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ILLINOIS DRAM SHOP REFORM: THE NEED FOR A SWORD, NOT A SHIELD

INTRODUCTION

On July 4, 1984, a drunk driver struck and killed Kellie Wheatley, a homemaker and mother, while she stood at a corner in Jacksonville, Illinois.[1] The drunk driver, Edward Frietag, had just missed killing Kellie's husband, Orville, and their one and a half year old son, Christopher.[2] An ambulance rushed Kellie to a nearby hospital, but, due to Kellie's massive head injuries from the collision, doctors pronounced her dead on arrival.[3] Orville Wheatley brought suit, individually and as a representative of Christopher, against the three bars that served Frietag that day.[4] However, because of constraints on recovery under the Illinois dram shop laws, Orville and Christopher recovered nothing.[5]

Dram shop laws are state statutes which impose liability[6] on sellers of alcoholic beverages for the tortious acts of their intoxicated customers.[7] Such liability did not exist at common law.[8] When first enacted, the Illinois dram shop laws were an innovative and progressive approach to dealing with problems arising

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1. Oliver West, *Man Uses Daughter's Tragic Death to Teach Drunken Drivers a Lesson*, JACKSONVILLE JOURNAL-COURIER, Dec. 19, 1993, at 3.

2. *Id.*

3. Farmers State Bank & Trust Co. v. Lahey's Lounge, Inc., 519 N.E.2d 121, 121 (Ill. App. Ct. 1988).

4. *Id.*

5. *Id.*

6. A classic dram shop liability situation involves bar *A* which serves alcohol to an intoxicated patron *B*. Patron *B*, while still intoxicated, leaves bar *A* and is involved in a automobile accident, injuring citizen *C*. The dram shop laws, within certain guidelines, allow citizen *C* to sue bar *A*. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. SUMMARY REPORT, DOT HS 807 628, ALCOHOLIC BEVERAGE SERVER LIABILITY AND THE REDUCTION OF ALCOHOL-RELATED PROBLEMS: EVALUATION OF DRAM SHOP LAWS 3 (June 1990).

7. BLACK'S LAW DICTIONARY 494 (6th ed. 1990).

8. Cunningham v. Brown, 174 N.E.2d 153, 157 (Ill. 1961) (noting that the historical background of the Act demonstrates that the Illinois legislature created the dram shop act because there was no common law precedent to support such an action). *See* RONALD S. BEITMAN, PRACTITIONER'S GUIDE TO LIQUOR LIABILITY LITIGATION § 1.01(c) (1987). Beitman notes that the case of Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959) was the first case in the United States to permit a common law negligence action against a dram shop. *Id.* Prior to *Rappaport*, courts prohibited such action on grounds that the serving of the alcohol was not a proximate cause of the plaintiff's injuries. *Id.* See *infra* note 180 for a list of cases which have followed the *Rappaport* decision.

from the consumption of alcohol.[9] The laws provided for strict liability and called for a liberal construction to ensure the protection of the "health and welfare of the people of Illinois."[10] The dram shop laws initially, in harmony with their purpose, gave a sword to innocent victims by allowing them to overcome the common law prohibition against dram shop actions.[11]

Notwithstanding their virtuous and innovative genesis, the current dram shop laws[12] no longer provide adequate protection

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9. *See* Harold D. Holder et al., *Alcoholic Beverage Server Liability and the Reduction of Alcohol-Involved Problems*, J. STUD. ALCOHOL, Jan. 1993, at 24. Very few states recognized liability for dram shops before the 1970s. *Id.* Consequently, Illinois' recognition of liability in 1874 was innovative for the time. *Id.* The strict liability approach adopted by Illinois was even more innovative because the dram shop laws which existed at that time typically imposed fines on taverns only for service to "habitual drunkards." *Id.*

10. The 1934 Liquor Control Act decreed:

> This act shall be liberally construed, to the end that the health, safety and welfare of the People of the state of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors.

1933-1934 Ill. Laws 2nd Spec. Sess., 57, art. VI, § 1. This construction language is still present in the Act. *See* 235 ILCS 5/1-2 (1992).

Notwithstanding the Act's clear and unambiguous mandate, many courts have called for a strict construction of the dram shop laws. Miller v. Owens-Illinois Glass Co., 199 N.E.2d 300, 306 (Ill. App. Ct. 1964) (citing to the original purpose of the Act calling for liberal construction, but agreeing with subsequent case law calling for the laws to be strictly construed). *See* Butler v. Wittland, 153 N.E.2d 106, 108 (Ill. App. Ct. 1958) (calling for a strict construction of the statute since it is penal in nature in that liability is established without a showing of fault).

Some courts have upheld the original design of the Act. *See, e.g.*, Edenburn v. Riggins, 301 N.E.2d 132, 134 (Ill. App. Ct. 1973) (referring to and upholding the original purpose behind the dram shop laws).

11. Cunningham v. Brown, 174 N.E.2d 153, 157 (Ill. 1961).

12. 235 ILCS 5/6-21 (1992). The statute reads:

> Every person who is injured within this State, in person or property, by any intoxicated person has a right of action in his or her own name, severally or jointly, against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor, within or without the territorial limits of this State, causes the intoxication of such person. . . . Any person owning, renting, leasing or permitting the occupation of any building or premises with knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused the intoxication of any person, shall be liable, severally or jointly, with the person selling or giving the liquors. However, if such building or premises belong to a minor or other person under guardianship the guardian of such person shall be held liable instead of the ward. A married woman has the same right to bring the action and to control it and the amount recovered as an unmarried woman. All damages recovered by a minor under this Act shall be paid either to the minor, or to his or her parent, guardian or next friend as the court shall direct. The unlawful sale or gift of alcoholic liquor works a forfeiture of all rights of the lessee or tenant under any lease

or contract of rent upon the premises where the unlawful sale or gift takes place. All actions for damages under this Act may be by any appropriate action in the circuit court. An action shall lie for injuries to means of support caused by an intoxicated person or in consequence of the intoxication of any person resulting as hereinabove set out. The action, if the person from whom support was furnished is living, shall be brought by any person injured in means of support in his or her name for his or her benefit and the benefit of all other persons injured in means of support. However, any person claiming to be injured in means of support and not included in any action brought hereunder may join by motion made within the times herein provided for bringing such action or the personal representative of the deceased person from whom such support was furnished may so join. In every such action the jury shall determine the amount of damages to be recovered without regard to and with no special instructions as to the dollar limits on recovery imposed by this Section. The amount recovered in every such action is for the exclusive benefit of the person injured in loss of support and shall be distributed to such persons in the proportions determined by the verdict rendered or judgment entered in the action. . . . For all causes of action involving persons injured, killed, or incurring property damage after September 12, 1985, in no event shall the judgment or recovery for injury to the person or property of any person exceed $30,000 for each person incurring damages, and recovery under this Act for loss of means of support resulting from the death or injury of any person shall not exceed $40,000. Nothing in this Section bars any person from making separate claims which, in the aggregate, exceed any one limit where such person incurs more than one type of compensable damage, including personal injury, property damage, and loss to means of support. However, all persons claiming loss to means of support shall be limited to an aggregate recovery not to exceed the single limitation set forth herein for the death or injury of each person from whom support is claimed. Nothing in this Act shall be construed to confer a cause of action for injuries to the person or property of the intoxicated person himself, nor shall anything in this Act be construed to confer a cause of action for loss of means of support on the intoxicated person himself or on any person claiming to be supported by such intoxicated person. In conformance with the rule of statutory construction enunciated in the general Illinois saving provision in Section 4 of "An Act to revise the law in relation to the construction of the statutes," approved March 5, 1874, as amended [5 ILCS 70/4], no amendment of this Section purporting to abolish or having the effect of abolishing a cause of action shall be applied to invalidate a cause of action accruing before its effective date, irrespective of whether the amendment was passed before or after the effective date of this amendatory Act of 1986. Each action hereunder shall be barred unless commenced within one year next after the cause of action accrued. However, a licensed distributor or brewer whose only connection with the furnishing of alcoholic liquor which is alleged to have caused intoxication was the furnishing or maintaining of any apparatus for the dispensing or cooling of beer is not liable under this Section, and if such licensee is named as a defendant, a proper motion to dismiss shall be granted.

(b) Any person licensed under any state or local law to sell alcoholic liquor, whether or not a citizen or resident of this State, who in person or through an agent causes the intoxication, by the sale or gift of alcoholic liquor, of any person who, while intoxicated, causes injury to any person or property in the State of Illinois thereby submits such licensed person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this

for the people of Illinois. Over the years, legislative amendments have curtailed the innovation and efficiency of the original laws; moreover, this curtailment has come at a time when other state legislatures have expanded their recognition of dram shop liability.[13] The Wheatleys' tragic story displays the unnecessary deficiencies that plague the Illinois dram shop laws. The current laws disallow damages both for Kellie's death[14] and for the support Kellie provided to the Wheatley household as a mother and homemaker.[15]

Drunk driving accidents are atrocities which leave thousands[16] maimed, injured, and dead each year.[17] Drivers leaving licensed commercial establishments cause fifty percent of these accidents.[18] This Note proposes improvements for the Illinois dram shop laws. This Note exposes current deficiencies and recommends ways in which effective measures, currently employed in

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State for a cause of action arising under subsection (a) above. Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this subsection, may be made by personally serving the summons upon the defendant outside this State, as provided in the Code of Civil Procedure, as now or hereafter amended [735 ILCS 5/1-101 *et seq.*], with the same force and effect as though summons had been personally served within this State. Only causes of action arising under subsection (a) above may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this subsection. Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

235 ILCS 5/6-21 (1992).

13. The citizens' movement to deter drunk driving in the 1970s dramatically changed the traditional common law approach of not assigning liability to retail sellers of alcohol. Holder, *supra* note 9, at 23. This period witnessed an increase in states which recognized not only dram shop recovery, but also a "new common law rule" based on general concepts of negligence. *Id.* See *infra* notes 161-216 and accompanying text for a discussion of the recent trends in dram shop liability.

14. Farmers State Bank & Trust Co. v. Lahey's Lounge, Inc., 519 N.E.2d 121, 121 (Ill. App. Ct. 1988).

15. *Id.* at 123.

16. Nationwide, in 1992, more than 18,000 people were killed in alcohol-related crashes in the United States. GEORGE RYAN, 1992 DUI FACT BOOK 1 (1993). This amounts to one death every 26 minutes. *Id.* Beyond those killed, another 318,000 suffered injuries from alcohol-related accidents. *Id.* This amounts to one injury every 90 seconds. *Id.*

17. In Illinois, in 1992, 48.5% of all traffic deaths were alcohol-related. Paul Froehlich, *Drunk Driving*, CHI. TRIB., Jan. 4, 1994, at 14, Zone N. This figure is 17% percent higher than the average of Illinois' closest neighboring states (Ohio, Indiana, Wisconsin, Michigan, and Minnesota). *Id.* See *infra* notes 161-216 and accompanying text for a discussion of other states' dram shop laws.

