

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 9, 2005 in Room 313-S of the Capitol.

All members were present except:

Jim Ward- excused
Michael Peterson- excused

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:

Brette Hart, Student, Washburn School of Law
Randy Hearrell, Kansas Judicial Council
Brenda Noone, Citizen
Sandi Raines, MADD
Diann Windemeyer, Citizen
Shellie Parton, Citizen
Derek Casey, Kansas Trial Lawyers Association
Jim Scott, Retailer, Ft. Scott
Marge Roberson, Retailer, Newton
Ron Hein, Kansas Restaurant & Hospitality Association

The hearing on **HB 2114 - dram shop law; liquor licensee liability**, was opened.

Chairman O'Neal gave the committee a brief overview of the proposed bill (Attachment 1). Kansas is one of eight states who have not enacted dram shop statutes. The eight are: Delaware, Kansas, Louisiana, Maryland, Nebraska, Nevada, South Dakota and Virginia. The bill 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. However, the bill does not apply to social hosts (Attachment 2). He provided the committee with a Public Policy Clinic paper by a University of Kansas Law School student regarding Dram Shop Legislation (Attachment 3).

Brette Hart, Student, Washburn School of Law, also wrote a Public Policy Clinic paper. She informed the committee that common law provides no liability on a 3rd party but that 43 states and the District of Columbia impose some liability on licensee who dispense alcohol in violation of state law when their actions are found to have been a contributing cause to another's injury or death (Attachment 4).

The Kansas Supreme Court refused to impose civil liability upon dram shop owners and social hosts in *Ling v Jan's Liquors*. The Kansas Court of Appeals has issued several strong opinions urging the Kansas Legislature to take action on this issue. The Kansas Supreme Court recently heard arguments in the case of *Bland, et al v Scott, et al*. This is a social host liability case which the Court has not released its opinion on (Attachment 5).

Randy Hearrell, Kansas Judicial Council, stated that the Judicial Council has looked at the dram shop legislation twice in the past several years. They recommended this bill be introduced which would allow for civil liability in cases where a licensee is found by a trier of fact to have violated one of two criminal statutes. One prohibits furnishing alcoholic liquor or cereal malt beverage (CMB) to a minor and the other prohibits sale or service of alcoholic liquor or CMB to a person incapacitated by the effects of alcohol. The bill would not allow for an action to be brought by the person consuming the alcohol.

In 2000, drunk drivers in Kansas were involved in about 18,000 automobile accidents, 128 deaths and 5,600 injuries. In 2003, 44% of traffic fatalities were alcohol related. The National Highway Traffic Safety Administration estimates that if K.S.A. 21-3610 and K.S.A. 41-715 were enforced, the number of alcohol related fatalities would decrease by 11% (Attachment 6).

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 9, 2005 in Room 313-S of the Capitol.

He reminded the committee that the Kansas Supreme Court has changed since the *Ling* decision was handed down and that the *Bland* case was argued in March 2004 and that the decisions should be released anytime.

Chairman O'Neal told the committee that there have been many proposals to help with the issue of drunk drivers: mandatory serving training, and portable breathalyzers but the liquor industry has continually opposed both.

Brenda Noone's son, James, was killed by a drunk driver when the car he was riding in was struck from behind causing the corvette to go underneath the car exploding on impact. The drunk driver had spent the evening at the Chalet in Wichita where he was served and drank four 32 oz glasses of beer. She suggested that establishments are only concerned with making money and should be held liable in instances where they over serve a person ([Attachment 7](#)).

Sandi Raines, MADD, strongly supports any legislation that would help remove drunk drivers from the roads of Kansas. Almost 50 % of all drunk drivers drink in licensed establishments ([Attachment 8](#)).

Diann Windemeyer lost her husband two years ago to a drunk driver who was four times over the legal limit. She told about the financial burden she has had to deal with since her husband was killed ([Attachment 9](#)).

Shellie Parton is a survivor of a car wreck caused by a drunk driver and urged the committee to pass legislation to hold people responsible for their actions ([Attachment 10](#)).

Derek Casey, Kansas Trial Lawyers Association, was supportive of legislation that would hold accountable drunk drives in Kansas. The current criminal penalties are not sufficient to compensate victims and their family. He suggested an amendment stating "Breach of the duties imposed by K.S.A. 21-3610 & 41-715 shall be actionable by a civil right of action including, but not limited to suite under K.S.A. 60-1801 et seq or 60-1901 et seq." ([Attachment 11](#)).

Representative Kiegeal suggested that the committee needed to look at the criminal sentence and make it longer with fines being increased.

Chairman O'Neal announced that the bill would not apply to package liquor stores. Jim Scott, Retailer, Ft. Scott ([Attachment 12](#)), & Marge Roberson, Retailer, Newton ([Attachment 13](#)), didn't notice the exclusion language for liquor stores. They did request that it be more specific.

Ron Hein, Kansas Restaurant & Hospitality Association, while not unmindful of the problem that is out there, opposed the bill. There is the fear that licensees will have to spend large amounts of money or lose their business because of the costs of litigation ([Attachment 14](#)).

Mr. Hein suggested that there needs to be

- some type of safe harbor provision,
- the two year statute of limitations should be shortened or at least the notice of the suit should be around 60 days
- amendment that would prohibit the licensee from being liable to those who are in the company of the alcohol consuming purchaser if they seek to recover damages for injuries sustained as a result of the actions of the incapacitated person

Chairman O'Neal announced that the hearing on **HB 2114** would continue at tomorrow's meeting.

The committee meeting adjourned at 6:00 p.m. The next committee meeting was scheduled for February 10, 2005 at 3:30 p.m. in room 313-S.

Committee minutes from February 2, 7, & 8 were distributed via e-mail with the notification that if no changes were requested by February 16, 2005 they would stand approved.

