Approved: 3-11-04
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 p.m. on February 19, 2004 in Room 313-S of the Capitol.

All members were present except:
Representative Dan Williams - Excused

Committee staff present:
Jill Wolters, Revisor of Statutes
Diana Lee, Revisor of Statues
Jerry Ann Donaldson, Kansas Legislative Research Department
Cindy O'Neal, Secretary

Conferees appearing before the committee:
Jim Concannon, Dean, Washburn University School of Law
Lew Ebert, Kansas Chamber of Commerce & Industry
Gene Balloun, Shook, Hardy & Bacon
Representative Michael O'Neal
Ron Pope, Kansas Trial Lawyers Association
Vic Allred, Jazz Restaurants
Phillip Bradley, Kansas Licensed Beverage Association
Ron Hein, Kansas Restaurant & Hospitality Association
Amy Campbell, Kansas Association Beverage Retailers
Tom Groneman, Alcoholic Beverage Control

The hearing on **HB 2764 - class action, appeals from certification of class**, was opened.

Jim Concannon, Dean, Washburn University School of Law, explained that the proposed bill would give the Court of Appeals the discretion to permit an immediate appeal prior to the final judgement of a trial court, whether it has been certified a class action or not. (Attachment 1)

Lew Ebert, Kansas Chamber of Commerce & Industry, stated that the proposed bill would allow for a more efficient use of legal resources and the courts. (Attachment 2)

Gene Balloun, Shook, Hardy & Bacon, appeared as a proponent of the bill because it would benefit both the plaintiffs and defendants and would not eliminate any appellate rights that currently exist. (Attachment 3)

The hearing on **HB 2764** was closed.

The hearing on **HB 2296 - dram shop**, was opened.

Representative Michael O'Neal appeared as the sponsor of the bill. Kansas is one of a very few states that does not extend liability to those who serve/dispense alcohol. It is his opinion that the courts want the legislature to address the issue of dram shop, and if the legislature does not then the courts will adopt some type of common law and the legislature will have no say as to whom it will apply. He provided the committee with some clarifying amendments and suggested that Sections 2-10 be struck as it relates to mandatory server training. (Attachment 4)

Ron Pope, Kansas Trial Lawyers Association, practices law in Kansas, Missouri and Oklahoma. Missouri and Oklahoma have dram shop and it works well in those states. He supported some level of liability for those who knowingly serve minors or incapacitated person. (Attachment 5)

Vic Allred, Jazz Restaurants, empathized with those who are damaged as a result of drunk driving, but believes that the intoxicated person must face personal responsibility of their actions. (Attachment 6)

Phillip Bradley, Kansas Licensed Beverage Association, opposed mandatory server training, mandatory state registration and dram shop type laws in general.(Attachment 7)

Ron Hein, Kansas Restaurant & Hospitality Association, supported the higher standards but believes that this is not a good bill. The responsibility should lay with the person who is drinking. He suggested that maybe the bill could include a safe harbor provision that would limit or remove liability from those restaurants that provide one. (Attachment 8)

Amy Campbell, Kansas Association Beverage Retailers, appeared to oppose the bill due to the mandatory server training program but since the provisions are being withdrawn from the bill she wanted to make sure that liquor stores would also not be included in the dram shop provisions. (Attachment 9)

Tom Groneman, Alcoholic Beverage Control, also appeared in opposition to the mandatory server training because they would need an additional four employees at a cots of approximately $150,000. (Attachment 10)

The hearing on **HB 2296** was closed.

The committee meeting adjourned. The next meeting was scheduled for February 23, 2004.

TESTIMONY BY JAMES M. CONCANNON
PROFESSOR OF LAW
WASHBURN UNIVERSITY SCHOOL OF LAW
HOUSE JUDICIARY COMMITTEE - HB 2764
FEBRUARY 18, 2004

My interest in House Bill 2764 comes from 31 years of teaching courses in Appellate Practice and Civil Procedure at Washburn Law School. This bill adopts verbatim as K.S.A. 60-223(f) the 1998 Amendment that added subsection (f) to Federal Rule of Civil Procedure 23, following six years of study by the Federal Rules Advisory Committee. It gives the Court of Appeals discretion to permit an immediate appeal, prior to final judgment, of a trial court order certifying, or refusing to certify, an action to proceed as a class action.

Some background about appeals is essential. Appeals in civil cases ordinarily are not permitted until there is a final decision in the case. K.S.A. 60-2102(a)(4); 28 U.S.C. 1291. The primary rationales for the final judgment rule are that (1) allowing piecemeal appellate review of the multitude of rulings a judge makes during the course of a lawsuit would undesirably delay the termination of the case and (2) many appeals may be avoided if the party who lost the particular ruling ends up winning the case.

However, delaying appeal until final judgment is not always desirable because some pretrial rulings may affect a party's rights irreparably or cause substantial expense or prolonged delay. Thus, the Legislature has provided for interlocutory appeals, prior to final judgment, in a number of instances. For example, K.S.A. 60-2102(a)(2) permits an immediate appeal, as a matter of right, from an order granting or denying a preliminary injunction. If immediate appeal is not allowed, there can never be effective review of such an order since it is lasts only until a final judgment is entered. As another example, the legislature elected in K.S.A. 60-2102(a)(3) to permit an immediate appeal of right of an order finally resolving a question under the Constitution, even though the order does not terminate the entire case. Other portions of K.S.A. 60-2102(a) (1)-(3) and other statutes permit interlocutory appeals of right of other orders.

In addition, K.S.A. 60-2102(b), which is identical to 28 U.S.C. 1292(b), permits discretionary appeal, rather than appeal of right, of certain other interlocutory orders. The trial judge has discretion to decide that a particular order is important enough to the outcome of the case to justify immediate appeal if it involves a controlling question of law as to which there is a substantial ground for difference of opinion. Even when the trial judge makes that determination, appeal is still not of right but the Court of Appeals has independent discretion to decide whether to allow immediate appeal.

Rulings certifying or refusing to certify a class action are almost never appealable prior to final judgment under current Kansas law, and the same was true in federal courts until 1998. They aren't final decisions under K.S.A. 60-2102(a)(4). *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Denial of class certification in an action seeking an injunction is not immediately appealable as the denial of a preliminary injunction [see K.S.A. 60-2102(a)(2)]. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). Discretionary review under K.S.A. 60-2102(b) rarely is possible, either because the issue of certification does not involve a

controlling question of law or because the trial judge refuses, in his or her discretion, to certify the question for immediate appeal. Occasionally, appellate courts have entertained original actions in mandamus to review class certification, but these cases are rare.

However, there will be some cases in which immediate appeal of class certification rulings might be especially helpful. For example, in what is described as the "death knell" situation, the individual claim of a plaintiff who is denied class certification may be so small that the plaintiff cannot afford the litigation expense of continuing the individual claim to final judgment. In what is called the "reverse death knell" situation, an order granting class certification may, as a practical matter, induce a defendant to settle rather than incur the costs of defending a class action and the risk of potentially ruinous liability, even though plaintiff's probability of success on the merits is small. Subsection (f) responds to concerns of these types by giving the Court of Appeals discretion to permit interlocutory appeal when it is appropriate.

Discretionary appeals under subsection (f) differ from discretionary appeals under K.S.A. 60-2102(b) in two important respects. First, subsection (f) eliminates the trial judge's ability to block immediate appeal by declining to certify the order for appeal. Only the Court of Appeals has to be persuaded to permit the appeal. Second, appeal is not restricted to orders involving a controlling question of law. The Court of Appeals is given what the Federal Rules Advisory Committee described as "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting of a petition for certiorari."

The amendment does not contemplate that immediate appeal will be routinely allowed. The Federal Rules Advisory Committee cited a Federal Judicial Center study supporting the view that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." The Committee opined that permission to appeal would most likely be granted "when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely to be dispositive of the litigation."

We have slightly more than five years experience in the federal courts with the new rule. The federal circuits have differed at least slightly in the guidelines they have adopted for the exercise of discretion and a few have differed more from the others. The Second Circuit has said the "standards of Rule 23(f) [would] rarely be met,"while the Eleventh Circuit has been more expansive. All circuits permit review of unsettled legal issues about class certification that are both important to the litigation and important in themselves and might otherwise escape review. Previously, fundamental legal issues regarding class actions often were not resolved by appellate courts because of the large portion of class actions that settled. Thus, Rule 23(f) will permit the appellate court to give greater guidance to trial judges about class certification. Most circuits recognize the propriety of appeal in death knell and reverse death knell cases, although most require in addition an initial demonstration of some significant weakness in the class certification decision or at least a substantial showing that it is questionable. Some courts recognize as a separate category instances in which the certification order appears manifestly erroneous under governing legal standards. The Kansas Court of Appeals can be expected to adopt standards for exercising its discretion from the federal cases it considers to be the most persuasively reasoned.

Those who opposed Federal Rule 23(f) did so on several grounds: that it would increase litigation costs and delay in properly certified class actions; that existing mechanisms for discretionary interlocutory appeal in 28 U.S.C. 1292(b) [K.S.A. 60-2102(b)] or review by mandamus were sufficient for those cases genuinely requiring immediate review; that defendants would abuse the rule by constantly appealing orders granting class certification; and that the rule's lack of guidance about when appeals should be permitted gave appellate courts too much discretion, risked divergent standards among the circuits, and might result in broader appellate review that did not accord the trial judge's decision the deference it deserved. The latter concern is a legitimate one. As one writer put it, "The line between helpful guidance and noxious interference by an appellate court in the proper sphere of the trial court is indeed a narrow one." Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROCESS 309 (1999). This concern prompted a response in the Federal Advisory Committee Note that while the trial judge has no veto of an appeal, the trial judge's order often will provide cogent advice on the factors that bear on the decision whether to permit appeal by identifying probable benefits and costs of doing so.

There does not appear to have been a flood of appeals under Rule 23(f). Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97 (2001). A review of the first 40 reported decisions under Rule 23(f), through August, 2002, published in Note, *A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE LAW REVIEW 151 (2002), shows 31 of the 40 were attempts by defendants to appeal orders certifying classes. In all, 22 of the class certifications were reversed, 5 were affirmed and in four cases the court declined to allow appeal. None of the nine refusals of class certification for which appeal was sought were reversed; six orders were affirmed and appeal was denied in the other three cases. Of course, the study included only reported decisions and many Rule 23(f) decisions, particularly those refusing to permit appeal, likely will not be published. Nevertheless, the study does suggest Rule 23(f) will more frequently benefit defendants than plaintiffs. This is not inherently troubling, however, if trial judges in the reversed cases in fact applied incorrect standards in making the class certification decision, perhaps because of the previous lack of appellate guidance, and if trial court decisions certifying class actions based upon incorrect standards previously were more likely to escape appellate review because of the reality of settlement in such cases.

At least three other states have conformed their class action rules to Rule 23(f): New Mexico, Georgia, and Vermont. In some other states, such as Minnesota, Texas, Alabama and North Dakota, Rule 23(f) is not needed to permit interlocutory appeals regarding class certification, either because of provisions giving appellate courts discretion in all cases to hear interlocutory appeals or making class certification orders appealable of right or by interpretations of the state's final decision rule that are broader than those followed in Kansas and federal courts.

I firmly believe that, absent compelling reasons, the Kansas rules of civil procedure should mirror the Federal Rules of Civil Procedure and in the area of class actions there are no issues unique to Kansas that create compelling reasons. This bill also incorporates the 1987 technical amendments that did not involve substantive changes. It does not incorporate the December, 2003 amendments. However, it would bring Kansas law into greater conformity with Federal Rule 23 and I support it.

Legislative Testimony

HB 2764

February 19, 2004

Testimony before the Kansas House Judiciary Committee
By Lew Ebert, *President and CEO*

THE KANSAS CHAMBER

The Force for Business

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Chairman O'Neal and members of the committee:

Good afternoon, my name is Lew Ebert, President of the Kansas Chamber. Reducing the cost of doing business while growing jobs in Kansas is the Chamber's primary goal. Our members are generally concerned about the cost of litigation. Improving the efficiency of our courts and reducing the costs of litigation helps us achieve this goal. House Bill 2764 is legislation that makes good business sense, good legal sense and is good public policy for all parties involved in litigation.

The Kansas Chamber supports this bill because conforming Kansas's civil procedure rule 23 (f) to the federal rule allows a more efficient use of our member's legal resources.

Conforming Kansas's civil procedure to the federal rule 23 is important for two additional reasons.

First, it is a proven rule protecting all parties' access to the judicial process. The Federal Rules Advisory Committee studied this issue for six years before it was enacted in the federal courts. In addition, it has been the rule of federal courts now for another 6 years. We can all agree this rule has had a thorough vetting.

Second, this bill would enhance judicial efficiency. Certifying a class can be a central deciding factor in a case. Allowing an interlocutory appeal of a class certification decision can prevent the courts from holding lengthy trials only to have them overturned on appeal due to a faulty class certification. Implementation of this rule in no way restricts any party's access to due process or their day in court.

Thank you for your time and consideration of this proposal.

The Kansas Chamber is the statewide business advocacy group, with headquarters in Topeka. It is working to make Kansas more attractive to employers by reducing the costs of doing business in Kansas. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have nearly 7,500 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, large and medium sized employers all across Kansas.

TESTIMONY OF J. EUGENE BALLOUN
PRACTICING ATTORNEY
SHOOK HARDY & BACON LLC

HOUSE JUDICIARY COMMITTEE – HB 2764
FEBRUARY 19, 2004

I am commenting on House Bill 2764 as a lawyer who has practiced in the Kansas courts for more than 45 years. During the course of my practice, which has principally involved commercial and other types of litigation, I have been involved in numerous cases in the Kansas Court of Appeals and the Kansas Supreme Court. Few Kansas lawyers have appeared in more appellate cases. During the course of my practice, I have been directly involved in more than 100 cases before the Kansas appellate courts. While I am a past president of the Kansas Association of Defense Counsel, I am appearing today on my own behalf.

House Bill 2764 adopts the provisions of Federal Rules of Civil Procedure 23(f) as an amendment to K.S.A.60-223. This provision allows the Court of Appeals discretion to permit an immediate appeal of a trial court order that has certified or refused to certify a class action.

An important fact concerning HB 2764 is that it does not take away any appellate rights that currently exist. It simply adds an additional provision for interlocutory appeal. Presently, K.S.A. 60-2102(b) permits a discretionary appeal of certain interlocutory orders. In such cases, the trial judge must determine that the order is important enough to justify an interlocutory appeal because it involves a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation…" However, even that finding does not insure an

interlocutory appeal. The Court of Appeals still has discretion to decide whether or not to allow the interlocutory appeal.

As Professor Concannon has explained in his testimony, rulings certifying or refusing to certify a class action are rarely appealable under K.S.A. 60-2102(b). Certification issues ordinarily do not involve a controlling question of law, and thus no appeal is granted.

There are many cases in which an immediate appeal of class certification rulings would be helpful to everyone involved. These types of cases have been aptly described by Professor Concannon. I want to again emphasize that this amendment would not take away any appellate rights that currently exist. It would supplement them by allowing the appellate court, in its discretion, to allow an interlocutory appeal of class certification issues. Under HB 2764, the trial judge would not play a role in the determination of whether or not an interlocutory appeal would be allowed, as does the judge in interlocutory appeals requested under K.S.A. 2102(b).

Professor Concannon discussed the *Drake Law Review* article, which analyzed the first 40 reported decisions under Federal Rules of Procedure 23(f), the provision that would be adopted by HB 2764. Most of those appeals involved cases where the trial court had certified a class, the defendant appealed, and the class certification ruling was reversed. Likewise in cases where the trial judge refused to certify a class, none of the plaintiffs were successful in obtaining class certification on appeal. One could interpret this information to claim that interlocutory appeals more frequently benefit defendants than plaintiffs.

But consider what would have happened in each of those cases in which class certification was eventually denied. Had there been no interlocutory appeal, all parties, and especially the plaintiffs, as well as their counsel, would have been in the position of proceeding with discovery, trial, and judgment, devoting their time and resources to that effort. Yet they would have been proceeding with the risk that the appellate court could (and did) ultimately rule that a class should not have been certified. This would be a tremendous waste of judicial resources.

Actual cases illustrate the waste of judicial resources that can be brought about by improper class certification. Several years ago, a state court in Florida certified a statewide class of 700,000 cigarette smokers and allowed a class action case to proceed against various tobacco manufacturers. (*Liggett Group Incorporated v. Engle,* 853 So. 2nd 434, May 21, 2003, District Court of Appeal of Florida) After a year-long trial, the jury ultimately entered a very large verdict against the defendants. On appeal, the Court of Appeals ruled that the case was not suitable for a class action, and decertified the class. More than one year had been expended by the court, the parties, their attorneys, and the jury in deciding the merits of a case when in fact it was never suitable for a class action. Such a result is not to the advantage of either plaintiffs or defendants, and certainly not the courts and the public.

I understand that some plaintiff-oriented groups oppose interlocutory appeal in class action suits. It is true that if a trial court certifies a class, the defendants are frequently pressured into making settlements. However, experience (as reflected in the *Drake Law Review* study) has shown that many of such class actions are improperly certified, and would be so held on appeal.

I suggest that pressuring defendants into making settlements because of fear of possible class-action verdicts is not a worthwhile, social goal. Also, not all defendants would yield to the temptation of a company-saving settlement, and would proceed with the litigation. As in the *Engle* case, the eventual ruling that the case was not a proper class action would then mean that judicial resources had been expended when they could have been saved. The public and courts are best served by an early determination of whether a case should proceed as a class action.

In summary, in my opinion, a procedure for interlocutory appeal, at the discretion of the appellate court, will benefit both plaintiffs and defendants. It does not eliminate any appellate rights that currently exist. HB 2764 does provide for an additional avenue of appeal that would lead to early resolution of class certification issues. This will benefit litigants, judges, attorneys and the public.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

'ICHAEL R. (MIKE) O'NEAL

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KANSAS JUDICIAL COUNCIL

H.B. 2296 – Dram Shop
House Judiciary Committee
Feb. 19, 2004

Members of the House Judiciary Committee:

It's been about 10 years since I last introduced legislation to have Kansas join the vast majority of states that impose some measure of liability on licensees who dispense alcohol in violation of state law where their actions are found to have been a contributing cause to another's injury or death. Since that time Kansas has become even more of a minority in that category. I'm furnishing Committee members with a notebook of information regarding Dram Shop laws and the status of laws in other states.

Today, the vast majority of jurisdictions have abandoned the concept that licensees should be absolutely immune from liability in spite of evidence that they violated state law with regard to the serving of alcoholic beverages. As can be seen in the attached Kansas court decisions, our courts have begged the legislature to address this issue once and for all. For example, in *Burton v. Frahm & Budde's Restaurant*, the Kansas Court of Appeals addressed an egregious fact situation and announced:

> "If we were free to follow our collective consciences and to apply what we believe to be sound legal reasoning, this panel would unanimously reverse the decision of the trial court granting summary judgment to Budde's. We have no disagreement among us that *Ling* is an anachronism, is not good law, and should not be the law of this state. As we perceive our duty, however, we are not free to follow our consciences or our best legal judgment.
>
> ...
>
> The *Ling* decision essentially grants immunity to one who sells intoxicating liquor to minors regardless of the consequences that sale may have had on the public. We see no rational basis for this carte blanche extension of such

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> immunity. The abolition of that immunity is not a difficult step to take, judicially speaking. The modern concept of tort liability is based on the foreseeability of harm to an innocent third party as the result of the sale of intoxicating liquor to a 16-year-old high school student in possession of an automobile does not require a crystal ball. It has been 7 years since *Ling* was decided, and the legislature has yet to act. We suggest it is now up to the courts to abolish the immunity granted by the *Ling* decision."

With recent changes to the Kansas Supreme Court, it is likely the Court will create the cause of action by case law due to legislation inaction. I know members of this Committee share my view that the Legislature should be the body writing new law, not the Court. However, I would not be critical of the Court for creating dram shop liability under circumstances where the Legislature has failed to act because of the horrendous factual cases the Court sees.

The argument that the sole responsibility for injuries resulting from an alcohol related accident should be on the consumer of the alcohol is not supported by current Kansas law, even though licensees are still immune. Injured parties in Kansas may sue others whose causal negligence is alleged to have contributed to their injuries; they just can't sue an alcohol licensee. Ask any doctor or nurse who has been sued after providing medical care and attention to a party injured in an alcohol-related auto accident. The injured party can sue the drunk driver and, e.g., an auto manufacturer, municipality, EMS team, doctor, nurse, hospital, air ambulance, etc. for what may be a remote and small percentage of comparative fault, but cannot sue a licensee who violated state law and whose casual negligence was a significant factor in the tragedy.

H.B. 2296 would create a reasonable form of potential dram shop liability in cases where a licensee is found to have breached the duties imposed by either the statute prohibiting underage service of alcohol or serving to an intoxicated person. The bill does NOT impose social host liability.

I have visited with our revisor about proposed amendments to the bill to clarify and address questions that have been raised since the bill's introduction.

1. In Section 1 (a) we need to add the reference to K.S.A. 2003 Supp. 21-3610a as we have split out the statutes relating to minors to distinguish between alcohol and CMB.

2. In Section 1, the word "harm" should be replaced with the word "damages" to be consistent with other language in the civil procedure code. Damages should include those for personal injury, death, property damage and/or economic loss as with any other personal injury or wrongful death action.

3. Also in Section 1 we need to clarify that the one consuming the alcohol served by the licensee need not be the one actually "purchasing" the alcohol for liability to attach.

4. In Section 1(e)(1) "incapacitated person" was inadvertently left out. We need to make it clear that both minors and incapacitated persons are covered.

5. In that same subsection a policy question arises as to whether there is a heightened burden of proof if the one who consumes alcohol suffers damages or whether you want to exclude altogether the party consuming the alcohol. The latter would make it clear that the liability imposed on the licensee would be third party liability only.