18. Telephone Interview with George Murphy, Field Director, Mothers Against Drunk Drivers (Feb. 22, 1994). *See* Mary O'Donnell, *Research on Drinking Locations of Alcohol-Impaired Drivers: Implications For Prevention Policies*, 6 J. PUB. HEALTH POL'Y 510, 516 (1985) (concluding that at least half of intoxicated drivers drink at licensed premises).

other states, can mend such deficiencies. These proposed improvements are aimed at providing the victims of drunk driving with compensation for their injuries and ultimately at preventing these atrocities before they happen.

Part I of this Note reviews the historical transformation of the Illinois dram shop laws. Part II examines the present inadequacies of the current Illinois dram shop laws. Part III examines other states' dram shop laws and analyzes their progressive attributes which provide a better alternative to the current Illinois laws. Lastly, Part IV suggests recommendations for reform.

I. THE TRANSFORMATION OF DRAM SHOP LAW IN ILLINOIS

Controversy over governmental regulation of Illinois dram shops has endured since the time of Abraham Lincoln[19] and Stephen Douglas.[20] This continuing controversy has caused the Illinois legislature to make a number of dubious changes to the dram shop laws. Part I examines the transformation of the Illinois dram shop laws as legislative amendments curtailed the laws' original effectiveness.

A. Dram Shop Laws From 1934 to 1949

Illinois' current dram shop laws are directly traceable to the Liquor Control Act of 1934,[21] which was essentially a recodification of the 1872 Dram Shop Act.[22] The preamble of the Liquor Control Act of 1934 (1934 Act) called for a liberal construction to protect the health, safety and welfare of the people of the State of Illinois.[23] The 1934 Act furnished the courts with the broadest

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19. In 1842, Abraham Lincoln, speaking to the Washington Society of Springfield, said: "when there shall be neither a slave nor a drunkard on earth—how proud the title of that land which may truly claim to be the birthplace and the cradle of those revolutions that shall have ended in that victory." CARL SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS 174 (1926).

20. Richard Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L. F. 175, 176; *see generally* HERBERT ASBURY, THE GREAT ILLUSION 60 (1960) (stating that in 1855 Stephen Douglas "spoke violently against" dram shop reforms endorsed by Abraham Lincoln).

21. Pertinent portions of the Act provided:

> Every husband, wife, child, parent, guardian, employer or other person who shall be injured, in person or property or means of support, by an intoxicated [person], or in consequence of the intoxication . . . shall have a right of action . . . against any person . . . who shall, by selling or giving alcoholic liquor, hav[e] cause[d] the intoxication in whole or in part, of such person.

1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14.

22. Interestingly, the 1934 Act itself was really a recodification of the Temperance Act of 1872, replacing only "alcoholic liquors" for "intoxicating liquors" in the passing of the 1934 Act. Comment, *The Illinois Dram Shop Act: Recent Developments and Alternative Solutions*, 51 NW. U. L. REV. 775, 778 (1957).

23. 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14.

range of authority to protect the victims of drunk driving in Illinois.[24] This act created a statutory strict liability[25] action which victims[26] could invoke against any dram shop[27] which caused the intoxication of the person who injured them.[28] The 1934 Act limited the types of recoverable damages to personal injury, property injury, and injury to one's means of support.[29] These enumerated injuries could be caused "by" or "in consequence" of an intoxicated person's acts. "By" actions seek damages for direct injuries inflicted by an intoxicated person on a third person.[30] Conversely, "in consequence" actions are situations where the intoxicant, or his family, is injured as a result of the intoxication.[31]

The 1934 Act's most commanding component was unlimited recovery of both actual and exemplary damages.[32] Actual damages are damages which compensate plaintiffs for loss, while exemplary damages are damages which punish defendants, thereby

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24. See *infra* notes 25-33 and accompanying text for a discussion of the 1934 Act.

25. *See* Byrne v. Stern, 431 N.E.2d 1073, 1077 (Ill. App. Ct. 1981) (imposing strict liability on licensees for all violations of the Act); Douglas v. Athens Mkt. Corp., 49 N.E.2d 834, 839 (Ill. App. Ct. 1943) (requiring plaintiff to prove only that the laws were violated).

26. Enumerated plaintiffs under the 1934 Act included every "husband, wife, child, parent, guardian, employer or other person." 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14. See *infra* note 64 for a discussion of the language change in the 1955 amendments and its later repercussions.

27. Cruse v. Aden, 20 N.E. 73, 77 (Ill. 1889). The Act only applied to dram shops, specifically those in the business of dispensing alcoholic liquors. *Id.* Consequently, the Act did not apply to someone who gave liquor to a friend in a social host situation. *Id.* The holding in *Cruse* limiting liability to licensed sellers has been followed for more than a hundred years by Illinois courts. *See, e.g.*, Demchuk v. Dahlberg, 440 N.E.2d 112, 114 (Ill. 1982); Wessel v. Carmi Elks Home, Inc., 295 N.E.2d 718, 724 (Ill. 1973); Puckett v. Mr. Lucky's Ltd., 529 N.E.2d 1169, 1173 (Ill. App. Ct. 1988). *But see* Cravens v. Inman, 586 N.E.2d 367, 380 (Ill. App. Ct. 1991) (allowing social host liability when a social host negligently serves minors knowing they are intoxicated and will shortly drive an automobile). See *infra* note 79 for a discussion of the codification of the *Cruse* holding.

28. See *supra* note 10 for the current wording of the dram shop laws.

29. These three forms of recovery are still included in the current dram shop statute. *See* 235 ILCS 5/6-21 (1992). See *supra* note 10 for the current text of the statute. See *infra* notes 130-34 and accompanying text for a discussion of the inadequacies of the "loss of means of support" category.

30. GERALD B. MULLIN, ILLINOIS DRAM SHOP ACT PRACTICE (ICLE) ¶ 1.5 (1993). When the injury resulted "by" an intoxicated person's direct affirmative act, liability accrues upon proof of that fact. *Id.*

31. *Id.* ¶ 1.7. Where, for example, a "wage earner fell to the ground after becoming drunk and, as a result, died or became disabled, the injury to his dependents' means of support was 'in consequence' of the intoxication." *Id.*

32. *See* Howlett v. Doglio, 83 N.E.2d 708, 712 (Ill. 1949) (permitting both unlimited actual and exemplary damages).

deterring future misconduct.[33] Although courts could impose severe judgments,[34] most courts levied realistic awards in the reported dram shop cases.[35] Armed with the authority to award both actual, and more importantly, exemplary damages, Illinois courts then had a sword: they could award judgments which not only made an injured party whole, but also punished dram shops for violating the statute, thus preventing future misconduct.

A series of legislative amendments[36] to the dram shop laws have dulled the blade of the plaintiffs' dram shop sword and have beaten it into a shield in order to protect the liquor industry. Legislative amendments in 1949[37] commenced the process. The 1949 amendments were the first substantive changes to the dram

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33. BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

34. In Garrity v. Eiger, the landlord of a dram shop tenant was compelled to sell his building in order to cover the damages awarded in a judgment against his dram shop tenant. 111 N.E. 735, 740 (Ill. 1916). *See* Osborn v. Leuffgen, 23 N.E.2d 757, 758 (Ill. App. Ct. 1939) (imposing dram shop liability on owners who rent, lease, or permit their premises to be used as a place where alcohol is sold). This right of action against a landlord in lieu of a bankrupt tenant still exists in the current dram shop laws. *See generally* 235 ILCS 5/6-21 (1992).

35. Gibbons v. Cannaven, 66 N.E.2d 370, 378 (Ill. 1946) (upholding a jury verdict of $12,000 to a woman assaulted by a man who had become intoxicated at the defendant's tavern); Howlett v. Doglio, 79 N.E.2d 864, 865 (Ill. App. Ct. 1948) (awarding $3,000 to the mother of a decedent killed when a drunk driver crossed over the center line of the road and struck decedent, who was traveling in a car in the opposite direction), *rev'd on other grounds*, 83 N.E.2d 708 (Ill. 1949); Suppe v. Sako, 36 N.E.2d 603, 604 (Ill. App. Ct. 1941) (awarding $7,000 to survivors of an automobile accident and $600 to the owner of the car which the intoxicant was driving).

36. The dram shop laws were amended in 1949, 1955, 1959, 1963, 1965, 1967, 1971, 1976, 1982, 1983, 1985, and 1986. 1949 Ill. Laws 816 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14); 1955 Ill. Laws 1961 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14, now cited as ILL. REV. STAT. ch. 43, para. 135, § 14 (1955)); 1959 Ill. Laws 597 (amending ILL. REV. STAT. ch. 43, para. 135, § 14 (1955)); 1963 Ill. Laws 3324 (amending ILL. REV. STAT. ch. 43, para. 135, § 14 (1959)); 1965 Ill. Laws 2217 (amending ILL. REV. STAT. ch. 43, para. 135, § 14 (1963)); 1967 Ill. Laws 2701 (amending ILL. REV. STAT. ch. 43, para. 135, § 14 (1965)); P.A. 77-1186 (1971) (amending ILL. REV. STAT. ch. 43, para. 135, § 14 (1967)); P.A. 79-1360 (1976) (amending ILL. REV. STAT. ch. 43, para. 135, § 14 (1971)); P.A. 82-783 (1982) (renumbering ILL. REV. STAT. ch. 43, para. 135, § 14 (1976) to ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1982)); P.A. 83-706 (1983) (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1982)); P.A. 84-271 (1985) (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)); P.A. 84-634 (1985) (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)); P.A. 84-1380 (1986) (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1985)); P.A. 84-1381 (1986) (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1985)); P.A. 84-1438 (1986) (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1985)); P.A. 87-1005 (1992) (recodifying ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1986) as 235 ILCS 5/6-21 (1992)).

37. 1949 Ill. Laws 816 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14).

shop laws since their inception in 1872.[38] The 1949 amendments placed a $15,000 inclusive cap[39] on recovery and also instituted a two-year statute of limitations.[40]

In enacting the 1949 amendments,[41] the legislature failed to address two questions: first, the status of exemplary damages and, second, the calculation of "loss of means of support" damages. This legislative silence concerning exemplary damages and the "loss of means of support" calculation required the courts to answer these questions in subsequent decisions.[42] Exemplary damages are damages designed to punish a defendant to deter his, as well as others', future wrongful conduct.[43] Under the 1934 Act, the courts could award exemplary damages; however, after the 1949 amendments, the legislature's inaction forced the courts to decide whether the amended laws permitted exemplary damages under the $15,000 cap.[44] The courts answered this question in the negative, deciding that the 1949 amendments limited dram shop awards to compensatory damages.[45] This response contravened the purpose of the dram shop laws by restricting plaintiffs' recovery to only actual damages.[46]

Nonetheless, in answering the "loss of means of support" question, the courts upheld the original purpose of the dram shop laws: the protection of the "health and welfare of the people of Illinois."[47] "Loss of means of support"[48] is a category of recovery

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38. Ogilvie, *supra* note 20, at 179.

39. This cap was inclusive because all the recovery categories (loss of means of support, personal injury, and property loss) were limited to a combined total recovery of $15,000. See *infra* notes 66-68 and accompanying text for a discussion of the 1955 amendments which implemented individual caps for each recovery category.

40. 1949 Ill. Laws 816 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14).

