1972); Restatement (Second) of Conflict of Laws §§ 6, 145.[6]

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[6]Restatement (Second) of Conflict of Laws § 145 reads:

The General Principle.

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issues.

Section 6 reads:

Choice of Law Principles:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(Continued)

There is no Missouri statutory directive on a choice of law in the factual situation of the case under review. Therefore, the relevant factors listed in Restatement (Second) Conflict of Laws § 6(2) must be considered.[7]

The relevant policies of the forum state, Missouri, must be considered. The policies behind allowing a full measure of recovery are three fold. One policy is to provide for the economic well-being of the decedent's dependents so that they will not become wards of the state. A second policy is to provide funds with which to pay creditors of the decedent. Another policy furthered by allowing unrestricted judgments of wrongful death is to promote the admonitory effect such judgments would have on potentially negligent defendants.

The first two policies are relevant to the case at bar. Missouri has an interest in the compensation of appellants for their loss because appellants are domiciliaries of Missouri. See Restatement (Second) 145(2)(c). If appellants are unable to support themselves financially, it will be the coffers of the Missouri treasury which will be called upon to provide them sustenance.

Compensation of the decedent's creditors is also a relevant policy. Missouri was the domicile of appellants' decedent and the place where it was injured. See Restatement (Second) of Conflict of Laws § 145(2)(a),(c).

Footnote 6 continued -

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular fields of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

The following factors in Restatement (Second) of Conflict of Laws, § 6(2) have minimal relevance to the choice of law in the case under review and will not be discussed:
(a) the needs of the interstate and international systems,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular fields of law,
(g) ease in the determination and application of the law to be applied.

Any creditors who have not been paid are likely to be located in Missouri.

The third policy, however, is of slight relevance in the present case. The conduct of respondent Roberts which contributed to the death of appellant's decedent occurred in Illinois and the tavern owner is apparently a domiciliary of Illinois. See Restatement (Second) of Conflict of Laws § 145 (2)(b),(c). A policy of allowing unrestricted judgments in actions for deaths occasioned in Missouri will have minimal deterrent effect on persons and entities who reside and conduct their business affairs outside this state.

Inasmuch as Illinois is the only state other than Missouri which is involved in the present case, the relevant policies of Illinois must also be taken into consideration. The Illinois Dram Shop Act would allow recovery against tavern owners, thus indicating a concern with compensation of victims and deterrent effect on dram shop owners. But by limiting the measure of damages, Illinois would seem to have expressed an interest in protecting tavern owners from excessive judgments.

The first policy, compensation of victims, is irrelevant in Illinois because appellants are neither residents nor domiciliaries of Illinois. The second policy, deterring tavern owners from serving alcoholic beverages to an intoxicated patron is relevant in Illinois for the reason that the tavern involved in the case at bar is located in Illinois. However, this policy would be better served by the unrestricted judgments allowed under Missouri law. Thus, the policy of deterrence would seem to point to a choice of Missouri law.

The third policy, protection of tavern owners from possible excessive judgments, is relevant in Illinois to the case at bar because the tavern owner resides and conducts her business in Illinois. Protection of tavern owners is inconsistent with the Missouri policy of full recovery.

Each state thus has an interest in the case under review which would be advanced by a choice of Illinois or Missouri. None of the other factors listed in Section 6 of the Restatement (Second) of Conflict of Laws are relevant with the exception of predictability of result.

Predictability of result would seem to point to a choice of Missouri law. On the one hand, one could say that a Missouri choice of law would

be an unfair surprise to respondent Roberts because her connection with the present case occurred as a result of transactions in Illinois. However, it is unlikely that respondent would have been totally unaware that many of her patrons came from Missouri because her tavern is located near the Illinois-Missouri border in Granite City, Illinois. Thus, the fact that an accident occurred in Missouri as a result of the intoxicated condition of one of her patrons blunts any claim of respondent that a choice of Missouri law was an unpredictable consequence.

If one examines the question of predictability from appellants' standpoint, any choice of law other than Missouri law would be a manifestly unfair surprise. Appellants reside in Missouri. The decedent lived and worked here. To tell appellants that a Missouri resident who is killed by a second Missouri resident while the former is working within Missouri that Illinois law governs a resulting lawsuit would doubtless be met with shock and disbelief.

The factor of predictability of result indicates that Missouri law should be applied. Furthermore, where it is difficult to establish that a particular state has the most significant relationship to an issue, " . . . then the trial court should continue, as in the past, to apply the substantive law of the place of the tort." Kennedy v. Dixon, supra at 185; see also State ex rel. Broglin v. Nangle, 510 SW2d 699, 704[3] (Mo. banc 1974).

Consideration of the relevant factors as set forth in the Restatement (Second) Conflict of Laws, § 6(2) dictates that Missouri law be chosen.

One cannot, however, apply Missouri law without addressing the question of whether such a choice of law violates respondent Roberts' constitutional rights under either the Full Faith and Credit Clause or the Due Process Clause of the Fourteenth Amendment of the federal constitution. U.S. Const. Art. 4 § 1; U.S. Const. Amend. 14.

> . . . [F]or a state's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

Allstate Ins. Co. v. Hague, 449 US 302, 101 S. Ct. 633, 640[3], ___ L.

Ed. 2d ____, reh. den. 101 S. Ct. 1494 (1981).

In Hague, the respondent's husband was killed while riding on a motorcycle in Wisconsin. The decedent and the respondent were residents of Wisconsin. The decedent, however, commuted daily from Wisconsin to his place of employment in Minnesota. After the accident, but before initiation of the lawsuit, respondent moved to Minnesota. Respondent then brought suit in Minnesota against Allstate Insurance Co., which did business there seeking a declaratory judgment that the " . . . $15,000 uninsured motorist coverage on each of her late husband's three automobiles could be 'stacked' to provide total coverage of $45,000." 101 S. Ct. at 636. The Minnesota Supreme Court applied Minnesota law to find that the policies could indeed be stacked. Id. at 636-637.

The U.S. Supreme Court upheld Minnesota's choice of law. Id. at 640[8]. Three factors influenced the court in its decision. First, the decedent was a member of the forum state's work force which gave it an interest in the " . . . safety and well-being of its work force and the concomitant effect on Minnesota employers." Id. at 641. In the instant case, appellants' decedent had an even more intimate connection with the forum state. Not only was the decedent a member of Missouri's work force, but he was also an employee of a political subdivision of Missouri. Furthermore, decedent was, and appellants are, residents of Missouri.