6. Section 1(e)(2) defining "harm" can be deleted or in the alternative, replaced with a definition of "damages" to make it clear that damages recoverable include damages for personal injury, death, property damage and economic loss.

7. Section 2 through 10 relate to a mandatory server permits and mandatory server education programs. There is a fiscal note on these sections and I'm inclined to drop those sections.

Please take time between now and next week when we work bills to review the attachments. After doing so, I respectfully submit that no one can seriously argue that Kansas should remain one of the last states in the county to provide additional protection and benefits to the victims of alcohol-related tragedies under circumstances where licensees are found to have contributed to the outcome.

Rep. Mike O'Neal

41-715. Sale of liquor to incapacitated or intoxicated person; penalties. (a) 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.

(b) Violation of this section is a misdemeanor punishable by a fine of not less than $100 and not exceeding $250 or imprisonment not exceeding 30 days, or both.

History: L. 1949, ch. 242, § 78; L. 1963, ch. 267, § 1; L. 1965, ch. 277, § 8; L. 1985, ch. 173, § 1; July 1.

Cross References to Related Sections:

Providing alcoholic beverage to minor, see 21-3610, 21-3610a.

Consumption or purchase of alcoholic liquor by minor, see 41-727, 41-2721.

Research and Practice Aids:

Intoxicating Liquors ⇒ 159(1).

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).

"Third Party Liability for Drunken Driving," Betsey J. Morgan, 26 W.L.J. 267, 280, 295 (1987).

Attorney General's Opinions:

Sale of liquor to intoxicated persons. 84-109.

Sale of intoxicating liquor and beverages on credit on-premises and off-premises sales distinctions; equal protection. 93-128.

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.

4. Cited in distinguishing penal and regulatory provisions of law; charge of sale of alcoholic beverage to minor. State v. Sleeth, 8 K.A.2d 652, 656, 664 P.2d 883 (1983).

5. Discussed; absent legislation, suppliers of alcohol not liable to victims of intoxicated tortfeasors; violation hereof not negligence per se. Ling v. Jan's Liquors, 237 K. 629, 639, 640, 703 P.2d 731 (1985).

6. Dispenser of alcohol not liable to victim of intoxicated tortfeasor; police officers' liability where guidelines or specific duty obligations involved (75-6101 et seq.) examined. Fudge v. City of Kansas City, 239 K. 369, 375, 720 P.2d 1093 (1986).

7. Cited; absence of employer's duty to third party for tortious acts of off-duty employee examined. Meyers v. Grubaugh, 242 K. 716, 719, 750 P.2d 1031 (1988).

8. Statute regulating sale of liquor not intended to impose civil liability. Mills v. City of Overland Park, 251 K. 434, 837 P.2d 370 (1992).

21-3610. Furnishing alcoholic liquor or cereal malt beverage to a minor. (a) Furnishing alcoholic liquor or cereal malt beverage to a minor is directly or indirectly, selling to, buying for, giving or furnishing any alcoholic liquor or cereal malt beverage to any minor.

(b) Except as provided by subsections (d) and (e), furnishing alcoholic liquor or cereal malt beverage to a minor is a class B person misdemeanor for which the minimum fine is $200.

(c) As used in this section, terms have the meanings provided by K.S.A. 41-102, 41-2601 and 41-2701, and amendments thereto.

(d) It shall be a defense to a prosecution under this section if: (1) The defendant is a licensed retailer, club, drinking establishment or caterer or holds a temporary permit, or an employee thereof; (2) the defendant sold the alcoholic liquor or cereal malt beverage to the minor with reasonable cause to believe that the minor was 21 or more years of age or of legal age for the consumption of alcoholic liquor or cereal malt beverage; and (3) to purchase the alcoholic liquor or cereal malt beverage, the person exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document, containing a photograph of the minor and purporting to establish that such minor was 21 or more years of age or of legal age for the consumption of alcoholic liquor or cereal malt beverage.

(e) This section shall not apply to the furnishing of cereal malt beverage by a parent or legal guardian to such parent's child or such guardian's ward.

History: L. 1969, ch. 180, § 21-3610; L. 1988, ch. 165, § 7; L. 1989, ch. 91, § 1; L. 1993, ch. 173, § 1; L. 2001, ch. 189, § 1; L. 2002, ch. 26, § 1; July 1.

Law Review and Bar Journal References:

"2001 Legislative Wrap-Up," Paul T. Davis, 70 J.K.B.A. No. 7, 14 (2001).

"2002 Legislative Wrap-Up," Paul T. Davis, 71 J.K.B.A. No. 7, 15 (2002).

Attorney General's Opinions:

Alcoholic liquor; city authority to issue and revoke a local city retail license. 96-55.

Ordinance requiring two forms of identification for service of alcohol in club or drinking establishment; exercise of city home rule. 98-18.

CASE ANNOTATIONS

4. No sentencing error in treating conviction of municipal ordinance of furnishing liquor to person under 21 as person misdemeanor. State v. Davis, 22 K.A. 2d 776, 922 P.2d 453 (1996).

5. Defendant bartender guilty of selling cereal malt beverage to person underage although patron's ID was checked but misread by a third party; general criminal intent crime. State v. Pendleton. 26 K.A.2d 565, 567, 990 P.2d 1241 (1999).

6. A minor furnishing alcohol to a minor is prohibited by section. State v. Sampsel, 268 K. 264, 268, 997 P.2d 664 (2000).

21-3610a.

History: L. 1981, ch. 201, § 6; L. 1985, ch. 171, § 3; L. 1988, ch. 165, § 8; L. 1989, ch. 91, § 2; L. 1993, ch. 173, § 2; Repealed, L. 2001, ch. 189, § 6; May 24.

CASE ANNOTATIONS

3. No sentencing error in treating conviction of municipal ordinance of furnishing liquor to person under 21 as person misdemeanor. State v. Davis. 22 K.A. 2d 776, 922 P.2d 453 (1996).

60-258a. Comparative negligence. (a) The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, property damage or economic loss, any other person whose causal negligence is claimed to have contributed to such death, personal injury, property damage or economic loss, shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

(e) The provisions of this section shall be applicable to actions pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.

History: L. 1974, ch. 239, § 1; L. 1976, ch. 251, § 4; L. 1987, ch. 221, § 1; July 1.

See also:
Mills v. City of Overland Park
257 K. 434

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No. 56,921

LYLLIS LING, *Appellant*, v. JAN'S LIQUORS, *Appellee*.

(703 P.2d 731)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Personal Service outside State—Action for Injuries Sustained in Kansas as Result of Negligence in Another State.* Under the provisions of K.S.A. 60-308(b)(2), it is possible to bring suit in Kansas to recover damages for injuries occurring in this state which resulted from negligent conduct outside the state.

2. TORTS—*Action for Injuries Sustained in Kansas as Result of Negligence in Another State—Defendant's Liability Determined by Kansas Law.* In an action for recovery of damages for injuries sustained in Kansas which were the result of a negligent act in another state, the liability of the defendant is to be determined by the laws of this state.

3. SAME—*Person Who Dispenses Liquor Not Liable at Common Law for Resulting Injuries Due to Acts of Intoxicated Persons.* At common law, and apart from statute, no redress exists against persons selling, giving or furnishing intoxicating liquor for resulting injuries or damages due to the acts of intoxicated persons, either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence. Since Kansas does not have a dram shop act, the common-law rule prevails in Kansas. *Stringer v. Calmes*, 167 Kan. 278, 205 P.2d 921 (1949).

4. TORTS—*Breach of Duty—When Negligence Per Se—Violation of Regulatory Statute by Liquor Vendor Is Not Actionable as Negligence Per Se.* Breach of a duty imposed by law or ordinance may be negligence per se, unless the legislature clearly did not intend to impose civil liability. K.S.A. 41-715, which prohibits the dispensing of alcoholic liquors to certain classes of persons, was intended to regulate the sale of liquor and was not intended to impose civil liability. Thus, a liquor vendor's violation of K.S.A. 41-715 is not negligence per se.

5. COURTS—*Common Law—Modification of Common Law by Judicial Decision—Declaration of Public Policy Is Function of Legislature.* The common law is subject to modification by judicial decision in light of changed conditions. However, declaration of public policy is normally the function of the legislative branch of government.

6. TORTS—*Liability of Suppliers of Alcohol for Torts of Intoxicated Patrons—Legislative Control.* The decision whether to impose liability upon the suppliers of alcohol for the torts of their intoxicated patrons is a matter of public policy which the legislature is best equipped to handle.

Appeal from Johnson district court, HERBERT W. WALTON, judge. Opinion filed July 17, 1985. Affirmed.

Donald W. Vasos, of Vasos, Kugler & Dickerson, of Kansas City, argued the cause and *Stephen C. Dickerson*, of the same firm, was with him on the briefs for appellant.

Mark V. Parkinson, of Payne & Jones, Chartered, of Olathe, argued the cause, and *Keith Martin*, of the same firm, was with him on the brief for appellee.

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The opinion of the court was delivered by

SCHROEDER, C.J.: Lyllis Ling (plaintiff-appellant) brought this action in the trial court alleging negligence on the part of Jan's Liquors (defendant-appellee) in selling alcohol to a minor whose intoxication allegedly resulted in a car accident causing plaintiff's injury. Ling appeals from an order and judgment dismissing her complaint against defendant on the ground that it fails to state a claim upon which relief can be granted pursuant to K.S.A. 60-212(b). We affirm the decision of the trial court.

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, Ling is afforded the safeguard of having all her allegations taken as true and all inferences drawn favorably to her. *Wirt v. Esrey*, 233 Kan. 300, 662 P.2d 1238 (1983). Applying that principle, we look to the complaint for the facts. It alleges:

At approximately 1 a.m., on Sunday, February 3, 1980, Ling was driving her automobile east on Johnson Drive in Fairway, Johnson County, Kansas, when the vehicle became disabled. Ling left the vehicle and was standing beside it when she was struck by a vehicle driven by Richard Shirley. At that time Shirley was nineteen years old and a minor under Missouri law governing the sale of intoxicating liquors to minors.

At the time of the accident, Shirley was operating a motor vehicle under the influence of alcohol. A blood alcohol examination taken at Shawnee Mission Medical Center, Overland Park, Kansas, showed a blood alcohol concentration of 0.30 percent by weight.

The petition also alleges that Jan's Liquors, a Missouri retail liquor establishment, sold or provided to Richard Shirley on the night of February 2, 1980, an alcoholic beverage which rendered him incapable of operating a motor vehicle.

On February 3, 1982, Ling filed a petition in the District Court of Johnson County, Kansas, seeking damages for the injuries she received which resulted in the amputation of both her legs. On July 20, 1983, the defendant filed a motion to dismiss pursuant to K.S.A. 60-212(b).

The district court granted the motion to dismiss, concluding (1) "there is no liquor vendor liability in Kansas and there is no indication that the Kansas Supreme Court will impose the same"; (2) Kansas law and not Missouri law should apply to the

instant action; and (3) the Kansas long-arm statute would apply to give the court in personam jurisdiction in the case.

Initially, we must ascertain whether the trial court erred in finding the Kansas long-arm statute (K.S.A. 60-308b) applied to give it in personam jurisdiction over Jan's Liquors, a nonresident defendant. The trial court based its finding on K.S.A. 60-308(b)(7), which provides:

> "(b) *Submitting to jurisdiction—process.* Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:
>
> . . . .
>
> "(7) causing to persons or property within this state any injury arising out of an act or omission outside of this state by the defendant if, at the time of the injury either (A) the defendant was engaged in solicitation or service activities within this state, or (B) products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of trade or use."

The defendant argues that this section of the Kansas long-arm statute is limited to products liability cases. We agree.

In order for personal jurisdiction to be obtained under K.S.A. 60-308(b)(7), the defendant must have had the type of contact with the state as defined in either alternative (A) or (B). In other words, the defendant must either have been engaged in solicitation or service activities within the state, *or* the product which was the cause of injury must have been used or consumed within the state in the ordinary course of trade or use. In *Tilley v. Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968), this court recognized that the legislative intent of K.S.A. 60-308(b)(7) was to grant in personam jurisdiction to the courts of this state over those who engage in the manufacture, sale, or servicing of products if they receive or can anticipate some direct or indirect financial benefit from the sale, trade, use or servicing of their products within this state.

We find that the sale by an out-of-state liquor vendor to an occasional Kansas customer does not fit within the provisions of either alternative (A) or (B). Moreover, based on our analysis of legislative intent in *Tilley*, we find the liquor vendor is not the kind of defendant the legislature intended to reach when it

enacted K.S.A. 60-308(b)(7). Therefore, the trial court erred by relying on K.S.A. 60-308(b)(7).

An Illinois court met with a similar factual setting and jurisdictional issue in *Wimmer v. Koenigseder*, 128 Ill. App. 3d 157, 470 N.E. 2d 326 (1984). In that case, the plaintiff brought suit on behalf of the decedent whose death resulted from injuries she received in a car accident in Illinois. The defendant-driver who caused the accident, a minor for purposes of Illinois law, had been served alcohol in a nearby Wisconsin tavern where he was of legal drinking age. The plaintiff brought suit in Illinois against the Wisconsin liquor vendor. The trial court dismissed for lack of jurisdiction. The appellate court reversed and held, in part, that Illinois had in personam jurisdiction under the section of its long-arm statute which provides jurisdiction over any person who commits a "tortious act within this State." Ill. Ann. Stat. ch. 110, § 2-209(a)(2) (Smith-Hurd 1983). The court stated, "For the purposes of the long-arm statute, 'physical presence is not necessary for the commission of a tortious act within this State; . . . the place of a wrong is where the last event takes place which is neessary to render the actor liable.' [Citations omitted.]" 470 N.E. 2d at 331. The court found the "last event" was the injury in Illinois. The fact that the sale occurred entirely in another state was of no consequence. The court further found that due process requirements of "minimum contacts" were met.

K.S.A. 60-308(b)(2) is similar to the provision relied on by the Illinois court. It provides jurisdiction over any person who commits a "tortious act within this state."

In the case at bar, the negligent act (selling liquor to a minor) was committed outside this state, while the injury occurred within this state. Therefore, in order for K.S.A. 60-308(b)(2) to apply, it must be found that an injury which occurs in this state as a result of a negligent act outside this state is equivalent to the commission of a "tortious act within the state." This is a question of first impression in Kansas.

Vernon's Kansas C. Civ. Proc. § 60-308 (1965) contains several articles discussing the Kansas long-arm statute. Each article concludes that if the injury caused by a tortious act occurs within this state, even though the first part of the tortious act took place outside the state, the occurrence of the injury is sufficient for establishing personal jurisdiction under (b)(2).

Other jurisdictions, in interpreting provisions similar to K.S.A.

60-308(b)(2), have given the term "tortious act" a broad interpretation, deeming it to imply the whole continuum of actions involved, rather than a single act. *Vandermee v. Dist. Ct.*, 164 Colo. 117, 433 P.2d 335 (1967); see also *Jack O'Donnell Chevrolet, Inc. v. Shankles*, 276 F. Supp. 998 (N.D. Ill. 1967); *Gray v. Amer. Radiator & Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961). Under this interpretation, the "tortious act" is not complete until the injury has occurred. In other words, the "tortious act" is deemed to have occurred in the state where the injury occurs.

In *J.E.M. Corp. v. McClellan*, 462 F. Supp. 1246 (D. Kan. 1978), it was held that a fraudulent misrepresentation made from without the jurisdiction (telephone calls) which cause tortious injury within the jurisdiction constituted a "tortious act" in this state within the meaning of K.S.A. 60-308(b)(2). The court found that a sufficient constitutional basis for the exercise of jurisdiction existed and arose out of the intentional tortious act causing injury to a resident in the forum on a claim for damages arising from that act.

Even though the *McClellan* case involved an intentional tort while the case at bar involves negligence, we find the reasoning in *McClellan* is applicable. In *McClellan*, the "tortious act" included both the misrepresentations from outside the state and the resulting injury in Kansas. In the case at bar, the "tortious act" included both the selling of the liquor in Missouri and the injury to the plaintiff in Kansas. The act was completed in Kansas. Therefore, we hold that under the provisions of K.S.A. 60-308(b)(2), it is possible to bring suit in Kansas to recover damages for injuries occurring in this state which resulted from negligent conduct outside the state.

This holding is consistent with our oft-repeated assertion that the long-arm statute should be liberally construed to assert jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the Fourteenth Amendment to the U.S. Constitution. *Misco-United Supply, Inc. v. Richards of Rockford, Inc.*, 215 Kan. 849, 528 P.2d 1248 (1974); *Woodring v. Hall*, 200 Kan. 597, 438 P.2d 135 (1968).

Accordingly, we find the trial court reached the correct result for the wrong reason, and so its decision on this point is upheld. *Strehlow v. Kansas State Board of Agriculture*, 232 Kan. 589, 592, 659 P.2d 785 (1983).

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The plaintiff next contends the trial court erred in finding that Kansas substantive law governed the action.

Under Missouri law, a tavern owner can be held civilly liable for selling intoxicating liquor to a minor. Ling argues that the rule in Kansas is that the law of the state where the tort occurred is applied to determine the substantive rights of the parties; that the tort in this case was the wrongful sale of the intoxicating liquor to a minor; and, therefore, Missouri substantive law should apply. Jan's Liquors argues that Kansas courts are to apply the law of the state where the injury occurred and, since the injury in this case occurred in Kansas, Kansas law should govern.

The rule in this state is that the law of the state where the tort occurred—*lex loci delicti*—should apply. *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965); *Pool v. Day*, 141 Kan. 195, 40 P.2d 396 (1935). However, this court has never addressed the conflict of law issue in a multistate tort action—that is, where the negligent act originated outside the state, but the resultant injury occurred in the state. In *Swearngin v. Sears, Roebuck & Company*, 376 F.2d 637, 639 (10th Cir. 1967), the court stated:

> " '[T]he general rule is that where an act of omission or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place.' "

Ling acknowledges that under the doctrine of *lex loci delicti*, the situs of the injury determines the governing law. However, she argues that in this type of case, the accident site is overshadowed by the location of the unlawful sale of liquor. Ling suggests that this court should adopt an analytical approach to determine whose law should govern. The "analytical approach" has been adopted by a number of courts in recent years. It allows the court to resolve the choice of substantive law by giving to the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual situation, thereby allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation. See Annot., 29 A.L.R. 3d 603; *Balts v. Balts*, 273 Minn. 419, 142 N.W. 2d 66 (1966); *Fuerste v. Bemis*, 156 N.W. 2d 831 (Iowa 1968). We reject the analytical approach for determining what law should govern the substantive rights of the parties.

We hold that in an action for recovery of damages for injuries

sustained in Kansas which were the result of a negligent act in another state, the liability of the defendant is to be determined by the laws of this state. Accordingly, the trial court did not err by applying Kansas law.

The final issue is whether Kansas recognizes a claim for relief against one furnishing liquor to a minor in favor of those injured as a consequence of the minor's intoxication.

Kansas does not have a dram shop act. Further, there has been no judicial imposition of dram shop liability in this state. Therefore, the question we are faced with is whether—in the absence of a dram shop act—this court should impose liability on the defendant, thus creating a new cause of action in this state.

Ling argues that we should impose liability upon the defendant on the basis of common-law principles of negligence or negligence per se. Jan's Liquors argues that in the absence of a special dram shop act specifically creating a civil remedy and civil cause of action against the commercial purveyor of intoxicants, no remedy or cause of action can be maintained.

At common law, and apart from statute, no redress existed against persons selling, giving, or furnishing intoxicating liquor for resulting injuries or damages due to the acts of intoxicated persons, either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence. This rule was based on the theory that the proximate cause of the injury was the act of the purchaser in drinking the liquor and not the vendor in selling it. See, *e.g.*, *State v. Hatfield*, 197 Md. 249, 78 A. 2d 754 (1951); 45 Am. Jur. 2d, Intoxicating Liquors § 553. This court recognized the common-law rule of nonliability for a liquor vendor in *Stringer v. Calmes*, 167 Kan. 278, 205 P.2d 921 (1949).

In recent years, many states have retreated from or have abrogated the strict common-law rule. Fourteen states now have dram shop statutes which give, generally, a right of action to persons injured in person, property, or means of support, by an intoxicated person, or in consequence of the intoxication of any person, against the person selling or furnishing the liquor which caused the intoxication in whole or in part. See appendix.

Courts in 29 jurisdictions, including the District of Columbia, have judicially abrogated the common-law doctrine of no liability. See appendix. Six states with dram shop laws have judicially imposed liability in some form. See appendix. Many of the

jurisdictions which now recognize a common-law right of action do so on the premise that the serving of liquor to a minor or an inebriated person initiates a foreseeable chain of events for which the tavern owner may be held liable. See, *e.g.*, *Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977). Others of these jurisdictions conclude that criminal statutes in force in their jurisdiction which proscribe sales of intoxicants to minors or inebriated persons establish a standard of conduct for tavern owners and their employees, deviation from which may constitute negligence per se. See, *e.g.*, *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983). These courts reason that the criminal statutes represent public policy and public interest in preventing injury to those specific classes incompetent to handle intoxicating liquors as well as injury to the public at large.

Six states which do not have dram shop laws have refused to impose liability judicially. See appendix. These jurisdictions have considered, but declined to follow, the new trend of cases, because they find the issue is one of public policy which is best left to the legislative body. These courts refuse to find negligence per se on the ground that the criminal statutes were intended to be purely regulatory in nature and were not intended to create a civil cause of action.