STATE OF KANSAS
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HUTCHINSON/NORTHEAST RENO COUNTY

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CHAIRMAN:
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UNIFORM LAW COMMISSION
KANSAS JUDICIAL COUNCIL

TALKING POINTS ON DRAM SHOP
H. B. 2114
Feb. 9, 2005

- 1. Applies only to licensees; no “social host” liability.**
- 2. Applies only to innocent third party injury or death; no liability to one who consumes or to one who aids/abets.**
- 3. Applies only where licensee is found to have violated duties in one of two existing Kansas criminal statutes – underage sales and sales to one incapacitated by the effects of alcohol.**
- 4. No “*per se*” liability; injured party or survivors would have to prove breach of the duties in the applicable criminal statute(s), consumption on the licensee’s premises, a causal connection between the consumption and the resulting injury/death, and evidence that the injury/death was a foreseeable consequence of the negligent service of alcohol by the licensee.**
- 5. Licensee is liable only for it’s proportionate share of fault; no “joint & several” liability or “strict” liability.**
- 6. In the case of minors, the licensee has all the same statutory defenses contained in the criminal statute.**
- 7. Plaintiff has the burden of proof; burden is not shifted to licensee.**

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House Judiciary
2-9-05
Attachment 1

STATE OF KANSAS
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**H.B. 2114– Dram Shop
House Judiciary Committee
Feb. 19, 2005**

CHAIRMAN:
JUDICIARY COMMITTEE

VICE CHAIRMAN:
SELECT COMMITTEE ON SCHOOL FINANCE

MEMBER:
TAX, JUDICIAL, TRANSPORTATION
AND RETIREMENT BUDGET
RULES AND JOURNAL
UNIFORM LAW COMMISSION
KANSAS JUDICIAL COUNCIL

Members of the House Judiciary Committee:

Last year I 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. Over time Kansas has become even more of a minority in that category. I'm furnishing Committee members with 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 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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House Judiciary
2-9-05
Attachment 2

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.”

More recently, the Kansas Court of Appeals in *Noone v. Chalet of Wichita*, 32 Kan. App. 2d 1230 voiced frustration with the state of case law as follows:

“Finally, we respectfully suggest that *Ling* is bad public policy Kansas is now one of only 8 states that do not recognize civil liability under these circumstances. We agree with appellee, who posits:

‘It is now time. A recent NHTSA study lists Kansas as No. 10 among states for drinking-Related deaths per mile driven. In 1991, 39% Of all traffic deaths in Kansas were caused by Drunk drivers. Drunk drivers caused 200 deaths And more than 5100 injuries in Kansas during 2001. NHTSA has determined that if Kansas would enforce its laws prohibiting the sale of alcohol to minors or obviously intoxicated persons, there would be an 11% decrease in the number of alcohol-related fatalities, annually. Enforcement of this law, K.S.A. 41-715, could save 20 lives each year. Given these startling statistics and the judiciary’s unique vantage point in seeing the civil and criminal prosecutions arising from this carnage, the courts should be sensitive to any remedies that may reduce these tragedies.’

Nevertheless, in recognition of our duty to abide by the rule of law announced in *Ling* and its progeny, we reluctantly reverse the ruling of the district court.” 32 Kan. App 2d at 6.

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. 2114 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.

Please take time between now and 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 country 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

UNIVERSITY OF KANSAS
SCHOOL OF LAW

PUBLIC POLICY CLINIC
FALL 2003

DRAM SHOP LEGISLATION

BY
JASON LLOYD

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.(McGrew, 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

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 for 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 persons (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 to 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 patrons.. 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 injured 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 server's 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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TO: Honorable Michael R. O'Neal
Chairman House Judiciary Committee

FROM: Brette S. Hart

DATE: February 9, 2005

SUBJECT: House Bill 2114

Good Afternoon, Mr. Chairman and Members of the Committee:

My name is Brette Hart. I am a third-year law student at Washburn School of Law. As part of a writing class, I have done extensive research and writing on the status of dram shop legislation in Kansas. I focused specifically on the current lack of dram shop legislation in Kansas and the possibility that dram shop liability could be imposed by the Kansas Supreme Court rather than by the Legislature. Under current law, a person who is injured in Kansas by a tort committed by an intoxicated person cannot seek recovery against the purveyor of the alcohol.

Some twenty years ago, the Kansas Supreme Court decided *Ling v. Jan's Liquors*, which set the precedent subsequent courts have followed. In *Ling*, the Kansas Supreme Court refused to impose civil liability upon dram shop owners and social hosts. The Kansas Court of Appeals has several times issued opinions strenuously urging the Kansas Legislature to take action on this public policy issue. When no legislative action was taken, the Kansas Supreme Court declined to change the common law through judicial opinion.

In *Burton*, the Court of Appeals openly disagreed with the decision in *Ling*, which essentially gives immunity to anyone who sells alcohol, regardless of the consequences.

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 . . . 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.

Burton v. Frahm & Budde's Restaurant, Inc., No. 66,840, slip op. at 5 (Kan. Ct. App. 1992).

The Court of Appeals went on to say, "It is difficult to imagine anyone who is not aware of the statistics which show the havoc wreaked on our roads by drunken drivers." *Id.* at 7. Showing its frustration with the Legislature's inaction on the dram shop issue, the Kansas Court of Appeals stated, "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."

Burton v. Frahm & Budde's Restaurant, Inc., No. 66,840, slip op. at 7 (Kan. Ct. App. 1992).

Whether a dram shop owner should be held civilly liable for the injuries caused by a minor or already intoxicated individual who has been served by that alcohol vendor is clearly an issue of public policy. The Legislature has been charged with the duty of setting public policy, of protecting and ensuring the safety of Kansas citizens. The lack of dram shop legislation in this state shows a lack of public policy concern. Drunk driving has steadily increased over the years. The lives and dollars that are spent to pay for the irresponsibility of intoxicated drivers and those who negligently supply them with alcohol have risen too high.

At last count, the laws of 43 states and the District of Columbia impose some measure of liability on licensees who dispense alcohol in violation of state law when their actions are found to have been a contributing cause to another's injury or death. Some of these laws were enacted by state legislatures. Some were judicially imposed as part of the common law of the state and then adopted by the legislature. Such strong public policy concerns have convinced the majority of states, over the years, that imposing civil liability on purveyors of alcohol is the best way to protect the majority of citizens. Dram shop liability, in some form, is both needed and inevitable

in Kansas. The only question that remains is, "Who will be the ones to make the law?" Either the Kansas Legislature can enact dram shop legislation that will protect public policy in the manner it sees fit, or the Kansas Supreme Court will exercise its authority to decide the issue by changing the common law of the state.

The Kansas Supreme Court recently heard arguments in the case of *Bland, et al. v. Scott, et al.* (Docket # 89773), a social host liability case. The court has not yet released its opinion in this case. In the absence of a statute enacted by the Legislature effecting liability for dram shop owners, a judicial opinion by the Kansas Supreme Court imposing common law liability can have the same legal effect. The make-up of the Kansas Supreme Court has changed since its holding in *Ling v. Jan's Liquors*. There are four new sitting justices. In fact, one of the judges who authored the Court of Appeals' opinion in *Burton v. Frahm & Budde's Restaurant* is now a member of the Kansas Supreme Court. If the Kansas Supreme Court decides in *Bland* to hold social hosts liable, the Legislature will have effectively delegated its authority to the courts on this very important public policy issue.