The second contact Hague had with Minnesota was that at all times Allstate Ins. Co. was doing business in Minnesota; therefore, Allstate could " . . . hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law . . ." Id. at 642-643.

Turning to the case under review, there are no facts in appellants' petition from which one could infer that respondent was "doing business" in Missouri. However, Granite City lies within ten miles by highway from the Missouri border. It is less than five miles from a major interstate highway, I-270, which connects Illinois and Missouri. In view of these facts, plus the foreseeability that a patron would drive a car to a tavern, it is unlikely that respondent was unaware of the

possibility that a drunken patron would leave the tavern by automobile and drive into Missouri.

The court in Hague also noted that the person seeking recovery was a Minnesota resident at the time of litigation, which gave Minnesota an interest in her compensation. Id. at 643-644. Likewise, Missouri has an interest seeing to it that appellants in the case at bar are fully compensated for their loss. Therefore, a choice of Missouri law by this court would not violate rights granted by the United States Constitution.

The decision reached by this court on the constitutionality of the choice of forum law is also supported by decisions of lower federal courts. In Rosenthal v. Warren, 475 F. 2d 438 (2d Cir. 1973), a New York domicilary was treated in Massachusetts by a Massachusetts physician. The New York domicilary died in a Massachusetts hospital as the result of the physician's medical malpractice. The court held that a federal district court sitting in New York was not required to apply a Massachusetts law which limited the amount of damages recoverable in a wrongful death action. Id. at 446-447[5]. Although this court is not bound by the pronouncements of the federal circuit courts of appeals, this court finds Rosenthal v. Warren persuasive. See also Scott v. City of Hammond, Ind., 519 F. Supp. 292, 297-298 (N.D. Ill. 1981) (Illinois law applied to an Indiana municipality).

The judgment on Count III of the petition is affirmed; the judgment on Count V of the appellants' petition is reversed and the cause remanded for further proceedings.

ROBERT O. SNYDER, Judge

JAMES A. PUDLOWSKI, Presiding Judge

Concur

JOHN J. KELLY, JR., Judge

Concur

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February 21, 1983

The Honorable Neal D. Whitaker
Chairman
House Federal and State Affairs
Capitol Building
Topeka, KS 66612

Dear Representative Whitaker:

I regret that I am unable to come before your committee today to testify in person regarding House Bill 2150. However, I want to take this opportunity to indicate my support for a dramshop act in Kansas.

The Kansas Legislature recognized, in its last session, the problem of the drunk driver by enacting a tougher drunk driving law. I believe it is time we take the additional step of providing for the recovery of damages from those who profit from the sale of alcoholic beverages to intoxicated persons. In doing so, a victim would have a greater chance of recovering for damages suffered. Additionally, enactment of a dramshop act may have some deterrent effect and in that way provide additional protection to Kansans. I believe enactment of a dramshop act is another appropriate response to the carnage on our highways caused by intoxicated persons.

I have not considered in detail HB 2150 and am only speaking in concept in my support for a dramshop act. I believe in the least HB 2150 is a vehicle for the study of this very important issue, and you can be assured if I can assist you further in your study of this issue, I would be most happy to do so.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General

RTS:naw/m

Atch. D

Kansas Alcoholism Counselors Association

(913) 234-3448
1318 Fillmore, Topeka, KS 66604

February 21, 1983

TO: House Federal and State Affairs Committee

FROM: Glenn Leonardi, President, Kansas Alcoholism Counselors Association G.L.

SUBJECT: House Bill No. 2150

I appear before you today on behalf of the Kansas Alcoholism Counselors Association (KACA) to voice our association's support of the concept of House Bill No. 2150.

Although our association has some questions about the technical and legal aspects of enforcing this bill, we do feel that it addresses the important issue of social awareness and responsibility relative to the potential problems associated with alcoholic beverages.

K.A.C.A. therefore supports the concept of House Bill No. 2150.

Heb. E

Kansas
Citizens
Advisory
Committee on Alcohol and other Drug Abuse

P.O. BOX 4052 TOPEKA, KANSAS 66604

February 21, 1983

TO: House Federal and State Affairs Committee

FROM: Ron Eisenbarth, Chairperson, Kansas Citizens Advisory Committee on Alcohol and other Drug Abuse

SUBJECT: House Bill 2150

On behalf of the Kansas Citizens Advisory Committee on Alcohol and other Drug Abuse, I would like to make the following comments regarding House Bill 2150. House Bill 2150 imposes liability on licensees for damages resulting from injuries caused by minors or intoxicated persons who have purchased alcoholic beverages from the licensee.

It is common in many cities in our State for minors to be sold alcoholic beverages by certain licensees. Also, many drunk-drivers are involved in accidents on the way home from the establishment where they have been drinking. Some type of action needs to be taken to hold licensees responsible in both these areas.

We therefore support the concept of House Bill 2150.

Atch. F

February 21, 1983
Hearing on HB 2150
House Federal and State Affairs Committee

Richard Taylor
KANSANS FOR LIFE AT ITS BEST!

This is product liability legislation. Recently GM was forced to take corrective action on a line of cars. The product can be a problem.

Because drinking impairs thinking, alcohol is a killer on our highways. The product is a problem.

The problem is so serious, we must come at it from all directions. HB 2150 is highway safety legislation. I do not understand why Kansas repealed their dram shop law in 1949. Was it an oversight or intentional? Dealers in this deadly drug probably wanted the law off the books and were successful just as they were successful in California when in 1978 the Beverage Industry News announced the signing by Governor Brown of SB 1645, saying "The Third Party Liability nightmare that has haunted California tavern owners since 1971 is over."

The storm stirred up by attempts to save lives with a higher drinking age will seem like a gentle breeze compared to the rage and wrath you will encounter from alcohol profiteers if the legislature gets serious about saving lives with a dram shop law.

Richard Taylor

Att. 6

The Gazette Cedar Rapids Thursday, May 8, 1980

Keggers for teens: Fun, maybe, but illegal

By Kurt Rogahn
Gazette staff writer

Kids may think they're fun, but for those under 19, "they're illegal."

That's what one police officer said about "keggers," beer parties for teens that sometimes are sanctioned by adults — and sometimes not.

High school graduation, which to many students signals their passage into the adult world, may also be the occasion for under-age drinking. For various reasons, parents may decide to host parties at which alcohol is served to their children and their friends.

Parents who sponsor keggers for their kids are opening themselves to a lot of problems, added Capt. Ralph Myers of the Cedar Rapids Police Youth Bureau. If something goes awry — and it can, easily, he said — parents can be liable under criminal law as well as civil law.