By way of historical background to aid in a better understanding of the problems involved in this appeal, we point out that the territorial legislature of Kansas enacted a dram shop act in 1859. That law included a civil damage statute which provided a cause of action against the seller, barterer or giver of intoxicating liquors for damage or injury caused "by any intoxicated person or in consequence of intoxication." The statute was included in the 1881 revision of the statutes (L. 1881, ch. 128, § 15) and again in 1923 when it was designated R.S. 1923, 21-2150 and stated:

> "Every wife, child, parent, guardian or employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, such wife, child, parent or guardian, employer or other person shall have a right of action, in his or her own name, against any person who shall, by selling, bartering or giving intoxicating liquors, have caused the intoxication of such person, for all damages actually sustained, as well as for exemplary damages; and a married woman shall have the right to bring suits, prosecute and control the same, and the amount recovered, the same as if unmarried; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parents, guardian, or next friend, as the court shall direct; and all suits for damages under this act shall be by civil action in any of the courts of this state having jurisdiction thereof."

Several Kansas cases have discussed and upheld the constitutionality of the statute. See *Coy v. Cutting*, 138 Kan. 109, 23 P.2d 458 (1933); *Zibold v. Reneer*, 73 Kan. 312, 85 Pac. 290 (1906); *Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753 (1899).

On November 2, 1948, the citizens of this state voted to amend art. 15 of the Constitution of the State of Kansas. The result was that only the open saloon is now prohibited in this state. (Art. 15, § 10, Constitution of Kansas.) The new constitutional provision gave the legislature the power to regulate, license, and tax the manufacture and sale of intoxicating liquors and to regulate the possession and transportation of intoxicating liquors.

In 1949 the legislature repealed certain statutes under the "Bone-Dry Law" (ch. 41—Intoxicating Liquors), because the Kansas constitutional prohibition against the manufacture and sale of intoxicating liquors had been repealed. The legislature, exercising its power, enacted the "Kansas Liquor Control Act." (Ch. 41, art. 1 through art. 27.) The new act regulated the manufacturing, bottling, blending, selling, bartering, transportation, delivery, furnishing or possessing of alcoholic liquor. The Act was a comprehensive plan to regulate liquor from the time of its manufacture within the state or importation into the state until it was ultimately sold by a licensed retailer for use or consumption. *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 752, 408 P.2d 877 (1965). Included in the Act was the prohibition against the sale of intoxicating liquors to minors and incompetents. G.S. 1949, 41-715 stated:

> "No person shall knowingly or unknowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any minor; and no such minor shall represent that he is of age for the purpose of asking for, purchasing or receiving alcoholic liquor from any persons, except in cases authorized by law. 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 mentally incompetent, or any person who is physically or mentally incapacitated by the consumption of such liquor. . . . [L. 1949, ch. 242, § 78; March 9.]"

The statute also provided for a fine or imprisonment.

The 1949 legislature—the same legislature which enacted the criminal regulatory statute—chose not to reenact the dram shop act. It was repealed in G.S. 1949, 41-1106, and has never been reenacted.

The 1949 law prohibiting sale of intoxicating liquor to minors was amended in 1963 (L. 1963, ch. 267, § 1) and in 1965 (L. 1965, ch. 277, § 8). K.S.A. 41-715 now states:

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> "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. [L. 1949, ch. 242, § 78; L. 1963, ch. 267, § 1; L. 1965, ch. 277, § 8; June 30.]"

The 1965 legislature enacted L. 1965, ch. 277, § 7, making it a crime for any person to knowingly or unknowingly sell to, buy for, give to, or furnish, either directly or indirectly, any intoxicating liquor to any person under the age of twenty-one years. That statute, K.S.A. 1965 Supp. 38-715, included a provision revoking the retail liquor license issued under K.S.A. 41-308 of any retailer who violated the statute. The revocation penalty was later repealed when K.S.A. 21-3610 was enacted in 1969. When the legislature enacted that statute in 1969, it omitted the phrase "knowingly or unknowingly," making the present violation a general intent crime.

Since the legislature's repeal of the civil liability statute in 1949, there has been no reported Kansas case asserting the liability to third persons of one selling or furnishing liquor. The last case to discuss the dram shop statute was *Stringer v. Calmes*, 167 Kan. 278, which was decided in 1949 prior to the repeal of the act. In that case the court held, unequivocably, that no common-law right of action existed.

In recent years, the Kansas legislature has made control of drunken drivers a high priority matter. Significant legislation has tightened the laws which deal with such offenses. The legislature of this state has considered all aspects of the problem of drunken driving in seeking solutions to the problem.

In 1984, limited dram shop legislation was introduced. (H.B. 2661). The proposed bill imposed liability on any person negligently selling or furnishing alcoholic beverages to a minor where the minor, under the influence thereof, caused death, personal injury or property damage to another. The bill died after it was passed out of committee.

On January 3, 1985, dram shop legislation was proposed by the

Kansas Attorney General. A press release of that date from his office states in part:

> "Attorney General Robert T. Stephan has written letters to the newly appointed chairmen of the House and Senate Judiciary committees urging consideration of a dram shop law in Kansas, along with other measures to stiffen the state's drunk driving laws.
>
> "Stephan wrote the letters to Senator-elect Robert Frey, Chairman of the Senate Judiciary Committee and Rep. Joe Knopp, Chairman of the House Judiciary Committee.
>
> "The dram shop law Stephan proposes would give persons injured by an intoxicated person, their families and employers the specific right to sue stores selling package liquor or beer, private clubs and taverns. The clubs, taverns and stores could be found liable for damages if they sold beer or liquor to a person who already was intoxicated, or served them alcohol to the point of intoxication, provided that the intoxication contributed to the injury."

Five days later (January 8, 1985) another press release from the Attorney General's Office stated:

> "Attorney General Robert T. Stephan said today he will advise the chairmen of the Judiciary committees he is modifying his proposals to combat drunk driving.
>
> " 'If you have decided that you have come up with a bad idea then you have a responsibility to say so,' Stephan said. 'I have the courage to make suggestions for legislative study, and also have the courage to know when my proposals to deter drunk driving should be modified.
>
> " 'Upon reexamination, I believe that existing law can be strengthened to better combat drunk driving. The dram shop law which I proposed would only add to legal entanglements. Therefore, I am withdrawing my suggestion that a dram shop law be enacted and will continue to study further means to deal with drunk driving.' "

With this historical background in mind, we again turn to the plaintiff's arguments. Ling contends that the violation of K.S.A. 21-3610 and K.S.A. 41-715 (establishing criminal penalties for sale of alcoholic liquor to a minor) is a breach of a duty imposed by law and, thus, negligence per se. In other contexts this court has recognized the rule that breach of a duty imposed by law or ordinance is negligence per se, and that damages may be predicated on its violation if the breach is the proximate cause of the injury or damages or substantially contributes to the injury. *Arredondo v. Duckwall Stores, Inc.*, 227 Kan. 842, 610 P.2d 1107 (1980); *Kendrick v. Atchison, T. & S.F. Rld. Co.*, 182 Kan. 249, 260, 320 P.2d 1061 (1958). We decline to find negligence per se in this case since to do so would subvert the apparent legislative intention.

The predecessor to K.S.A. 41-715 (of which K.S.A. 21-3610 was once a part) was first enacted in 1949, the same year the dram

shop act was repealed. Since that time, the legislature, although it has considered it, has not re-created a civil cause of action in favor of those injured as a result of a violation of the liquor laws. Clearly, the legislature would have done so had it intended for there to be a civil cause of action. K.S.A. 41-715 prohibits the dispensing of intoxicating liquors to certain classes of persons and is a comprehensive act to *regulate* the manufacture, sale, and distribution of alcoholic liquors. The legislature did not intend for it to be interpreted to impose civil liability. Therefore, we hold that the Missouri liquor vendor's violation of a criminal regulatory statute was not negligence per se.

As previously noted, the common-law rule is that, in the absence of legislation, the suppliers of alcohol are not liable to the victims of an intoxicated tortfeasor. *Stringer*, 167 Kan. 278. The common law remains in force in this state where the constitution is silent or the legislature has failed to act. K.S.A. 77-109. However, the common law is not static. It is subject to modification by judicial decision in light of changing conditions or increased knowledge where this court finds that it is a vestige of the past, no longer suitable to the circumstances of the people of this state. Indeed, we have not hesitated to adopt a new cause of action by judicial decision where we have determined that course was compelled by changing circumstances. See, *e.g.*, *Dawson v. Associates Financial Services Co.*, 215 Kan. 814, 529 P.2d 104 (1974) (creating new cause of action of intentional infliction of emotional distress); *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982) (creating new cause of action for negligent entrustment). See also *Durflinger v. Artiles*, 234 Kan. 484, 673 P.2d 86 (1983).

Although empowered to change the common law in light of changed conditions, this court recognizes that declaration of public policy is normally the function of the legislative branch of government. Whether Kansas should abandon the old common-law rule and align itself with the new trend of cases which impose civil liability upon vendors of alcoholic beverages for the torts of their inebriated patrons depends ultimately upon what best serves the societal interest and need. Clearly, this is a matter of public policy which the legislature is best equipped to handle.

The court in *Holmes v. Circo*, 196 Neb. 496, 504-05, 244 N.W.2d 65 (1976), made the following astute observation with which we agree:

"We are mindful of the misery caused by drunken drivers and the losses sustained by both individuals and society at the hands of drunken drivers, but the task of limiting and defining a new cause of action which could grow from a fact nucleus formed from any combination of numerous permutations of the fact situation before us is properly within the realm of the Legislature.

"The imposition of a common law duty of due care would create a situation rife with uncertainty and difficulty. If the commercial vendor is liable for negligence, does the host at a social gathering owe a duty to prospective victims of guests? The difficulties of recognizing intoxication and predicting conduct of an intoxicated patron without imposing some duty of inquiry are evident. Problems could also arise in the apportionment or sorting out of liability among the owners of various bars visited on 'bar hopping' excursions. The correct standard of care to be used also presents a problem, as does the determination of whether all acts of the patron, including intentional torts, should be included within the liability of the tavern owner or operator."

In the final analysis, we find the decision should be left to the legislature.

Accordingly, we affirm the trial court's finding that the plaintiff failed to state a claim upon which relief could be granted.

HOLMES, J., concurring in part and dissenting in part: I concur with the majority opinion that under the common law as it exists in this state there is no liability in this case and that the trial court was correct in dismissing plaintiff's case for failure to state a cause of action. When the legislature, in 1949, repealed R.S. 1923, 21-2150, it would appear obvious that it intended the common law to prevail. As pointed out by the majority opinion, the legislature has, on numerous occasions, revised our liquor control laws but has failed to re-enact legislation creating the cause of action sought by plaintiff and it is not our position to do so. Hence, I agree with the result reached by the majority opinion.

I disagree with that portion of the opinion which would apply long-arm jurisdiction under K.S.A. 60-308(b)(2) to the facts of this case. The tortious act of the defendant in selling liquor to a minor in Missouri is too far removed from the auto accident occurring hours later, in Kansas, to be considered the "commission of a tortious act within this state" as required by the statute. While plaintiff's unfortunate injuries were suffered in Kansas, they were not, in my opinion, the result of any tortious act committed in Kansas by Jan's Liquors. The tortious act of this defendant was complete upon the sale of the liquor in Missouri. There are not

sufficient minimum contacts in this case to justify personal jurisdiction under the long-arm statute. See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945); *Schlatter v. Mo-Comm Futures, Ltd.*, 233 Kan. 324, 662 P.2d 553 (1983).

MCFARLAND and HERD, JJ., join in the foregoing concurring and dissenting opinion.

LOCKETT, J., concurring and dissenting: I concur with the majority that: (1) under the provisions of K.S.A. 60-308(b)(2) it is possible to bring suit in Kansas to recover damages for injuries occurring in this state which resulted from negligent conduct outside the state; and (2) in an action for recovery of damages for injuries sustained in Kansas which were the result of a breach of a duty in another state, the liability of the defendant is to be determined by the laws of this state.

I cannot agree with the majority's denial of a right of action to persons injured in person, property or means of support, by an intoxicated person, or in consequence of the intoxication of any person, against the person illegally selling or furnishing the liquor which caused the intoxication in whole or in part. In reaching this conclusion, the majority, by denying that a cause of action exists, misapplies the common law, the legislature's acts and prior decisions of this court.

The majority, citing *State v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951), and 45 Am. Jur. 2d, Intoxicating Liquors § 553, states, "At common law, and apart from statute, no redress existed against persons selling, giving, or furnishing intoxicating liquor for resulting injuries or damages due to the acts of intoxicated persons, whether on the theory that the dispensing of the liquor constituted a direct wrong or constituted actionable negligence." The Am. Jur. 2d citation actually states, "At common law it is not a tort to either sell or give intoxicating liquor to *ordinary able-bodied men*, and it has been frequently held that in the absence of statute, there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished. The reason usually given for this rule is that the drinking of the liquor, not the furnishing of it, is the proximate cause of the injury. . . . [O]ne cannot become intoxicated by reason of liquor furnished him if he does not drink it."

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When the driver, Shirley, was furnished intoxicating liquor in this case he was not an able-bodied man. He was a minor. There is a statute in Kansas, as well as a similar one in Missouri, which prohibits the sale or furnishing of intoxicating liquor to a minor. K.S.A. 41-715. Clearly the common law is not a bar to Ling's action against the vendor who illegally furnished intoxicating liquor not to an able-bodied man, but to a minor.

The common law of England is the basic component of the common law adopted in the United States. Even if the common law is as the majority states, the courts of this country are not required to adhere to the decisions of the English common law courts unless such law is adopted by the state courts or by legislative enactment in aid of the general statutes.

Constitutional or statutory provisions in most states expressly declare the common law to be in force. The 1868 General Statutes of the State of Kansas, ch. 119, sec. 3 (now K.S.A. 77-109) provided that the common law shall remain in force in aid of the general statutes. The common law has been continuously incorporated into our law by our legislature to fill the voids in law where the constitution is silent or the legislature and the courts have failed to act.

When our legislature adopted the rule that the common law was to remain in force in aid of the general statutes, it recognized that the common law was modified by our constitution and can be modified by the legislature when it enacts new laws or repeals old laws. The legislature also recognized that the common law can be modified by the courts when rendering judicial decisions and when the conditions and wants of the people require action (K.S.A. 77-109).

The courts of this state have never maintained that the common law is static and must be used to maintain the status quo. Like the Constitution of the United States and the constitution of this state, the common law grows as it is applied to new situations or as a need arises. The common law is judge-made and judge-applied. It is not to be followed blindly and can be changed when conditions and circumstances require if the prior law is unjust or has become bad public policy. In the past, this court has expanded the common law to meet the requirements of a modern society. It would be unfortunate to our economy and our developing society if we should cease to engage in the

common-law tradition of judicial expansion which adapts the law to the ever-changing needs and demands of a dynamic society.

The general principle of negligence law is that every person owes a duty to avoid creating situations which pose an unreasonable risk of harm to others. Negligence exists where the duty owed by one person to another is breached. Further, if recovery is to be obtained for such negligence, the injured party must show: (1) a causal connection between the duty breached and the injury received; and (2) that the person was damaged by that negligence. *Durflinger v. Artiles*, 234 Kan. 484, 488, 673 P.2d 86 (1983).

In 1974, we recognized that an action exists against one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. *Dawson v. Associates Financial Services Co.*, 215 Kan. 814, 820, 529 P.2d 104 (1974). In *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982), we determined that parents who knowingly and negligently furnish a car to their son, who by reason of age, experience, mental condition, or known habits of recklessness, is incapable of operating a vehicle with ordinary care, are responsible for the injuries caused by their negligent entrustment of the automobile to their son. In *Balagna v. Shawnee County*, 233 Kan. 1068, 668 P.2d 157 (1983), there was evidence that an architect-engineer had actual knowledge of safety standards contained in a construction contract and had actual knowledge that the prescribed safety precautions were not being followed by the contractor. We imposed a duty upon the architect-engineer to take reasonable action to prevent injury to the contractor's employees. In *Durflinger v. Artiles*, 234 Kan. 484, where a state hospital physician, as part of his employment, participated in a hospital team which recommended that a committed patient be discharged because he was no longer dangerous to himself or others, we imposed a duty upon that physician to use reasonable and ordinary care and discretion in making the recommendation to release the patient. The duty imposed to protect was a duty owed to both the patient and the public. In each of these cases where this court imposed a duty for a negligent act, the defendants did not purposefully violate a law.

We have recognized there is a distinction between "negligence" and "negligence per se." Negligence must be found by

the jury from the evidence, while "negligence per se" results from a violation of law or ordinance. Kansas follows the rule that a breach of duty imposed by law or ordinance is negligence per se, and liability in damages can be predicated on violation of that law where that breach is the proximate cause of the injury or damages or substantially contributes to the injury. *Kendrick v. Atchison, T. & S.F. Rld. Co.*, 182 Kan. 249, 260, 320 P.2d 1061 (1958).

The majority states that a breach of a duty imposed by law or ordinance is negligence per se, unless the legislature clearly did not intend to impose civil liability for the breach. It states that K.S.A. 41-715, which prohibits the dispensing of alcoholic liquors to certain classes of persons, was intended by the legislature to regulate the sale of liquor and was not intended to impose civil liability. It concludes that K.S.A. 41-715, while imposing criminal penalties for a violation of the statute, is merely a portion of a comprehensive act to regulate the manufacture, sale and distribution of alcoholic beverages and, therefore, not a basis for negligence per se.

Does the majority suggest that such is true of all similar acts passed by the legislature or is it limited only to this act? Consider Chapter 8, "Automobiles and Other Vehicles," which is a comprehensive act to regulate the licensing, sale and use of automobiles. Is not the same true of Chapter 8 as is true of Chapter 41, that while it contains certain provisions for licensing, other sections provide criminal sanctions for violation of those sections? The majority would imply that an individual who, while driving an automobile, intentionally and illegally proceeded into a controlled intersection and struck another vehicle is not required to bear the responsibility for any damage caused.

The legislature did not create a civil cause of action in favor of those injured as a result of a violation of the traffic laws. Does this legislative silence mean that the legislature did not intend for such violations of the traffic laws to be interpreted to impose civil liability, that a violation of the traffic laws is not negligence per se because the legislature remained silent? Rarely does the legislature specifically create a civil cause of action in favor of those injured as a result of a violation of a law.

K.S.A. 41-715 is not a licensing statute enacted by the legislature to regulate who may sell liquor. Chapter 41 of the statutes,

which is entitled "Intoxicating Liquors and Beverages," contains several sections which regulate the issuance of a license. K.S.A. 41-715, however, does not appear in a licensing article of Chapter 41. It appears in Article 7, which is entitled "Certain Prohibited Acts and Penalties." A violator of 41-715 may, in addition to receiving a fine not to exceed $200.00, receive a sentence not to exceed 30 days or both a fine and imprisonment *in the discretion of the court*. Any person violating 41-715 is deemed guilty of a misdemeanor by the statute.

The majority is either failing to overrule prior case law or ignoring it. In *Arredondo v. Duckwall Stores*, Inc., 227 Kan. 842, 610 P.2d 1107 (1980), this court determined that for public safety reasons, K.S.A. 21-4209 prohibits minors, habitual drunkards, narcotics addicts and felons from obtaining explosives or detonating substances. It was the public policy of the act that the party whose conduct violates the act must bear the responsibility for the damage caused. The defendant, in violation of the statute, sold gunpowder to a sixteen-year-old boy who used the gunpowder to reload some shells. The boy was injured when his shotgun misfired. The minor predicated his successful action against the seller of the gunpowder upon the theory that actionable negligence occurs when one breaches a duty imposed by a criminal statute and the breach results in an injury of the type intended to be prevented.

K.S.A. 41-715 forbids the sale of alcoholic liquor to a minor, any person who is incapacitated or any person who is physically or mentally incapacitated by the consumption of liquor. The statute establishes a criminal penalty for such sales. The purpose of 41-715 is to prevent the sale of alcoholic beverages to those individuals who are unlikely to be able to handle alcohol. These individuals not only need protection from their own acts, but society needs protection from them.

Are we required to take legislative silence as to civil liability for alcohol vendors who violate a statute as an expression of legislative intent? Why has the majority suddenly determined that legislative silence is action? Prior to the legislature's repeal of the dram shop act in G.S. 1949, 41-1106, the legislature knew that this court had stated that where there is a breach of a duty imposed by law and injury occurs as a result of the breach, the injured party is entitled to compensation. If the legislature

wishes to exempt a specific class of violators from liability for damages which they cause by their negligence, then the legislature should speak. The court should not legislate an exemption. There is no more persuasive evidence of the legislature's intention than a statute undertaken by the legislature to give expression to that intention. Where legislative enactments in the past have contained no express provision that their violation shall result in tort liability, and no implication to that effect, this court has adopted the requirements of that enactment as a standard of conduct necessary to protect certain individuals or society as a whole.

Section 18 of the Bill of Rights of the Constitution of the State of Kansas provides that all persons who suffer injuries to their person, reputation or property have a remedy by due course of law. In addition to our constitution, the legislature is aware of the principle of negligence law that every person is under a duty to avoid creating situations which impose an unreasonable risk of harm to others. Many times we have stated that a breach of a duty imposed by law or ordinance constitutes negligence per se and where injury occurs as a result of the breach, the injured party is entitled to compensation. Cognizant of our past actions, the legislature may well consider that when a judge-made common-law rule has become obsolete, anachronistic and oppressive, the court is responsible for change.

The majority states that the issue presented is whether this court should judicially enact a "dram shop" law imposing civil liability upon liquor vendors who violate 41-715. The real issue is whether this court should follow our previous case law which determined that public policy requires, where a party's conduct violates a penal statute, that party must bear the responsibility for the damage caused as a result of the violation.

A statute is an expression of policy arising out of specific situations and addressed to the attainment of a particular aim of the legislature. The majority should not rewrite the statute. It should neither enlarge it nor contract it. The majority should take the statute as it finds it. This it has failed to do.

PRAGER and MILLER, JJ., join in the foregoing concurring and dissenting opinion.