Dram shop legislation discourages negligence on the part of retailers and encourages them to act responsibly with regard to whom they serve intoxicating beverages. The Kansas Legislature needs to take this opportunity to sculpt dram shop liability in the manner you believe will best serve the citizens of Kansas. It is the Legislature's responsibility -- not the Kansas Supreme Court's -- to decide how best to protect Kansas citizens from the consequences of serving liquor to Kansas drivers.

Thank you for allowing me to testify today. I will yield for questions.

TO: Representative Mike O'Neal
FROM: Brette Hart
DATE: February 5, 2005
RE: James Bland et al. vs. Sean Scott et al.

Factual Statement of the Case:

On September 16, 2000, a motor vehicle accident occurred involving a vehicle operated by Sean Scott and a vehicle operated by Lisa Bland. Sean Scott, 16-years-old at the time of the accident, was visiting his brother Mike Scott at the Phi Gamma Delta house at the University of Kansas on September 16, 2000. Plaintiffs claim that Sean Scott was provided substantial amounts of alcohol at the Phi Gamma Delta house and earlier by Scott's parents at The Wheel. Plaintiffs claim Sean Scott's car keys were taken away from him because of Sean's level of intoxication, but Sean later regained possession of the car keys. Sean Scott traveled east on Highway K-10, swerving in and out of the eastbound lanes, and reaching speeds up to 100 miles per hour before he lost control of the car. When Sean Scott lost control of the car, he crossed the highway into the westbound lanes of K-10, struck Lisa Bland's car, and killed her. Sean Scott's blood alcohol level was .15 after the accident.

The trial court dismissed the Defendants because the Plaintiffs had failed to state a claim. Plaintiffs appealed.

Arguments:

The legal question is whether the Plaintiffs can state a cause of action against the Defendants and extend civil liability beyond the drunk driver. Plaintiffs argue that the District Court erred in dismissing their petition because they stated a claim for negligence under theories

of assumption of duty, negligence and negligence per se. Defendants rely on precedent to argue that Plaintiffs have failed to state a claim. The Kansas Supreme Court has made the decision to preclude civil liability for injury caused by an intoxicated minor to a third person. This decision was based on public policy, and the Court has held that if public policy were to be changed, the Legislature would have to do it. The Plaintiffs attempt to distinguish this case from the established common law in Kansas. Plaintiffs rely on language in Ling v. Jan's Liquors, 237 Kan. 629 (1985):

“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.”

Plaintiffs claim Ling is not similar to the facts in Bland since there is no question as to proximate cause whether the supplier (here, Phi Gamma Delta) knew or should have known that the adult was already intoxicated. Additionally, Plaintiffs argue that Justice Lockett's dissent in Ling applies, stating: “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 the conditions and circumstances require if the prior law is unjust or has become bad public policy.” Plaintiffs argue that the holdings in Ling should, thus, not be applied.

Additionally, Plaintiffs claim that the Kansas Liquor Control Act is unconstitutional pursuant to Section 18 of the Kansas Bill of Rights to the extent that it denies Plaintiffs a remedy for their injuries. Plaintiffs claim it is the duty of the courts to safeguard the declaration of right and remedy guaranteed by constitutional provisions for all injuries. The Kansas Liquor Control Act is unconstitutional to the extent that it abrogates a common law remedy of person injured by violations of the act.



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JUDICIAL COUNCIL TESTIMONY ON HB 2114 FEBRUARY 9, 2005

Twice in the past two years, the Judicial Council has been requested by the Legislature to study proposed legislation that relates to civil liability for serving alcoholic beverages. In 2003, the Judicial Council was requested to study 2003 HB 2296 which was an act relating to civil liability for serving alcoholic beverages. The Judicial Council did not recommend passage of SB 2296.

In 2004, the Judicial Council was requested to study 2004 House Substitute for SB 437, also relating to civil liability for serving alcoholic beverages. After study, the Judicial Council Civil Code Advisory Committee recommended SB 437 (now HB 2114) be introduced into the legislative process this year. The Judicial Council approved the recommendation of the advisory committee.

HB 2114 allows for civil liability (with fault comparison) in cases where a licensee is found by a trier of fact to have violated one of two criminal statutes. One statute prohibits furnishing alcoholic liquor or cereal malt beverage to a minor (21-3610) and the other prohibits sale or service of alcoholic liquor or cereal malt beverage to a person incapacitated by the effects of alcohol (41-715).

The bill has the usual requirement of causation (no strict liability) and does not allow an action by the person consuming the alcohol (third party recovery only).

Kansas is one of only eight states that have not enacted dram shop statutes. (The eight states are: Delaware, Kansas, Louisiana, Maryland, Nebraska, Nevada, South Dakota, and Virginia). In some states that have dram shop laws, it is also possible to maintain a negligence cause of action pursuant to common law. Kansas offers no remedies statutorily or at common law. Even though it is a crime to sell alcohol to a minor (K.S.A. 21-3610) or to a person who is already physically or mentally impaired by the consumption of alcohol (K.S.A. 41-715), there is no civil liability for those actions, even in clear cases of negligence.

In the year 2000, drunk drivers in Kansas were involved in nearly 18,000 automobile accidents, 128 deaths, and 5,600 injuries. The National Highway Traffic Safety Administration (NHTSA) also reports that 44% of the traffic fatalities in Kansas in 2003 were alcohol related (45% in 2002). The NHTSA has estimated that if K.S.A. 21-3610 and K.S.A. 41-715 were enforced, the number of alcohol related fatalities would decrease by 11%, which would mean more than 20 lives saved each year.

Among the 42 states that have enacted dram shop laws, the statutes vary greatly as to the extent of liability imposed. Some states allow a cause of action against a vendor only when liquor has been served to minors. Other states go so far as to allow causes of action against social hosts who provide liquor to someone who later causes injury to a third party. The bill proposed here does not go that far. It allows for the negligence of a vendor to be compared only when there has been a violation of K.S.A. 21-3610 (serving liquor to a minor) or K.S.A. 41-715 (serving liquor to a person already incapacitated by the consumption of liquor). This legislation does not impose strict

liability for the violation of those statutes, nor does it impose any liability at all in social host situations.

The Committee might also be interested in where the appellate courts are on this issue. In 1985, the Kansas Supreme Court held in *Ling v. Jan's Liquors*, 237 Kan. 629, 703 P.2d 731, that Kansas does not have common law dram shop liability, and refused to impose such liability judicially. In a case handed down a few months ago on August 27, 2004, the Kansas Court of Appeals very reluctantly followed the precedent of *Ling* only because of their duty to follow current Supreme Court precedent. *Noone v. Chalet of Wichita*, No. 91, 095.