And parents who let their children go to a kegger also open themselves to problems, said James E. Barnes, assistant chief of police.

Myers described situations in which criminal penalties could apply to keggers.

"If a parent doesn't give permission for his child to drink and someone else gives that child alcohol, that can lead to a misdemeanor charge for the person serving the alcohol, contributing to the delinquency of a minor," Myers said.

But even if the parents of partygoers do give permission, that doesn't totally clear the sponsors of the party, he continued.

"It can clear the sponsors up to the point that the kid gets drunk," Myers said. If that happens, the law again takes a dim view of those who have made the alcohol available.

"A parent can serve his child alcohol in his own home," Myers noted. "It's not illegal for a parent or a doctor to give a child alcohol. But a parent can be charged if he allows his own child to get intoxicated. That starts getting into the child abuse area," Myers said.

"The 'Dram Act' can also come into play," Myers said. The Dram Act provides that a bartender can be sued civilly if he serves someone intoxicating beverages and the person served gets drunk.

If someone has a kegger at his house, and one of the partygoers gets drunk, drives away and injures himself seriously in an accident, Myers said, the parents of the partygoer "could come back and sue" the person who gave the party.

"You could lose your house, your property, everything," Barnes said.

"I know there's a lot of peer pressure involved here," Barnes said. "I can sympathize with parents, because on the one hand they might say, 'Well, I'd rather have them drink here.' So they throw a party to keep their own kids home and other kids come to the party, and their parents are put in a bind. But you're really sticking your neck out in the civil area," he said.

Some sponsors of keggers attempt to minimize the risks by imposing conditions for the party. One parent said he'd heard of a party at which participants were required to hand over their car keys to the host at the door. Those who wanted to drive home had to leave by 10:30 p.m.; the rest had to stay overnight. No one was returned his or her car keys if they appeared intoxicated.

Myers, told of those conditions, said the party-giver isn't covered there, either.

"An automobile is only one area that can lead to trouble," Myers said. "They could leave the party on foot and get into a fight, for example. They could fall into a swimming pool and drown. Anything could happen.

"It's a stupid idea to sponsor one," Barnes said, "because you're left holding the bag. And it's also a bad idea to send your kid to one."

Topeka State Journal
Friday, July 29, 1977 5

Firm responsible for office party

PROVIDENCE, R.I. (UPI) — A Rhode Island Supreme Court ruling may make company Christmas bashes things of the past.

The court deems the firms responsible for employes who get drunk and hurt themselves at Christmas parties in the office during working hours.

In a unanimous ruling last week, the court ruled that Albert Beauchesne, an employe at David London & Co., a barrel reconditioning concern in Lincoln, R.I., was entitled to full medical, legal and disabilities benefits.

At a 1975 Christmas party, Beauchesne, then 18, fell out a third-story window, suffering injuries that led to a leg amputation. Bearchesne had been drinking boilermakers — whisky with beer chasers — provided by the small family-owned business.

The bash was held during regular work hours and the David London employes were celebrating $10 bonuses in their Christmas pay checks.

In its ruling, the court limited the liability to the following specific circumstances: intoxication with company alcohol at a company-sponsored party on company time and premises.

It also upheld a Workmens' Compensation Commission award of $97 a week and $14,050 to Beauchesne to cover the loss of his leg and related medical expenses.

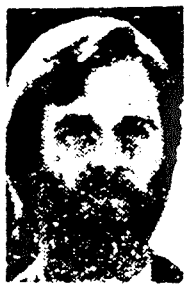
"While the party may not be classified as an expressed 'command performance' for the employes, one can certainly conclude ... that their attendance was expected," Justice Thomas F. Kelleher wrote in the decision.

"There was a clear indication that management felt that a Christmas get-together financed by the company did much to create good will between labor and management," he wrote.

2A THE KANSAS CITY TIMES Monday, June 21, 1976

Judge Won't Cut Damages

A Superior Court judge has refused to reduce the $1.9 million in damages to be collected from a Beverly Hills bar in connection with an accident that maimed James Stacy, actor.



STACY

Stacy won the settlement from the Chopping Block Bar after he lost his left arm and leg in a motorcycle accident involving a patron of the bar. The patron, Carter B. Gordon, pleaded no contest to charges of drunk driving and manslaughter and is serving a 5-year term in prison.

Judge Charles Church said the case has implications that "cast a very heavy burden on bars and restaurants which serve alcoholic beverages."

TIME, Sept. 16, 1974

THE LAW

Spadework Specialists

TV lawyers like Mason, Hawkins and Preston routinely best prosecutors and private attorneys alike by dint of imaginative research and brilliant courtroom tactics. Without the aid of the TV scriptwriters, though, a lone practitioner or a small firm is rarely a match for a large adversary backed by a platoon of associates in the firm and a big reference library. Nor can small outfits usually afford the high annual fees electronics firms charge for use of computers that can search their prodigious memories in seconds and spew out legal precedents.

One way for the small firm to have a fighting chance, at reasonable rates, is to turn to a research company manned by lawyers. There is now a handful of these in the U.S. doing legal spadework. The largest and most aggressive is The Research Group Inc., with offices in Cambridge, Mass., Ann Arbor, Mich., and Charlottesville, Va.—all cities with major university law libraries. The Group gears its services to smaller firms, which constitute an important market; about three-quarters of the private attorneys in the U.S. work in offices that have three lawyers or fewer.

The company will prepare basic analyses of statutes and precedents in question, draw up briefs, develop strategy or seek grounds for appeal. It claims to be competent in most legal specialties, from admiralty law to zoning. Relying solely on old-fashioned search and analysis, not computers, the Group charges its customers $17.50 an hour—a bargain compared with the average $40 that individual lawyers routinely charge for their own time. The difference can mean substantial savings for the client.

The staff that churns out this cut-rate research consists of 50 lawyers, most of them under 30, and some 150 third-year law students who work part-time. The founder and chief is Walter W. Morrison, 29, who began organizing his enterprise in 1969 while still attending the University of Virginia Law School. During the summer he served as a clerk in a 15-man Hartford firm and occasionally came into contact with lawyers from smaller firms. "Their hours," he observed, "are eaten up by running an office and gathering the facts on a case." All too often, he found, they were so ill prepared in court that they could not argue their cases competently. He concluded that "true legal advocacy, the bedrock of our system, is crumbling."