APPENDIX

Following is a brief summary of the present status of the civil liability of liquor vendors in all jurisdictions.

1. ALABAMA Dram shop act (Ala. Code § 6-5-71 [1975]). No common-law vendor liability. *DeLoach v. Mayer Elec. Supply Co.*, 378 So.2d 733 (Ala. 1979).
2. ALASKA No statutory vendor liability. Common-law liability. *Nazareno v. Urie*, 638 P.2d 671 (Alaska 1981); and *Morris v. Farley Enterprises, Inc.*, 661 P.2d 167 (Alaska 1983).
3. ARIZONA No statutory vendor liability. Common-law liability. *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983); and *Brannigan v. Raybuck*, 136 Ariz. 513, 667 P.2d 213 (1983), overruling earlier Arizona cases adhering to nonliability rule.
4. ARKANSAS No statutory vendor liability. No common-law liability. *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965).
5. CALIFORNIA Prevailing common-law vendor liability for injury or damage resulting from intoxication abrogated in 1978 by Cal. Bus. & Prof. Code § 25602 (West 1985 Supp.) and Cal. Civ. Code § 1714 (West 1985).
6. COLORADO No statutory vendor liability. Common-law liability. *Kerby v. Flamingo Club*, 35 Colo. App. 127, 532 P.2d 975 (1974).
7. CONNECTICUT Dram shop act (Conn. Gen. Stat. § 30-102 [1985]). No common-law vendor liability. *Nelson v. Steffens*, 170 Conn. 356, 365 A.2d 1174 (1976); and *Slicer v. Quigley*, 180 Conn. 252, 429 A.2d 855 (1980).
8. DELAWARE No statutory vendor liability. No common-law liability. *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981).
9. DISTRICT OF COLUMBIA No statutory vendor liability. Common-law liability. *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973).
10. FLORIDA Prevailing common-law vendor liability for injury or damage resulting from intoxication. *Davis v. Shiappacossee*, 155 So.2d 365 (Fla. 1963); and *Prevatt v. McClennan*, 201 So.2d 780 (Fla. Dist. App. 1967), limited in 1981 by Fla. Stat. § 768.125 (1983).
11. GEORGIA Dram shop act (Ga. Code § 3-3-22 [1982]). No common-law liability. *Keaton v. Kroger Co.*, 143 Ga. App. 23, 237 S.E.2d 443 (1977).

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12. HAWAII No statutory vendor liability. Common-law liability. *Ono v. Applegate*, 62 Hawaii 131, 612 P.2d 533 (1980).
13. IDAHO No statutory vendor liability. Common-law liability. *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980), overruling earlier Idaho case adhering to nonliability rule.
14. ILLINOIS Dram shop act (Ill. Stat. Ann. ch. 43, ¶ 135 [Smith-Hurd 1984 Supp.]). No common-law vendor liability. *Demchuk v. Duplancich*, 92 Ill. 2d 1, 440 N.E.2d 112 (1982); and *Thompson v. Trickle*, 114 Ill. App. 3d 930, 449 N.E.2d 910 (1983).
15. INDIANA No statutory vendor liability. Common-law liability. *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966).
16. IOWA Dram shop act (Iowa Code Ann. § 123.92 [West 1984 Supp.]). Common-law vendor liability. *Haafke v. Mitchell*, 347 N.W.2d 381 (Iowa 1984).
17. KANSAS No statutory vendor liability. No common-law liability.
18. KENTUCKY No statutory vendor liability. Common-law liability. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968).
19. LOUISIANA No statutory vendor liability. Common-law liability. *Thrasher v. Leggett*, 373 So.2d 494 (La. 1979).
20. MAINE Dram shop act (Me. Rev. Stat. Ann. tit. 17, § 2002 [1983]). Status of common-law liability not confirmed.
21. MARYLAND No statutory vendor liability. No common-law liability. *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981); and *Fisher v. O'Connor's, Inc.*, 53 Md. App. 338, 452 A.2d 1313 (1982).
22. MASSACHUSETTS No statutory vendor liability. Common-law liability. *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); and *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 453 N.E.2d 430 (1983).
23. MICHIGAN Dram shop act (Mich. Stat. Ann. § 18.993 [Callaghan 1984 Supp.]). Common-law vendor liability. *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W.2d 820 (1973).
24. MINNESOTA Dram shop act (Minn. Stat. § 340.95 [1984]). Common-law liability. *Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (1973). Recently, Minnesota Supreme Court refused to extend liability to a social host. *Holmquist v. Miller*, No. C7-83-1919 (5/3/85).
25. MISSISSIPPI No statutory vendor liability. Common-law

liability. *Munford, Inc. v. Peterson*, 368 So.2d 213 (Miss. 1979).

26. MISSOURI No statutory vendor liability. Common-law liability. *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. 1980); and *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983).
27. MONTANA No statutory vendor liability. No common-law liability. *Runge v. Watts*, 180 Mont. 91, 589 P.2d 145 (1979); *Folda v. City of Bozeman*, 177 Mont. 537, 582 P.2d 767 (1978); and *Swartzenberger v. Billings Labor Temple Assn.*, 179 Mont. 145, 586 P.2d 712 (1978). But see *Deeds v. United States*, 306 F.Supp. 348 (D.Mont. 1969).
28. NEBRASKA No statutory vendor liability. No common-law liability. *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976).
29. NEVADA No statutory vendor liability. No common-law liability. *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969).
30. NEW HAMPSHIRE No statutory vendor liability. Common-law liability. *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965).
31. NEW JERSEY No statutory vendor liability. Common-law liability established in *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959), recently extended to social hosts. *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984).
32. NEW MEXICO No statutory vendor liability. Common-law liability. *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982); *MRC Properties, Inc. v. Gries*, 98 N.M. 710, 652 P.2d 732 (1982); and *Porter v. Ortiz*, 100 N.M. 58, 665 P.2d 1149 (Ct. App. 1983), overruling earlier New Mexico cases adhering to nonliability rule.
33. NEW YORK Dram shop act (N.Y. Gen. Oblig. Law § 11-101 [McKinney 1984 Supp.]). Common-law liability. *Berkeley v. Park*, 47 Misc.2d 381, 262 N.Y.S.2d 290 (1965).
34. NORTH CAROLINA Dram shop act (N.C. Gen. Stat. § 18B-121 *et seq.* [1983]). Common-law liability. *Hutchens v. Hankins*, 63 N.C.App. 1, 303 S.E.2d 584, *rev. denied*, 309 N.C. 191 (1983).
35. NORTH DAKOTA Dram shop act (N.D. Cent. Code § 5-01-06 [1983 Supp.]). No common-law liability. *Thoring v. Bottonsek*, 350 N.W.2d 586 (N.D. 1984).

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36. OHIO Dram shop act (Ohio Rev. Code Ann. § 4399.01 [Page 1982]). Common-law vendor liability. *Mason v. Roberts*, 33 Ohio St.2d 29, 294 N.E.2d 884 (1973).
37. OKLAHOMA Has not ruled on subject.
38. OREGON Prevailing common-law vendor liability. *Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977) limited in 1979 by Or. Rev. Stat. § 30.950 *et seq.* (1983).
39. PENNSYLVANIA No statutory vendor liability. Common-law liability. *Jardine v. Upper Darby Lodge No. 1973*, 413 Pa. 626, 198 A.2d 550 (1964).
40. RHODE ISLAND Dram shop act (R.I. Gen. Laws § 3-11-1 [1976]). Status of common-law not confirmed.
41. SOUTH CAROLINA Has not ruled on subject.
42. SOUTH DAKOTA No statutory vendor liability. Common-law liability. *Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982), overruling earlier South Dakota case adhering to nonliability rule.
43. TENNESSEE No statutory vendor liability. Common-law liability. *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (1964).
44. TEXAS Has not ruled on subject.
45. UTAH Dram shop act (Utah Code Ann. § 32-11-1 [1983 Supp.]). Status of common-law liability not confirmed.
46. VERMONT Has not ruled on subject.
47. VIRGINIA Has not ruled on subject.
48. WASHINGTON No statutory vendor liability. Common-law liability. See, *e.g.*, *Callan v. O'Neil*, 20 Wash. App. 32, 578 P.2d 890 (1978); and *Halligan v. Pupo*, 37 Wash. App. 84, 678 P.2d 1295 (1984).
49. WISCONSIN No statutory vendor liability. Common-law liability. *Sorensen v. Jarvis*, 119 Wis.2d 627, 350 N.W.2d 108 (1984), overruling earlier Wisconsin cases adhering to nonliability rule. *Koback v. Crook*, 123 Wis. 2d ___, 366 N.W. 2d 857 (1985), Wisconsin Supreme Court imposes liability on social host who served liquor to a minor.
50. WEST VIRGINIA Has not ruled on subject.
51. WYOMING No statutory vendor liability. Common-law liability. *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983), overruling earlier Wyoming cases adhering to nonliability rule.

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UNIVERSITY OF KANSAS
SCHOOL OF LAW

PUBLIC POLICY CLINIC
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DRAM SHOP LEGISLATION

BY
JASON LLOYD

11-30

EXECUTIVE SUMMARY

The unacceptably high social cost of injury to person and property associated with drunken driving has led to efforts by members of the public, judiciary, and the legislature to reduce the risk of injury and provide more adequate compensation for the unfortunate victim. As a response to the problems associated with drunk driving, many states have enacted Dram Shop laws providing third party civil liability innocent injured victims.

Drams shop laws are state statutes that impose civil liability on commercial vendors of alcohol, and in some cases on individuals who serve liquor at social gatherings. Under dram shop acts, a vendor or social host is liable when the sale of liquor results in harm to the interests of a third party because of the illegal intoxication of the buyer.

As background information relevant to understanding the issue of dram shop liability, this report will identify the historical background of dram shop legislation nationwide and the history of the original Kansas' dram shop act. It will also report the current state of dram shop laws in Kansas and throughout the nation.

This report will also discuss the potential policy objectives that should be considered in assessing dram shop legislation. These objectives include : (1) Increasing the public safety, (2) Compensating injured victims of drunk drivers, (3) Maintaining personal autonomy, and (4) Protecting business interests. These objectives will be used in analyzing the alternative dram shop requirements. These options include, (1) the scope of defendants liable under the act (2) to whom service is prohibited, and (3) the level or standard of due care.

The scope of possible defendants under a dram shop act include commercial vendors of alcohol and social hosts. While many states allow recovery, under dram shop actions against commercial vendors, few extend the scope of liability to include social hosts. Unlike a social host, commercial vendors profit from the sale of alcohol, have more control over the service of alcohol, and are better able to spread the threat of liability through increased prices and insurance. On balance, social hosts are not regulated by the state, and may pose a greater risk to public safety by serving to minors.

Dram shop laws usually include intoxicated persons and minors as persons to whom service of alcohol is prohibited. However, some states only allow recovery for illegal service to minors. The Kansas liquor laws evidence a policy that individuals are responsible for their own actions. Therefore, intoxicated persons would be liable for their negligent conduct. There is also strong sentiment to prohibit underage drinking. This may imply Kansas would allow civil liability for the illegal service to minors, but not for service to an intoxicated adult.

The standard of due care in a dram shop act allows the legislature to fine tune the effect of dram shop liability. Depending upon the necessary requirements imposed for recovery from a vendor or social host, dram shop statutes can be classified as having a high or low standard of care. A low standard of care would allow recovery for unintentional or negligent actions by the server and require lower showing of proof by the injured victim. A high standard, contrarily, would only allow recovery for knowing or reckless behavior and require a much higher showing. Therefore, depending on the scope of liability and prohibited protected class, the legislature can determine the effectiveness of the statute by increasing or decreasing the standard of care accordingly.

Finally, this reports sets forth the legal steps necessary for the legislature to take to establish dram shop liability and implement the various policy options. This reports also provides an

explanation of: (1) possible legal standards of care, (2) possible legal limitations, and (3) relevant constitutional considerations that could effect that are related to dram shop laws and should be considered when structuring a dram shop act.

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I. INTRODUCTION

Automobile accidents involving alcohol are a leading cause of death in the United States. More than 17,000 Americans die each year in alcohol-related traffic crashes. Someone dies in an alcohol-related traffic crash every 30 minutes. Nearly 600,000 Americans are injured in alcohol-related crashes each year. The social cost of alcohol-related accidents has been estimated to be twenty-one to twenty-four billion dollars annually. (NCADD, Bib. A.3)

The affects of drunken driving in Kansas mirror the national statistics. In 2000, there were 18,500 alcohol related crashes in Kansas, in which 154 people were killed and an estimated 6,100 people were injured (NHTSA, Bib. A.4). Additionally, alcohol is a factor in 23% of Kansas crash costs. Alcohol-related crashes in Kansas cost the public an estimated $0.9 billion in 2000. (Id..) Persons other than the drinking driver paid $0.6 billion of the alcohol related crash bill. (Id.) The average alcohol-related fatality in Kansas costs $3.4 million: $1.1 million in monetary costs and $2.3 million in quality of life losses. (Id.) The estimated cost per injured survivor of an alcohol-related crash averaged $97,000: $48,000 in monetary costs and $49,000 in quality of life losses. (Id.) To deter drunken driving and compensate innocent victims, the majority of state legislatures have enacted "dram shop acts".

Dram Shops are drinking establishments (bars and taverns) where liquors are sold and drunk on the premises. Dram shop statutes impose liability on commercial vendors and social hosts who supply alcoholic beverages to minors and to already intoxicated persons who injure third parties. Many states that have not enacted dram shop statutes, judicially impose liability, similar to dram shop liability, on vendors and social hosts that furnish alcoholic beverages.

Kansas is one of the few jurisdictions in which suppliers of alcohol are not liable for damages caused by the consumer of alcohol. There is no statutory basis for liability, and the Kansas Supreme Court has case refused to follow the trend of other jurisdictions toward changing the common law rule or the rule of vendor non-liability. The court reasoned that whether or not liquor vendors should be liable for the torts of their inebriated patrons is a question that should be left to the Kansas Legislature. In light of the experience of other states in which courts have considered prior decisions to defer the issue to their respective legislatures and have judicially imposed liability, the Kansas Legislature should take affirmative action to declare its position.

A. General Background

1. Historical Background

Public policies exhorting the inherent evils of alcohol consumption prompted the enactment of the earliest dram shop acts. Beginning in the nineteenth century, several state legislatures enacted dram shop and civil damages acts as part of a campaign for temperance.(McGreww, Bib. B.1). Kansas originally adopted a dram shop act in 1859. (Kansas, Bib. B.3) The act included a civil damage statute which provided a cause of action against the seller, barterer, or giver of intoxicating liquors for damage or injury caused "by any intoxicated person or in consequence of intoxication." (Kan, Bib. B.5) The statute was included in the 1885 revision of the Kansas statutes (Kan, Bib. B.4) and again in 1923 (Kan, Bib.6). On November 2, 1948, the citizens of Kansas voted to amend Article 15 of the Kansas constitution to give the legislature the power to regulate, license, and tax the manufacture of intoxicating liquors. (Kan, Bib. B.7) In 1949, the Kansas legislature, exercising this power, enacted the Kansas Liquor Control Act , a comprehensive system of regulating alcoholic beverages that is enforced by fines and criminal penalties. (Kan, Bib. B.8). However, the same

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legislature that enacted the Liquor Control Act chose not to reenact the dram shop law and it was repealed in general session in 1949. (Id.)

2. Current Law

a. Nationally

Forty of the fifty states have enacted dram shop legislation. (Dram, Bib. G.1-40). Those states that have not enacted dram shop statutes continue to rely on the judiciary to determine dram shop liability. Each of these ten states have criminal statutes that prohibit the sale of alcohol to already intoxicated patrons and minors. Five of these states judicially impose civil liability for violation of these statutes. (Non, Bib. F.1-5) Kansas and the four remaining states, continue to follow the common law rule that neither commercial vendors nor social hosts are liable for third party injuries. (Non, Bib. F.6-10)

b. Kansas

The actions of the Kansas Legislature in recent years indicate a concern about drunken driving. A number of laws have been implemented to curb the problem. The Legislature has enacted mandatory penalties for drunk driving, prohibited liquor vendors from engaging in certain sales practices, and defined as a crime "aggravated vehicular homicide," a category which encompasses unintentional homicide by an intoxicated driver. (Kan, Bib. C.1) Other laws make it a crime for anyone to provide or serve intoxicating liquor to a minor, or for a vendor to furnish alcohol to a minor or intoxicated person. Additionally, the Kansas Alcohol Beverage Control law (A.B.C.) imposes penalties for violating certain parts of the Kansas Liquor Control Act. The penalty for serving to a minor is revocation, suspension, or involuntary cancellation of license, and up to a $1000 fine. (Kan, Bib. C.6) The penalty for knowingly serving to an intoxicated person is a $ 300 fine for a first offense, a $600 fine for the second offense, and a $1000 fine for a third offense. Four or more violations in twelve months require involuntary cancellation, suspension, or revocation of the vendors license. (Id.).

B. Identification of Policy Objectives

There are several public policy objectives to consider in assessing whether to implement dram shop legislation. These objectives represent the ends to be achieved through governmental action. In examining the policy alternative of dram shop liability, the legislature should consider the following objectives:

1. Increasing Public Safety

The primary goal of the liquor laws of Kansas is to protect the public health, safety, and general welfare. These goals may be achieved by deterring dangerous behavior and encouraging responsible decisions. Civil liability maybe an effective means of deterrence to restrict the service of alcohol to intoxicated persons and minors.

2. Compensating Injured Victims

The liquor laws of Kansas should be fair and equitable. Equity requires an innocent injured victim be made whole by parties responsible for their injuries. Persons injured by drunken driving are usually innocent victims. Civil liability is commonly advanced as a means to ensure recovery of damages for innocent third party victims.

3. Maintaining Personal Autonomy

Kansas liquor laws to date indicate that the legislature favors a policy that would hold the individual responsible for his own actions. This policy may be achieved by requiring individual accountability for wrongful acts. The freedom of choice is vital to the American system of democracy. Without personal autonomy an individual is not able to be truly free. Maintaining this freedom requires personal accountability for ones actions. Allowing third party liability for the wrongful acts of a tortfeasor may diminish personal autonomy.

4. Protect Business Interests

The liquor laws of Kansas should not unduly overburden legitimate business practice. Bar and tavern owners represent legitimate businesses, and they comprise a significant portion of Kansas revenue. Therefore, the legislature should work against implementing laws that treat legitimate businesses unfairly.

C. Identification of Policy Options

At common law, recovery against a liquor provider was not allowed because the proximate cause of the injuries was considered to be the consumption of the alcohol and not its distribution. Dram shop laws abrogate the common law rule with respect to tavern owners and social hosts. These laws give an innocent party a cause of action against the illegal supplier of liquor, in the event that the act caused him injury. They are designed or the individual that hosted the social gathering. The flexibility of dram shop options allow several policy options, including, (1) the scope of defendants liable under the act, (2) to whom alcohol service is prohibited, and the (3) the standard of due care for liability.

1. Scope of Defendants

a. Commercial Vendors of Alcohol

Commercial vendors of alcohol or "dram shops" profit from the sale of liquor. This sale requires the on premise consumption of alcohol. In some cases, this on-premise consumption leads to bar patrons driving while impaired when leaving the liquor establishment. The rationale for imposing liability on commercial vendors is to deter the sale of alcohol to classes of p ersons (intoxicated persons and minors) who are likely to injure themselves or third party victims, and to place the economic consequences of intoxicated behavior on the business that profited from the selling of liquor. Commercial vendors maybe likely candidate for liability because they distribute the majority of the intoxicating beverage which contributes t o the intoxication of patrons and resulting injury of innocent victims. Additionally, commercial vendors have the experience and the ability to police alcohol consumption to prevent an individual from reaching a state of intoxication dangerous to others. Finally, vendors have the ability to pass on the threat of liability to consumers through increased prices.

b. Social Hosts

Alcohol use at social gatherings is a well-established fixture in our society. The excessive use of alcohol at social gatherings, is a significant problem. The problematic result is drunken driving. Social host liability imposes liability on the private individual. Under this alternative, the host may be liable for injuries to a third party if an intoxicated guest subsequently causes an accident. Social hosts pose a different sort of harm than that of a commercial vendor. Minors have easier access to alcohol at social gatherings therefore, social host liability may curb the threat of drunken driving by minors.

2. Service to Whom

a. Intoxicated Persons

Every dram shop act necessarily involves an intoxicated person who causes injury to an innocent third party. A majority of the states with dram shop acts allow recovery against commercial vendors who serve alcohol to already intoxicated persons. Depending on the purpose of the statute, the standard of care under each act may vary from knowing service to an obviously intoxicated person to negligent service to an intoxicated person.

b. Minors

A few states have enacted dram shop liability for third parties if the dram shop improperly sold alcohol to a minor. In these states, there is no liability for alcohol sales to already intoxicated patrons over the drinking age. Florida's dram shop act is representative of the other four dram shop acts: "A person who sells...alcoholic beverages to a person of lawful drinking age is not liable for injury caused by the intoxication of such person, except that a person who willfully and unlawfully sells...alcoholic beverages to a person who is not of lawful drinking age...maybe become liable for injury or damage caused by the intoxication of such minor". (Florida, Bib. G.7).