“We do so reluctantly because changes in Kansas liquor laws and the growth and development of the hospitality industry, as noted by the district court, and the evolving trend of the common law on this subject throughout much of the nation directs us down a path away from *Ling*.”

. “We respectfully suggest that *Ling* is bad public policy. Kansas is now one of only eight states that do not recognize civil liability under these circumstances.”

The appellee in *Noone* quoted some of the same statistics I gave earlier and then stated,

“Given these startling statistics and the judiciary’s unique vantage point in seeing the civil and criminal prosecutions arising from this carnage, the courts should be sensitive to any remedies that may reduce these tragedies.”

The Kansas Court of Appeals responded, “We agree with the appellee.”

The *Ling* case was the product of a divided Supreme Court (four justices joining in concurring or dissenting opinions). Now, twenty years later, the makeup of the Supreme Court is quite different, and it is not known whether, faced with this issue again, the current Court would once again decide against imposing liability judicially, even in the absence of legislation.

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) 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 when such furnishing is permitted and supervised by the child or ward's parent or legal guardian.

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; L. 2004, ch. 94, § 1; July 1.

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.

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.

60-1801. Survival of actions; what causes of action survive. In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, or for death by wrongful act or omission, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same.

History: L. 1963, ch. 303, 60-1801; Jan. 1, 1964.

60-1901. Cause of action. If the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom if the former might have maintained the action had he or she lived, in accordance with the provisions of this article, against the wrongdoer, or his or her personal representative if he or she is deceased.

History: L. 1963, ch. 303, 60-1901; Jan. 1, 1964.

Mr. O'Neal, Members of the Committee:

I sit here before you today as an angry, grief stricken mother. Grief stricken because I lost my oldest of three sons to a drunk driver. Angry, because our state continues to allow this to occur. I need you to explain to me, why my son had to die, and why all the parties involved in his death were not held accountable.

My 18 year old son, James J. Noone was killed at approximately 12:30 AM, Jan 26, 2002 along with 18 year old Jeremy Pawlak, the driver of the car, whom he was riding with. They were struck from behind by a drunk driver with such force that he drove his corvette underneath their car causing it to explode on impact.

The cause of death for both of our sons was severe head trauma. Seatbelts, which are designed to prevent occupants from being propelled forward were useless against the upward thrust that forced their heads into the roof of the car. In addition to the catastrophic head trauma which was the official cause of death, my son also suffered, according to the autopsy report, a broken neck, complete laceration of his spinal cord, and all the ribs on his right side were broken, causing lacerations to his liver, right lung and right kidney. Thank God, our sons were killed instantly and my son did not have to suffer through the torture of feeling his flesh being burned as the car was incinerated with him in it. As a result of the fire, my son had to be identified by dental records as his body was left charred beyond recognition.

As the one who made the conscious decision to drink then drive drunk, the drunk who killed our sons is ultimately responsible for their deaths. However, blame, shame and guilt does not stop at his doorstep. The staff of the Chalet in Wichita, KS were negligent and recklessly, irresponsibly, and illegally continued to serve alcohol to the drunk who killed our sons. Illegally, because we do have a law on the books (statute KSA 41-715(a) which prohibits establishments from serving alcohol to someone who they know to be, or should reasonably know to be intoxicated. It is impossible not to know that someone who consumes a gallon of beer isn't going to be drunk. Yet they served this drunk at least that much.

Obviously, the current law is ineffective and not worth the paper it is written on, and is rarely, if ever, enforced. Even if it were to be enforced, it is only a \$250.00 fine per, KSA 41-715(b). I want someone to explain to me why the Chalet, the owners of the Chalet, and the staff of the Chalet who allowed this man to get intoxicated in their establishment, were not nor cannot be held accountable under our current laws.

Based on this current law, I tried holding the owners of the Chalet accountable by filing a law suit against them. Judge Bribiesca of the 18th Judicial Court found grounds to revisit this issue and ruled in our favor. Of course the attorneys of the Chalet filed an appeal, and after several months of deliberation the Appellate Court "reluctantly" overturned Judge Bribiesca's decision, stating that because of previous decisions by the Kansas State Supreme Court, this matter had to be decided by them. They did however, indicate that this ruling should be overturned and these establishments should lose their immunity and protection from civil litigation. The Kansas Supreme Court however, refused to hear our

case.

Please tell me why I should not be outraged about the unfairness of a system that allowed my son to be killed, but does not allow for all those responsible for his death to be held accountable. Explain to me, why Kansas is a state where the one's in charge of protecting it's citizens from illegal activity, instead chooses to protect and in a sense reward those committing the illegal activity. If it wasn't for the protection these establishments enjoy under our current and faulty laws, our sons just might be alive today.

These establishments have proven over the years, the only thing that concerns them is the all mighty dollar. The more drinks they serve, they more money they make, regardless of the innocent lives that are so brutally taken each and every year. They have repeatedly demonstrated, they are not going to police themselves, they will continue to snub the current, ineffective laws we now have, and they have no intention of doing anything other than getting every person in their establishment to drink as much as they can possibly get them to drink.

Currently, bar owners are the only professionals who are immune from civil liability when they do wrong and cause injury or death to someone. I worked in a major hospital in Wichita as a nurse. If I gave a narcotic to a patient, I had to have another adult sign the discharge paperwork accepting responsibility as a "designated driver" for the patient. If there was no "designated driver", arrangements had to be made for them to catch a bus, take a taxi or stay put for at least 4 hours after the last dose of narcotic had been given.

You, as our legislative officials, are obligated to enact laws which protect us the citizens of this state, from this kind of illegal activity. So please, explain to me, why you continue to ignore this atrocity and refuse to enact a meaningful dram shop law that will enable victims to seek justice and retribution against persons who so willingly and arrogantly disregard the laws of this state. We need a dram shop law that will make it more costly for establishments to settle law suits than what they will make by continuing to serve more alcohol to intoxicated patrons.

Before you cast your vote on this bill, please take a moment to remember our sons, James Noone and Jeremy Pawlak. They were killed because an establishment, The Chalet, recklessly, irresponsibly and illegally served one man a gallon of beer, with total disregard to whether he would be driving when he left. They provided the ammunition, and willingly and eagerly, loaded the weapon that killed our sons. Please enact this dram shop bill that will forever take away the immunity they now enjoy.

Thank you for your consideration of this matter.