41. *Id.*

42. See *infra* notes 45-47 for a discussion on how the courts decided to calculate exemplary damages and loss of means of support.

43. BLACK'S LAW DICTIONARY 390 (6th ed. 1990). Exemplary damages are different from compensatory damages which are designed to compensate only for the injuries actually sustained. *Id.*

44. See *infra* note 45 for a discussion of De Lude v. Rimek, 115 N.E.2d 561, 566 (Ill. App. 1953).

45. The 1949 amendments did not specifically eliminate exemplary damages when the amendments established the $15,000 cap; however, in the case of De Lude v. Rimek, the court decided that a defendant is liable only for actual damages. 115 N.E.2d 561, 566 (Ill. App. Ct. 1953). In *De Lude*, the court reversed a jury verdict for the plaintiff and remanded the case for submission to the jury for a determination of actual damages sustained by the plaintiff. *Id.*

46. See *supra* note 10 for a discussion of the purpose behind the dram shop laws.

47. *Id.*

48. The dram shop laws prescribe three categories of recovery: personal injury, property loss, and loss of means of support. 235 ILCS 5/6-21 (1992). See *supra* note

under the dram shop laws that reimburses dependents for future support which they would have received had their provider not been injured or killed.[49] The implementation of the 1949 recovery cap allowed courts to calculate damages under the "loss of means of support" category, either by the number of providers injured ($15,000 per injured provider), or by the number of dependents actually injured ($15,000 for each dependant injured).[50] The courts answered the calculation question in favor of the dependents, allowing each dependent to have a separate cause of action for the loss that he or she sustained.[51] For example, in *Childers v. Modglin*, the court awarded the wife and ten children of a man injured by an intoxicated person "loss of means of support" recovery of $15,000 for each plaintiff, resulting in an award of $165,000.[52]

The 1949 amendments also compelled plaintiffs to seek alternative forms of recovery outside the scope of the dram shop laws.[53] These plaintiffs sought to extend common law negligence theories to include other types of actions against dram shops.[54] However, those attempts failed.[55] The courts repeatedly held that

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12 for the actual language of the act. A classic example of a "loss of means of support" situation is where a father is killed or injured in a drunk driving accident. The survivors have a cause of action under the dram shop laws for the "loss of means of support" they suffered as a result of the father's injuries or death. See *infra* notes 130-34 and accompanying text for a discussion of the "loss of means of support" category's prejudicial prohibition against the recovery of domestic services.

49. L. BARETT BODACH, *Illinois Dram Shop Act Practice, in* ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, ¶ 2.4 (1993).

50. See *infra* note 52 and accompanying text for a discussion of how the Illinois courts resolved this discrepancy.

51. Childers v. Modglin, 119 N.E.2d 519, 519 (Ill. App. Ct. 1954).

52. *Id.* at 519. The court found that each plaintiff demanding "loss of means of support" had a separate right to recover up to the cap of $15,000. *Id.* at 522. To hold plaintiffs to one total recovery would be a far more "radical change in the general purpose and effect of the Act than a mere limit on the amount of each person's recovery." *Id.*; *see generally* Hudson v. Leverenz, 132 N.E.2d 427 (Ill. App. Ct. 1956) (allowing for full statutory recovery for any plaintiff injured within the terms of the dram shop laws), *rev'd on other grounds*, 139 N.E.2d 255, 258 (Ill. 1957).

53. *See* Busser v. Noble, 161 N.E.2d 150, 155 (Ill. App. Ct. 1959) (noting that the dram shop laws provided the exclusive remedy for plaintiffs); Fourt v. De Lazzer, 108 N.E.2d 599, 600 (Ill. App. Ct. 1952) (holding that the right of action against a dram shop exists "purely from statutory enactments").Likewise, the *Fourt* court also referred to the long-held position that it was not a tort at common law to serve alcohol to an able-bodied individual. *Id.*; *see also* Zboinsky v. Wojcik, 106 N.E.2d 764, 766 (Ill. App. Ct. 1952) (holding that plaintiff did not have common law cause of action against a dram shop); Padulo v. Schneider, 105 N.E.2d 115, 116 (Ill. App. Ct. 1952) (stating that the "inherent evils of intoxicating liquor have not enlarged upon the common law duty of the vendor to his patrons").

54. See *supra* note 53 for a listing of cases which sought to extend common law liability.

55. *Id.*

a plaintiff's cause of action against a dram shop is statutorily based, and that it was not a tort at common law to serve alcohol to an able-bodied individual.[56] After the restrictive precedents following the 1949 amendments, the courts would never again possess an adequate statutory power base from which to provide for the health and welfare of the people of Illinois.[57]

B. The 1955 Amendments

In 1955, the Illinois General Assembly once again enacted major amendments to the dram shop laws. The 1955 amendments[58] changed the dram shop laws in four distinct ways. First, the amendments restricted the "in consequence"[59] form of recovery to "loss of means of support" only. This had the effect of limiting recovery by the intoxicated person and his family to merely "loss of means of support."[60] No longer could the intoxicated person or his family recover for property loss or personal injury sustained "in consequence" of the intoxication.[61]

Second, the amendments eliminated the enumerated plaintiff language and replaced it with the phrase "[e]very person."[62] The purpose of the language change was to exclude insurance companies from recovering under the previous "other person" catchall language.[63] The language change also negated the inference that plaintiffs could recover for loss of domestic services under the "loss of means of support" category.[64]

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56. Fourt v. De Lazzer, 108 N.E.2d 599, 600 (Ill. App. Ct. 1952). See *supra* note 53 citing other cases holding the same.

57. See *supra* note 10 for the self proclaimed mandate of the Liquor Control Act of 1934.

58. 1955 Ill. Laws 1961 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14, now cited as ILL. REV. STAT. ch. 43, para. 135, § 14 (1955)).

59. As a result of the 1955 amendments, only a "loss of means of support" action could be premised on an "in consequence" theory of recovery. MULLIN, *supra* note 30, ¶ 1.3. This effectively wiped out recovery for the intoxicated person and his family for property loss and personal injury caused "in consequence" of his own intoxication. *Id.* See *supra* notes 30-31 for a discussion of the differences between "by" and "in consequence" theories of recovery. See *infra* notes 85-87 and accompanying text for a discussion of the 1985 amendment and the termination of the "in consequence" theory of recovery.

60. MULLIN, *supra* note 30, ¶ 1.3.

61. *Id.*

62. 1955 Ill. Laws 1961 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14, now cited as ILL. REV. STAT. ch. 43, para. 135, § 14 (1955)).

63. Comment, *supra* note 22, at 782. The change appears to broaden the potential plaintiffs under the statute; however, the change reflected the legislature's intention to exclude insurance companies from recovering under the former "other persons" provision in the statute. *Id.*

64. This language change will play a role in the future limiting of dram shop recovery through an implication of exclusion of non-breadwinning persons from recovery under the "loss of means of support" category. In the former version, both

Third, the amendments reduced the statute of limitations from two years to one year.[65] Not only did the legislature cut the statute of limitations in half; the courts further required that the plaintiff prove that he brought the cause of action within one year from the accident.[66] The courts distinguished actions under the dram shop laws as being purely statutory, bound by the criteria set forth in the statute alone, and not subject to normal tolling conventions.[67]

Finally, the 1955 amendments provided for segmented caps on recovery under the three types of recoverable damages.[68] The original 1949 cap limited each of the three recovery categories[69] to a total aggregate recovery of $15,000.[70] However, the 1955 amendments changed the aggregate recovery cap by furnishing each category with its own separate cap. This separation of the categories initially allowed for a greater total recovery because the courts allowed plaintiffs to recover the maximum amount under each category. However, the segmentation of the caps also led the courts to change the calculation of "loss of means of support" recovery.[71] Before, courts calculated "loss of means of support" ac-

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"husband" and "wife" were enumerated as proper plaintiffs. 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14. Implied in this language was that a husband could recover for the "loss of means of support" that he suffered through the loss of his wife's labor. However, with the change of the language to "[e]very person," the implication no longer exists. 1955 Ill. Laws 1961 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14, now cited as ILL. REV. STAT. ch. 43, para. 135, § 14 (1955)).

65. 1955 Ill. Laws 1961 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14, now cited as ILL. REV. STAT. ch. 43, para. 135, § 14 (1955)).

66. In Lowery v. Malkowski, 170 N.E.2d 147, 149 (Ill. 1960), the court further defined the one year period as a condition precedent to bringing a dram shop action.

67. *Lowery*, 170 N.E.2d at 149. *See* McCullough v. Tomaich, 314 N.E.2d 643, 645 (Ill. App. Ct. 1974) (bringing an action within the one year prescribed time is a condition precedent to recovery, not a statute of limitations).

68. 1955 Ill. Laws 1961 (amending 1933-1934 Ill. Laws 2d Spec. Sess., 57, art. VI, § 14, now cited as ILL. REV. STAT. ch. 43, para. 135, § 14 (1955)).

69. The three categories are personal injury, property loss, and loss of means of support. 235 ILCS 5/6-21 (1992).

70. See *supra* notes 37-41 and accompanying text for a discussion of the 1949 recovery caps.

71. Steller v. Miles, 150 N.E.2d 630, 637 (Ill. App. Ct. 1958). The *Steller* court held: "Undoubtedly, the language of the recovery limitation provision could have been improved upon, but regardless of its shortcomings, the intent of the law makers is not thereby obscured. . . . [It was] the purpose and intent of the legislature to establish a method of uniform procedure in loss of support cases. . . ." *Id.* Under the *Steller* calculation, recovery for "loss of means of support" would be treated as a class action recovery, with "the distribution of any amount recovered among the members of the claimant class." *Id.*

The *Steller* decision was in direct conflict with the decision in Childers v. Modglin, 119 N.E.2d 519, 519 (Ill. App. Ct. 1954). See *supra* note 51 and accompa-

cording to the number of dependents injured.[72] However, with segmented caps, courts decided that the "loss of means of support" should be calculated according to the number of providers injured.[73] The recovery caps set in 1955 remained unchanged for thirty years.

C. The 1985 Amendments

Not until 1985 did the legislature raise the segmented recovery limitations established in the 1955 amendments.[74] In 1985, the Illinois legislature passed two separate amendments to the dram shop laws.[75] These amendments combined to constitute the most comprehensive transformation of the dram shop laws to date.

The 1985 amendments made three major changes to the dram shop laws. First, the amendments codified three long established dram shop judicial practices:[76] allowing "stacking" of the three categories of recovery;[77] calculating "loss of means of support" according to the number of providers injured;[78] and limiting

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nying text for a discussion of the *Childers* case. The Illinois Supreme Court, in Moran v. Katsinas, 157 N.E.2d 38, 40 (Ill. 1959), resolved the conflict between the divergent *Steller* and *Childers* decisions concerning the calculation of "loss of means of support" damages. See *infra* note 73 and accompanying text for a discussion of the *Moran* decision.

72. See *supra* notes 50-52 and accompanying text for a discussion of the 1949 amendment and how "loss of means of support" was calculated after that amendment.