3. Standard of Care

The standard of care alternatives represent opportunities to fine tune dram shop legislation. A low standard of care may result in higher liability and increased safety, but could be detrimental to business interests and personal autonomy. On the other hand, a high standard of care may not deter negligent acts and therefore be ineffective. In determining the standard of care, the legislature should consider the overall purpose of the law and the scope of the defendants.

a. Negligence Per Se For Unlawful Sale

Under this standard, liquor servers would face civil liability if the sale of alcohol violates either a criminal statute or the Liquor Control Act. As Kansas has criminal penalties for serving alcohol to a minor and serving alcohol to an already intoxicated person, this standard would operate under the existing liquor laws. However, the laws apply to commercial vendors of alcohol and not social hosts.

b. Negligent Service of Alcohol

A negligent service standard would allow recovery against a liquor retailer or social host for negligently selling or serving alcohol to an already intoxicated person, a minor, or an obviously intoxicated person. This mere negligence standard requires a greater showing than negligence per se, in that, it requires a showing of causation.

c. Willful and Knowing Service of Alcohol

This standard is higher than mere negligence, because it requires a volitional act by the vendor or social host. This standard requires the injured party to prove the server actually knew the patron was already intoxicated or was a minor.

d. Reckless Service of Alcohol

This is the highest of the standards. This standard requires an injured victim not only prove the server knew the patron was intoxicated or a minor, but also that the server acted in a reckless manner by serving the liquor

II. Policy Analysis

A. Scope of Defendants

In an effort to deter drunken driving and compensate innocent victims injured by drunken driving, many states impose liability on the providers of alcohol for damages caused by the drunk driver.

1. Commercial Vendors of Alcohol

a. Effect on Public Safety

The primary purpose of Kansas liquor laws is to promote public safety. A primary threat to public safety is drunken driving. Preventing or limiting commercial sale of alcohol to classes of persons (minors and intoxicated persons) who are likely to injure themselves or third parties could decrease the threat of drunken driving. Civil liability maybe an effective means to deter service of alcohol to intoxicated persons and minors.

Under current Kansas law, commercial vendors of alcohol face fines and license revocation for selling alcohol to an intoxicated person or minor. However, Kansas liquor licenses are rarely revoked and punitive sanctions rarely exceed one thousand dollars. Without the threat of civil liability against commercial vendors, the current laws may not be an effective deterrent to keep vendors from selling alcohol to intoxicated patrons or minors. Dram shop laws provide the deterrent threat of civil liability. As a result, licensed vendors may take greater precautions against serving minors and intoxicated persons. There is some evidence of the deterrent effect of civil liability in states that have already enacted dram shop acts. A Texas study found that single vehicle nighttime crashes decreased sharply and over the long-term after the institution of dram shop liability laws in 1983 and 1984... There were 6.5% fewer single vehicle nighttime injury crashes after a 1983 liability case was filed and an additional 5.3% after a 1984 case was filed" (Clinical and Experimental Research 1991). The level of deterrence, however, may be limited by the amount of liability individual vendors face. Conceptually, the deterrent effect of tort liability depends on the extent to which potential tortfeasors are made to bear the cost of the injury they cause. The fact that persons may be liable for amounts up to their total wealth provides the motive for purchasing liability insurance. However, with liability insurance, there is likely to be a lack of total accountability. Due to rapidly increasing premiums, the cost of an accident to a negligent injurer no longer equals the victim's loss, but rather the present value of the increase in premiums resulting from "chargeable accidents". (Sloan, Bib. D.3) Larger chain stores may able to pay higher premiums while smaller local taverns may not afford the increase in cost. This may alter the deterrent effect of a dram shop law.

b. Effect on Compensating Injured Victims

Businesses that sell alcohol are generally in a better financial position than an intoxicated driver to compensate injured victims. In dram shop states, bars and taverns are often required to have liability insurance in order to be licensed by the state. These dram shop policies usually cover any damages an injured victim might incur. Implementation of a dram shop statute, however, does not guarantee recovery under the act. Depending on the wording of the statute, the injured victim may not have an actionable case due to the failure to meet an element of the act, or the amount of recovery may be limited. Alternatively, a seriously injured victim may have adequate proof of causation, but due to statutorily limited recovery, he may not be made whole. Another possible hurdle might be getting the action into court. The statute allows an action against the liquor store owner, but the victim still must hire an attorney and receive a verdict. While dram shop statutes offer

the possibility for injured victims to recoup losses, they do not guarantee any recovery. Nonetheless, an injured victim could have a better chance to recover his losses under a dram shop act than under current Kansas liquor law.

c. Effect on Personal Autonomy

Commercial vendors chose to profit from the sale of liquor to patrons. The more liquor they sale the more money they make. Patrons of liquor establishments choose to drink alcohol and pay the vendor for the service. Unless unduly influenced, the patrons decision to drink is completely voluntary. Under common law negligence principles, if he drinks too much, the potential results of his actions are foreseeable. As such, it is negligent behavior and the drinking driver should be solely responsible. However, dram shop acts require commercial vendors take responsibility for the negligent act of a drunk driver. A commercial vendor who is sixty miles away from the scene of an accident could face greater liability than the drunk driver. Nonetheless, personal autonomy works in both directions. The commercial vendor has the choice to refuse service to an intoxicated person. If he chooses profit over responsible service, he may have to accept the consequences of third party liability.

d. Effect on Business Interests

Dram shop liability implements a system of accountability by which retailers of intoxicating liquor can be held liable for the negligent sale of alcoholic beverages to intoxicated p atrons.. However, the effects of dram shop liability may be unfair to business owners. Some dram shop acts require liquor selling establishments to carry dram shop liability insurance, thus forcing businesses to pay higher premiums even if they have never been found in violation of the statute.. Implementation of dram shop liability may lead to a reduction in the profit of dram shop owners due to the increased operating expenses, including increased insurance premiums and significantly higher training and licensing budgets. As many liquor selling establishments operate on slim profit margins, they can ill afford these additional costs. Smaller bars and taverns, especially those who exercise the proper care in serving alcohol, may feel the law is unjust. Commercial vendors have the resources to insure against potential loss suffered from dram shop liability and can spread the loss by increasing prices. Dram shop laws may impose unfair treatment on commercial vendors. Intoxicated persons may not frequent the same bar for the entire evening. Instead, they may "bar hop" to a few different bars before driving and getting in a wreck. The victim then has to make a decision of which bar to sue without knowing which bar was truly the proximate cause of the injury. This "defendant shopping" could lead to arbitrary enforcement of dram shop laws.

2. Social Host Liability

A social host is an individual that serves alcohol at social gatherings. A social host could be a friend who shares some beer with another, an individual hosting a cocktail party, or even an employer sponsoring a company picnic or Christmas party. Whether a social host may be liable under dram shop acts is uncertain in some states, but in the majority states dram shop legislation is inapplicable to social hosts.

a. Effect on Public Safety

Social host liability does not have the vast policy ramifications of commercial vendor It may, however, have an important effect on deterring underage drinking. Opponents of imposing liability on social hosts argue they are less likely to possess the experience or training of a commercial vendor in determining when a person should no longer be served. Compounding this factor, a social host

often drinks with his or her guests and may also be intoxicated, thus further lessening his or her ability to determine the intoxication of the guests. Another concern is that due to social pressure, a social host may be more reluctant to refuse to serve an intoxicated guest than is a commercial vendor who generally does not have the same ties of companionship or friendship with the person being served.

b. Effect on Compensating Injured Victims

Spreading the risk of loss of an injured party by enlarging the pool of defendants to include the host increases the victims sources of compensation. Nonetheless, social host statutes are not necessarily compensatory or remedial in practice. Instead, they act as a deterrent to negligent service of alcohol. Intoxicated drivers are often the logical targets for recovery by persons injured in alcohol-related accidents. However, third parties injured by intoxicated patrons, usually face difficulties in recovering damages. Intoxicated drivers are often financially irresponsible, uninsured, or insolvent, therefore, injured victims go after "deeper pocket" liquor establishments. This theory may not apply to a social host. Social hosts may not have the same capacity to cover their potential liability with insurance, and since social hosts usually do not charge their guests for drinks, they are unable to spread the cost as readily as commercial vendors. Nonetheless, the potential threat of liability may encourage homeowners to purchase liquor liability insurance, thus providing compensation for injured victims of drunken driving.

c. Effect on Personal Autonomy

In alcohol related accidents, it is traditional and logical that both the legal and moral blame should rest solely with the drinker. The mix of drinking and driving results in tragedy each year. Instead of placing all of society's opprobrium on the individual who makes the free choice to both drink and then drive, social host liability may defuse the reproach of society towards the intoxicated actor's behavior by confusing the issue of responsibility. Ultimately, the concept of social host liability raises many questions concerning the average persons ability to monitor and control a guest's consumption of alcohol and the extent to which society is willing to bear responsibility for drinking and driving.

Courts have been reluctant to interfere with social drinking, which often takes place between friends, neighbors, and employees, however, if courts did recognize social host liability it may not serve as an effective deterrent. Instead of refusing to host social gatherings, a social host may just take steps to reduce their liability risk. They might ask their guests to bring their own liquor and serve themselves, thus circumventing the threat of liability. Alternatively, the host may attempt to monitor the liquor supply and/or control the guest's behavior, however, the social server's ability to do so is limited compared to that of a bar or tavern. Another factor concerning social server autonomy is that Kansas liquor laws primarily regulate commercial vendors, and criminalize the sale of alcohol to already intoxicated persons or minors. However, the laws are virtually silent on social hosts. Therefore, it may not be just to treat the social server of alcohol as though the alcohol supplied was outlawed when alcohol is legal to purchase and serve.

d. Effect on Business

As social host liability does not apply to vendors, it may not have any discernible affect on business. On balance, social host liability may limit the amount or size of parties hosted by social servers. This may lead to a decrease in bulk alcohol purchases by social hosts from liquor stores.

B. Service to Whom

1. Intoxicated Persons

a. Effect on Public Safety

Research suggests a high percentage of drunk drivers obtain their alcohol from establishments that sell alcohol for on premise consumption. (McGough, Bib. D.1) Therefore, deterring the sale and service of alcohol to already intoxicated persons could reduce the number of drunk drivers, potentially decreasing injuries from alcohol related accidents. Because of the potential difficulty in determining a persons level of intoxication, the threat of liability may have a lesser effect on social hosts.

b. Effect on Compensating Injured Victims

Intoxicated drivers are often the logical targets for recovery by persons injured in alcohol-related accidents. However, third parties injured by intoxicated patrons, often face difficulties in recovering damages. Intoxicated drivers maybe financially irresponsible, uninsured, or insolvent. Dram shop acts allow the injured victim to seek recovery against the vendor or social host that served the intoxicated person. Therefore, the victim has a broader avenue of compensation.

c. Effect on Personal Autonomy

The theory that a commercial vendor or social host should be liable for service to an intoxicated person arises from a belief that once a patron or guest becomes intoxicated, his subsequent actions are not completely voluntary. It is argued that the intoxication renders the drinker incapacitated and therefore, one who continues to provide liquor to such a person increases the risk of resulting injury. For example, a person in an intoxicated condition might unintentionally, but as a result of his intoxication, injure some other party. Consequently, the server is partially responsible for any resulting injury. This liability may effect the amount of choice a patron has at a bar. Personal autonomy requires freedom of choice. This freedom includes responsible and irresponsible decisions. By implementing dram shop laws bar patrons may be limited in the amount of alcohol they can drink. Thus, limiting their freedom to choose.

d. Effect on Business Interest

Bars and taverns profit from the sell of alcohol. Many bar patrons who frequent liquor establishments drink enough alcohol to be considered legally intoxicated. By refusing service to those patrons who are already intoxicated, the bar risks losing customers and potential business to other liquor establishments. In addition, the commercial vendors may have to train their staff on how to discern if a patron is intoxicated. This increased training may pose additional costs to bar and tavern owners.

2. Minors

a. Effect on Public Safety

The Kansas liquor laws evidence a strong public policy against providing alcohol to an underage person. Imposing liability on those who furnish liquor to minors would not only protect the public from intoxicated minors, but would also afford further protection to minors. About 10.1 million people age 12 to 20 years reported current use of alcohol in 2001- 28.5 % of this age group for whom alcohol is an illicit substance. Underage drivers account for 17% of alcohol related vehicle crashes despite comprising only 11% of the total drivers on the road. The intoxication rate for 16-20 year old drivers in fatal crashes in 1996 was 14.1 %. (DEP, Bib. E. 3). Young drivers are more often involved in alcohol related crashes than any other comparable age group. Alcohol crash involvement

rates, share of the alcohol crash problem, and alcohol-crash risk all reach their peaks with young drivers, with the peaks for fatal crashes occurring at age 21.(DEP, Bib. E. 1). Social host liability may be a preemptive measure to deter underage drunken driving. Most minors do not buy liquor or become intoxicated at bars or taverns. Instead, they receive access to alcohol at parties and social gatherings. Therefore, social hosts could pose a greater risk to minors under certain circumstances than commercial vendors.

b. Effect on Compensating Injured Victims

While the Kansas liquor laws evidence a strong public policy against providing alcohol to an underage person, none of the present laws aimed toward deterring minor drunken driving authorize compensation for injuries incurred by the innocent victim of a drunken driver. This appeared to be the concern of the Kansas Supreme Court in Ling, which would have recognized a cause of action favoring parties injured by an intoxicated minor, or in consequence of the intoxication of a minor, against one who illegally provides the liquor which leads to the intoxication. Minors often do not have the means of compensating injured victims. Parents may be liable for the torts of their children, but that does not guarantee recovery by an injured victim. Many families do not possess the financial stability to cover the damages incurred by a victim of drunken driving.

c. Effect on Personal Autonomy

Minors may lack the sufficient knowledge about the affects of drinking. Personal autonomy requires informed decision making. Because they lack the knowledge to make an informed decision, the personal autonomy of minors should not be affected. Additionally, it is illegal to serve alcohol to a minor. As the Kansas legislature has already imposed criminal sanctions for serving alcohol to a minor, any civil liability should not further affect social host or commercial vendor autonomy.

d. Effect on Business Interest

It is illegal for any person in the state of Kansas to serve alcohol to a minor. Bars and taverns are monitored by the Kansas Alcohol Beverage Control unit to ensure compliance with the law. Dram shop liability may increase the pressure on bars and taverns to comply with the law. As bars and taverns should not serve alcohol to minors, the effect on business is potentially nominal.

C. Standard of Care

The standard of due care in a dram shop act allows the legislature to fine tune the effect of dram shop liability. Depending upon the necessary requirements imposed for recovery from a vendor or social host, dram shop statutes can be classified as having a high or low standard of care. A low standard of care would allow recovery for unintentional or negligent actions by the server and require a lower showing of proof by the injured victim. A high standard, contrarily, would only allow recovery for knowing or reckless behavior and require a much higher showing.

In determining the standard of care the legislature should consider several factors, including, the purpose of the current Kansas liquor laws and the purpose of the statute. The liquor laws of Kansas primarily work to regulate commercial vendors and prevent service of alcohol to minors. Therefore, the legislature may want to enact a dram shop law that includes civil liability for injuries resulting from the negligent service of alcohol to a minor. This standard may amplify the deterrent affect of the present liquor laws and may serve to protect the public from the torts of intoxicated minors. Because of the inherent differences between social hosts and commercial vendors, the legislature may want to use a different standard of care for social hosts. Social hosts lack the

expertise, staff, and control over alcohol service compared to commercial vendors. Therefore, a knowing or reckless service standard may be more appropriate for social hosts.

If the legislature is concerned with deterring all drunk driving, then commercial vendors should not only face liability for negligently serving minors, but also for serving intoxicated persons. Because of the difficulty in determining a patron's level of intoxication, however, in most states the standard of due care for serving an intoxicated person is a knowing or reckless standard. Nonetheless, if the purpose of the statute is remedial, the legislature may want to open commercial vendors up to liability by imposing a negligent standard of care for service to minors and intoxicated persons. This remedial purpose should have little effect on the standard of care for social hosts.

III. Legal Analysis

A. Steps Necessary for Implementation

Dram shop acts offer relief to parties injured in the form of civil damages. In order to impose civil liability for liquor sales, the Kansas Legislature would need to enact a dram shop statute that sets forth the standards and procedures underlying its operation. As Kansas has no dram shop policy, it would need to draft a new statute. In regard to construction, dram shop acts vary as to 1) who is covered under the act, 2) the standard of due care, and 3) recovery under the statute.

1. Coverage under the Act

Some states such as Illinois and Vermont, have broadly worded dram shop acts, which permit a cause of action against "any person". (Dram, Bib. G.11, 37) Other states, such as North Carolina, allow a cause of action against certain classes of licensees or commercial vendors (N.C., Bib. G.28).Those states with dram shop acts that originally were judicially interpreted to include social hosts along with commercial vendors invariably changed their statutes through subsequent legislation. Therefore, any dram shop act should incorporate careful wording that clearly denotes certain classes covered under the act.

2. Standard of Due Care

The most common variation in dram shop act terms involves changes to the burden of proof for showing the knowledge of the dram shop or causation.

a. Negligence Per Se for Unlawful Sale

This standard requires that the alcohol sale violates a state criminal statute forbidding the sale of alcohol to an already intoxicated person or minor before civil liability may attach. (Dram, Bib. G.1,2,18,19,27,39) These dram shop acts provide for a form of strict liability, where proximate cause of third party damages does not need to be shown for recovery to be had.

b. Negligent Service of Alcohol

States that have a negligent service standard allow recovery against the licensee or social host for negligently selling or furnishing an alcoholic beverage to a patron who was already intoxicated or was a minor at the time of sale, or that the patron was visibly intoxicated at the time of sale (thereby imputing knowledge). The statutory elements may include: 1) that alcohol was supplied to a minor or intoxicated person, 2) under circumstances where the server knew or should have known the patron was a minor or intoxicated , 3) when a reasonable person under similar circumstances would not have supplied the alcohol, and 4) the service of the alcohol was the proximate cause of

the injury. Fourteen states incorporate the negligent standard of liability in their dram shop acts. (Dram, Bib. G.3,10,13,14,16,20,22,24,33,36,37)

c. Willful and Knowing Service of Alcohol

This standard requires a higher showing than mere negligence. The dram shop act of states with this standard permit recovery from a dram shop by a third party only if it is proven that the sale was willingly made to a patron whom the dram shop actually knew was already intoxicated or was a minor at the time of sale. (Dram, Bib. G.4,6,9,12,17,29,30) Typical of these statutes is Colorado Revised Statute section 12-47-801(3)(a)(I): Licensee not civilly liable to any inured person for any injury suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to such person, except when: it is proven that the licensee willfully and knowingly sold or served any alcohol to such person who a minor or who was visibly intoxicated. (Dram, Bib. G.6)

d. Reckless Service of Alcohol

Liability based upon a server's reckless conduct is similar to the knowing standard, but requires an additional showing. A person injured as a result of an intoxicated person's negligence could recover against the server who furnished the alcoholic beverage if the servers actions were shown to constitute reckless conduct. Reckless conduct is characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious disregard for or indifference to that risk. Reckless behavior is a much higher standard than mere negligence; it is a gross deviation from what a reasonable person would do. The standard applies where the service of alcoholic beverages to an obviously intoxicated person or minor indicates a reckless disregard of the just rights or safety of others, or of the consequences of their actions. The Texas dram shop act follows this standard. (Texas, Bib. G.36) Texas requires that the patron being sold alcohol be so obviously intoxicated that he presents a "clear danger" to himself and others. Should a claimant meet the "clear danger" threshold, he must also prove causation (Id.)

3. Recovery Under the Statute

a. Eligibility

Dram shop acts allow recovery by a third party, injured by an intoxicated person, to bring a civil action against the person who contributed to the intoxication. Some states have extended recovery under their dram shop acts to include recovery for injury to property or means of support.

b. Limitations

While the amount of recovery in a dram shop action is unregulated in most jurisdictions, some dram shop acts limit recovery to a specific sum. (Dram, Bib. G.6,7,11,16,26) Recovery may also be limited by comparative negligence acts. Comparative negligence apportions damages according to the relative fault of the parties. Therefore, a commercial vendor or social host would be liable for only the portion of the damages attributable to them.

B. Limitations on Implementation

The power to regulate all phases of the control of the manufacture, distribution, sale, possession, transportation, and traffic in alcoholic liquor and the manufacture of beer regardless of its alcohol content is vested exclusively in the state. (Constitution, Bib. B.7)

1. Choice of Law

Choice of law is a problem Kansas may face whether or not implements a dram shop act. As Missouri has enacted a dram shop act and Oklahoma has not, a significant issue may arise: If a minor

or intoxicated person is served a drink in Missouri and then drives into Kansas where he causes an accident due to his intoxicated state is the vendor liable under Missouri or Kansas law?

2. Due Process

Liquor retailers may argue that imposing vendor liability violates their right to equal protection guaranties found in the Fourteenth Amendment of the United States Constitution and in the Kansas Constitution. However, this argument should fail as forty other states have implemented dram shop acts.

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2. Kansas Traffic Accidents Facts 2001, http://ksdot.org/burtransplan/prodinfo/accstat/2001FactBookD.pdf (2002).
3. Dept. of Justice, Costs of Underage Drinking, http://www.doj.gov./underage/injury/alcohol/1999/~youth/ (2000).

F. Non-Dram Shop States

1. Haw. Rev. Stat. § 281-78 (Michie 1996); Ono v. Applegate 612 P.2d 533 (1980).
2. Okla. Rev. Stat. Ann. tit. 37s537; Brigance v. Velvet Dove Rest. Inc.725 P.2d 300 (1986).
3. S.C. Code Ann. § 61-4-580; Tobias v. Sports Club Inc. 504 S.E. 2d 318 at 321 (1998).
4. Wash. Rev. Code Ann. 66.44.200, 66.44.270; Kelly v. Flain 896 P.2d 1245 (1995).
5. W.Va. Code § 60-7-12; Bailey v. Black, 394 S.E. 2d 58 (1990).
6. Delaware. Samson v. Smith,560 A.2d 1024 (1989).
7. Kansas. Mills v. City of Overland Park,837 P.2d 370 (1992).
8. Maryland. Felder v. Butler, 438 A.2d 494 (1981).
9. Nebraska. Holmes v. Circo, 244 N.W. 2d 65(1976).
10. Virginia. Williamson v. Old Brogue Inc., 350 S.E.2d 621(1986).