MADD

Activism | Victim Services | Education™

Mothers Against Drunk Driving
KANSAS STATE OFFICE
Victim Services Office
3601 SW 29th Street, Suite 211
Topeka, KS 66614
Phone (785)271-6199
Phone (785)271-6324
Hotline 1-800-443-6233
Fax (785)271-0797
maddkansas@parod.com

February 9, 2005

Rep. Michael O'Neal, Chairman
House Judiciary Committee
State Capitol Room 170-W
Topeka, Kansas 66612

Dear Representative O'Neal and Committee Members:

MADD strongly supports by means of legislation or case law, the right of victims of alcohol-related crashes to seek financial recovery from establishments and servers who have irresponsibly provided alcohol to those who are intoxicated or to minors, or who serve past the point of intoxication, individuals who then cause fatal or injurious crashes. Kansas MADD supports House Bill 2114.

As long as establishments can pour out unlimited drinks to their patrons with impunity, they will experience little compunction to seriously consider the public health impact of their irresponsible serving practices upon society. However, under threat of civil liability, many establishments and businesses in states with such statutory or case law provisions have demonstrated a greater concern for the safety of their patrons and others on the road.

Approximately fifty percent of all drunk drivers drink in licensed establishments before their offense, it is appropriate and necessary to expect these licensees to share the burden of responsibility with their impaired patrons when preventable tragedies occur. The existence of liability risks therefore encourages and promotes responsible hospitality, including server and management training, which can contribute to a reduction in the likelihood of alcohol-related crashes and fatalities.

Kansas MADD requests your support by bringing House Bill 2114 to a House vote. Kansas MADD also requests your support for this life-saving legislation.

Sincerely,

Sandi Raines
State Chairperson
Kansas MADD

House Judiciary
2-9-05
Attachment 8

Testimony on House Bill 2114

Chairman of the House Judiciary Committee

Michael O'Neal and committee Members

Today I am here to give my testimony on behalf of House Bill 2114, that will be heard and approved.

My name is Diann Windmeyer, My husband, Fred Windmeyer, was brutally murdered on Sunday May 18,2003. He was out walking in the neighborhood with our family dog, which he walked several times a week. He walked for his health, due to having a heart attack, then years later he had a seven by-pass heart surgery. Breaking every bone in my husband's body, and limbs torn apart, 21 year old Dustin Deppe hit my husband at the speed of 75 miles per hour, in a 35 mile per hour speed zone. Deppe fled the crime scene where he hit and killed my husband. Dustin was found four hours later, where he was sent to the hospital and had his blood alcohol tested. It was still four (4) times over the legal alcohol limit.

Deppe had no insurance on the truck he was driving. He had previous DUI, and other criminal convictions. He was also on probation for two offences in two separate counties, Shawnee and Jackson.

The judge gave Deppe the maximum sentence (only 52 months) by Kansas Law for the crime of involuntary manslaughter while driving under the influence. The majority of Kansans do not know that our courts are limited by a bureaucratic grid system, confined to a top number and a lower number set up for sentencing criminals.

My son, Shane Windmeyer, ended his Victim impact letter in court, stating to Dustin, "Dustin made a choice. He was not forced to drink. He was not coerced to drive his truck. He made the choice to drink and drive. He made the choice to kill my father. It is tragically simple, he told Dustin...

Your alcohol was the bullet...
Your vehicle was the gun...
Your choice murdered my father."

I am having a hard time understanding how guns are not legal in Kansas, but alcohol is? Sundays are now open to be a day of drinking, with the new Sunday liquor sales law passing. Is it because guns have no revenue, and alcohol does? How does the revenue of alcohol help me and my family or the thousand of other families affected by Kansas laws. I do not understand!

Just as I do not understand how my husband can go for a walk for his health and not come back home. I think about this everyday, sometimes several times a day. To this day, I wake up at night thinking it was a nightmare, just to be reminded that it is real, and then cry myself back to sleep. I have been heavily medicated since all of this has happened. About three months ago, I told my doctors that I wanted my medicine cut back because I felt to heavily medicated, and had no control of my body and mind. My medicine was cut back and now I am experiencing more pain. I didn't think it could get any worse.

My daughter, son, and myself are all still undergoing counseling to this day. My daughter has been awakened by me crying at night, or waking up to me screaming from a nightmare. My daughter Jennifer did not return to college this semester because she had been portraying an image of strength for me, while everything is building up inside of her.

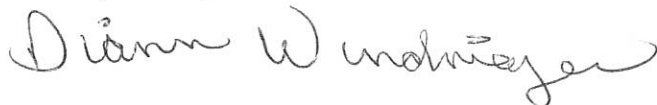
One and half years later, she breaks emotionally, from trying to keep her emotion and heartaches inside. My son is in the same shape. Even though they are grown adults, they are lost with out their father. We were all a very strong close family. Something you do not see much of in our society anymore.

My children and me have been tragically robbed of a husband and father. People ask if we are ok and the answer is honestly, "No." People tell us that it will get easier with time, it will be two years on May 18th 2005 and it has not gotten easier.

My husband was a hard worker, and the best father ever. We were robbed of our golden years together, with so many plans for the future. In a blink of the eye, it is all gone. Because of some one that was unable to control himself while under the influence of alcohol.

This tragedy has left me with emotional struggles and financial hardships. Health problems when my insurance was taken when my husband died. I was put on Cobra, but it is about to run out. I cannot begin to tell you of all the hardships this has been for us. Just because of alcohol, we are suffering along with hundreds of other families in Kansas. In closing, I ask for your support on House Bill 2114. Please help, so other Kansas families do not have to live through all the sadness and pain that is cause by alcohol. Think about your family, and what might happen to them if you were the one killed by a drunk driver.

Thank you for your time to listen.



Diann Windmeyer
4311 NE Indian Creek Road
Topeka, Kansas 66617-1537
(704) 277-6710

Chairperson Rep. O'Neal; Vice Chairperson Rep. Jack; Rep. Pauls; Rep. Ward; Rep. Kinzer; Rep. Ward Loyd; Rep. Newton; Rep. Owens; Rep. Peterson; Rep. Pilcher-Cook; Rep. Watkins; Rep. Yoder; Rep. Crow; Rep. Colloton; Rep. Davis; Rep. Garcia; Rep. Hutchins; Rep. Kelley; Rep. Kiegerl

My name is Shellie Parton. I represent thousands of lives that are affected daily due to drunk drivers. I am here to support House Bill 2114. I want to thank you for your time in allowing me to open up a personal part of my life, and share my experiences, and for allowing me to express my support of this crucial piece of legislation that lies before you.

In April of 1989, I had the honor of being part of the first women's soccer team at my high school. It took a lot of hard work, and it was beginning to pay off. My team mates were being scouted, that day, to play at local colleges. This was important to me and my family, because my father had been laid off from the General Motors-Leed's Plant, and my family did not really have the means to put me through college. I had made a call to my friends, and told them that I was on my way home from school. I made the mistake of turning right, instead of turning left. I should have gone home. At approximately 3:45pm, I was hit by a drunk driver.