73. Moran v. Katsinas, 157 N.E.2d 38, 40 (Ill. 1959). Given more direction by the 1955 amendments for the calculation of "loss of means of support" damages, the Illinois Supreme Court thereafter decided that recovery for "loss of means of support" was limited to an aggregate recovery not to exceed the single limitation set forth in the act, regardless of number of persons claiming support. *Id.* The *Moran* court reasoned that the dram shop laws should be definite and certain so that bar owners could know with certainty the maximum obligation that they would be expected to meet. *Id.* Once the Illinois Supreme Court had answered the calculation question, no longer would the courts be able to fashion judgments to ensure the protection of the health and safety of the people of Illinois.

74. See *supra* notes 58-73 and accompanying text for a discussion of the 1955 amendments.

75. 1986 Ill. Laws 84-271 and 1986 Ill. Laws 84-634) (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)).

76. 1986 Ill. Laws 84-271 (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)).

77. *Id.* Stacking is a practice which allows for the combining of recoverable damages. As applied to the dram shop act, stacking means that a plaintiff can recover the maximum amount under all three types of recovery (personal injury, property damage, and loss of means of support). Because the dram shop act only pertains to actual damages, a plaintiff must establish that he has sustained each type of loss before recovery under the statute is allowed. See *infra* notes 129-39 and accompanying text for a discussion of the inadequacies of the "loss of means of support" category.

78. 1986 Ill. Laws 84-271 (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21

liability to licensed vendors only.[79] Second, the legislature doubled the recovery caps,[80] allowing the plaintiff to recover up to $30,000 for both "personal injury" and "property loss." This amendment also raised the cap on "loss of means of support" recovery to $40,000.[81] The increase in the caps was only made possible by a compromise in Springfield.[82] The legislature was willing to increase the recovery caps only if it could shield its dram shop owner constituents from higher liability insurance rates.[83]

The legislature accomplished this by eliminating a whole category of recovery, the third major change to the previous dram shop laws. The act barred all recovery by the intoxicant's family.[84] This amendment sounded the death knell for the "in consequence" cause of action.[85] Before, an intoxicated person or his family could recover for injuries to their "means of support" sustained "in consequence" of the intoxication.[86] The legislature, in

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(1983)). This change was a direct codification of the *Moran* decision. See *supra* note 73 and accompanying text for a discussion of the *Moran* decision. See *infra* note 88 for a discussion of possible legislative motives for codifying this long established judicial practice.

79. 1986 Ill. Laws 84-634 (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)). This amendment codified the long established rule laid down in the case of Cruse v. Aden that only licensed retailers of liquor were liable under the act. 20 N.E. 73, 77 (Ill. 1889). See *supra* note 27 for a discussion of *Cruse* and its progeny.

80. 1986 Ill. Laws 84-271 (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)). The 1985 amendments were the first time that the recovery caps had been increased since 1955 amendments, some thirty years earlier.

81. *Id.*

82. See *infra* note 83 for a discussion of the legislative compromise allowing for increased caps.

83. Legislators were concerned that the increased caps would put the "ma and pa" bar owners out of business because of increases in dram shop insurance premiums. Floor debates from the Illinois House of Representatives demonstrate that many of the legislators were more concerned with the increased insurance premiums that dram shop owners would have to pay than with the inadequate recovery predicament confronting innocent victims of drunk driving accidents. See *infra* notes 94, 96 for excerpts from the actual floor debates.

Consequently, the legislators were willing to allow an increase in the caps only if the amendments also prohibited any recovery by the intoxicant's family. Thus, while the recovery caps went up, the amendments wiped out a whole category of recovery.

The preference shown by the legislature toward the liquor industry demonstrates that the liquor lobbyists are an extremely powerful force in the state capital. This conviction is buttressed by the fact that the state wide liquor excise tax has not been raised in Illinois since 1969. Telephone Interview with Tom Locassio, Director, Beverage, Alcohol, Sellers and Servers Educational Training (BASSET) program (Jan. 31, 1994).

84. 1986 Ill. Laws 84-271 (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)).

85. MULLIN, *supra* note 30, ¶ 1.5. See *supra* notes 30-31 for a discussion of the difference between a "by" and "in consequence" theory of recovery under the dram shop laws.

86. See *supra* note 31 and accompanying text for a discussion of the "in conse-

passing the 1985 amendments, completely barred an intoxicant and his family from this recovery.[87] Although these amendments doubled the recovery caps under the dram shop laws, the codification of the changes ensured that the courts would continue to possess only a blunted sword.[88] By codifying the "loss of means of support" calculation, the legislature prevented the courts from reverting back to a more equitable calculation based on the number of dependents injured.[89]

The Illinois legislature has consistently hammered away at the dram shop laws. This hammering began in 1949 with the imposition of recovery caps[90] and continued through the succeeding amendments.[91] Through these amendments, the legislature has effectively beaten the sword, originally designed as a weapon to safeguard the "health and welfare" of the people,[92] into a shield protecting, instead, the rights of dram shop owners. This transformation resulted in the inadequate dram shop laws which now exist.

II. EVALUATION OF CURRENT ILLINOIS DRAM SHOP LAWS

There are four major deficiencies in the Illinois dram shop laws. First, the laws reflect greater concern for the liquor industry[93] than for the victims of drunk driving. Second, the laws al-

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quence" form of recovery.

87. 1986 Ill. Laws 84-271 (amending ILL. REV. STAT. ch. 43, para. 135, § 6-21 (1983)). See *supra* note 60 and accompanying text for a discussion of how the 1955 amendments had previously restricted the "in consequence" theory of recovery to apply only to "loss of means of support" actions.

88. The codification of the judicial practice of damage calculation for "loss of means of support" was apparently a maneuver by the legislature to ensure that the courts would not overturn their previous self-restraining decisions. Beginning with the *Steller* and *Moran* decisions, the courts themselves blunted their own use of the dram shop sword by choosing a calculation for "loss of means of support" according to the number of providers injured rather than by the number of dependents injured. Thus, the codification of court decisions to that effect was a legislative guarantee that the courts would be bound to such a calculation. See *supra* notes 71-73 and accompanying text for a discussion of the *Stellar* and *Moran* decisions.

89. This restriction is important because since 1985, the legislature has failed to raise the caps. Now, because of the codification, the courts are forced to continue with such a calculation even though every year, with the effects of inflation, the maximum recovery becomes more and more inadequate. By codifying the calculation the legislature ensured that the courts cannot revert back to the calculation based on the number of dependents actually injured.

90. See *supra* notes 37-57 and accompanying text for a discussion of the 1949 amendments.

91. See *supra* notes 19-89 and accompanying text for a discussion of the transformation of the Illinois dram shop laws.

92. See *supra* note 10 for the purpose of the Illinois dram shop laws.

93. For this Note, the term "liquor industry" denotes all establishments licensed

low recourse against dram shops for the injury, but not for the wrongful death, of the victim. Third, the dram shop laws prejudicially prohibit non-breadwinner recovery. Finally, the laws' current recovery caps are absurdly low.

A. Inappropriate Protection of the Liquor Industry

In debating the 1985 amendments to the dram shop laws, many legislators indicated that they were more concerned with protecting the liquor industry[94] than with providing adequate protection for innocent victims.[95] State Representative Panayotovich illustrated this misplaced concern for the liquor industry when he stated, "[s]o, what we're doing is were [sic] increasing the cost of the Ma and Pa tavern, that neighborhood tavern . . . all these places that we all go to."[96]

Possessing a liquor license in the State of Illinois is not a right; instead, it is "purely a personal privilege"[97] which the state may revoke.[98] Although taverns have a right to do business, that right does not outweigh the people's right to safety. Holding a higher concern for the rights of bar owners than for the rights of innocent victims directly contradicts the purpose of the dram shop laws.[99] Furthermore, the improper application of the Wrongful Death Act is another aspect of the Illinois dram shop law which undermines its purpose.

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to sell alcohol.

94. Representative Regan stated:

> I believe that we're one of the very very few states that still have the Dram [shop] Act enforced here. I don't support [House Bill 737] at all. I think that it's a double layer of coverage that should be eliminated, and I certainly don't think that the benefits should be increased. And I just have a funny feeling that if the Liquor Association . . . would definitely oppose this bill. I stand opposed.

H.R. 168, 84th Gen. Ass'y, 1st Sess. (May 23, 1985). See *infra* note 178 and accompanying text for a discussion of the 36 states which currently have dram shop statutes.

95. See *supra* note 83 and accompanying text for a discussion of the compromise which allowed for the passage of the 1985 amendments.

96. H.R. 169, 84th Gen. Ass'y, 1st Sess. (May 23, 1985). Representative Panayotovich went on to say: "We are increasing their cost of business to stay in business by increasing the tax. . . . I stand in opposition to [House Bill 737], and I think everybody should take a look at it and see that we do not need to have to worry about raising the Dramshop limits." *Id.* at 169-70.

97. 235 ILCS 5/6-1 (1992); *see* Klopp v. Benevolent Protective Order of Elks, 33 N.E.2d 161, 165 (Ill. App. Ct. 1941) (noting that the right to sell intoxicating liquors is permissive only).

98. 235 ILCS 5/6-1 (1992).

99. See *supra* note 10 for the statutory text defining the purpose behind the dram shop laws.

B. Necessity for Wrongful Death Recovery

Under the current Illinois dram shop laws,[100] an injured third person can recover damages for his or her "personal injury" resulting from an intoxicated person's acts.[101] Recoverable damages under this category include pain and suffering,[102] disability and disfigurement,[103] and medical expenses.[104] Emotional distress is not a recoverable damage.[105] The inadequacy of recoverable damages under the "personal injury" category becomes even more apparent when an intoxicated tortfeasor actually kills a victim.

Under these circumstances Illinois courts allow heirs and next of kin to recover for the "personal injury" suffered by the decedent.[106] However, if the decedent dies instantaneously in an accident,[107] the survivors' recovery attempts are severely complicated.[108] For example, when the victim dies in a car accident, the survivors must prove that the decedent actually suffered "conscious pain" before his resulting death.[109] If the survivors cannot prove conscious suffering, they recover nothing under the "personal injury" category.[110] Survivors have to demonstrate conscious

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100. See *supra* note 12 for text of the current laws.

101. 235 ILCS 5/6-21(a) (1992).

102. Maras v. Bertholdt, 467 N.E.2d 599, 607 (Ill. 1984).

103. Halka v. Zupan, 386 N.E.2d 439, 443 (Ill. App. Ct. 1979).

104. Rinkenberger v. Cook, 548 N.E.2d 133, 134 (Ill. App. Ct. 1989).

105. Engel v. Lamplighter, Inc., 526 N.E.2d 641, 643 (Ill. App. Ct. 1988).

106. Maras v. Bertholdt, 467 N.E.2d 599, 604 (Ill. 1984); Liberty Mut. Ins. Co. v. Lloyd Schoenheit Truck & Tractor Serv., 547 N.E.2d 1272, 1274 (Ill. App. Ct. 1989).

107. *See* Estate of Barney v. Berry, 615 N.E.2d 1342, 1344 (Ill. App. Ct. 1993) (involving an instantaneous death); Messenger v. Vogler, 553 N.E.2d 61, 62 (Ill. App. Ct. 1990) (involving an instantaneous death).