Strengthening the bedrock has turned out to be profitable work for Morrison, who began with a $150,000 loan and is now grossing $2 million a year. The Group currently has some 8,000 lawyer-customers and is wooing more with an advertising campaign in legal trade journals. Because the company does not deal directly with the public, professional codes against a lawyer's advertising his services do not apply. Morrison even dreams of opening branches overseas; he already has a few clients on Guam, in Canada and Guatemala.

He keeps the clientele happy by helping them win tough cases. In one, the parents of a Missouri youth sued a liquor-store owner for selling to a minor, thus allowing him to get so drunk that he drove his car into a tree, killing two passengers and injuring himself. The case was a particular problem in Missouri. The state has no statute holding a liquor seller liable in damages for any injuries that befall a person who has been sold booze improperly. In fact, Missouri has followed the common-law tradition that it is the consumption of alcohol, not the sale, that is the legal cause of accidents. Six attorneys turned down the case as having no chance; the seventh, Elmer Oberhellmann of St. Louis, a single practitioner, tried in vain to find a precedent. Then he handed the problem over to the Group, which turned up an 1850 Missouri court opinion involving the sale of liquor to a slave without the permission of his owner. The slave got drunk, fell asleep and froze to death on a blustering winter night; his master sued and won the price of a new slave. That led the Group to a 1972 case containing language indicating that the Missouri courts might be willing to abandon the old common-law tradition. Finally, they pulled together the recent legal developments across the country concerning a seller's liability. With that armament of precedents, they drew up a memorandum that persuaded three attorneys for the liquor dealer's insurance companies to settle out of court for $25,000.

Schneider: Hosts Might Be Liable

TOPEKA (AP) — Kansas hosts should be mindful not only of the damages intoxicated guests pose to others but of their own possible liability, Atty. Gen. Curt Schneider said Wednesday.

Schneider, replying to an inquiry from Rev. Richard Taylor, executive director of Kansas United Dry Forces, said the lack of a dram shop or civil damage act has not prevented the courts in some other states from finding the host or server liable for damages resulting from voluntary intoxication.

SCHNEIDER SAID Kansas had a law from 1868 until 1949 that provided that every wife, child, parent, guardian or employer, or other persons who shall be injured in person or property by any intoxicated person has a right of action against any person selling, bartering or giving intoxicating liquors.

The attorney general said that although there appears to be no court precedent since repeal of the law in 1949 in favor of liability, there does not appear to be any precedent against it.

"Thus, the question remains an open one in Kansas," he said. "Given the lack of statutory guidance or judicial precedent, it is difficult to predict the likelihood that such liability will be recognized in Kansas."

SCHNEIDER SAID he joins with Taylor in urging those who choose to consume alcoholic beverages to do so responsibly and in moderation, "in order that a season of celebration does not become a time of tragedy."

The Ohio Issue, January 1972

SOCIAL HOST LIABLE
FOR INTOXICATED GUEST

The Minnesota Supreme Court, in a unanimous decision, recently ruled that the social host who serves drinks to minors or allows his guests to drink too much is just as liable for his actions as a bartender or liquor dealer who provides the liquor commercially.

The court drastically extended the scope of the state's 61-year-old "Dram Shop Law" to those who "provide liquor gratuitously as an act of hospitality, if injury occurs to a third person as a result of the intoxication of the recipient who was furnished the liquor legally."

The law applies even to such special situations as the host of a wedding reception or the employer who acts as a host at a company picnic.

—Listen

HUMBUG!

DECEMBER 1974

Court Dries Up Office Parties

SAN FRANCISCO (AP) — Most office Christmas parties in San Francisco this year are pale shadows of the revelries of Yules past because of a ruling by the California Supreme Court.

Some residents of this ex-Barbary Coast town, accustomed to dipping deeply into the office wassail bowl on the week before Christmas, can count on subdued office festivities.

In a unanimous decision upholding a lower court ruling, the state's high court said in effect that a party host who serves drinks to a guest runs the risk of damages if the guest later is the guilty party in an accident.

"We have a strictly 'bah humbug' situation," said a spokesman for the Bank of America. "It will be up to the individual branches whether they want to have Christmas parties or not."

The same view prevailed at Standard Oil Co. of California, where some individual departments had staff members meet in restaurants for some Yule cheer.

One business executive who declined the use of his name and that of his firm said his company has ordered bartenders serving the firm's office party to water down the highballs 50 per cent.

Another firm shifted its usual evening party to a long lunch — back to work at 3 p.m. — with the hope that some sobering work might get done before the whistle blew.

"There's a definite change of pattern this year," said Ed McGovern of a catering firm. "The parties which are being given are serving primarily food. There's no consideration of alcohol of any description. This is a reaction to the court's decision."

City Hall, which was to have tossed a Christmas bash in the basement Tuesday, moved to another location after workers were warned by City Administrative Officer Tom Mellon that drinking on city property was a definite no-no "on any occasion, for any purpose."

For Mayor Joseph L. Alioto's office came teetotaling tidings that the Supreme Court's decision would affect not only Christmastime, but all future receptions and other events at City Hall.

"It means no more champagne on the premises," said a spokesman for the mayor. "Sorry about that."

The court decision involved a $200,000 award to a 3-year-old child whose parents were killed in a headon auto collision with a car being driven by a drunk driver. The judgement was made against the saloon that served the driver his last drink.

The court warned that its ruling could also apply to a private person, such as the host who gives drinks to a guest who later gets into trouble.

Company Held Responsible for Death After Office Party

CHRISTMAS PARTIES MAY BE DRYER THIS YEAR

(1975)

There may be considerably less liquor served at office Christmas parties this year, as a result of a recent ruling by the California Supreme Court.

In the case of McCarty v. Workmen's Compensation Appeals Board and Apartment Plumbers, Justice Torbriner's opinion held the employer responsible for the death of an employee who had become intoxicated at the annual office Christmas party.

On December 23, the company permitted the employees to leave work at 2:30 p.m. although it paid them for a full working day. Dan McCarty, an employee of the Los Angeles plumbing firm, joined others in the festivity which included drinking liquor from the company stock which was kept for use as gifts to customers, suppliers, plumbing inspectors and parties.

Apparently the liquor supply was running low, because the court records showed that McCarty left the office around 5 p.m. to go home for a bottle of his own. He returned to the party and continued to drink from his own bottle.

When McCarty left for home around 9 p.m. he was visibly intoxicated. A company foreman offered to drive him home, but McCarty refused. While driving home, McCarty was killed when he collided with a railroad signal pole.

At the time of his death, he had a blood alcohol content of .26%, well above the legal minimum of .10% which is prima facie evidence of drunk driving in most states.