The damage that it had done to my body did not compare to the damage it had done to my life. To this day, I cannot sleep properly, and I have had a nightlight in my bedroom, for 15 years. When I realized what had happened to me, all I could think about was the other driver? Was that person ok? The pain then set in; I realized I was in trouble. All of a sudden, that slushy from the convenience store, was no longer that important to me on that hot day. All I could smell was the burned engine, and gasoline. I had heard voices that were telling me to stay calm. I kept asking about my car, and the other driver. The emergency crew told me that the most important thing for to do, at that time, was to calm down, focus on their voices, and try not to fall asleep. I remember hearing my friends, telling me that I was not hurt that bad. I only needed a few stitches. They could not bring themselves to tell me what I really looked like. I could smell and taste blood.

The driver of the other vehicle was intoxicated. At 3:45pm, in the evening, he was so drunk he told officers he could not see me. I was in a bright red Camero. It did not make sense. I later found out, through the law enforcement gentleman whom helped me that he had sitting in a local pizza slash bar, and had been drinking all day long. He had had a "liquid lunch".

This crash was in the middle of the day. Not but three blocks from

this establishment, was an elementary school. A bus load of children could have been injured, or killed. I found peace knowing that I had saved someone else's life that day. That is why I sit here before you now...I want to save more lives.

I did not receive any type of financial recovery or assistance from the driver nor the establishment. Neither party was found guilty in civil court. We all knew that both parties were equally guilty, but no punishment was ever made to the establishment. And as far as the driver; before we could go to trial, had another drunk driving crash, and died; he was the only party involved in that crash.

Had the establishment that this man was in, "cut him off", and used better judgment, I would not have to write you this letter. If establishments knew in some way that they would and/or could be held responsible, I would not have to plea House Bill 2114.

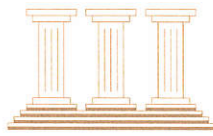
I could sit here and write on and on about everything I and my family went through and what I still fight everyday. That is not my intent. It is not intent to ask for your sympathy. Please, do not feel sorry for me. I am a healthy, happy 34 year old married woman, and I am blessed with a beautiful little girl, and my husband John. Without whom, I would have to fight my battles alone. I am also an American that believes in a system that will prevail, is willing to correct a problem inflicting our Kansas citizens.

It took me days to be able to fall asleep; It took me weeks, to catch up on my school work; It took me months, before I could pull out of a parking lot, into the street, without having a panic attack; and it has taken me years to be able to talk about it, without getting physically sick.

Chairman O'Neil, and distinguished members of the Judiciary Committee, a matter of seconds, to decide the fate of House Bill 2114. It would then only take a few more minutes to pass the bill. Minutes that I, and several people across Kansas have had taken away from us, due to drunk driving, and the irresponsibility of controlling the serving, sale, and consumption of liquor.

I pray that you consider this crucial piece of legislation, House Bill 2114, be passed, so that other parents may have the piece of mind, knowing that their child is going to come home safely from school, from practice, from work, from college, and from this hearing, right here, right now.
Thank you.

Respectfully Submitted,
Shellie Parton



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman O'Neal and Members of the House Judiciary Committee
From: Derek S. Casey for the Kansas Trial Lawyers Association
Date: February 8, 2005
Re: HB 2114

The Kansas Trial Lawyers Association supports the current civil justice system wherein wrong-doers are held fully accountable for the harm and the damage that they cause. Consistent with that mission, KTLA is supportive of legislation that would hold accountable drunk drivers and others that enable driving under the influence in Kansas. We applaud the committee for considering HB 2114.

The victims of drunk drivers and their families are the best evidence that Kansans need greater protection through stronger laws. Violation of K.S.A. 41-715 is a misdemeanor punishable by a fine of \$100-\$250 dollars, up to 30 days in jail, or both. Violation of K.S.A. 21-3610 is a class B person misdemeanor that carries a fine of up to \$200. Unfortunately, the criminal penalties alone are not sufficient to compensate or comfort the victims and the families of those who are injured or killed by a drunk driver. We believe passage of HB 2114 will serve as a deterrent to those who jeopardize the safety of our communities.

We believe HB 2114 would be improved by simply clarifying that if a licensee violates the provisions of the liquor statutes such violation would give rise to a civil action. Our preference, and recommendation for a substitute amendment, is the following: "Breach of the duties imposed by K.S.A. 21-3610 and 41-715 shall be actionable by a civil right of action including, but not limited to, suit under K.S.A. 60-1801 et seq. or 60-1901 et seq."

If HB 2114 passes, it is KTLA's sincere hope that no family or other party has occasion to seek redress under its provisions. Thank you for the opportunity to offer our support and our comments.

Terry Humphrey, Executive Director

Testimony- House Judiciary Committee

Wednesday, Feb 9th, 3:30pm

Mr. Chairman and members of the Committee:

I speak in opposition to HB-2114, the Dram Shop bill.

My name is Jim Scott. My wife Martha and I own Scotty's Wine & Spirits in Fort Scott. Who we are is defined by what we do in our community. As a younger man I was president of the Jaycees. In more recent years I was president of our rotary club. I've emcee'd our Chamber of Commerce banquets and announced all the Good 'Ol Days Parades. I've been an elder in my church, and I've chaired over a dozen community wide chili feeds, spaghetti feeds, and soup kitchen fundraisers, and a multitude of other activities. My wife's list is longer than mine including Chairman of Chamber Tourism, past president of the Historical Preservation Association, past Jaycee Wives president and state officer, Chairman of the Holiday Homes Tour, a Kansas Master Gardner, and chairman of the annual Fort Scott's Secret Garden Tours.

I'm a board member and past president the Kansas Association of Beverage Retailers (KABR). KABR is the largest adult beverage association in Kansas. In addition, I represent Kansas and the KABR as a board member of the national association, ABL, the American Beverage Licensees.

Most important, however, is that I am a Kansas shopkeeper. And thanks to big business and monster retail chain stores, we are fast becoming the last of the mom and pop businesses. There are only 700 of us left, down from 1,500 just 25 years ago.

We started in 1949 as the most regulated business in Kansas. We can't own more than one store, spouses can also own only one store, we can't be incorporated so when the store is sued there's no legal paperwork to hide behind. We're the ones that can't get our license renewed if we owe taxes. We're the ones who must have employees over twenty-one to dust our shelves. We're the ones who are challenged by state and local agencies who send underage persons to make illegal purchases. We're the ones who can make 9 selling mistakes in a 30 year period and the state can have our licenses revoked- even if the mistakes were done by a part-time employee making minimum wage. We're the ones who can be fined \$100 for accepting a dollar in our store for the purchase of a bag of ice.