G. Dram Shop Statutes

1. Alabama. Ala. Code §6-5-71 (2000).
2. Alaska. Alaska Stat. §04.21.020 (Michie 1999).
3. Arizona. Ariz. Rev. Stat. Ann. §§4-301,4-311 (West 2000).
4. Arkansas. Ark. Stat. §16-126-104 (Michie 1999).
5. California. Cal. Bus & Prof Code §25602.1 (West 2000).
6. Colorado. Colo. Rev. Stat. §12-46-112.5 (limits), 12-47-128.5 (intox. per.). (West 2000).
7. Connecticut. Conn. Gen. Stat. §30-102. (West 2000).
8. Florida. Fla. Stat. §768.125. (West 2000).
9. Georgia. Ga. Code Ann. §§51-1-18, 51-1-40 (limits). (1999).
10. Idaho. Idaho Code §23-808. (1999).
11. Illinois. Ill. Rev. Stat. Ch. 43 part 135. (West 2000).
12. Indiana. Ind. Code §7.1-5-10-15.5. (West 2000).
13. Iowa. Iowa Code §§123.49, 123.92. (West 2000).
14. Kentucky. Ky. Rev. Ann. §413.241. (Banks-Baldwin 2000).
15. Louisiana. La. Rev. Stat. Ann. §9:28M.1. (West 2000).
16. Maine. Me. Rev. Stat. Ann. tit. 28, §§1401-1416. (West 1999).
17. Massachusetts. Mass Stat. Ann. §85T. (West 2000).
18. Michigan. Mich. Stat. Ann. §18.993;Mich Comp Laws § 436.22. (West 2000).
19. Minnesota. Minn. Stat. § 340A.801. (West 2000).
20. Mississippi. Miss. Code Ann. §67-3-73. (2000).
21. Missouri. Mo. Rev. Stat. §537.053. (West 2000).
22. Montana. Mont. Code Ann. §27-1-710. (1999).
23. Nevada. Nev. Stat. Ann. §41.1035 (1995).
24. New Hampshire. NH. Rev. Stat. Ann. §507. (1999).
25. New Jersey. NJ Rev. Stat. Ann. §2A:22A. (West 2000).
26. New Mexico. NM. Stat. Ann. §41-11-1. (Michie 1999).
27. New York. NY Gen. Oblig. Law §11-101. (McKinney 2000).
28. North Carolina. NC Gen. Stat. §18B-121. (2000).
29. North Dakota. ND. Cent. Code §5-01-06. (1999).
30. Ohio. Ohio Rev. Code Ann. §4399.01. (West 2000).
31. Oregon. Or. Rev. Stat. §30.950. (1999).
32. Pennsylvania. Pa. Stat. Ann. tit. 47, §497. (West 2000).
33. Rhode Island. RI. Gen. Laws §§3-11-1-3, 3-14-1. (1999).
34. South Dakota. S.D. Codified Laws §35-11-1 (Michie 1985).

35. Tennessee. Tenn. Code Ann. §32A-14-1. (1999).
36. Texas. Texas Alco. Bev. Code Ann. Ch.2. (1999).
37. Utah. Utah Code Ann. §32A-14-1. (1999).
38. Vermont. Vt. Stat. Ann. tit. 7, §501. (1999).
39. Wisconsin. Wis. Stat. §125.035. (West 2000).
40. Wyoming. Wyo. Stat. §12-5-502. (Michie 2000).

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Literature Summaries on Dram Shop Liability Laws

Related Links:
Dram Shop Liability Laws: Fact Sheet
Dram Shop Liability Laws: Literature Reviews

Dram shop liability laws are a potentially powerful tool for changing the environment in which alcohol is sold. Dram shop liability laws hold alcohol servers responsible for harm that intoxicated or underage patrons cause to other people (or, in some cases, to themselves). These laws are established at the state level through common law, legislation, or both. States' dram shop laws form a continuum, with alcohol sellers in different states exposed to varying degrees of liability. Dram shop laws can be particularly important in preventing alcohol problems because regulatory agencies mainly state Alcohol Beverage Control departments are so ineffective. The few studies that have been done to date on dram shop liability laws' impact on the alcohol serving environment and on alcohol-related injury indicate that these laws can be effective. More research in this area is needed.

These summaries were written by the ARIV project staff

Type of document: peer-reviewed research report

Alcoholic beverage server liability and the reduction of alcohol-involved problems. Harold D. Holder, Kathleen Janes, James Mosher, Robert Saltz, Stephen Spurr, and Alexander C. Wagenaar. Journal of Studies on Alcohol 54:23-36, January 1993.

Key words: dram shop liability

Summary: This study concludes that dram shop liability laws have the potential to change server behavior and thus to reduce risks associated with alcohol use. Dram shop laws hold alcohol servers liable for harm caused by drunken or underaged patrons or to other people. These laws are established at the state level through either common law, legislation, or a combination of both.

The study found that in states in which servers have a relatively high level of exposure to liability:

- there is more publicity regarding liability
- alcohol servers and management are more aware of liability
- more alcohol establishments obtain liability insurance
- there are fewer low-price drink promotions
- more servers check identification
- alcohol establishments are not more likely to participate in responsible beverage service training programs

The study involved the ranking of all 50 states and the District of Columbia by a panel of legal experts

based on the exposure to liability of establishments in each state. High risk and low states were compared with respect to a variety of measures, including publicity of liability laws and owner/manager perceptions of liability risk and server behavior. Perceptions of risk and server behavior were obtained through a survey of 839 owners/managers nationwide. The authors state that the data must be approached with caution due to the low response rate to the survey (11.7%).

Practical implications: To make liability laws more effective, the authors recommend:

- that liability laws be reformed so as to encourage safer management and server policies
- mandatory state data gathering on liability insurance, which would spur competition among insurers, causing a decrease in liability insurance cost and thus creating a greater incentive for alcohol outlets to buy liability insurance
- discouraging the creation of "insurers of last resort" in which low-risk establishments subsidize high-risk establishments, thus eliminating the latter's incentive to reform their practices since their premiums would be far below the cost of their expected damages

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Type of document: peer-reviewed research report

Effects of alcoholic beverage server liability on traffic crash injuries. Alexander C. Wagenaar and Harold D. Holder. Alcoholism: Clinical and Experimental Research 15(6):942-947, November/December 1991.

Key words: dram shop liability

Summary: This study found that single vehicle nighttime (SVN) crashes in Texas decreased sharply and over the long-term after the institution of dram shop liability laws in 1983 and 1984. The laws caused significant changes in alcohol servers' practices, resulting in fewer people driving drunk and thus fewer SVN crashes. There were 6.5% fewer SVN crashes immediately after a 1983 liability case was filed and an additional 5.3% after a 1984 case was filed.

Dram shop laws hold alcohol servers liable for harm caused by drunken patrons to other people. Prior to 1983, Texas common law did not recognize an alcohol seller's or server's liability for harm caused by his or her sales or service, nor did such a law exist in state statutes. In 1983, and again in 1984, major dram shop liability claims were filed (and eventually proved successful).

The Texas SVN injury crash data were compared with data from the other 47 contiguous states and national trends were accounted for. That is, the findings excluded that portion of the decrease in SVN injury crashes in Texas that could be attributed to national trends toward a decrease in such crashes. In addition, changes within Texas that helped decrease the number of SVN injury crashes were also taken into account. Thus the figures presented reflect only that portion of the decrease due to the liability cases. SVN crashes are commonly used to measure alcohol-involved crashes given the unreliability of police reports of alcohol involvement in crashes.

Practical implications: As the authors suggest, strengthening dram shop liability laws may be an effective way of reducing alcohol-related injury crashes. In particular, stricter liability laws may encourage alcohol establishments to implement responsible beverage service programs to establish clear policies and to train servers to prevent patrons from becoming intoxicated (and to prevent sales to minors).

Sept 9

NOT DESIGNATED FOR PUBLICATION

No. 66,840

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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ROBERT BURTON,
Plaintiff/Appellee,

v.

JASON C. FRAHM, THOMAS K. FRAHM,
and MARY E. FRAHM,
Defendants/Appellants,

and

BUDDE'S RESTAURANT, INC.,
Defendant/Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; JANICE D. RUSSELL, Judge. Opinion filed July 31, 1992. Affirmed.

Edward M. Boyle and *Michael B. Lowe*, of Payne & Jones, Chartered, of Overland Park, for defendants/appellants.

Richard T. Merker and *D'Ambra M. Howard*, of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, for plaintiff/appellee.

Before LEWIS, P.J., LARSON and GERNON, JJ.

LEWIS, J.: The defendants appeal from a jury verdict in favor of the plaintiff and from several rulings by the trial court. The subject matter of this lawsuit is a personal injury action wherein plaintiff seeks to recover damages for injuries sustained in an automobile accident.

The automobile accident in question took place when a vehicle driven by defendant, Jason Frahm, collided with a vehicle driven by plaintiff, Robert Burton. Jason has admitted he was intoxicated and at fault in causing the accident. Jason's parents, Thomas and Mary Frahm, were joined as defendants on the theory of negligent entrustment. The jury returned a verdict in favor of Burton, finding Jason 82 percent at fault, and Thomas and Mary each 9 percent at fault. The verdict awarded damages in favor of Burton in the amount of $56,565.

The accident in which Burton was injured took place on the evening KU played Duke in the Final Four of the NCAA basketball tournament. Jason told his parents he was going to the home of a friend to watch the basketball game on TV. Jason was given permission and possession of his father's automobile to go to the friend's home, but was admonished to return to his home by 11:30 p.m.

The reasons Jason gave his parents for leaving home on the evening in question were not trustworthy. He did not go to a friend's home. The invitation, it develops, was a ruse

developed by Jason and two of his friends. Instead of going to his friend's home, Jason met two of his friends at Budde's, a local bar. Jason was 16 years of age, and his two friends were also underage. Despite this fact, they were all served alcoholic beverages at Budde's while they watched the basketball game on a big-screen TV. It is undisputed that no one at Budde's required any identification or proof of age before serving drinks to Jason and his friends.

After the game was over, Jason and his friends left Budde's and went to a private party at the home of another friend. Jason drove his father's automobile to that party. The three boys stayed at the private party for a couple of hours, and then returned to Budde's.

Upon their return to Budde's, Jason was again served alcoholic beverages. Once again, no identification was requested and no proof of age demanded. Indeed, there was testimony that Jason told his waitress he really was not 21 when she asked him, but she continued to serve him alcoholic beverages despite this confession on his part. There was further testimony that some of the beer was paid for by a man named Lawrence, who was possibly a part-owner of the bar. Jason consumed a number of beers at Budde's and ultimately became intoxicated.

After drinking in Budde's for about an hour, Jason and his friends left in Jason's father's car. Once again, Jason

was driving. At the intersection where the accident took place, Jason was traveling at a speed of 50-55 miles per hour, did not slow down as he approached the intersection, and ran a red light. In the process, Jason hit Burton's car as it was entering the intersection. That car caught fire and burned, and Burton suffered severe and permanent injuries.

This appeal involves a variety of issues.

DRAM SHOP LIABILITY

The defendants in this case sought to add Budde's Restaurant, Inc., (Budde's) as an additional defendant against whom they could compare negligence. As a protective measure, the plaintiff also sought to add Budde's as a defendant. Once Budde's became a party defendant in this action, it filed a motion for summary judgment. That motion was sustained. Jason, Thomas, and Mary appeal from the decision sustaining Budde's motion for summary judgment.

The sole basis on which liability can be imposed on Budde's is that it knowingly sold intoxicating beverages to Jason, who was 16 years old at the time. Jason has admitted he was intoxicated at the time of the accident, and it seems beyond question that his intoxication and the sale of alcoholic beverages to him by Budde's was related to the accident. Unfortunately, this theory of liability is rendered untenable

our Kansas Supreme Court decision of *Ling v. Jan's Liquors*, 237 Kan. 629, 703 P.2d 731 (1985). That decision requires that we affirm the decision of the trial court.

If we were free to follow our collective consciences and to apply what we believe to be sound legal reasoning, this panel would unanimously reverse the decision of the trial court granting summary judgment to Budde's. We have no disagreement among us that *Ling* is an anachronism, is not good law, and should not be the law of this state. As we perceive our duty, however, we are not free to follow our consciences or our best legal judgment.

"This court is duty bound to follow the law as established by Kansas Supreme Court decisions, absent some indication the Supreme Court is departing from its previously expressed position. *Stratton v. Garvey Internat'l, Inc.*, 9 Kan. App. 2d 254, Syl. ¶ 6, 676 P.2d 1290 (1984)." *Batt v. Globe Engineering Co.*, 13 Kan. App. 2d 500, 507-08, 774 P.2d 371, *rev. denied* 245 Kan. 782 (1989). See *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 40, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

We have no indication that the Kansas Supreme Court is about to depart from the rule announced in *Ling*. Indeed, in the most recent decision of our Kansas Supreme Court involving this issue, a five-to-two majority chose to distinguish the

Ling case on its facts rather than overrule it. See *Mills v. City of Overland Park*, 251 Kan. ___ , ___ P.2d ___ (1992) (No. 66,580, filed July 10, 1992). This indicates that the doctrine of *Ling* remains the law of the State of Kansas.

We have considered whether we can distinguish *Ling* on the facts. We conclude this is not possible. In *Ling*, there was an illegal sale of liquor to an underaged individual. The facts indicated that the young man in *Ling* became intoxicated with the liquor he purchased from the defendant and was intoxicated when he ran over the plaintiff, who was standing beside her parked car. The case presently before this court also involves the sale of liquor to an underaged driver and a subsequent automobile accident. In *Ling*, the plaintiff sought to subject the seller of liquor to liability on the theory that the sale of liquor was the proximate cause of her damages. These are the same issues presented to us in the instant matter. In *Ling*, 237 Kan. 629, the Supreme Court rejected the theory of liability on the part of the liquor dealer and, in Syl. ¶ 3, held:

> "At common law, and apart from statute, no redress exists against persons selling, giving or furnishing intoxicating liquor for resulting injuries or damages due to the acts of intoxicated persons, either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence. Since Kansas does not have a dram shop act, the common-law rule prevails in

Kansas. *Stringer v. Calmes*, 167 Kan. 278, 205 P.2d 921 (1949)."

The *Ling* decision essentially grants immunity to one who sells intoxicating liquor to minors regardless of the consequences that sale may have had on the public. We see no rational basis for this carte blanche extension of such immunity. The abolition of that immunity is not a difficult step to take, judicially speaking. The modern concept of tort liability is based on the foreseeability of the consequences of a wrongful or illegal act. The foreseeability of harm to an innocent third party as the result of the sale of intoxicating liquor to a 16-year-old high school student in possession of an automobile does not require a crystal ball. It has been seven years since *Ling* was decided, and the legislature has yet to act. We suggest it is now up to the courts to abolish the immunity granted by the *Ling* decision.

The record in this case is particularly egregious. Budde's knowingly sold alcoholic beverages to a 16-year-old high school student. Its employees made no effort to ask for proper identification and continued to sell liquor to Jason after he advised the waitress that he was underage. There is evidence from the record from which it can be inferred that one of the owners of Budde's may have purchased drinks for Jason and his friends. It is difficult to imagine anyone who is not aware of the statistics which show the havoc wreaked on our roads by drunken drivers. It seems evident to us that some

tragedy was clearly the foreseeable result of the indiscriminate sale of alcoholic beverages to Jason under the circumstances shown.

Our research indicates that Kansas is only one of seven states which clings to the common-law rule enunciated by *Ling*. At the time *Ling* was decided, the states of Oklahoma, Texas, South Carolina, Vermont, Virginia, and West Virginia had not ruled on the issue. Since *Ling*, all of these states, with the exception of Virginia and Vermont, have ruled and have imposed liability.

We find particularly appropriate the decision of *Brigance v. Velvet Dove Restaurant, Inc.*, 725 P.2d 300 (Okla. 1986), where the Supreme Court of Oklahoma, in rejecting the common-law doctrine of *Ling*, stated: "We believe the application of the old common law rule of a tavern owner's nonliability in today's automotive society is unrealistic, inconsistent with modern tort theories and is a complete anachronism within today's society." 725 P.2d at 304. We fully agree with the decision of the Oklahoma Supreme Court and with its comments quoted above.

The other states which have changed their positions or taken a position since *Ling* are: (1) Montana: adopted common-law liability; held that violation of liquor control statute is evidence of negligence but not negligence per se. *Nehring v. LaCounte*, 219 Mont. 462, 712 P.2d 1329 (1986).

(2) South Carolina: violation of the state's liquor control statutes is not negligence per se, but is evidence of negligence subject to the requirement that the defendant show a causal link between the violation and his injury. *Steele v. Rogers*, 413 S.E.2d 329 (S.C. App. 1992). (3) Texas: adopted common-law vendor liability. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987). (4) West Virginia: adopted the principle that violation of the state's nonintoxicating beer act is prima facie evidence of negligence. *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990).

We close our discussion of this issue by noting that we agree with the dissents of Justice Lockett in *Ling* and Justice Abbott in the recently decided *Mills* case. We believe that the Kansas Supreme Court should adopt the philosophy set forth by those dissenting justices and abolish the concept of immunity from wrongdoing conferred on sellers of liquor. The facts presented in this case present an opportunity to depart from *Ling*, and we urge such departure by our Supreme Court.

In summary, for the reasons pointed out above, we reluctantly affirm the decision of the district court granting the motion for summary judgment filed by Budde's in the instant matter.

NEGLIGENT ENTRUSTMENT

After trial, the jury returned a verdict in which it found Thomas and Mary each nine percent at fault for Burton's injuries on the theory of negligent entrustment. Thomas and Mary attack this assessment in a variety of ways. We will address all of their contentions in this section of the opinion as a sufficiency of evidence question. After careful consideration, we find the defendants' arguments in regard to the negligent entrustment issue to be without merit.

In attacking the verdict, the defendants do not quarrel with the facts on which the issue was submitted to the jury. Their position is that the facts shown were not sufficient to support a finding of negligent entrustment.

Negligent entrustment is a confusing and somewhat ill-defined concept on which to base liability. The liability of a defendant in a negligent entrustment case is not based on the negligence of the driver in the accident in question. It stems from the concept that one who entrusts his or her vehicle to a known incompetent or habitually careless driver is responsible for any damage caused by that driver. The issue on which liability turns is whether the entrustor knew or should have known that the driver he entrusted his vehicle to was an incompetent or habitually careless driver. *McCart v. Muir*, 230 Kan. 618, Syl. ¶ 4, 641 P.2d 384 (1982). Thus, the focus in a case of this nature must be on the driving record, skills,

and personal characteristics of the entrusted driver and on the knowledge of the entrustor as to those matters.

> "A claim of negligent entrustment is based upon knowingly entrusting, lending, permitting, furnishing, or supplying an automobile to an incompetent or habitually careless driver. *Fogo, Administratrix v. Steele*, 180 Kan. 326, 304 P.2d 451 (1956); *Neilson v. Gambrel*, 214 Kan. 339, 342, 520 P.2d 1194 (1974). An incompetent driver is one, who by reason of age, experience, physical or mental condition, or known habits of recklessness, is incapable of operating a vehicle with ordinary care. This definition of an incompetent driver is deduced from our prior cases including *Priestly v. Skourup*, 142 Kan. 127, 45 P.2d 852, 100 A.L.R. 916 (1935); and *Richardson v. Erwin*, 174 Kan. 314, 255 P.2d 641 (1953)." *McCart v. Muir*, 230 Kan. at 620-21.

The question presented to this court is whether Jason's past stamped him as an incompetent or habitually careless driver and, if it did, whether Thomas and Mary are chargeable with knowledge of those facts. If there was sufficient evidence from which the jury could make these findings, then liability will follow.

Jason failed his driver's license examination the first two times he took it. This evidence is offered as evidence of incompetence and habitual carelessness. We see no probative value in the fact that Jason failed his driver's

license exam. The failing of a driver's license exam is not evidence of incompetence or habitual recklessness, nor is the passing of that exam or the holding of a license evidence that shows particular competence to drive.

The evidence which we deem relevant has to do with Jason's actual driving record and some of his personal habits and characteristics. Jason had received one ticket for speeding and one for driving while intoxicated. After the DUI arrest, his driving privileges were suspended for six months. The ticket for speeding and the DUI conviction both happened within a year of the accident in question.

For one as young as Jason, his driving record is far from exemplary. The question, however, is whether these incidents were sufficient for the jury to find he was an incompetent or habitually reckless driver. Thomas and Mary were well acquainted with the facts concerning Jason's previous driving record.

In addition to the evidence relating to his driving skills, other evidence was introduced concerning Jason's personal habits and his general lifestyle. This evidence indicated that Jason's general lifestyle was somewhat questionable. At one point, it was shown that he had gone to Padre Island on spring break. He lied to his parents about having adult supervision on this trip. During the trip, Jason and his friends acquired false identification and spent the

time drinking and partying. Certainly one inference to be made from evidence of this nature is that Jason was less than trustworthy and, for one so young, had a rather serious drinking problem.

The question for this court is whether the evidence bearing on the issue of negligent entrustment provided a submissible question on that issue. After carefully reviewing the record, we hold that it did. Whether Jason was an incompetent or habitually reckless driver became an issue for the jury to determine from the evidence. The extent of knowledge of Thomas and Mary was equally a matter for the jury.

Once we have determined that the evidence was sufficient to take the issue to the jury, our scope of review contracts to a considerable degree.

> "When a verdict is challenged for insufficiency of evidence or as being contrary to the evidence, it is not the function of this court to weigh the evidence or pass on the credibility of the witnesses. If the evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the verdict, it will not be disturbed on appeal. [Citations omitted.]" *Wisker v. Hart*, 244 Kan. 36, 37, 766 P.2d 168 (1988).