108. *See* Maras v. Bertholdt, 467 N.E.2d 599, 608-10 (Ill. 1984). In *Maras*, after refusing to recognize a wrongful death cause of action, the court remanded the case for a determination as to whether the plaintiffs could prove that the decedent suffered conscious pain and suffering before she died. *Id.* at 610. The court did not express an opinion as to whether this could be proven. *Id.* However, the court noted that because the decedent was unconscious when she was found at the scene of the accident, "the maximum time period for which plaintiff could conceivably establish pain and suffering was from the time the accident occurred until she was located in the field approximately twenty minutes later." *Id.*

109. *Cf.* Messenger v. Vogler, 553 N.E.2d 61, 62 (Ill. App. Ct. 1990).

110. In *Messenger* the appellate court stated: "It seems anomalous that a person injured to the extent that he dies immediately should have no cause of action for his personal injuries while a person less severely injured should be able to recover damages." 553 N.E.2d at 63. Nonetheless, after illustrating this anomaly, the court digressed by stating that nothing in the legislative history indicated that the legislators intended such recovery. *Id.* The court further declared that any change would have to come from the legislature and not from the courts. *Id.* See *infra* note 187 for discussion of Alvis v. Ribar, 421 N.E.2d 886, 895 (Ill. 1981), where the Il-

pain and suffering because Illinois courts have consistently refused to apply the Wrongful Death Act[111] to dram shop cases.[112]

In 1937 the Illinois Supreme Court, in *O'Connor v. Rathje*,[113] held that the Wrongful Death Act and the Dram Shop Act were separate and distinct.[114] This holding laid the foundation for subsequent decisions rejecting the incorporation of the Wrongful Death Act into dram shop cases.[115] However, the circumstances surrounding the status of today's dram shop laws are distinguishable from the situation presented in *O'Connor*.

O'Connor presented an appeal by a defendant tavern owner who sought to synthesize the dram shop laws and the Wrongful Death Act to limit his liability.[116] The defendant in *O'Connor* wanted to confine his liability to the damage caps provided under the Wrongful Death Act.[117] However, the court distinguished the dram shop laws from the Wrongful Death Act based on the difference in allowable damages: the dram shop statute allowed for unlimited damages, but the Wrongful Death Act recovery caps limited recovery to $10,000.[118] Consequently, because the two acts were not in conflict, the court allowed O'Connor to recover for the death of her son, who was killed at the defendant's tavern by an intoxicated patron.[119]

That rationale no longer applies today, for three reasons. First, at the time *O'Connor* was decided, in 1937, the Wrongful Death Act was the more constraining of the two acts. It designated a $10,000 cap on recovery, while recovery under the dram shop laws was unlimited.[120] In *O'Connor*, the defendant, not the injured victim, was attempting to synthesize the dram shop and

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linois Supreme Court initiated change in an area in which the legislature had refused to act.

111. 740 ILCS 180/0.01 (1992). Note that the survivors can maintain a wrongful death cause of action against the drunk driver. *Id.* The prohibition discussed in the text refers to the courts' refusal to apply the wrongful death concept into the dram shop action against the bar. *Id.*

112. O'Connor v. Rathje, 12 N.E.2d 878, 880 (Ill. 1937) (refusing to allow wrongful death recovery under dram shop laws in a case of first impression in Illinois).

113. *Id.*

114. *Id.*

115. Knierim v. Izzo, 174 N.E.2d 157, 161 (Ill. 1961). *See, e.g.*, Howlett v. Doglio, 83 N.E.2d 708, 712 (Ill. 1949); Messenger v. Vogler, 553 N.E.2d 61, 62 (Ill. App. Ct. 1990); Farmers State Bank & Trust Co. v. Lahey's Lounge Inc., 519 N.E.2d 121, 125 (Ill. App. Ct. 1988); Maras v. Bertholdt, 467 N.E.2d 599, 604 (Ill. App. Ct. 1984).

116. *O'Connor*, 12 N.E.2d at 879.

117. *Id.* at 880.

118. *Id.*

119. *Id.*

120. *Cf. id.* See *infra* notes 32-35 and accompanying text for a discussion of the unlimited recovery possible under the dram shop laws at the time.

wrongful death acts to shield his own liability.[121]

Second, today the circumstances surrounding the two acts have completely changed. Now, plaintiffs seek the incorporation of the wrongful death statute into the dram shop laws in an attempt to get around the proof requirements associated with the "personal injury" category of recovery, primarily the requirement that plaintiffs prove "conscious pain and suffering" before death.[122] These attempts, thus far, have been fruitless because modern courts still apply the *O'Connor* rule.[123]

Lastly, in *O'Connor* the court decided in favor of the plaintiff, in accord with the self-proclaimed intent of the dram shop laws, to "protect the people of Illinois."[124] Today, the isolation of the two acts operates in favor of the defendant dram shops, in direct opposition to the protective intent behind the dram shop laws. These changed circumstances provide the courts with the opportunity to reexamine their preclusion of the wrongful death statute from dram shop cases. Application of the wrongful death statute would allow survivors to recover for a victim's death under the "personal injury" category.

This outcome is equitable and is warranted by the fact that prior courts have erroneously applied the rule in *O'Connor* without considering the circumstances under which it was decided.[125] Moreover, the application of the wrongful death statute would show that the courts acknowledge that the dram shop laws were intended to "protect the people of Illinois." In spite of the foregoing, Illinois courts have not yet allowed for the incorporation of the Wrongful Death Act into a dram shop case.[126] The results of this unwillingness are extremely troubling. In refusing to apply the Wrongful Death Act, the Illinois courts create a legal landscape in which it is cheaper for the defendant tavern if the drunk driver kills the victim, rather than merely injuring him. This result is "intolerable."[127]

Drunk driving accidents are tragic. When an innocent victim of such an accident dies, the tragedy is amplified. The wrongful

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121. O'Connor v. Rathje, 12 N.E.2d 878, 880 (Ill. 1937).

122. *See* Messenger v. Vogler, 553 N.E.2d 61, 62 (Ill. App. Ct. 1990).

123. *See, e.g.*, Messenger v. Vogler, 553 N.E.2d 61, 62 (Ill. App. Ct. 1990); Farmers State Bank & Trust Co. v. Lahey's Lounge Inc., 519 N.E.2d 121, 125 (Ill. App. Ct. 1988); Witek v. Leisure Technology Midwest, Inc., 350 N.E.2d 242, 244 (Ill. App. Ct. 1976).

124. 12 N.E.2d at 880.

125. See *supra* notes 113-24 and accompanying text for a discussion of the *O'Connor* case.

126. See *supra* note 123 for Illinois cases which have refused to incorporate the Wrongful Death Act into a dram shop recovery.

127. Brief for Appellant at 10, Messenger v. Vogler, 553 N.E.2d 61 (Ill. App. Ct. 1990) (No. 89-701).

death deficiency in the Illinois dram shop laws simply adds to the suffering. The legislature enacted the dram shop laws to provide for the "health and welfare of the people of Illinois;"[128] however, the current status of the "personal injury" category operates in direct opposition to the underlying goals of the dram shop laws.

The courts conceivably could correct this aspect of the dram shop laws by acknowledging that the reasoning underlying *O'Connor* is no longer applicable. If the courts refuse to take this opportunity to amend this deficiency, then they will be placing their imprimatur on the notion that the death of an innocent victim, in itself, is worth nothing under the dram shop laws. This prohibition against wrongful death recovery is even more troubling when combined with the prohibition against non-breadwinner recovery under current Illinois dram shop laws.

C. Prohibitions Against Non-Breadwinner Recovery

Under the dram shop laws' "loss of means of support" category of recovery, dependents can recover from a tavern any "loss of means of support" caused by one of their intoxicated patrons.[129] Damages are "measured by such tangibles as loss of wages and inability to earn a living."[130] This definition of "loss of means of support" fails to include domestic services provided by one family member for another.[131] Illinois' prohibition is particularly indefensible in light of the legislature's recognition of such contributions in other areas of the law, such as divorce.[132] Nonetheless,

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128. See *supra* note 10 for the self-proclaimed purpose of the dram shop laws.

129. 235 ILCS 5/6-21(a) (1992).

130. Farmers State Bank & Trust Co. v. Lahey's Lounge Inc., 519 N.E.2d 121, 123 (Ill. App. Ct. 1988).

131. *Id.* at 124 (refusing to recognize wife's domestic services under the "loss of means of support" category); Wilberton v. Freddie's Pepper Box, Inc., 499 N.E.2d 615, 618 (Ill. App. Ct. 1986) (refusing to include wife's alleged "occupational services and support" as "loss of means of support" because such integration was beyond the legislature's intent); Martin v. American Legion Post, 383 N.E.2d 672, 674 (Ill. App. Ct. 1978) (refusing to recognize the domestic services which decedent daughter performed in caring for her brother and sister). *Cf.* Weiner v. Trasatti, 311 N.E.2d 313, 318 (Ill. App. Ct. 1974) (allowing wife's death to be a "loss of means of support" because wife had worked at the family delicatessen).

The court in *Wilberton* refused to accept a "liberal construction" of the "loss of means of support" category. 499 N.E.2d at 618. There, the court reasoned that because the legislature had amended the act many times, and in doing so had declined to include domestic services under the "loss of means of support" category, the courts were restricted to a construction prohibiting such recovery. *Id.* The legislature's inaction was understood to be legislative intent that domestic services were not included in the "loss of means of support" category. *Id.*

Note that the *Weiner* case, mentioned above, has been distinguished because the wife there actually did provide actual support for the husband by working at the family delicatessen. *Martin*, 383 N.E.2d at 674.

132. In divorce proceedings, the trial court is required to consider all relevant

under the current Illinois dram shop laws, anyone injured by a drunk driver who, at the time of the accident was not an income producer, is denied recovery under the "loss of means of support" category.[133] This prohibition discriminates against non-breadwinning family members and also adds to their injury because it renders the contributions of a homemaker to a family unit worthless under the dram shop laws.

The inadequacies of the "loss of means of support" and "personal injury" categories are unjustifiable.[134] However, when the two categories combine in a drunk driving accident, their inadequacies become even more obvious. For example, if a homemaker walking along the sidewalk is killed instantaneously by a drunk driver, her survivors recover nothing from the dram shop under either category. The court would deny "personal injury" recovery because the survivors would be unable to prove conscious pain or suffering.[135] The court would deny "loss of means of support" recovery because domestic services are not compensable.[136] The survivors would be left with only one possible[137] avenue of recov-

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factors, including: "any impairment of the present and future earning capacity . . . due to the [time devoted] to domestic duties." 750 ILCS 5/504(a)(4) (1992).

133. *See* Shiflett v. Madison, 245 N.E.2d 567, 570 (Ill. App. Ct. 1969) (holding that "loss of means of support" is construed to require that the person injured did in fact render support, and further holding that no damage award can be based on future potentiality of support not presently provable); Robertson v. White, 136 N.E.2d 550, 552 (Ill. App. Ct. 1956) (holding that parents of a child killed by a drunk driver were not able to recover under the "loss of means of support" category).