The chief question before the California Court was whether McCarty's intoxication arose in the course of his employment. The Court ruled that his overindulgence was in the course of his employment, since employee social and recreational activity on the company premises, endorsed with the express or implied permission of the employer did indeed fall within the course of employment as "activity conceivably of some benefit to the employer."

The court's ruling has several far-reaching implications:

- Knowledge that drinking parties occur gives rise to an implied consent to such activity.
- Even though the employee left his place of employment to go home, he was still considered under jurisdiction of the employer when he returned.
- The employee furnished his own bottle of liquor, which was at least in part responsible for his intoxication, yet the employer was still liable for damages.
- Although the employer offered to drive the employee home, seeing that he was drunk, and was refused, the employer was still liable for damages.

It is expected that the McCarty Court decision will result either in fewer office Christmas parties this year, or in parties where employee drinking is not a part of the Holiday celebration.

BARS LIABLE IN DRUNKEN-DRIVING DEATHS

SALEM -- Owners of drinking establishments are liable for injuries inflicted by patrons who become intoxicated on the premises, then drive automobiles, the Oregon Supreme Court ruled recently.

In a landmark decision by Multnoman County Circuit Judge William Dale, who held Keith and Mary Carpenter liable for the deaths of Marie M. and Arnold Scheie, who were killed when their car was struck by one driven by Betty Jean Pierce on August 23, 1974, at NE 102nd Avenue and Glisan Street in Portland.

The Judge found that the Carpenters' tavern continued to serve beer to Mrs. Pierce after she became visibly intoxicated. The barkeeper also had sufficient reason to think that Mrs. Pierce would drive her own car when she left the tavern, the judge determined.

The Supreme Court, in an opinion by Justice Thomas Tongue, said the facts presented in the case were sufficient to show the Carpenters were negligent, and the court dismissed their appeal.

The court adopted this rule. A tavern keeper is negligent if at the time of serving drinks to a customer, that customer is visibly intoxicated (and if) at that time it is reasonably forseeable that . . . he or she will drive an automobile.

In the Circuit Court trial, Judge Dale awarded damages against the Carpenters and Mrs. Pierce in the amounts of $6,500 to the estate of Arnold Scheie and $21,500 to the estate of Marie M. Scheie.

Mrs. Pierce testified in the Circuit Court that she had taken a tranquilizer before going to Mary Jo's Inn, 8012 NE Glisan Street, about 4 p.m. and that she had five glasses of beer before leaving at 6:30 p.m. Bartenders and others testified she had six or eight beers.

During her time at the tavern, witnesses said, she passed out. Witnesses testified her car careened away from the tavern travelling at 70 to 80 miles an hour.

Other testimony showed Mrs. Pierce's blood alcohol content at .24 percent. Under Oregon law, driving under the influence of alcohol involves blood alcohol readings of more than .10 percent.

—*Oregonian*, July 21, 1977

Bar Owner Liable for Customer's Tort

The California Supreme Court unanimously decided that a bartender may be held liable for injuries to third persons, caused by his unlawful sale of liquor to an **obviously intoxicated person.**

December 1970 T.N.T. reported details of this case of Vesely v. Sager. A state Court of Appeal had routinely ruled that California, and several other states, still cling to the archaic English common law which prohibited injured persons from suing a bartender who helped cause the drunkenness of the person responsible for the accident.

The court records reveal that "William Sager owned and operated the Buckhorn Lodge, a roadhouse near the top of Mount Baldy in San Bernadino County . . . Beginning about 10 p.m. on April 8, 1968, Sager served or permitted defendant O'Connell to be served large quantities of alcoholic beverages. At the time the beverages were served, Sager knew that O'Connell was 'incapable of exercising the same degree of volitional control over his consumption of intoxicants as the average reasonable person.' Sager also knew that the only route leaving the Buckhorn Lodge was a very steep, winding, and narrow mountain road and that O'Connell was going to drive down that road. Nevertheless, Sager continued to serve O'Connell alcoholic drinks past the normal closing time of 2 a.m. until 5:15 a.m. on April 9. After leaving the lodge, O'Connell drove down the road, veered into the opposite lane, and struck plaintiff's vehicle."

June 24, 1971, the state Supreme Court overruled previous decisions and sent this case of Vesely v. Sager back to the local Superior Court to proceed with the trial on the merits of the evidence available in the case.

To recover for injuries suffered in a tort ("torturous wrong"), the victim must always prove two things:

1. That the wrong-doer had a DUTY **not** to do the wrongful act because he could have reasonably foreseen it might result in injury to another **or** because the act was illegal and might cause injury to a person protected by the law.

2. That the specific ACT committed was **in fact** A CAUSE of the injury suffered by the victim.

In **past** years, California courts had always said that the SALE OR SERVICE of liquor was **not** a cause of the accident, because the voluntary act of the drinker in consuming the beverage had broken the chain of causation. **Now** the Supreme Court states that such earlier court decisions are wrong.

The court ruled a person "may be liable if his negligence is a substantial factor in causing the injury, and he is not relieved of liability because of the intervening act of a . . . (drinker) . . . if such act was reasonably foreseeable at the time of his negligent conduct."

". . . It is clear that the furnishing of an alcoholic beverage to an **intoxicated person** may be the proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent."

The California court said that Section 25602 of the A.B.C. Act, which prohibits selling or giving alcoholic beverages to obviously intoxicated persons and drunkards, was "adopted for the purpose of protecting members of the public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor. Our conclusion concerning the legislative purpose in adopting section 25602 is compelled by Business and Professions Code Section 23001, which states that one of the purposes of the Alcoholic Beverage Control Act is to protect the safety of the people of this state."

This recent decision **must** also **mean** that ANYONE (friend, relative, bartender) who violates the law by giving or selling any alcoholic beverage to a **minor** or to an **habitual** or **common drunkard** or to an **obviously intoxicated person** is liable for the reasonably forseeable injuries to other persons.

The ruling **should eventually extend to include** instances where the statutory law has **not** been violated. This would mean that **every person** who is injured in person or property by any intoxicated person would have a right to sue **any person** who by selling or giving alcoholic beverages causes the intoxication, in whole or in part, of the person responsible for the accident.

Everyone finds he has good credit when he starts to borrow trouble.

If at first you don't succeed, do it the way she told you.

Driving is a lot like baseball—it's the number of times you get home safely that counts.