See *Johnson v. Geer Real Estate Co.*, 239 Kan. 324, 325, 720 P.2d 660 (1986); *Cantrell v. R. D. Werner Co.*, 226 Kan. 681,

34, 602 P.2d 1326 (1979); *Montgomery v. Morgenson*, 213 Kan. 167, 168, 515 P.2d 746 (1973).

When we review the record in light of our standard of review quoted above, we hold the evidence, considered in the light most favorable to Burton, supports the jury's finding of negligent entrustment and its assessment of fault. We acknowledge that contrary evidence was submitted by Thomas and Mary, and we acknowledge their argument with regard to that evidence. The jury had all of the evidence before it and chose to find that Thomas and Mary were negligent in entrusting a vehicle to Jason. This is a jury function, and we are not disposed to substitute our judgment for the jury's.

Mary argues there is no evidence to indicate she was guilty of entrusting anything to Jason. We concede that a reading of the record indicates it was Thomas who loaned Jason the car, Thomas who gave him permission to go out, and Thomas who Jason called and lied to in an effort to convince him he was at his friend's house. We concede there is little specific evidence to indicate what, if any, role Mary played in all of this. However, the evidence shows she was present in the home on all pertinent occasions and apparently did not object to Jason going out or to his use of Thomas' vehicle. There is competent evidence in this record from which it can be inferred that the decisions made were, if not explicitly, at least impliedly joint parental decisions by both Thomas and Mary. Certainly the evidence which Thomas and Mary introduced showing

their efforts to discipline and rehabilitate Jason after his first DUI incident is indicative of a joint effort by both parents on behalf of their son. We do not believe that, under the circumstances shown, we can or should decide which parent was responsible for entrusting the vehicle to Jason. We conclude the evidence is sufficient to support a finding of negligent entrustment on behalf of Mary as well as Thomas.

INSTRUCTIONS

The defendants argue that the trial court incorrectly instructed the jury. This argument encompasses a contention that the court gave an improper instruction on negligent entrustment and failed to give proper instructions submitted by the defendants.

> "It is the duty of the trial court to properly instruct the jury upon the theory of the case. Errors regarding jury instructions will not demand reversal unless they result in prejudice to the appealing party. Instructions in any particular action are to be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct, and the jury could not reasonably be misled by them, the instructions will be approved on appeal.

[Citation omitted.] *Trout v. Koss Constr. Co.*, 240 Kan. 86, 88-89, 727 P.2d 450 (1986).

The defendants complain about instruction No. 23, which was given to the jury and which read as follows: "A person who furnishes a motor vehicle to a person he knows, *or had reasonable cause to know*, to be an incompetent driver is liable with the driver for any damages caused by the negligence of the driver in the operation of the vehicle." (Emphasis added.)

The defendants argue that the emphasized portion of the instruction was erroneous. It is their position that negligent entrustment requires *actual knowledge* of incompetency and that proof a person merely had "reasonable cause to know" is insufficient. The defendants' argument is without merit.

The law of this state holds that negligent entrustment is established if the entrustor either knew or had reasonable cause to know of the driver's incompetence.

> "The owner of an automobile who lends it to one whom he knows to be an incompetent, careless and reckless driver, *or had reasonable cause to know or believe him to be such*, is guilty of negligence in permitting such party to use, drive or operate the automobile along and upon the well-traveled public streets of a city, and is liable to third parties who may be injured by

such driver in the negligent operation of such automobile." (Emphasis added.) *Priestly v. Skourup*, 142 Kan. 127, Syl. ¶ 2, 45 P.2d 852 (1935).

In *Fogo, Administratrix v. Steele*, 180 Kan. 326, 304 P.2d 451 (1956), the court indicated that, if the lender knows the driver to be incompetent, there is liability. The court went on to say: "This would be true . . . if the lender knew *or had reason to know* [the driver] could not, because of incompetency, carelessness, or recklessness be trusted to drive the automobile." (Emphasis added.) 180 Kan. at 328. This same language was most recently upheld and repeated by the Kansas Supreme Court in *McCart v. Muir*, 230 Kan. at 621.

Based on the decisions quoted above, we hold that the wording of instruction No. 23 was proper and the giving of that instruction was not erroneous.

The defendants complain about the failure of the trial court to give their proposed instructions No. 23, No. 24, No. 26, and No. 27. Highly summarized, these proposed instructions would have advised the jury that it could presume a person to be a competent driver if he had a valid driver's license. The defendants postulate that the State would only license a competent driver and, as a result, one who holds a driver's license is presumed to be a competent driver. We do not agree.

The defendants cite us no authority to support their proposed instructions or the theory on which they are based. We suspect the absence of authority is indicative of the merit of this argument. We hold the trial court did not err in refusing to give the defendants' requested instructions.

We have reviewed the instructions given as a whole. We conclude they fairly state the law, did not mislead the jury, and are substantially correct. Under *Trout*, this is all the law requires, and we affirm the instructions given by the trial court.

BIFURCATION

Defendants moved to bifurcate the trial, and their motion was denied. They argue that the issue of negligent entrustment should be tried separately from the question of damages. Defendants assign the denial of their motion to bifurcate as error on appeal.

The basis for defendants' argument is prejudice. Defendants point out that many facts which were relevant to the issue of negligent entrustment were not relevant to the question of damages. They insist that most of the facts relevant to the issue of negligent entrustment were prejudicial to all of the defendants and tended to arouse the jury against them. For example, the evidence concerning Jason's past

driving record, his trip to Padre Island, his use of fake identifications, his lies to his parents, etc., were all irrelevant to the issue of damages but were relevant to the question of negligent entrustment. This evidence, they argue, prejudiced the jury against them. This prejudice, they submit, could have been avoided by a bifurcated trial, and they contend it was error for the trial court to deny the motion for bifurcation.

K.S.A. 60-242(b) provides for separate trials under certain circumstances:

> "In furtherance of convenience, to avoid prejudice or when separate trials will be conducive to expedition and economy, the judge may order a separate trial in the county where the action is pending, or a different county in the judicial district, of any claim, cross-claim, counterclaim, third-party claim, or any separate issue."

The decision to bifurcate a trial is one which rests within the sound discretion of the trial court. "In the sound discretion of a trial court distinct issues may be severed for trial in the furtherance of convenience and justice or to avoid prejudice and undue delay when the complicated claims of the parties reasonably justify such action." *Guy Pine, Inc. v. Chrysler Motors Corp.*, 201 Kan. 371, Syl. ¶ 1, 440 P.2d 595 (1968).

This court's standard of review in determining whether the trial court erred in denying the motion to bifurcate is abuse of discretion. *Betts v. General Motors Corp.*, 236 Kan. 108, 116-17, 689 P.2d 795 (1984). Judicial discretion is abused when action is arbitrary, fanciful, or unreasonable, which is another way of saying discretion is abused when no reasonable person would take the view adopted by the trial court. *In re Marriage of McPheter*, 15 Kan. App. 2d 47, 48, 803 P.2d 207 (1990).

When we apply the standard of review to the issue in this case, we conclude that the trial court did not abuse its discretion in failing to grant the defendants' motion to bifurcate.

We have searched the record and are unable to locate the journal entry denying the motion to bifurcate. Without reviewing the journal entry, we are not able to determine the trial court's reason for denying the motion. It is well settled that the burden is upon the appellant to designate a record sufficient to present its points to the appellate court and establish the claimed error. *First Nat'l Bank & Trust Co. v. Lygrisse*, 231 Kan. 595, 602, 647 P.2d 1268 (1982). Error is never presumed, it must be proven. As a result, the defendants' failure to designate a sufficient record prevents this court from reviewing the claimed error, and we must presume the trial court's action was correct. 231 Kan. at 602.

In our attempt to review this issue, we fail to see in the record any indication that the trial court abused its discretion. We do not consider the jury award of $56,565 to Burton excessively high considering the nature of his injuries. The record indicates Burton was seeking a judgment in excess of $80,000. This simply indicates to us that the jury was not inflamed by the evidence on the question of negligent entrustment.

We cannot say that no reasonable person would have taken the view adopted by the trial court, and we affirm the trial court's decision to deny the motion to bifurcate.

MISTRIAL

During jury deliberations, the jury asked a number of questions to the trial court. The defendants contend the questions asked demonstrate the jury did not understand the evidence or the issues. As a result, the defendants moved for a mistrial and argue on appeal that the trial court erred in failing to declare a mistrial.

The decision to declare a mistrial lies within the sound discretion of the trial court. *State v. Stallings*, 246 Kan. 642, 646, 792 P.2d 1013 (1990). Further, the defendants have the burden of showing substantial prejudice before an appellate court will find an abuse of discretion by the trial

court. As we stated previously, judicial discretion is abused only when no reasonable person would take the view of the trial court. *In re Marriage of McPheter*, 15 Kan. App. 2d at 48. See *State v. Ruebke*, 240 Kan. 493, 506, 731 P.2d 842, *cert. denied* 483 U.S. 1024 (1987); *Hagedorn v. Stormont-Vail Regional Med. Center*, 238 Kan. 691, Syl. ¶ 2, 715 P.2d 2 (1986).

We hold the trial court did not err in refusing to grant a mistrial on the grounds that the jury failed to understand the evidence or the issues involved. We consider the verdict to be evidence of the fact that the defendants have not shown they were substantially prejudiced by the alleged misunderstanding of the evidence on the part of the jury. As pointed out earlier, the award for damages was not out of line and was approximately $23,000 less than plaintiff was seeking. In all, the record fails to show that defendants were prejudiced by the trial court's failure to declare a mistrial.

Affirmed.

GERNON, J., concurring and dissenting: I concur with the majority's result relating to the negligent entrustment, instruction, bifurcation, and mistrial rulings of the trial court. I respectfully dissent from the result concerning the liability of the bar and its employees.

In my view, what distinguishes this case from *Mills v. City of Overland Park*, 251 Kan. ___, ___ P.2d ___ (1992) (No. 66,580, filed July 10, 1992), and *Ling v. Jan's Liquors*, 237 Kan. 629, 703 P.2d 731 (1985), is the element of notice.

Here, Jason Frahm, who was 16 years of age, appeared at Budde's two separate times, was never asked for any identification or proof of age, told his waitress he was not 21, and was served alcoholic beverages after such notice to the establishment through its employee. In addition, the record suggests that some of the intoxicants furnished to Jason on the evening in question were paid for by a part-owner of the bar. One cannot imagine a more egregious set of facts than presented in this case.

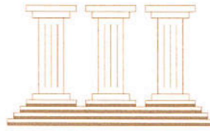
My reading of *Ling* leads me to conclude that the Kansas Supreme Court was there inviting the legislature to enact some sort of "dram shop" legislation. *Ling* was published in 1985. No legislative response to *Ling* has been forthcoming. In *Mills*, the Kansas Supreme Court seeks to distinguish *Ling* from *Arredondo v. Duckwall Stores, Inc.*, 227 Kan. 842, 610 P.2d 1107 (1980). *Arredondo* dealt with the

purchase of gunpowder by a minor. The court there allowed the application of comparative negligence, finding that K.S.A. 60-258a was applicable and holding that public safety was the primary purpose of its enactment as opposed to protection of a named class.

I would adopt the re expressed by Justice Lockett in his dissent in *Lir* Justice Abbott in his dissent in *Mills*. Given the hat the legislature has not accepted the invitation to a ss the issue, it is my view that the courts must. At the v ist, comparative negligence ought to apply.

There is no empirical data to suggest that adopting such a view would open a floodgate of litigation. I have no doubt that the trial courts and the appellate courts of this state can sort out, based upon the facts, the cases in which negligence ought to be compared.

Given the facts in this case, coupled with actual notice to the establishment and the number of drinks Jason was served in the establishment, I believe the negligence of Budde's should be compared.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee

FROM: Ron Pope, president
Kansas Trial Lawyers Association

RE: HB 2296

DATE: Feb. 19, 2004

Chairman O'Neal and members of the House Judiciary Committee:

Thank you very much for allowing KTLA to submit written testimony on HB 2296. KTLA's believes that all parties' conduct that caused or contributed to a tragic accident should be compared and such parties should be responsible for their inappropriate behavior. This includes comparing the conduct of the licensee for selling to an intoxicated person and/or a minor, to the conduct of the person who is incapacitated and caused injury. If a jury finds no fault on the part of the licensee, then there should be no liability.

HB 2296 movesKansas toward the mainstream of other states that have passed legislation to protect their citizens from all intoxicated individuals. As of 2003, only Delaware, Louisiana, Maryland, Nebraska, Nevada, South Dakota, and Virginia join Kansas in its refusal to address the tragic consequences caused by negligent conduct related to the sale of alcohol. Hopefully Kansas will join the forty-three other states in having liability laws that allow for civil enforcement of inappropriate distribution of alcohol by licensees.

While KTLA supports the bill, we are afraid the bill's application will be so narrow as to have no effect and provide none of the safeguards intended by the Bill.

KTLA will suggest that the Bill be rewritten to include all incapacitated individuals whether a minor or not.

With this revision, KTLA would be in full support of the Bill. Further, KTLA has provided an enclosure of the Kansas Legislative Research Department of the history of the Kansas liquor laws. Finally, KTLA is also providing you with an alcohol-related injury and violence link regarding a brief review of literature on dram shop liability laws. As you can see from this review, there has been a reduction in injuries and damage to consumers and citizens when there is full liability associated with the conduct of people's behavior and acts.

Terry Humphrey, Executive Director

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Victor B. Allred
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Testimony RE: HB 2296
House Judiciary Committee
February 19, 2004

My name is Victor Allred. I own restaurants called Jazz, A Louisiana Kitchen. I have six locations, two in Texas, three in Missouri and one in the great state of Kansas, in Olathe. They are French Quarter Cafés featuring Cajun/Creole Cuisine in a relaxed New Orleans style atmosphere. I opened the first one in Lubbock, TX in 1986 and the second on historic 6th Street in Austin, TX in 1988. I ventured to Kansas City in 1993 when I bought the old Jimmy's Jigger location in Midtown and converted it to my concept. I subsequently opened two more locations on the Missouri side of Kansas City in 1998 and 2000, respectively. In 2001, I looked to open another location in Missouri, but due to a dramatic change in the dram shop laws in Missouri, I elected to not pursue any more locations in Missouri. Instead I choose the Olathe location in South East Kansas City, because of the non-existence of dram shop laws and the business friendly tort laws in the state of Kansas.

It should also be noted that I currently serve as President Elect for the Greater Kansas City Restaurant Association as well as serve on the Board of Directors for both the Missouri Restaurant Association (MRA) and the Kansas Restaurant and Hospitality Association (KRHA) as well as many other civic, community and religious organizations.

Prior to a controversial judicial decision by the Missouri Supreme Court in 2000, Missouri had one of the most protective dram shop laws in the country. It required a criminal prosecution before a civil lawsuit and cause of action could be filed against a liquor-serving establishment. The Court legislated from the bench when it said the statute violated the open court law of Missouri and in effect changed the spirit of the dram shop law. It had clearly stated the Missouri Legislature adopts the common law of England, which defines **CONSUMPTION** to be the proximate cause of injury relating to the service of alcohol except in egregious cases where one is found guilty of a criminal conviction. By removing the criminal conviction portion of the statute, it stripped all protection down to the most common Tort Law, violating the original spirit of the statute and opening up the floodgates of litigation against liquor license holders such as myself. We went from having some of the best protection in the nation to the worst.

Working along with many other restaurateurs, over the next two years, MRA presented HB 1532 which redefined and strengthened the dram shop statute. We succeeded in raising the standard of proof to a clear and convincing standard and in establishing key wording changes from an obvious standard to a visible standard. While it was a victory against our major opponent on the bill, the Missouri Association of Trial Lawyers, it has

proved to be hollow protection due to the anti business tort laws of Missouri. By requiring a five-year statute of limitation and including total Joint and Several Liability based on even a one percent at fault verdict, restaurants and bars serving alcohol have been left to fight a barrage of litigation and increased insurance costs.

In 2001, to cover my four Kansas City Metro area restaurants, my premium costs for Worker's Compensation and Property and Casualty Insurance, including Liquor Liability Coverage totaled $ 48,000 dollars. In just two short years after the Missouri Supreme Court's "legislative action", my costs for the same coverage have nearly doubled to $ 95,000. My premium costs would have been even higher but a significant lowering of my Worker's Compensation experience mod offset some of the increases. In addition, many restaurants and bars that have fifty percent or more in alcohol sales have been unable to obtain any Liquor Liability Insurance at all or at a rate that is cost prohibitive. The result is that many establishments are not covered and are just one lawsuit away from bankruptcy, regardless of the success and cash flow of the business.

In 2001, shortly after the change in the dram shop statute, I was presented with a dram shop lawsuit against my Midtown location. It was alleged that I served an intoxicated patron who subsequently was involved in a vehicle accident where the other driver was killed. The entire burden of the accusation was shifted to my staff and me at the time of the incident. It is impossible for a restaurateur to remember or recall every person who has eaten or consumed beverages at their restaurant. We are open to the public and often do not know our patrons by name. Since two years had passed since the incident, many of the employees who potentially might have had some knowledge did not work for me any longer. I was able to find the other patron this gentleman had dinner with, who testified that he had consumed only one beer at my establishment. The prosecution alleged based on toxicology reports and his Blood Alcohol Level that he had consumed many more beers than one prior to the accident. There was no one who could remember him showing any visible signs of intoxication at my establishment and he traveled for a significant time in his vehicle after he left Jazz before the wreck. I have no way of knowing if he consumed alcohol after he left or before he arrived at my establishment. The only witness who had any actual knowledge, the person who was with him, stated that he showed no signs of intoxication and even felt comfortable enough to travel with him as a passenger. My establishment served him dinner, bread and water while he was there. It should also be noted that the victim and plaintiff ran a stop sign before being involved in the accident, so she had significant comparative fault. However, the suit was settled out of court by my insurance company for my insurance limits, one million dollars. That was a very expensive beer. The resulting damages caused my insurance company of ten years to cancel my coverage and now I face even higher insurance costs, above the 100 percent increases I have already absorbed, during my next renewal period. The problem was Joint and Several Liability and by being tied or linked in any fashion to his alcohol consumption, I absorbed the bulk of the judgment.

I want each of you to know that I take Liquor Liability seriously. Liquor Liability training is mandated as part of the dram shop law in Texas in1988 and my company was the first in the entire state of Texas to certify each of its employees. I brought that attitude with me when I expanded to Missouri and carried Liquor Liability Insurance and the expense associated with it, even though there had never been a successful dram shop related lawsuit. I established an in-house training program fashioned after the one required in Texas and have now required all my staff to be certified through the National Restaurant Association's Bar Code Training program. However, this is not enough to prevent a damaging lawsuit.

It is my position as a representative of the Kansas Restaurant and Hospitality Association and as an individual restaurateur that we already recognize that it is illegal to serve an intoxicated person. Those laws were written as part of the liquor code and should not be disturbed. However, it is our position that the CONSUMPTION of alcoholic beverages should be the proximate cause of any liability. It is proven that dram shop laws do little to reduce incidents of drunk driving and the related injuries. More effective methods to decrease drunk driving involve legal measures that are directed at the consumer. Open container laws, mandatory BAC testing, confiscation of driver's licenses or plates and lowering the legal BAC limit have a greater impact on the reduction of drunk driving than dram shop Acts.

I also want to point out the economic effects of dram shop. I am a good example of a person who chose Kansas as opposed to Missouri to expand my business. I created forty jobs and significant tax revenue for Kansas based on my sales and payroll during a time when the state was losing significant jobs and its tax base. Others will follow, but will be more hesitant if the liability for selling a legal product to a legal patron is increased.

I empathize with any victims who are damaged as a result of a drunk driver or an intoxicated person. The penalties for the perpetrator should be severe and just. However, it is the consumer of alcoholic beverages who must face his or her own personal responsibility and the consequences of their actions. As an association, we can do much to influence our members to be responsible in the service of alcohol through training and the enforcing of effective limits. It would be an injustice to remove or transfer the burden of personal responsibility from the consumer to the provider. We are legally licensed to sell a legal product to legally aged patrons. While not shirking from the burden of being a responsible business owner, the fact remains that only the consumer knows specifically if they have had too much.

I urge you on behalf of all restaurateurs to not support HB 2296. Please send a message to all who partake of alcohol that their personal actions should be held accountable by personal consequences. The current law already prohibits serving an intoxicated person and the creation of a statutory cause of action is unnecessary.

Thank you for allowing me to testify and I would be happy to answer any questions I am qualified to answer.

Kansas Licensed Beverage Association

President
Tom Intfen

Secretary/Treasurer
Tammy Davis

Vice Presidents
Robert Farha
Glenda Dewey
Jim Hendricks
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Testimony on HB 2296, Thursday, February 19, 2004
House Judiciary Committee

Chairman O'Neal and Members of the Committee,

I am Philip Bradley representing the Kansas Licensed Beverage Assn., a group of men and women, in the hospitality industry, who own and manage bars, clubs, caterers, restaurants and hotels where beverage alcohol is served. Thank you for the opportunity to testify today.

We oppose HB-2296.

- We oppose mandatory server training. Already there is server training available from multiple source at no cost to the state.
- We oppose mandatory state registration in order to have a job. Now after you are hired your employer submits your name to the ABC and they run background checks.
- We oppose Dram shop type laws and unnecessary liability laws. We practice responsible service and are already accountable for our own actions, but should not be answerable for the actions of others, outside our control.

We support efforts to reduce the accidents and casualties happening in our state. Millions of dollars and thousands of man hours are expended on our side, the "supply" side, of this equation to accomplish these goals. We work with the ABC to educate, train and promote compliance and responsible practices. We have a training program certified by the ABC for Kansas. Our Techniques of Alcohol Management (TAM) program is nationally recognized as a leader in server training. We have conducted over 80 training sessions in the last 2 years. This represents training of over 2000 individuals. Since we started training in 1996 we have certified over 4000 servers. We believe that education is the single most useful tool in reducing alcohol-related incidents. We cooperate with KABR and KRHA to assure that training is available to all. We do all this with no cost to the state.