134. See *supra* notes 101-27 and accompanying text for a discussion of the "personal injury" category. See *supra* notes 129-33 and accompanying text for a discussion of the "loss of means of support" category.

135. See *supra* notes 106-12 and accompanying text for a discussion of the requirement of proof of conscious pain and suffering under the "personal injury" category.

136. See *supra* notes 129-33 and accompanying text for a discussion of the current prohibitions against non-breadwinner recovery under the "loss of means of support" category.

137. This is only a "possible recovery" because the survivors would have to prove that they actually suffered property loss. *See* Ragan v. Protko, 383 N.E.2d 745, 748 (Ill. App. Ct. 1978) (denying recovery to parents of deceased son for the value of their wrecked car because the value of the car was not established at trial).

As a general rule, medical expenses do not qualify as an "injury to property" under the act. Thorsen v. City of Chicago, 392 N.E.2d 716, 725 (Ill. App. Ct. 1979). Nonetheless, courts have held that medical expenses can qualify as property damage when a minor or spouse is physically injured and the parent or non-injured spouse is under an obligation to pay for their medical expenses. Thompson v. Tranberg, 360 N.E.2d 108, 110 (Ill. App. Ct. 1977); *see also* Kelly v. Hughes, 179 N.E.2d 273, 274 (Ill. App. Ct. 1962) (permitting parent
to recover under dram shop laws for medical expenses).

A New York court, interpreting a dram shop act grammatically similar to the Illinois act, was forced to consider whether a deceased child was a recoverable "property loss." In deciding the case the court reluctantly held:

ery under the dram shop laws: loss of property. However, the court probably would deny property recovery because, in this example, the survivors did not sustain any actual property loss, such as a wrecked automobile.[138] This is exactly what happened to the Wheatleys in their recovery attempts against the three bars that served Edward Frietag the day he killed Kellie Wheatley.[139] Even had they been able to recover, the Wheatleys would have been limited in their recovery by a further deficiency in the Illinois dram shop laws, extremely low recovery caps.

D. Illinois' Current Recovery Caps

The Illinois dram shop laws impose recovery caps on dram shop actions.[140] Illinois' current caps restrict plaintiffs to $40,000 for "loss of means of support," $30,000 for personal injury, and $30,000 for property loss.[141] Plaintiffs can stack these separate categories for a potential total recovery of $100,000.[142] However, with the absence of the application of the wrongful death statute[143] and the nonrecognition of domestic services,[144] achieving this potential $100,000 recovery can be difficult, and actually impossible for certain types of injured victims.[145] For example, the Wheatleys recovered no "personal injury" damages because the drunk driver killed Kellie instantaneously. They recovered no "loss of means of support" damages because Kellie was not working.[146] Finally, the Wheatleys recovered no "property" damages because the drunk driver killed Kellie while she was standing on

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> In order to recover . . . [the father] must establish the fact that he has been injured either in his person, property, or means of support. In this case. . . . [i]t was the plaintiff's son that was injured, and the father has no property in the son. If it had been his horse or cow . . . that was injured, then it would be an injury to property.

Stevens v. Cheney, 36 N.Y. Sup. Ct. 1, 3 (N.Y. App. Div. 1885).

138. The survivors might be able to recover the funeral expenses they incurred; however, these expenses are only considered "property loss" if the person who paid for them had a legal obligation to do so. *Cf. Thompson*, 360 N.E.2d at 110.

139. *Cf.* Farmers State Bank & Trust Co. v. Lahey's Lounge Inc., 519 N.E.2d 121, 124 (Ill. App. Ct. 1988).

140. 235 ILCS 5/6-21(a) (1992).

141. *Id.*

142. *Id.* See *supra* note 77 for a discussion of stacking.

143. See *supra* notes 106-12 and accompanying text for a discussion of the nonapplication of the Wrongful Death Act to dram shop causes of action.

144. See *supra* notes 129-33 and accompanying text for a discussion of the prohibition against the recognition of domestic service under the "loss of means of support" category.

145. *See, e.g.*, Farmers State Bank & Trust Co. v. Lahey's Lounge Inc., 519 N.E.2d 121, 124 (Ill. App. Ct. 1988).

146. *Id.*

the corner, rather than riding in a car.[147]

Illinois is one of six states which impose liability caps on dram shop recoveries.[148] These caps not only place Illinois in the minority of states which impose caps; the caps are also the second lowest in the nation.[149] The current recovery caps have remained at their current inadequate levels since 1985,[150] and before that change, the caps had remained frozen for more than twenty years.[151] Since the segmentation of the caps in 1955, if the "loss of means of support" cap had increased with inflation, the cap would be "closer to $150,000 than to the current limit of $40,000."[152]

The current caps provide an inadequate recovery when the victim is hospitalized. Medical costs associated with drunk driving injuries can be astronomical; in some instances, the victims themselves are left paying the bills.[153] Under the current Illinois caps, any recovery attained by a victim will frequently go toward paying the victim's medical bills, instead of compensating the victim for the other losses suffered in the accident.[154]

A better question is why Illinois should impose any caps at all. Other states have rejected such caps because they single out liquor providers from the rest of society, insulating them from the consequences of their own negligence.[155] The state supreme courts in Minnesota[156] and New Mexico,[157] for instance, have

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147. *Id.*

148. The legislation in the other five states is: COLO. REV. STAT. § 13-21-103 (1987); CONN. GEN. STAT. § 30-102 (1958); ME. REV. STAT. ANN. tit. 28A, § 2509 (West 1988); N.C. GEN. STAT. § 18B-123 (1993); UTAH CODE ANN. § 32A-14-101 (1991). See *infra* notes 162-86 and accompanying text for a discussion of other states' dram shop statutes.

149. *Cf.* COLO. REV. STAT. § 12-47-128.5 (1987) (allowing recovery up to $150,000); CONN. GEN. STAT. ANN. § 30-102 (1990) (allowing recovery up to $20,000); ME. REV. STAT. ANN. tit. 28A, § 2509 (West 1964) (allowing recovery up to $250,000); N.C. GEN. STAT. § 18B-123 (1989) (allowing recovery up to $500,000); UTAH CODE ANN. § 32A-14-101 (1991) (allowing recovery up to $100,000).

150. See *supra* notes 19-92 and accompanying text for a discussion of the transformation of the Illinois dram shop laws.

151. *Id.*

152. Paul Froehlich, *Dramshop Law Is Ripe for Reform*, ALLIANCE AGAINST INTOXICATED MOTORISTS NEWSNOTES, Summer 1990, at 2.

153. For example, Fran Liquori was injured in a crash when a drunk driver plowed into her car after becoming intoxicated at a Chicago bar. Flynn McRoberts, *Injured Pay High Cost For Low Cap on Dramshop Claims*, CHI. TRIB., Dec. 15, 1991, at 1, Zone C. Liquori settled with the bar for $60,000, but that amount, even added to the money she received from her own insurance company, was not nearly enough to cover her medical costs from the accident. *Id.*

154. *Id.*

155. See *infra* notes 157-58 and accompanying text for a discussion of Richardson v. Carnegie Library Restaurant, 763 P.2d 1153, 1166 (N.M. 1988).

156. McGuire v. C & L Restaurant, 346 N.W.2d 605, 615 (Minn. 1984) (invalidating Minnesota dram shop caps because recovery limitations were different for bars

ruled dram shop recovery caps unconstitutional. The Supreme Court of New Mexico, in invalidating the state's recovery cap, stated:

> [w]e are distinctly unable to rationalize a legitimate or substantial reason for limiting the liability of a tavern keeper who has a duty not to place drunks behind the wheel of a vehicle on the highway when, by contrast, a rancher or farmer is fully liable for negligently allowing his livestock to meander dumbly into the path of oncoming vehicles.[158]

However, to date, the Illinois dram shop caps have been upheld by the Illinois courts. Although the issue has yet to reach the Illinois Supreme Court, in 1985 an Illinois appellate court, in *Mulhern v. Talk of the Town, Inc.*, held that the Illinois dram shop caps were constitutional.[159] As a result, in Illinois, the liquor industry is "the only industry with a cap for negligence awards."[160]

These low caps, combined with the many other dram shop deficiencies, result in a situation which, instead of protecting victims, actually suppresses their recovery attempts. Other states' approaches offer insight into potential solutions to cure the current deficiencies in Illinois dram shop laws. The remainder of this Note examines these other approaches.

III. EFFECTIVE MEASURES EMPLOYED IN OTHER STATES

Dram shop laws in other states illustrate the deficiencies in Illinois law and provide models for change in Illinois. First, other states do not shield the liquor industry at the expense of the protection of their own citizens. Second, other states apply their wrongful death statutes to dram shop recovery, and, in doing so, give value to the lost life of a deceased victim. Third, other states do not prejudicially prohibit recovery for loss of domestic services as a "loss of means of support." Lastly, the minority of states which impose recovery caps on dram shop actions afford adequate recovery for injured victims by implementing a more sensible approach to their limitations.

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that served 3.2% beer versus those that served regular strength alcohol).

157. Richardson v. Carnegie Library Restaurant, 763 P.2d 1153, 1166 (N.M. 1988). See *infra* note 158 and accompanying text for a discussion of the *Richardson* case.

158. *Richardson*, 763 P.2d at 1164.

159. Mulhern v. Talk of the Town, Inc., 486 N.E.2d 383, 388 (Ill. App. Ct. 1985) (deciding that the imposition of dram shop recovery caps are constitutional).

160. Flynn McRoberts, *Injured Pay High Cost For Low Cap on Dramshop Claims*, CHI. TRIB., Dec. 15, 1991, at 1, Zone C. While workers' compensation provides caps for negligence awards, it covers a wide range of industries.

A. Control over the Liquor Industry

The possession of a liquor license in Illinois is not a right; instead, it is "purely a personal privilege."[161] Other states uphold this idea of a privilege by requiring server training for employees of licensed liquor establishments.[162] Illinois currently requires 1300 hours of training to procure a barber's license; yet, the state requires no training whatsoever for bartenders or other servers of alcoholic beverages to assist them in preventing drunk driving accidents.[163] Studies have documented that server training reduces drunk driving accidents.[164] Consequently, requiring server training in Illinois would be consistent with the protective design of the dram shop laws.

The Prevention Research Group conducted an eighteen month research project on state dram shop liability.[165] This project culminated in the drafting of the Model Dram Shop Act (Model Act) in 1985.[166] The Model Act calls for comprehensive training of employees regarding responsible service of alcoholic beverages and the management of intoxicated patrons.[167] Two states have fully adopted the mandatory training aspect of the Model Act,[168] while other states have used it as a guide for updating their dram shop laws.[169]

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161. 235 ILCS 5/6-1 (1993); *see* Klopp v. Benevolent Protective Order of Elks, 33 N.E.2d 161, 166 (Ill. App. Ct. 1941) (holding that the right to sell intoxicating liquors is permissive only).

162. James Mosher, *The Model Alcoholic Beverage Retail Licensee Liability Act of 1985*, 12 WASH. L. REV. 442, 477 (1985). See *infra* notes 168-69 and accompanying text for a discussion of the states which currently impose server training.