To: House Committee Federal and State Affairs

From: Dr. Lorne A. Phillips, Commissioner
SRS/Alcohol and Drug Abuse Services

Date: February 21, 1983

Re: HB 2150

We at SRS/ADAS find little difficulty in supporting the provisions of this bill that require a licensee to share joint liability for damages caused by minors or intoxicated persons. It is our belief that it is only just that the responsibility be shared by both parties, and consider this bill a reasonable deterrent to the abuse and illegal sale of alcohol.

However, aside from the apparent intent of this legislation, we feel that there are other positive aspects which may be realized with the passage of this bill.

1. First, we feel that the provisions of HB 2150 could serve as an additional inhibiting factor for any licensee considering the sale of alcohol to minors.

2. We also feel that HB 2150 could serve to diminish the further abuse of alcohol by those persons already intoxicated.

3. And finally, we feel that it can serve as an additional safeguard for the general public which must endure the sometimes fatal repercussions resulting from serving minors and intoxicated persons.

It is our belief then, that HB 2150 will have a positive impact upon alcohol abuse and all that it implies. We therefore support passage of HB 2150.

3910A

TESTIMONY REGARDING HOUSE BILL 2150
BEFORE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE
BY BOB W. STOREY
REPRESENTING KANSAS BEER RETAILERS ASSOCIATION

MEMBERS OF THE COMMITTEE:

First, I would like to say to the committee that the idea of legislation such as House Bill 2150, commonly referred to as the "dramshop" act, has been proposed by the legislature over a long period of years.

The idea, or at least the hoped-for result, of a dramshop act is to prevent the sale of alcoholic beverages to those persons who are intoxicated (whatever that term may refer to) and minors. House Bill 2150 attempts to place the liability for any damages caused by a minor or intoxicated person to a third party upon a licensee, retailer, or tavern owner who sells, gives, or serves any alcoholic beverage to that intoxicated person or minor.

There are many legal implications raised by the proposal of House Bill 2150, as there have been in the past by all proposed dramshop legislation.

First, I would like to point out to the committee that the bill as written is discriminatory in nature. It defines a licensee as any retailer licensed under the present Kansas statutes, or as any licensed private club under the statutes of the State of Kansas as the party or parties which would be

Atch. 4

jointly liable with the minor or intoxicated person for damages inflicted to a third party.

The committee should note at this point that the first problem which arises with this particular bill is that it is discriminatory in nature and has very grave constitutional problems. It attempts to define a licensee as the only person furnishing alcoholic beverages to an intoxicated person or a minor who would be liable under the statutes of the State of Kansas. In other words, there is no provision in this bill to impose liability upon any individual, partnership, or corporation that would serve alcoholic beverage to a minor or intoxicated person, unless that person or that entity was licensed under Chapter 41 of the Kansas Statutes Annotated. In other words, a licensee, retailer, or tavern owner who would violate the terms of this act could be completely liable to a third party for damages. However, an individual, let's say at either a house party or a private party, who served alcoholic beverages to a minor or an intoxicated person would not be liable under this act-- unless he, she, or the entity involved was a licensee under the terms of the act. This would not be fair and equal treatment under the Constitution of the United States. One class of individuals or entities would be deemed to be liable under the act while another class would be exempt by not being named.

The second example of discrimination and confusion would be in the instance of a nonprofit club which would be licensed under Chapter 41 of the Kansas Statutes Annotated, such as a country club. If this act refers to all clubs licensed

under Article 26 of Chapter 41 of the Kansas Statutes Annotated, then this would apply to all Class A clubs. These, of course, are nonprofit organizations such as country clubs, Elks, American Legions, Knights of Columbus, etc. In the case of a nonprofit club such as a country club, it would be very difficult to determine liability. There is no ownership of an organization such as this; it is only a membership club which operates as a nonprofit organization and is normally regulated by a Board of Directors. It would be a problem to decide who would share the responsibility if the terms of this act were knowingly violated. There is no known person or entity that owns the club; therefore, it would be difficult to impose liability upon the organization.

As mentioned above, let's take the case of a private party wherein a group of individuals is asked to attend a function. The host or hostess is having the party to help further business interests or for other promotional purposes. The individual or entity hosting the party is not a licensee under this act, but knowingly gives alcoholic beverage to a minor or intoxicated person. This act does not cover that particular instance. Again in this case it would be discriminatory, since if the individual or entity were a licensee they could be liable; but if a private individual or entity were hosting a party no, liability would be imposed under House Bill 2150.

The next possibility would be in the case of a charitable event. I am sure that each one of the committee is fully aware that there are many charitable events at which money is attempted to be raised for good causes, and which events

usually result in the serving of cocktails. Or, let's take another example of a political rally, such as are popular throughout our state as in all other states in the union, where cocktail parties are thrown for the benefit of a particular candidate or candidates, either by a group or by an individual in a private home or on premises leased or donated for these purposes. In either one of these two cases, either charitable or politcal, there is no liability imposed by House Bill 2150 for an individual or entity serving alcoholic beverages to an intoxicated person or to a minor, simply because that entity or individual does not hold a license as dictated in Chapter 41 of the Kansas Statutes Annotated.

Finally, let's discuss the practicability of enforcement of this proposal if it were enacted into the statutes of the State of Kansas.

I would point out to the committee that the act is completely unenforceable for the following reasons:

First, the bill attempts to impose liablity upon a licensee who serves an intoxicated person alcoholic beverages. There appears to be no definition in the Kansas statutes of an intoxicated person. Rather, our laws speak of one who is presumed to be under the influence of alcohol as an individual whose blood alcohol content in his or her body measures more than .10%. It is interesting to note here that the statute does not classify this person as intoxicated; it merely states that one is presumed to be under the influence of alcohol with that particular content in his or her body. Would then under this act

the definition of an intoxicated person be one who has that level of alcohol in his or her bloodstream? Or one who has been convicted of being under the influence of alcohol regardless of content? Or one who has a higher blood alcohol content than .10% but who is acquitted of being under the influence? As you can readily see, the confusion would lie in the definition of an intoxicated person. I submit to the committee that there is no ready definition which could be used in a civil lawsuit to determine damages against a licensee, retailer, or tavern owner for the benefit of an injured third party.