In spite of all that, and more, we accept those challenges. Why? Because that was part of the deal when we started our businesses. We chose to live by those rules.

But now things have changed. We are still playing the same game but the rules are being changed. We are attacked every year by those willing to slowly legislate us out of business, sometimes under the guise of morality, other times by neo-prohibitionist. Please understand that for many of us our only retirement is the selling of our business. If our business is devalued we will suffer for the rest of our lives.

We find ourselves coming to Topeka every year in an attempt to defend ourselves. EVERY YEAR!! We are always first on someone's list to increase taxes, even though our gallonage tax is already double Missouri's. If enforcement of liquor laws doesn't take place, someone is ready to fix the problem by enacting more laws that can't be enforced. And then there's the annual attempt by grocery store chains or convenience store chains to take our products away from us. If Sam's, Costco, and Quik Trip had their way we would lose half of our remaining stores.

And now another attack. Dram Shop. What's wrong with this bill:

- It provides an opportunity for someone I've never met, who's never been in my store, has never been a customer to sue me for everything I own.

- In an era where everyone from President Bush down has said that tort reform limiting liability needs to take place, we now have a bill that increases our liability.
- a bill that will cost every liquor store owner in Kansas between \$50 and \$100 per month PER \$1,000,000 COVERAGE depending on the volume of business of the liquor store. If I have a million in coverage and lose by 2 million, guess what..I lose everything.
- a bill that increases the potential for innocent liability while ignoring personal responsibility.
- a statement by the state of Kansas that motivates frivolous lawsuits.
- a bill that emphasizes the danger of selling alcohol while minimizing over-consumption.
- a bill that threatens sale to an "incapacitated person". I teach Beverage Alcohol Training to liquor retailers and their employees, and I'm not sure what "incapacitated" means. Is that a legal term? Is that one level or two levels below drunk? We work hard at teaching employees how to recognize someone in a drunken state, which can be very difficult. So if "incapacitated" is below "drunk", would that mean "sober"? By definition if someone is not drunk they are sober. If "incapacitated" means not necessarily "drunk", that means we can go bankrupt for selling alcohol to a sober person.
- a bill that says we need to look at someone and determine if there is a danger that is a "foreseeable consequence"!??!
- a bill that could allow a liquor store to make a legal sale, the product having a store price sticker on it, after which the buyer sells to someone underage who kills himself and someone else, resulting in a claim that will survive the death. The retailer would have to prove innocence, against a minimum of evidence pointing to a potential negligent sale.
- a bill that allows a legal sale, while the customer leaves and then does an irresponsible act. Could "irresponsible" turn into "incapacitated"?
- a bill that becomes law, then is open to additional provisions every year it's on the books, usually based on some solitary incident.

Committee members, this bill makes me feel exposed to the worst of what society has to offer. And my family then becomes the victim. Many years ago I chose Kansas as my home. I don't worry about hurricanes or tsunami's. I feel relatively safe from Terrorists. We have minimal crime. Our kids are still able to go outside and play without adult supervision. Our schools provide a safe atmosphere for learning. I've chosen a town of 8,500 to avoid traffic jams and gridlock. I feel safe.

I now only worry about health issues, customer theft, employee theft, competition, poor sales, tax deadlines, bank payments, injuries in my store, unemployment claims, employees losing customers, and employees violating laws.

We mom and pop stores aren't asking for anything special. We just ask that you don't change the rules- we're still playing the same game.

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Roberson's Liquor Store
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Testimony Against HB2114
Marjorie L. Roberson

Chairman O'Neil and Members of the Committee:

I am Marge Roberson, owner of Roberson's Liquor Store in Newton, Ks. I am also a director on the board of the Kansas Association of Beverage Retailers. Thank you for the opportunity to testify today in opposition of HB 2114.

25 years ago I applied for a liquor license through the ABC Division of the Dept of Revenue. At that time every new licensee met with the Director, who made it very clear what were the responsibilities of owning a liquor store. I took very seriously my partnership with the State in selling alcohol to legal aged citizens, and worked very hard at making sure I understood and followed all the rules and regulations. To this day I take my business very seriously because I believe in being personally responsible.

I believe this Dram Shop bill has the potential to expose me to legal actions for something someone else does! It is already illegal for me to sell to an intoxicated person, or an underage person. Now you would have me be responsible for someone who purchases my product and then they decide to either consume too much, or combine it with medication; all of which happens away from my place of business, and I get to be sued by a 3rd party? Whatever happened to personal responsibility? Using this same rational it seems to me you should be allowed to sue Ford motor company because they make a car that goes too fast, and someone might get injured, or injure someone else.

Who is protected with this law? What has been made safer when this goes into effect? If you are after the drunk driver, you have all sorts of laws that are suppose to deter him/her from drinking in excess. At some point we have to make people responsible for their own actions, and quit using this shotgun approach to litigation.

I have a sole proprietorship license. In 1980 when I got my first license that was the only way to get a license. If I get sued, it's me personally, not some corporation that has insulated themselves. I am 60 years old, and that's way too old to start over because someone was irresponsible.

I did some checking, and if this bill passes, my insurance coverage will increase at least \$2500 a year. I would also want to install the latest video security system that constantly copies everything that happens in the store to a hard drive and can be accessed via the Internet. When I checked out that system three years ago it would around \$3500. I would probably have to try and set up an LLC, so I could at least keep my home when I got sued. I don't know how that would affect the way I pay in social security, and at my age that is important.

Once again, I would encourage you to vote against HB 2114, which I believe places an unfair burden on the liquor retailer.

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**Testimony Re: HB 2114
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Kansas Restaurant and Hospitality Association
February 9, 2005**

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 2114. KRHA is concerned about any dram shop legislation that makes restaurants or other retailers of alcoholic beverages civilly liable for the negligent actions of customers of such facilities. The KRHA appreciates that there are significant problems with consumption of alcohol and is even more concerned about the tragic consequences of alcohol related accidents and fatalities which result from illegal conduct of anyone who consumes alcohol irresponsibly. The concept of making the person or business selling alcohol responsible or liable for the acts of the purchaser has numerous problems.