If we operate our business in a legal and responsible manner, we should not be held accountable for, nor could we control the actions of individuals after they leave. We train our servers to follow responsible practices and to comply with all Kansas statutes and regulations. We can, and do, determine if they appear intoxicated, incapacitated or disorderly and if so we refuse service. This is the current law. We do not fight the keys out of an individuals hands but I have called the Police on a person I believed was unsafe. We voluntarily work with taxi and transit companies to make sure that our patrons have alternatives. We are professional hospitality employees.

It is impossible for us to control whether our patrons consume alcohol in their vehicle after they leave, before they arrive or if they medicate themselves. It is impossible for us to determine if they have social or psychological problems that represent a threat to themselves or to others.

We continue to work with Law enforcement and our communities to improve ourselves and our service.

As always we are available for questions. Thank you for your time.

Dr. Philip B. Bradley
Executive Director

Supporting Information

Dram Shop Liability by State
Broken down into 4 Categories

a) Vendor Liability for Intoxicated Adults
b) Vendor Liability for Intoxicated Minors (various ages)
c) Social Host Liability For Intoxicated Adults
d) Social Host Liability For Intoxicated Minors (various ages)

Category Number of States	Yes	No	Limited
Vendor Liability for Intoxicated Adults	22	15	14
Vendor Liability for Intoxicated Minors	40	8	3
Social Host Liability for Intoxicated Adults	5	40	6
Social Host Liability for Intoxicated Minors	26	20	5

From Wisconsin Law Journal article found at www.wisbar.org/wislawmag

HISTORY
Liquor liability laws began as far back as the mid-19th century in the U. S. when some states passed legislation known as dram shop laws. These laws generally provided for financial protection for families of habitual drinkers who were injured as a result of drunkenness in bars and taverns. An early law enacted in the state of Illinois provided for a maximum recovery of $15,000 in actual damages for personal injury or injury to property and $20,000 for recovery of means of support. Early dram shop acts were enacted primarily to discourage drinking of alcohol and public drunkenness. With the passage of the 18th amendment and national prohibition more states passed dram shop legislation. However, with the repeal of this amendment in 1933, states began to repeal their dram shop legislation. There was relative inactivity in this area until California enacted one in 1978.

COMMON LAW CASES
For many years courts in various states had held that an action could not be maintained at common law against the vendor of alcoholic beverages for furnishing such beverages to a customer who, as a result of being intoxicated, injured himself or a third person. The rationale for this common law rule was that the *consumption* of liquor and not the sale of liquor was the proximate cause of injuries sustained as a result of intoxication. This rule is clearly brought out in many cases. In California the question was considered by the courts four times leading up to *Cole v. Rush, 45 Cal. 2d 345 (1955),* which stated that "it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use." Two leading recent cases enforcing this rule were *Nolan v. Morelli, 226 A. 2d 383, 154 Conn. 432 (1967)* decided by a court in Connecticut, and *Carr v. Turner, 385 S. W. 2d 656 (1965)* decided by an Arkansas court.

TRAINING
Researchers are showing a link between comprehensive server training programs and the reduced risk of intoxication. The importance of server training is beginning to be recognized by the insurance community.

STATUS OF LIQUOR LIABILITY IN STATES
The Insurance Services office maintains a system of categorizing the status of jurisdictions exposed to liquor liability. Its purpose is to enable its member and subscriber companies, which write liquor liability insurance, to take the status into consideration when rating a particular risk.
The various jurisdictions under this system are divided into four groups ranging from A to D:
Group A--Applies in jurisdictions where no liability is imposed.
Group B--Applies in jurisdictions where moderate liability is imposed.
Group C--Applies in jurisdictions where strict liability is imposed.
Group D--Applies in jurisdictions with special requirements. Rates vary in these jurisdictions.
As of January 1, 1990, the states fall into the four categories as follows:
Group A includes: 13-Arkansas, Delaware, Kansas, Maryland, Nebraska, Nevada, South Carolina, South Dakota, Texas, Virginia, West Virginia and Puerto Rico.
Group B includes: 21-Arizona, California, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Montana, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Washington, Wisconsin and Wyoming.
Group C includes: 10-Alabama, Alaska, Massachusetts, Mississippi, New Jersey, North Carolina, North Dakota, Oregon, Vermont and the District of Columbia.
Group D includes: 6-Connecticut, Iowa, Michigan, Minnesota, Pennsylvania and Vermont.
Missouri is rated in Group A for classes which sell alcohol for off- premises consumption; Group C, for classes which sell alcohol for on- premises consumption.
Finally, ratings for Hawaii and Illinois were unavailable as of this writing.

Taken from a document written by and for insurers of "customized" policies. From at www.roughnotes.com

What is the KLBA?

The Kansas Licensed Beverage Association is a non-profit group of men and women licensed to serve beverage alcohol in the state of Kansas. We are small business owners who formed to educate ourselves about this industry and in the process help the public to understand as well. We represent the interests of over 3000 establishments, the women and men who as a part of their business hold a license for on premise alcohol service. We are the restaurants, hotels, clubs, bars, breweries, vineyards and caterers you frequent and enjoy. We are in the hospitality business. We advocate safe responsible consumption and are training our servers to practice these principals.

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Ronald R. Hein
Attorney-at-Law
Email: rhein@heinlaw.com

Testimony Re: HB 2296
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Restaurant and Hospitality Association
February 19, 2004

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Restaurant and Hospitality Association. The KRHA is the Kansas professional association for restaurant, hotel, lodging and hospitality businesses in Kansas.

The KRHA opposes HB 2296. KRHA is concerned about any other dram shop legislation that makes restaurants or other retailers of alcoholic beverages criminally or civilly liable for the negligent actions of customers of such facilities.

We appreciate that there are significant problems with consumption of alcohol and the tragic consequences of alcohol related accidents and fatalities.

The KRHA understands and appreciates that HB 2296 sets a higher standard of proof, and attempts to require knowledge or intentional conduct, but the concept that the person selling the alcohol should be liable for the acts of the purchaser has numerous problems.

KRHA believes there is no liability presently existing regarding restaurants that serve alcohol because of subsequent acts committed by customers. We understand it is already contrary to law to serve alcohol to inebriated customers. Legislation or court opinions that provide liability for restaurants represent, in our opinion, bad social policy and are imposing liability not where it belongs, with the responsible person, but with a third party who is in no position to judge how much alcohol an individual can consume before that person becomes inebriated. The seller is also not in a position to know how much alcohol the purchaser may have consumed before entering the premises or after leaving the premises. The seller is also not in a position to determine how incapacitated a purchaser might be at some arbitrary time in the future when the purchaser's conduct might cause harm to an aggrieved person.

Such impositions of liability fail to recognize the evidentiary and other problems facing individuals or businesses when lawsuits are brought for damages incurred by others as a result of a person under the influence of alcohol or other drugs. When attempts are made

to impose liability on anyone or any business who might have sold the alcohol to the person in a lawful manner, there is often no mechanism for properly ascertaining all of the relevant facts. Oftentimes, the facts are blurred by the emotion involved because an innocent person is badly injured as a result of the alcohol incapacitated person.

Years ago, intoxication was determined based upon the behavior of the person. In more recent times, the statutes have been modified to provide for blood alcohol content thresholds to determine presumptions of intoxication and, now, violations of intoxication statutes. In many cases, violations of these thresholds have subjected individuals to punishment for being intoxicated, even absent the existence of behavioral or other physical symptoms.

Oftentimes, threats of liability ignore intervening causes, including prior or subsequent consumption of alcohol; prior, current, or subsequent consumption of drugs; and numerous other actions which oftentimes are difficult to prove, and which must be established by the defendant as a means of avoiding liability.

Restaurants and other facilities that sell cereal malt beverage or alcoholic beverages to customers should not be forced to subject themselves to liability for attempting to predict future behavior. Determining intoxication symptoms requires substantial training and experience, even for law enforcement personnel. And determination of symptoms is not a fail proof mechanism for determining intoxication.

There are statutes on the books to prohibit selling alcohol to an intoxicated person. Legislative efforts to impose additional liability, either civilly or criminally, upon businesses or their agents who dispense cereal malt beverage or alcoholic liquors and sell them to customers are not needed. Businesses should not be forced to make judgements on levels of intoxication that may subject them to liability which drive them out of business. .

Individuals who frequently consume alcohol to an excess can appear to be very normal in their behavior while having BAC in excess of the legal limits, and sometimes in excess of .2%. On the other hand, individuals who do not consume liquor on a regular basis, can be public intoxicated with an extremely low BAC, sometimes as low as .04% or lower. Oftentimes purchasers of alcohol move on to other venues where alcohol is served, drink additional alcohol in their own possession, or subject themselves to drugs, legal or otherwise, which will ultimately effect their behavior after they have left a restaurant or establishment. To subject the business person to predict future behavior is absolutely bad policy, and one that will expose businesses and their owners and agents to substantial liability for acts for which they are not responsible.

Last year, this committee considered HB 2292, which grants immunity from liability if

voluntary blood alcohol content tests are conducted by a restaurant on their customers. If legislation such as HB 2296 would pass, some type of safe harbor legislation, which HB 2292 was intended to be, would probably be appropriate. Other provisions might also be appropriate.

It is one thing to judge a person's conduct when you are present with them for an entire evening. It is quite another to judge a person's conduct with minimal, if any, time spent with them or talking to them. So information learned about a person by patrons dining with a person is almost always significantly different than the information made available to a waiter or waitress working a busy room. Liability determined under the kinds of factual conditions that can arise are inherently subject to suspicion. Ironically, this act provides no liability for those who might be with the individual who is allegedly incapacitated even though they might be in a far better situation to determine whether the individual should be consuming more alcohol, or should be leaving the premises unescorted. Those individuals also might be in a better position to know what the individual has done before entering and after leaving the premises.

We believe that the current criminal laws relating to serving an incapacitated person already prohibit selling alcoholic beverages and cereal malt beverage to minors and to incapacitated persons, and the creation of a statutory cause of action is not necessary. However, we are aware of the uncertainty that accompanies this issue, and are willing to work with this or an interim committee to fine-tune this legislation if there is legislative support for this type of legislation in Kansas.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

The Kansas Association of Beverage Retailers

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Martin Platt, President

Amy A. Campbell, Executive Director

TESTIMONY PRESENTED TO THE HOUSE COMMITTEE ON JUDICIARY re: HB 2296

FEBRUARY 19, 2004

BY AMY A. CAMPBELL, EXECUTIVE DIRECTOR

Thank you, Chairman and members of the Committee. My name is Amy Campbell and I appear before you today on behalf of the Kansas Association of Beverage Retailers to oppose HB 2296. The Kansas Association of Beverage Retailers represents the State licensed owners of retail liquor stores. Currently, there are approximately 700 stores in the state of Kansas.

KABR supports the intended effects of this measure:

- Responsible sales to legal customers
- Widespread employee training

But because the training is mandatory, we must oppose the bill itself.

KABR has been meeting with staff at the Division of ABC and the Attorney General's office to develop and implement server training programs for at least ten years. Our organization was instrumental in the passage of SCR 1619 in 1999. (See attached.) In fact, liquor stores have shown consistent improvement in passing compliance checks conducted by the agency, reaching an all-time high last year of 88% compliance.

KABR members are small business owners. The responsibility for every action of the employees within that store comes to rest on the liquor store owner. This includes administrative penalties for illegal sales, which result in fines from $100 to $1000 per individual and suspension of the license for 1 weekend day up to 14 consecutive days. On the 9th offense, the license is to be revoked. These are serious implications. Imagine that you have owned your store for ten years and there is a State agency which on any given day will send an underage individual through your front doors to "test" the employee on duty. For the vast majority of our stores, the employee on duty is the owner. For the others, this is a serious risk to be managed on a daily basis.

This is why our organization has worked hard to implement our licensee and employee training program. We have met regularly with the Division of ABC to develop the standards and requirements. Through this work, ABC instituted a first offense incentive to licensees to attend and pass a certified training program, as well as enroll their employees. Pro-active training is recognized as a mitigating factor for ABC penalty hearings.

Beverage Alcohol Training (B.A.T.) is a nationally recognized training program and our instructors - who

are liquor store owners themselves - are certified to conduct these seminars by the national program and the Division of ABC. KABR determined long ago that server training might provide a partial solution to what we believed were some unnecessarily punitive ABC enforcement actions. Additionally, we are always searching for methods to demonstrate to you and the public that State licensed liquor stores are operated in a responsible manner.

Five years ago, we were conducting two or three seminars a year with one statewide certified trainer. Today, KABR has six certified trainers and conducts monthly seminars across the state. Since the new geographic initiatives implemented by the Board of Directors in mid-2002, KABR's BAT program provided training to 92 stores. In addition, we will deliver a training seminar to any city where we can generate at least ten participants.

The Division of ABC has been helpful in instituting some incentives which some individuals require before they will participate. We believe further pursuit of the cooperative system *encouraging* training and testing through incentives rather than *mandating* through penalties will be a positive step forward for our industry.

Attracting and maintaining good employees is the number one complaint of our members. Please do not add an additional financial burden to the already difficult task of hiring good help. Liquor store employees must be 21 years of age and do not typically work for minimum wage. The fees in this bill add nothing to the training programs already available in Kansas.

KABR issues a BAT card and certificate to the individual which passes the written test. We maintain a database of names and dates which correspond. All of this is done at no charge to the state. It does not require the creation of an I.D. or permit, but simply the maintenance of information. That proof of training should be worth something to both the agency and to the business owner. Working together, we can increase that value.

KABR promotes the following recommendations:
(Please note that although these initiatives have been presented to the agency in the past, the current director has not been exposed to all of this information.)

- Division of ABC maintain a database of liquor store employees which have passed background checks and the applicable dates.
  The Division had indicated plans to develop the database for background checks prior to the change of administration. This process alone would eliminate running duplicate background checks on employees which move to another store within a three year period. If posted on the website, this would assist business owners in finding qualified employees and significantly reduce costs to the agency.

- The Division should certify programs and/or instructors with an assurance of consistency among programs, encourage agents to participate in the actual programs when possible, and share information with certified programs as appropriate.
  Currently, there are many changes taking place with the issuance of drivers licenses by the State. Certainly, our trainers will need to be informed.

- Establish incentives for licensees which would encourage the hiring of individuals who are or will be server-trained. *The ABC should be given flexibility in determining the types of incentives as enforcement priorities change. However, the legislation should specify that licensees with permit holders as employees will have a different, incentive-based penalty structure. No employees or licensees will be forced to obtain permits. They will simply operate under a slightly different penalty structure than licensees and employees who have passed the seminar and written test.*

- Publish the list of licensees which have recently been subject to enforcement action. *Our programs have the unique advantage of attracting members of the business. Unlike programs promoted by many of the community drug and alcohol abuse prevention organizations, licensees know that they will be taught by other members of the industry which face the same problems that they must face. However, it is a common occurrence that the BAT training seminar in Hutchinson may be scheduled six months after a compliance operation takes place there. If the information was published - as it used to be - we could target educational programs to those areas in need.*

- Direct funding to industry based training programs. *Currently there are federal dollars being expended through the Kansas Department of Transportation - Division of Traffic Safety. Despite many meetings and recommendations for cooperative efforts, these dollars have not been made available to our programs. KABR did succeed in working with the Barton County Community College to conduct an extremely successful industry training in Great Bend for both on-premise and off-premise employees. We did so at no charge to the College.*

- Update and make available copies of the Licensee Handbook *We are spending nearly $1000 a year simply reproducing the ABC required documents for our training seminars. Certainly we are aware of the cuts made over the past few years at the Division of ABC, but surely this would be a beneficial use of the safety dollars made available to the state from the federal government. The current version of the book is from 1999.*

- Meet regularly with the industry training programs to continue to improve upon past performance.

Dram Shop Liability

KABR does not support legislation which creates liability for the actions of our customers once they have walked out the door. Although this bill pertains to on-premise sales, clearly this type of legislation is easily broadened and represents a threat to liquor stores statewide. The majority of the liquor stores in this state would not be able to afford to contract the attorney to begin their defense, let alone add the expense of a new insurance policy into the business.

Thank you, Mr. Chairman, for allowing us to testify regarding our support of voluntary server training programs and opposition to mandates and dram shop liability.

Senate Concurrent Resolution No. 1619

By Committee on Federal and State Affairs

4-9

9 A CONCURRENT RESOLUTION requesting the Division of Alcoholic
10 Beverage Control to establish course requirements for alcoholic bev-
11 erage server training programs.
12
13
14 WHEREAS, The interests of the state of Kansas are served by en-
15 couraging specialized training for servers of alcoholic beverages because
16 of the unique nature of Kansas liquor laws and the special skills necessary
17 for selling and serving alcoholic beverages to adult consumers; and
18 WHEREAS, The Kansas Department of Revenue, Alcoholic Beverage
19 Control, Kansas Retail Liquor Dealers Association, Kansas Restaurant
20 and Hospitality Association and the Kansas Licensed Beverage Associa-
21 tion have recognized the value of alcoholic liquor server education by
22 instituting specialized server training programs; and
23 WHEREAS, The Division of Alcoholic Beverage Control has authority
24 to establish server training program content and criteria for instruction
25 and instructors before a server training program receives approval from
26 the Division of Alcoholic Beverage Control; and
27 WHEREAS, The Division of Alcoholic Beverage Control has authority
28 to require server training programs approved by the Division to submit
29 names of persons who have successfully completed an approved server
30 training program; and
31 WHEREAS, The Division of Alcoholic Beverage Control has estab-
32 lished a voluntary server training program as an alternative to fines or
33 license suspensions for a licensee's initial violation involving an underage
34 person; and
35 WHEREAS, The Division of Alcoholic Beverage Control has the au-
36 thority to establish a penalty structure for violations of the state liquor
37 laws by licensees: Now, therefore,
38 *Be it resolved by the Senate of the State of Kansas, the House of Rep-*
39 *resentatives concurring therein:* That the Legislature requests the Di-
40 vision of Alcoholic Beverage Control establish the course content before
41 a server training program is approved by the Division. The Legislature
42 further requests the Division of Alcoholic Beverage Control to consider
43 whether employees of a licensee have completed an approved server
44 training program during the previous twenty-four month period when

1 imposing any penalty which the division may administer against a licensee.
2 The Legislature further requests the Division of Alcoholic Beverage Con-
3 trol to give special consideration to whether the individual or individuals
4 involved in the violation have attended a server training program ap-
5 proved by the Division; and
6 *Be it further resolved:* That the Division of Alcoholic Beverage Con-
7 trol is requested to provide to the Legislature a report on server training
8 on or before January 15, 2000, to assist the Legislature in assessing the
9 effectiveness of server training; and
10 *Be it further resolved:* That the Legislature requests the Division of
11 Alcoholic Beverage Control to issue evidence of proof that a server is
12 qualified to be employed by a licensee from moneys appropriated for
13 such purpose; and
14 *Be it further resolved:* That the Secretary of State be directed to send
15 enrolled copies of this resolution to the Secretary of the Department of
16 Revenue, the Director of the Division of Alcoholic Beverage Control, the
17 Executive Director of the Retail Liquor Dealers Association, the Exec-
18 utive Director of the Kansas Restaurant and Hospitality Association and
19 the Executive Director of the Kansas Licensed Beverage Association.
20

Testimony on House Bill No. 2296
Concerning civil procedure;
relating to civil liability for serving alcoholic beverages
To
The House Committee on Judiciary
By
Tom Groneman, Director
Alcoholic Beverage Control

February 19, 2004

Mr. Chairman, members of the committee, I am Tom Groneman, Director of the Alcoholic Beverage Control Division (ABC) and I appear before you today to share the ABC's perspective on HB 2296.

In addition to the dram shop provisions, HB 2296 also requires all employees of on-premise liquor or CMB licensees, who participate in the sale of liquor or CMB, to obtain a server permit issued by the Director of ABC or a certified instructor of a server training education program. No licensee would be able to employ an individual to sell/serve liquor or CMB unless they have a valid server permit. Before receiving a server permit, an individual would need to make application for the permit to the ABC, authorize a criminal records check, pay the appropriate fees and successfully complete a server training education program.

The division has estimated that there may be as many as 78,000 liquor and CMB server permits requested during the first year of implementation and 36,000 per year thereafter. The ABC will need an additional 4 employees to handle the increased workload of processing permit applications, submitting background investigations, forwarding background investigation results, tracking server training and overseeing the issuing and re-issuing of server permits. The cost for these positions, including necessary workstations will run approximately $150,000.00.

A new database will be required to process applications, track training and issue renewal notices for server permits. The cost of developing a new database would be absorbed by the department.

With the requirements in this bill, a start-up date of July 1, 2004, would not be feasible. We would ask that the effective date of the bill be delayed until July 1, 2005, to allow for the adoption of the necessary rules and regulations, hiring of associates, establishment of the business process, forms design, database development, development of educational courses, certification of instructors, notification to all licensees, completion of background checks and the issuance of server permits.

Also, there are several parts of the bill that need to be clarified. Section 3 (a) [page 2, line 30] requires a "valid, unexpired server permit issued **by the director**." Section 6 (b) [page 3, line 18] states "Server permits shall be issued, in accordance with rules and regulations of the secretary, **by instructors** of the education program". These two passages seem to be in conflict. In the same section [page 3, lines 22-23] there is a reference to "rules and regulations adopted by the director" it should read "by the secretary". Throughout the bill there are references to the Kansas liquor control act and Section 11 [page 5, lines 41-42] states "Sections 2 through 10, and amendments thereto, shall be part of and supplemental to the Kansas liquor control act." The liquor control act regulates manufacturers, distributors and off-premise establishments. This bill seems to address only on-premise establishments.