Let's take a further example wherein a person leaves a club, as determinted by Chapter 41 of K.S.A., and is involved in an automobile accident wherein a third party is damaged. It is proved that the person causing the accident has been to the club and had quite a few drinks, however, is not for any reason at all prosecuted or charged with being under the influence of alcohol. Yet a lawsuit is brought against the owner of the club for the reason that the damaged party believes that the party causing the accident was intoxicated. What proof would then be necessary to present to a jury to try to prove by a preponderance of the evidence that the licensee did in fact serve an alcoholic beverage to an intoxicated person? How would the damaged party go about proving that the individual was in fact intoxicated when he entered the club, and the law was violated by the club serving alcoholic beverage to the person? Or, how would one go about submitting proof that the person who entered the club was not intoxicated at the time, but became intoxicated while in the

club, and it was not apparent to the person serving the alcoholic beverage that he or she was in fact intoxicated? Or, let's ask the question, at what point is the one dispensing the alcoholic beverage in a club able to determine whether or not one is intoxicated and should not be served any further alcoholic liquor? It is at this point that the definition of intoxicated becomes very cloudy under the terms of the law. When a person has consumed enough alcoholic beverage to be loud and boisterous, is this a sign of intoxication? Or, let's take the case of a person who sits quietly at a bar and makes no noise, causes no trouble, and continues to drink at a steady rate. At what point in time would this person be considered to be intoxicated by a person dispensing the alcoholic beverage? Finally, let's take the case where there are three or four individuals sitting at a table sharing a common beverage, such as a pitcher of beer, and the person ordering the same does not appear to be intoxicated. However, another person sitting at the table may become intoxicated and is furnished the alcoholic beverage by the person making the purchase. Would this then be the fault of the tavern or the club selling the beverage, or would it be the fault of the one ordering the same who apparently is not intoxicated?

As I believe the committee can readily see, this bill would be a nightmare to law enforcement officials and would heavily burden the courts with lawsuits joining as a party defendant the licensee, retailer, or tavern or club owner. As a result of this type of legislation, I believe you also can readily see that the insurance companies could react in two ways.

One, the insurance premiums would be so high to one operating a cereal malt beverage tavern or one operating a private club that it would be almost prohibitive to obtain licenses or permits for these types of establishments. Surely the insurance premiums would eat so heavily into the profits (which are not enormous in any event) that this would restrict one's right to operate a private business, with the end result that the bill would result in restriction of trade in this particular business area.

The next and a very serious problem which would arise in law enforcement would be how to determine whether or not a licensee, retailer, tavern owner, or club owner has knowingly sold to a minor.

As the committee is well aware, in this day and age it is very simple for a minor to obtain legal identification to show that he or she is in fact of legal age. With the older appearance of many teenagers in today's society, false identification is usually believable by any retailer. At one point we thought that the requiring of colored photos on driver's licenses encased in plastic would be the answer; however, I think it is common knowledge that these driver's licenses may be obtained at any of our universities or at other locations for fifteen or twenty dollars, which give readily accessible false identification to a minor. Further, this bill is attempting to hold a retailer, tavern owner, or club licensee liable for damages caused by an individual who has proved to that retailer that he or she is of age, even though it is by false identification, since the retailer has absolutely no way to prove

the individual is not a minor. As a matter of fact, if the retailer refuses service to such an individual and he or she is later able to prove that he or she is an adult, then the club owner is subjected to a lawsuit from that direction for having refused service to one who is lawfully entitled to such service. It is a no-win situation which I do not believe the committee wishes to impose upon a retailer as provided for in this act.

Finally, if House Bill 2150 were enacted into law, it would have the effect of filling the court houses with lawsuits for damages, since it presupposes that if an alcoholic beverage is served to a minor and that minor is later in an accident, then the implication would be great that because he or she was served this beverage he or she was the cause of the accident.

In closing, members of the committee, I do not believe that you wish to impose the heavy burdens which are represented by House Bill 2150 upon the business community of the state of Kansas. I am sure that in your wisdom you will see, as stated above, that the law is discriminatory, completely unenforceable, and is not the solution to some of the problems that now exist in our society.

Respectfully submitted,

BOB W. STOREY

Kansas Association of Private Clubs

(913) 357-7642 • 117 W. 10TH ST. • TOPEKA, KS 66612

February 21, 1983

Mr. Chairman and Members of the Committee. My name is Jack Milligan. I appear this afternoon in behalf of the Kansas Association of Private Clubs in opposition to HB 2150.

Our opposition to HB 2150 is predicated on several reasons.

First, this type of legislation is discriminatory. It would place liability on private clubs, taverns and retail liquor store personnel for the actions of individuals who consumed their products.

If this sort of rationale is deemed appropriate, then maybe you should also consider holding automobile dealers liable for selling vehicles to persons who operate them in an unsafe or reckless manner. Or possibly, you should consider making the service station attendant liable who sells fuel to a driver who may or may not seem to be under the influence of alcohol or cereal malt beverage. Possibly, this same rationale should be applied to the retail store clerk who sells ammunition to someone who uses the ammunition in an illegal, harmful or deadly manner. Or, even the party host who permits his or her guest to consume too much alcoholic beverage.

Secondly, HB 2150 would generate a dramatic if not disastrous jump in liability insurance premiums for private clubs, taverns and retail liquor stores. Unnecessary and excessive costs to club, tavern or store proprietors will ultimately generate much higher food and beverage prices.

Atch. I

Thirdly, HB 2150 will not solve the problem in our society of alcoholism or even the problem of driving under the influence of alcohol. We are convinced the Legislature took a positive step toward solving the DWI problem a year ago when you implemented stiff penalties for DWI violations. We are also convinced the problems of alcoholism will remain a problem to our society until our school systems provide accurate and effective education about alcohol and its negative effects if consumed in excess.

Fourthly, we believe HB 2150 would make it impossible for a court of law to determine an accurate or equitable allocation of liability if an individual stopped for a cocktail or beer in several establishments before causing damage to persons or property. Consider the individual who stopped in a tavern where he or she consumed 3.2% cereal malt beverage, later a private club or two where he or she consumed alcoholic liquor, a retail liquor store where he or she consumed even more alcoholic liquor, and finally stopped by a friend's party where he or she consumed even more alcoholic liquor and possibly even drugs, which further impaired the driver's ability to operate a motor vehicle. Needless to say, a situation of this nature could get incredibly complex and virtually impossible to litigate.

Fifthly, we believe its unfair and unrealistic to expect anyone working in a tavern, club or retail liquor store to determine just when a patron may be approaching the point of intoxication. I am confident we have all witnessed an individual who could consume large amounts of alcoholic beverages and appear to be totally unaffected even though the individual is well past the point of intoxication.

Finally, legislation comparable to HB 2150 represents less than a mandate for national public policy.

According to the figures obtained from the United States Brewers Association, there are 29 states and the District of Columbia that do not have any form of "dram law". Nine states have repealed their dram laws in the past ten years. And, only four or five have full dram laws where the establishment owner, employees and even private party hosts are liable for their patrons or guests.