163. Telephone Interview with Tom Locassio, Director, Beverage, Alcohol, Sellers and Servers Educational Training (BASSET) program (Jan. 31, 1994).

164. Harold D. Holder & Alexander C. Wagenaar, *Mandated Server Training And Reduced Alcohol-Involved Traffic Crashes: A Time Series Analysis Of The Oregon Experience*, 26 ACCID. ANAL. & PREV. 89, 95 (1994).

165. Mosher, *supra* note 162, at 443.

166. *Id.*

167. *Id.* at 477. The Model Act calls for: "[T]he development of both knowledge and skills regarding the responsible service of alcohol beverages and the handling of intoxicated persons. *Id.* This reflects the need to learn interaction skills in order to make identification of intoxicated persons easier and to make interventions with patrons who drink heavily more effective." *Id.*

168. Oregon and Utah require mandatory training for employees of licensed liquor establishments. OR. REV. STAT. § 471.542 (1983); UTAH CODE ANN. §62A-8-402 (1993).

169. States such as Maine, New Hampshire, and Rhode Island have used server training as a defense to dram shop actions. ME. REV. STAT. ANN. tit. 28A, § 2515 (West 1964); N.H. REV. STAT. ANN. § 507-F:6 (1993); R.I. GEN. LAWS § 3-14-12 (1987). If all of the employees of the licensed establishment have completed a state-certified server training course, the bar can raise the affirmative defense of "responsible business practices" against a dram shop action. ME. REV. STAT. ANN.

The results of mandatory server training are impressive. Oregon was the first state to require mandatory training for employees of licensed liquor establishments.[170] A study focusing on the effects of the mandatory server training in Oregon revealed that after three years of mandatory training there was a 23% reduction in single-vehicle nighttime crashes.[171] The study further found that server training resulted in lowered blood alcohol levels (BAL) of patrons exiting the establishments.[172] This reduction in BALs is significant, since studies have established that there is a direct correlation between high BAL and the risk of automobile accidents.[173]

Many Illinois communities have passed ordinances which require alcohol server training.[174] The training is provided by the Beverage, Alcohol, Sellers and Servers Educational Training (BASSET) program, which is currently regulated by the Illinois Department of Alcoholism and Substance Abuse (DASA).[175] Consequently, much of the groundwork for the implementation of server training in Illinois is already done.[176] Nevertheless, Illinois still has no comparable server training requirements, even though this training, through education and awareness, has been proven to reduce drunk driving accidents.[177]

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tit. 28A, § 2515 (West 1964).

170. OR. REV. STAT. § 471.542 (1983).The legislature placed the Oregon Liquor Control Commission (OLCC) in charge of providing server education classes. Holder & Wagenaar, *supra* note 164, at 91. By the end of 1991, all servers had completed the course and received a permit. *Id.* To obtain the permit, the server or manager was required to complete a one day training course which covered seven areas of instruction including:

> (i) the effects of alcohol on the body; (ii) interaction effects of alcohol with other drugs, both prescription and illicit; (iii) problem drinking and alcoholism; (iv) State of Oregon alcohol service laws; (v) drinking and driving laws in Oregon as well as legal liability issues; (vi) effective server intervention techniques including how to intervene with a customer who is drinking too much or show signs of intoxication; and (vii) alcohol marketing practices for responsible alcohol service.

Id. at 90. Furthermore, permit holders are required to repeat the course every four years if they wish to keep their permit. *Id.* at 91.

171. Holder & Wagenaar, *supra* note 164, at 95.

172. *Id.*

173. *Id.*

174. Telephone Interview with Tom Locassio, Director, Beverage, Alcohol, Sellers and Servers Educational Training (BASSET) program (Jan. 31, 1994).Municipalities which currently require BASSET training: Arlington Heights, Burlington, Elgin, Hanover Park, Naperville, Palatine, Rolling Meadows, Roseland, Schaumburg and Stevenswood. *Id.*

175. *Id.*

176. *Id.*

177. See *supra* notes 170-73 and accompanying text for a discussion of the results from Oregon.

B. Application of the Wrongful Death Act

Besides Illinois, at least thirty-six states have some form of dram shop legislation.[178] Five of these thirty-six states have legislated a wrongful death cause of action directly into their dram shop laws.[179] Furthermore, twenty-one other states, notwithstanding their legislatures' omission, have transcended their dram shop statutes by acknowledging a common law cause of action outside of those statutes.[180] Thus, the Supreme Court of New

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178. *See* ALA. CODE § 6-5-71 (1975); ALASKA STAT. § 04.21.020 (1986); ARIZ. REV. STAT. ANN. § 4-311 (1989); CAL. BUS. & PROF. CODE § 25602.1 (West 1994); COLO. REV. STAT. § 13-21-103 (1987); CONN. GEN. STAT. ANN. § 30-102 (West 1990); FLA. STAT. ANN. § 768.125 (West 1986); GA. CODE ANN. § 51-1-40 (Supp. 1990); IDAHO CODE § 23-808 (Supp. 1994); IND. CODE § 7.1-5-10-15.5 (1991); IOWA CODE § 123.92 (1987); KY. REV. STAT. ANN. § 413.241 (Baldwin 1991); LA. REV. STAT. ANN. § 9:-2800.1 (West 1991); ME. REV. STAT. ANN. tit. 28A, § 2501 *et seq.* (West 1964); MASS. ANN. LAWS ch. 231, § 85T (Law. Co-op. Supp. 1994); MICH. COMP. LAWS ANN. § 436.22 (West 1978); MINN. STAT. § 340A.801 (1990); MISS. CODE ANN. § 67-3-73 (1972); MO. REV. STAT. § 537.053 (1988); MONT. CODE ANN. § 27-1-710 (1993); N.H. REV. STAT. ANN. § 507-F:1 *et seq.* (Supp. 1993); N.J. STAT. ANN. § 2A: 22A-1 *et seq.* (West 1987); N.M. STAT. ANN. § 41-11-1 (Michie 1989); N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 1989); N.C. GEN. STAT. § 18B-120 *et seq.* (1989); N.D. CENT. CODE § 5-01-06.1 (1987); OHIO REV. CODE ANN. § 4399.01 (Anderson 1989); OR. REV. STAT. § 30.950 (1988); PA. STAT. ANN. tit. 47, § 4-497 (1969); R.I. GEN. LAWS § 3-14-1 *et seq.* (1987); TENN. CODE ANN. §§ 57-10-101, 57-10-102 (1989); TEX. ALCO. BEV. CODE ANN. § 2.01 *et seq.* (West 1993); UTAH CODE ANN. § 32A-14-101 (1991); VT. STAT. ANN. tit. 7, § 501 *et seq.* (1988); WIS. STAT. § 125.035 (1989); WYO. STAT. § 12-5-502 (Supp. 1992).

179. *See* KY. REV. STAT. ANN. § 413.241 (Baldwin 1991); ME. REV. STAT. ANN. tit. 28A, § 2508 (West 1964); MICH. COMP. LAWS § 436.22 (1978); MISS. CODE ANN. § 67-3-73 (1972); R.I. GEN. LAWS § 3-14-8 (1987).

180. In addition to having dram shop statutes, 21 states also allow for a common law negligence cause of action. *See* Brannigan v. Raybuck, 667 P.2d 213, 221 (Ariz. 1983) (holding that negligent service of alcohol can be the proximate cause of a negligence action against a bar); Kerby v. Flamingo Club, 532 P.2d 975, 980 (Colo. Ct. App. 1974) (allowing for a negligence cause of action against bar); Ellis v. N.G.N. of Tampa, 586 So. 2d 1042, 1048 (Fla. 1991) (allowing a negligence cause of action outside of the dram shop statute); Picadilly, Inc. v. Colvin, 519 N.E.2d 1217, 1220 (Ind. 1988) (recognizing common law dram shop liability notwithstanding the existence of a dram shop statute); Grayson Fraternal Order of Eagles v. Claywell, 736 S.W.2d 328, 334 (Ky. 1987) (allowing a common law cause of action); Adamian v. Three Sons Inc., 233 N.E.2d 18, 20 (Mass. 1967) (allowing common law cause of action); Thaut v. Finley, 213 N.W.2d 820, 822 (Mich. 1973) (holding that violation of alcohol laws can constitute a negligence cause of action based on violation of statute); Trail v. Christian, 213 N.W.2d 618, 626 (Minn. 1973) (violation of alcohol laws can constitute negligence *per se*); Carver v. Schafer, 647 S.W.2d 570, 574 (Mo. Ct. App. 1983) (allowing negligence, yet requiring plaintiffs to prove by a preponderance of the evidence that the defendant was the proximate cause of their injuries); Nehring v. LaCounte, 712 P.2d 1329, 1334 (Mont. 1986) (allowing common law liability for negligent service); Ramsey v. Anctil, 211 A.2d 900, 901 (N.H. 1965) (permitting a common law cause of action against a bar); Rappaport v. Nichols, 156 A.2d 1, 10 (N.J. 1959) (holding that violation of alcohol laws can constitute negli-

Mexico, in *Lopez v. Maez*,[181] cited Justice Cardozo for the proposition that it is "within the court's province to change a common law doctrine if it is unwise."[182] In allowing these common law actions, the courts overturned the old common law rule that consumption of alcohol could not be a proximate cause of injuries inflicted by the intoxicated person.[183] Before this trend, courts had held that consumption by the drinker was an intervening cause cutting off the server from liability.[184] Courts which have adopted a common law cause of action[185] now treat the consumption as a foreseeable intervening cause, one which, because of its foreseeability, does not break the causal chain.[186]

Nonetheless, the trend toward allowing a common law cause of action has bypassed Illinois.[187] Illinois courts, as a matter of law, refuse to recognize any cause of action against tavern defendants outside of the dram shop laws.[188] Illinois courts hold that

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gence *per se*); Lopez v. Maez, 651 P.2d 1269, 1276 (N.M. 1982) (allowing common law negligence liability); Berkeley v. Park, 262 N.Y.S.2d 290, 292 (N.Y. 1965) (allowing a common law negligence cause of action); Hutches v. Hankins, 303 S.E.2d 584, 598 (N.C. Ct. App. 1983) (allowing a common law negligence cause of action); Mason v. Roberts 294 N.E.2d 884, 888 (Ohio 1973) (allowing a common law negligence cause of action); Cambell v. Carpenter, 566 P.2d 893, 895 (Or. 1977) (allowing a common law negligence cause of action); Jardine v. Upper Darby Lodge, 198 A.2d 550, 553 (Pa. 1964) (allowing common law negligence cause of action for violation of statute); Poole v. El Chico Corp., 732 S.W.2d 306, 309 (Tex. 1987) (establishing common law negligence liability for bars); Osrenson v. Jarvis, 350 N.W.2d 108, 119 (Wis. 1984) (holding that the selling of alcohol to a minor amounts to negligence *per se*).

181. Lopez v. Maez, 651 P.2d 1269, 1276 (N.M. 1982).

182. *Id.* at 1273. Here the New Mexico Supreme Court cited to Cardozo for the proposition:

> A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience.

Id. (quoting BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924)).