It is already a violation of Kansas law to sell alcohol to a minor or to sell alcohol to a person incapacitated by the consumption of alcohol. Legislation or court opinions that provide liability for restaurants represent, in many cases, bad social policy. As a general rule, liability should be placed not with businesses which sell alcoholic liquor, but where it belongs, with the responsible person. HB 2114 provides that the liquor licensee can be held liable, even though, in most cases, such liquor licensee is not in a position to judge how much alcohol an individual customer has consumed or can consume before that person becomes incapacitated. The seller is also not in a position to know how much alcohol the purchaser may have consumed before entering the premises or will consume after leaving the premises. The seller is often 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 being under the influence of alcohol or other drugs. When attempts are made to impose liability on any individual or any business which might have sold the

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alcohol to the person in a lawful manner, there is often no mechanism for ascertaining all of the relevant facts that might establish that the seller did NOT sell illegally. Often, the facts are blurred by the emotion involved because an innocent person is badly injured as a result of the alcohol incapacitated person. In a civil action, the plaintiff must come forward with the evidence, and establish by a preponderance of the evidence that the defendant licensee sold alcohol to the minor or incapacitated person and that the consumption of such alcohol was a proximate cause of the injury to the third party. However, there is no physically reliable test to determine if the consumption of alcohol at the licensees' premises caused the accident or injury as opposed to alcohol that might have been consumed elsewhere, either before or after the consumption at the licensees' premises. Thus, oftentimes, the alcohol licensee cannot establish sufficient facts to "prove" that the customer was not incapacitated when they were served.

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 are difficult if not impossible to establish, and which oftentimes 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 are forced by this legislation to subject themselves to liability for attempting to predict future behavior. Determining intoxication is virtually impossible, especially given the limited contact many restaurants have with their customers, and the fact that many customers are "strangers" to restaurant employees. Determining symptoms of alcohol induced incapacity requires substantial training and experience, even for law enforcement personnel. Physical symptoms is not a fail proof mechanism for determining intoxication. Ironically, other persons who might be with the alcohol consuming person have far more knowledge of the potential incapacity of the alcohol consuming customer, and yet this bill provides absolutely NO liability for those persons, who are in a much better position to judge the intoxication level of their alcohol consuming companion.

Individuals who frequently consume alcohol to an excess can appear to be very normal in their behavior while having BAC well 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 intoxicated with an extremely low BAC, sometimes as low as .04% or lower. So the restaurant employee cannot just judge intoxication on the number of drinks.

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. To subject the business person to being liable for behavior which occurs outside the establishment will expose businesses and their owners to substantial liability for acts for which they are not responsible.

Despite all of these concerns which I have raised, and which have been experienced in practice by our members, I must also say that the KRHA is concerned about egregious cases where irresponsible liquor licensees knowingly sell alcohol to a minor or knowingly sell alcohol to an incapacitated person. Our industry has a strong social conscience, and the KRHA is equally shocked by some of the legal cases which have been filed which allege totally unprofessional and reckless behavior, and which, if true, make justifying immunity statutes extremely difficult. However, some solutions to the existing problem will be killing a gnat with a hammer, and will subject a large number of innocent liquor licensees to liability or at the least expensive litigation in exchange for holding the few bad violators responsible.

We are also concerned, as is the Chairman and probably several of the committee members, that the courts may rule on this issue and take the matter out of the legislative body, with its open and deliberative process. We hope that they will not do that.

I would express the following concerns about the bill from a drafting standpoint:

1. In 2002, 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 2114 would pass, some type of safe harbor legislation, which HB 2292 was intended to be, would probably be appropriate.
2. A provision for notice of suit should be required. With a statute of limitations of two years, by the time a suit is filed and the liquor licensee gets notice, obtaining evidence is extremely difficult. Waiters and waitresses have left the employment or are relocated and difficult to find. Memories are taxed, especially when the alcohol consumer was a stranger to the business, and left no evidence of being at the premises or of food or drink consumed. In restaurants, people come and go, and generally do not identify themselves, unless they pay by credit card. Provision for notice to file suit sometime shortly after the accident would protect the defendant from evidentiary problems inherent in these situations.
3. Current law makes criminal the acts of serving a minor or an incapacitated person. The burden of proof for violating those statutes is beyond a reasonable doubt. This bill

does nothing more than lower the burden of proof to be found "liable" for "violating" those statutes.

4. The current criminal law requires, as noted above, that for a "violation" to occur, the defendant must be found guilty beyond a reasonable doubt. HB 2114 requires that one or both of those criminal statutes be "violated" (p, 1, line 17), but then attempts to provide that the "violation" of those criminal statutes be established only by a preponderance of the evidence. We respectfully suggest that the requirement of this bill that the licensee be found to have "violated" a criminal statute would require a criminal conviction, which would require a burden of proof of beyond a reasonable doubt. Otherwise, there would be no "violation" of the criminal statute.

5. In order to "violate" K.S.A. 41-715, the statute relating to selling, giving away, etc. liquor to an incapacitated person, requires that the person "knowingly" sell, give away, etc. alcohol to an incapacitated person. This always requires that the person "knows" that the purchaser is "incapacitated." HB 2114, in line 24, specifically refers to the "negligent service of alcoholic liquor". This obviously changes the standard from one of "knowingly" to one of simple negligence. This lowering of the standard appears to conflict with the provision of HB 2114 which requires a "violation" of K.S.A. 41-715.

6. With regards to K.S.A. 21-3610, selling to a minor, the criminal statute specifically provides for a defense to the action if the licensee has reasonable cause to believe the minor is 21 or older, and if the licensee is shown appropriate ID indicating the minor is 21 or older. HB 2114 only provides (on page 1, lines 38-40 that "the defenses...shall be admissible for the purpose of determining comparative negligence..." In essence, this bill is eliminating such provisions as a defense, and instead has merely labeled "admissible". Ostensibly, instead of being a defense, the jury can disregard the evidence. This needs to be clear that there is a defense for such actions, just as is provided in K.S.A. 21-3610.

7. Last year, the KRHA requested an amendment that would prohibit the licensee from being liable to those who are in the company of the alcohol consuming purchaser if they seek to recover damages for injuries sustained as a result of the actions of the person alleged to be incapacitated or a minor. If the liquor licensee is going to be found liable because they are supposed to be aware that the person is intoxicated, then certainly the companions who are drinking with the intoxicated person should be aware of that as well. To require the licensee to be liable for the drinking companions injuries when they would know of the purchaser's level of intoxication more so than the licensee, given their relatively greater contact, is absurd. Those persons who were present and knew of the consumption of alcohol have assumed the risk if they ride with or otherwise subject themselves to the behavior of the person they should be aware was intoxicated, and should not be able to sue the licensee seeking damages.

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8. If the bill intends to say that the plaintiff must establish that the licensee knew that they were selling to a minor or knew that they were selling to an incapacitated person, the bill should expressly say so. We would propose an amendment to make that clear.

9. We would request that IF this bill is to be passed, that it require a conviction of the two statutes, so that the "violation" provided for in the bill is truly that, a "violation" of the criminal statutes.

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