The state of California presents an interesting study in the unworkability of dram laws. A California Supreme Court decision imposed a dram law on the food and beverage establishments that ultimately caused liability insurance premiums to skyrocket to $30,000 - $40,000 per year. This appears reminiscent of four or five years ago, when the Kansas Legislature was attempting to control runaway medical malpractice insurance premiums.

Eventually, the California Legislature moved to repeal their state's dram law when it was deemed to be applicable for citizens who wished to invite his or her friends to social gatherings where alcoholic beverages would be consumed.

It should be noted several of the approximate 15 states that have some form of dram liability law only apply to products sold or service granted to habitual drunkards or the visably intoxicated. It should also be noted two states had to subsequently pass legislation to protect food and beverage establishment proprietors in cases where they refused to serve someone because they appeared intoxicated. Needless to say, this presents a Catch 22 for the food and beverage business.

Thank you for the opportunity to appear this afternoon. I will be happy to address any questions the committee might have.

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TOM GREEN, OF THE KANSAS BAR
ASSOCIATE

WRITTEN COMMENTS OF THE KANSAS RETAIL LIQUOR DEALERS

TO: House Federal and State Affairs Committee

FROM: T. L. Green, Kansas Retail Liquor Dealers Association

RE: HB 2150

DATE: February 21, 1983

House Bill No. 2150 seeks to create liability of the retail licensee who sells any liquor to a minor or intoxicated person, which person subsequently causes "damage." The bill further requires each licensee to maintain liability insurance or post a bond in order to insure against the liability created by the bill. The Kansas Retail Liquor Dealers Association opposes HB 2150.

The Kansas Retail Liquor Dealers Association has always been concerned with the problems of alcohol and alcoholism. The Retail Liquor Dealers Association encourage their customers to consume their products only in moderation. The Association supports the many programs of education and treatment and believe this is the proper approach to dealing with alcohol related problems. Any act which seeks to create liability upon a particular class of small businessmen is not in the best interest of the state or those individuals subjected to the liability.

There are several particular problems with the language used in HB 2150. The first problem is that there is no requirement that the sale of

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alcohol to a minor or intoxicated person be the probable cause of the damage done by those individuals. Particularly as it relates to a minor, the language of the bill creates liability of the licensee whether the minor has consumed any alcohol or not.

Another problem with the language of the bill is the definition of an intoxicated person. As the members of the committee are well aware, it is extremely difficult at times to ascertain whether an individual is intoxicated or not. The Kansas Retail Liquor Dealer frequently will not sell to an individual who is obviously "stumbling drunk." In order for the liability to be created under this bill it will be necessary for a court to establish a definition of an intoxicated person and require proof that the person was so intoxicated at the time of acquiring the alcohol from a particular retailer.

Another severe legal problem with the statute is the creation of joint and several liabilty upon the licensee with the individual causing the damage. The State of Kansas in 1973 enacted a comparative negligent statute which eliminated the joint and several liability concept. To create joint and several liability in this context is to create a special exception to the comparative negligence statute. Conceivably under the language of HB 2150 an individual could buy a bottle of whiskey from a retail liquor dealer, consume that bottle of whiskey then get in his car and have an accident causing several hundred thousand dollars in damage. If the individual was impecunious this bill would make the retailer liable for the full amount of damages without recourse against the individual who consumed the alcohol and caused the accident.

Another serious problem with HB 2150 is the liability insurance burden it would create on all licensees. Many of this committee will not recall the "products liability crisis." However, because this bill creates a new area of liability in which insurance companies have no experience upon which to base their exposure the initial premiums of retail licensee are likely to be extremely high. In fact there is a strong probability that acquiring liability insurance would be prohibitive, as was the case with products liability coverage.

Another problem with this bill is the broad range of liability that is created. Not only does this create liability for automobile accidents and injuries but it would create other forms of liability such as an individual getting drunk and beating somebody up or unintentionally setting fire to a home or hotel, as examples.

In summary the Kansas Retail Liquor Dealers Association feels that the best approach to dealing with alcohol and alcohol problems is through education and treatment. To create special liability on that group of small businessmen which the state has allowed to merchandise alcohol will not significantly aid the state in dealing with alcohol or alcohol problems. What it will do is create a financial burden upon an industry already beleaguered financially. The Kansas Retail Liquor Dealers Association would request that you report HB 2150 unfavorably.

Respectfully submitted,

T. L. Green

TLG/mbb

MEMORANDUM

TO: Honorable Neil Whitaker, Chairman
House Federal and State Affairs Committee

FROM: THOMAS J. KENNEDY, Director, ABC Division

RE: House Bill 2150

DATE: February 21, 1983

PURPOSE

House Bill 2150, as introduced, is an act concerning alcoholic beverages; imposing liability on certain licensees for damages resulting from injury caused by certain minors and intoxicated persons.

PERSPECTIVE

This act would place joint and several liability on any retail licensee, (retail liquor store licensee, cereal malt beverage retailer, or private club licensee) and any minor or intoxicated person, to whom the retailer had sold, given or served any alcoholic beverage for any damages caused by the minor or intoxicated person.

"Alcoholic beverage" means alcoholic liquor as defined by K.S.A. 41-102 and amendments thereto or cereal malt beverage as defined by K.S.A. 41-2701 and amendments thereto.

Each licensee would be required to furnish proof to the director of alcoholic beverage control, proof of the existence of liability insurance coverage or post with the director a bond, in an amount determined by the director to be necessary to insure the financial responsibility of the licensee for any liability incurred under this act.

Failure to maintain insurance coverage, or post bond in the amount required by the director, shall be grounds for suspension or revocation of a licensee's license to sell alcoholic liquor or cereal malt beverage.

COMMENTS AND/OR RECOMMENDATIONS

1. Recommend that the bill be amended to provide that city or county officials verify that cereal malt beverage retailers have liability insurance coverage or a bond, in an amount determined by the city or county, as appropriate, to insure the financial responsibility of the retailer for any liability incurred under this act. The reason for this recommendation is that cities and/or counties license cereal malt beverage outlets and the director of alcoholic beverage control is not involved in the licensing of these 5,000 plus retailers.

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2. Recommend that a statutory formula be provided to the director of alcoholic beverage control as well as city and county officials for determining the amount of the bond required for a licensee, if proof of liability insurance cannot be provided.

3. The director of alcoholic beverage control is neither a proponent nor an opponent of this legislation.

Respectfully submitted,

THOMAS J. KENNEDY, DIRECTOR
Alcoholic Beverage Control Division

TJK:cjk