183. *See, e.g.*, *Lopez*, 651 P.2d at 1275 (allowing the sale of alcohol to an intoxicated patron to be a proximate cause of injuries sustained later by third party).

184. James v. Brewton Motel, 570 So. 2d 1225, 1230 (Ala. 1990) (noting that at common law voluntary consumption was considered to be an intervening cause between any negligent dispensing and subsequent injury).

185. See *supra* note 180 for a list of the states which allow a common law cause of action outside of their dram shop statutes.

186. *See, e.g.*, Trail v. Christian, 213 N.W.2d 618, 626 (Minn. 1973).

187. See *infra* note 188 for Illinois cases which have refused to recognize a common law cause of action outside of the dram shop laws.

188. Hopkins v. Powers, 497 N.E.2d 757, 759 (Ill. 1986) (confirming that liability for dram shops is limited to the dram shop laws alone); Knierim v. Izzo, 174 N.E.-2d 157, 161 (Ill. 1961) (holding that the dram shop laws provide the only remedy against tavern owners and operators). See *supra* note 53 and accompanying text for a discussion of how plaintiffs pursued a common law cause of action outside of the dram shop laws only after the imposition of the 1949 recovery cap.

the dram shop laws provide the sole remedy for injured plaintiffs,[189] and that the consumption, not the sale of liquor, is the proximate cause of the intoxication.[190]

The Illinois courts' refusal to acknowledge a common law cause of action or to allow a wrongful death claim within the "personal injury" dram shop category has forced survivors to prove conscious pain and suffering in order to recover damages for the death of a relative or next of kin.[191] Absent such a showing in Illinois, the death of the victim is worth nothing.[192]

C. Prohibition Against Domestic Services

Under current Illinois law, domestic services are not a recoverable injury under the "loss of means of support" category.[193] By contrast, New York, whose dram shop statute[194] delineates the

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189. Cunningham v. Brown, 174 N.E.2d 153, 157 (Ill. 1961).

190. *Id.* In *Cunningham,* the plaintiffs asked the court to merge the serving and consumption as a proximate cause in recognizing a common law cause of action against a liquor vendor for knowingly selling alcohol to an intoxicated person. *Id.* The *Cunningham* court refused, stating:

> The plaintiffs' argument has some merit, and if no more were involved than laying down a new rule of liability it would warrant more serious consideration. But the lack of common-law precedent for such liability motivated our legislature, as well as the legislatures in 21 other States, to create such liability. . . . The remedy we are asked to recognize would, except as to recoverable damages, be almost coincidental with the remedy provided in section 14. Section 19 of article II of the constitution does not require the courts to recognize a remedy when the legislature has already provided such remedy even though the statutory remedy be limited as to recoverable damages.

Id. Notwithstanding the judicial restraint in *Cunningham*, other Illinois courts have initiated change in the common law, and moreover, have done so in spite of legislative inaction. Alvis v. Ribar, 421 N.E.2d 886, 895 (Ill. 1981), *superseded by statute as stated in* Ward v. K-Mart Corp., 554 N.E.2d 223 (Ill. 1990). In *Alvis*, the Supreme Court replaced the common law doctrine of contributory negligence with that of pure comparative negligence. *Id.* at 897. The *Alvis* court held:

> We believe that the proper relationship between the legislature and the court is one of cooperation and assistance in examining and changing the common law to conform with the ever-changing demands of the community. There are, however, times when there exists a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court. Such a stalemate is a manifest injustice to the public. When such a stalemate exists and the legislature has, for whatever reason, failed to act to remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society.

Id. at 896.

191. See *supra* notes 106-12 and accompanying text for a discussion of the conscious pain and suffering proof requirement.

192. *Id.*

193. See *supra* notes 129-39 and accompanying text for a discussion of the prohibitions against domestic services under the "loss of means of support" category.

194. N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 1989).

same three enumerated recovery categories (injury to person, property, and loss of means of support), has made domestic services recoverable under its "loss of means of support" category.[195] Furthermore, New York and twenty other states provide plaintiffs with an alternate negligence cause of action outside of their states' dram shop statutes.[196] This alternate common law cause of action allows plaintiffs to avoid any prohibitions, like the non-recognition of domestic services, which their states' dram shop statutes might impose on them.[197] Illinois goes beyond refusing to recognize domestic services as an injury to one's "means of support." Illinois further refuses to recognize any additional cause of action for plaintiffs other than that provided by the dram shop laws.[198] Consequently, Illinois adds insult to injury by telling plaintiffs that the support provided by a housewife or househusband is worth nothing under the dram shop laws.[199]

D. Recovery Cap Reform

Illinois is one of only six states which impose limits on dram shop recovery.[200] Illinois has the second lowest cap.[201] Moreover, two of the six states imposing caps allow plaintiffs to maintain a negligence cause of action outside of the dram shop statute, and, thus, surpass the caps.[202] Obviously, raising the caps to the $500,000 level of North Carolina[203] would be a vast improvement for Illinois. However, beyond simply raising the limits of the caps, measures employed in other states could improve the situation in Illinois.

States can employ measures to limit a defendant-tavern's liability, while at the same time providing adequate protection for injured victims. For example, Maine limits dram shop recovery to $250,000;[204] however, this amount does not include a victim's

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195. Valicenti v. Velenze, 108 A.D.2d 300, 305 (N.Y. App. Div. 1985) (allowing plaintiff to establish the value of the domestic services the decedent wife would have provided had she been alive).

196. See *supra* note 180 for a listing of states which allow for a common law recovery in conjunction with their dram shop laws.

197. *Id.*

198. See *supra* note 188 for a listing of Illinois cases which have refused to recognize a common law cause of action outside of the dram shop laws.

199. See *supra* notes 129-39 and accompanying text for a discussion of the prohibitions against domestic services under the "loss of means of support" category.

200. See *supra* note 148 and accompanying text for a discussion of the minority of other states which impose recovery caps.

201. See *supra* note 149 for a listing of the recoverable amounts under each state's recovery cap.

202. *See* Kerby v. Flamingo Club, 532 P.2d 975, 980 (Colo. Ct. App. 1974); Hutches v. Hankins, 303 S.E.2d 584, 598 (N.C. Ct. App. 1983).

203. N.C. GEN. STAT. § 18B-123 (1989).

204. ME. REV. STAT. ANN. tit. 28A, § 2509 (West 1964).

medical expenses.[205] Consequently, under the Maine version, an injured victim need not worry about recovery being diminished by having to pay medical expenses.[206] This approach would help Illinois victims, since any damages recovered by injured victims often go towards paying their medical expenses.[207]

Utah provides another model for liability caps.[208] Utah's law allows a maximum award of $100,000 for any injured person.[209] Under the Utah model, an injured plaintiff can recover up to the $100,000 limit for injury to his "person," or to his "property," or to his "means of support," or any combination thereof.[210] This approach is superior to Illinois' because it allows plaintiffs to reach the $100,000 limit through any one of the three injury categories.[211] This approach does not restrict victims' recovery attempts by segmenting each category with an individual cap.[212] For example, under the Utah dram shop laws, a court could award a plaintiff the full $100,000 for his pain and suffering alone. In Illinois, to attain the maximum recovery under the caps, a plaintiff must suffer at least $30,000 in "property damage," $30,000 in "personal injuries," and $40,000 in "loss of means of support." An Illinois plaintiff who suffers less than the maximum amount of injury under any one category will be unable to reach the $100,000 maximum total recovery.

Furthermore, the Utah model allows its courts to award the $100,000 cap to other injured persons, in addition to the physically injured crash victim.[213] Thus, if a spouse or child suffers injury to their "property" or "means of support," then they, too, can potentially recover up to the $100,000 limit.[214] No such potential recovery exists in Illinois. The Illinois dram shop laws limit recovery for "loss of means of support" to a total "aggregate recovery" of $40,000,[215] regardless of the number of dependents actually injured.[216]

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205. *Id.*

206. *Id.*

207. See *supra* note 153 for a discussion of Fran Liquori's liability for her own medical expenses.

208. UTAH CODE ANN. § 32A-14-101 (1991).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. UTAH CODE ANN. § 32A-14-101 (1991).

214. *Id.*

215. 235 ILCS 5/6-21 (1992).

216. Essentially the Illinois laws treat the "loss of means of support" category as a class action suit, with the maximum $40,000 to be distributed among all persons claiming such injury. The statute reads: "all persons claiming loss to means of support shall be limited to an aggregate recovery not to exceed the single limitation set forth herein. . . ." 235 ILCS 5/6-21 (1992). See *supra* note 12 for the complete

IV. RECOMMENDATIONS

The approaches taken by other states in dealing with dram shop liability illustrate the current deficiencies in Illinois dram shop law and point to potential solutions for these deficiencies. Obviously, not all of these suggested solutions need be implemented to cure the current defects in Illinois law. A variety of combinations of these suggestions, thoughtfully planned and implemented, could sufficiently fill the voids in recovery left after years of legislative neglect in Illinois dram shop law.

Many of these solutions can be effectuated by the Illinois legislature. The General Assembly can reform the Illinois dram shop laws by adopting some of the approaches utilized in other states. First, the legislature can establish a mandatory statewide server training program, the groundwork for which has already been laid. Second, the legislature can revise the dram shop laws to include a wrongful death recovery, which would allow victims' relatives, like Orville and Christopher Wheatley, to recover for the wrongful death of their family members. Third, the legislature should recognize domestic support as a compensable loss, which would allow widowed spouses, like Orville Wheatley, to recover for lost services that he and his one and a half year old son, Christopher, suffered when a drunk driver killed Kellie Wheatley. A final change in Illinois dram shop law that the legislature might undertake would be to alter Illinois recovery caps, either by eliminating them, raising them to more contemporary levels, or replacing the segmented caps with one inclusive cap.

Yet not all defects in Illinois dram shop law depend on the legislature for solution. If the legislature fails to act or fails to act sufficiently to improve Illinois dram shop laws, then Illinois courts could ameliorate the deficiencies in the current laws in two ways. First, the courts could follow the national trend by recognizing a common law cause of action for dram shop liability outside of the dram shop laws, which would allow for the application of a wrongful death cause of action, the recovery of domestic support, and uncapped damage awards. A second course of action Illinois courts should consider would be abandoning the *O'Connor* holding that the Illinois dram shop laws and the Wrongful Death Act are separate and distinct,[217] since the rationale of *O'Connor* no longer applies today. Overruling *O'Connor* would allow the courts to recognize death as a recoverable injury and would remedy one of the more serious inadequacies of the current Illinois dram shop laws.

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text of the statute.

217. See *supra* notes 113-25 and accompanying text for a discussion of the *O'Connor* case.

CONCLUSION

When originally enacted, the Illinois dram shop laws represented a progressive approach to dealing with the problems associated with alcohol. Yet today, because of years of restrictive legislative amendments and judicial indifference to emerging dram shop recovery trends, innocent drunk driving victims in Illinois are not afforded adequate protection. The General Assembly must amend, or the courts must alter their interpretation of, the Illinois dram shop laws to ensure that they adequately "protect the health and welfare of the people of Illinois."[218]

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218. See *supra* note 10 for a discussion of the self-proclaimed mandate of the Illinois dram shop laws.