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## COMMENTS

### RECONSIDERING THE ILLINOIS DRAM SHOP ACT: A PLEA FOR THE RECOGNITION OF A COMMON LAW ACTION IN CONTEMPORARY DRAM SHOP LITIGATION

On June 25, 1978, having already consumed a considerable amount of liquor, Fred Gustafson drove to two Illinois taverns and purchased more alcohol.<sup>1</sup> Upon leaving the premises, employees of the two taverns physically escorted Gustafson to his car. Gustafson displayed conduct showing a reckless disregard for his safety. Inside the car, visible to those who escorted him, were five of Gustafson's children. Later that evening, an automobile accident took the life of Gustafson and four of his children.<sup>2</sup>

Gustafson's wife sued the owners of the taverns for damages under the Illinois Dram Shop Act (the "DSA").<sup>3</sup> Because of the stringent statutory limitations, Mrs. Gustafson was entitled to recover a maximum award of only \$35,000 from the defendants.<sup>4</sup> Because the DSA relies upon the doctrine of strict liability,<sup>5</sup> the tavern

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1. *Gustafson v. Mathews*, 109 Ill. App. 3d 884, 886, 441 N.E.2d 388, 389 (1982).

2. *Id.* at 885-86, 441 N.E.2d at 389.

3. ILL. REV. STAT. ch. 43, § 135 (1983).

4. Section 135 of the Dram Shop Act limits recoverable damages for loss of property of any person to \$15,000, and \$20,000 for loss of means of support. Thus, assuming Mrs. Gustafson could prove \$15,000 worth of property damage, and prove her means of support was damaged by \$20,000, she would only receive a total of \$35,000. See ILL. REV. STAT. ch. 43 § 135 (1983). In addition to property damage and loss of means of support, the DSA allows recovery for personal injury up to \$15,000 for each person. *Id.* Thus, each surviving person, in this instance the one child, could potentially recover \$15,000 individually from the tavern owners based upon a personal injury claim. See also *Zamiar v. Linderman*, 132 Ill. App. 3d 886, 889, 478 N.E.2d 534, 536 (1985) (liability for each occurrence under the DSA for commercial suppliers of liquor is limited to \$35,000).

Further, the DSA places an aggregate limitation of \$20,000 for the loss of means of support. Thus, if all five Gustafson children had survived the accident, the family still would have only recovered a total of \$20,000 for the loss of means of support. See *Steller v. Miles*, 17 Ill. App. 2d 435, 150 N.E.2d 630 (1958) (held that legislative intent of 1955 amendment to the DSA was to establish an aggregate limitation of \$20,000).

5. Plaintiff need only show that the sale or gift of intoxicating liquor caused the intoxication and not that the defendant was negligent or that he violated a liquor control law. ILL. REV. STAT. ch. 43, § 135 (1983). The pertinent section of the statute states "[e]very person who is injured 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

employees' acts of escorting Gustafson to his car and their failure to prevent him from driving, while visibly intoxicated, were of no consequence to the widow's cause of action.

Illinois' first DSA was enacted in July of 1872. As revised, the Act establishes a strict liability standard on dram shop operators for torts committed either "by" an intoxicated patron or "in consequence of" the intoxication of any person.<sup>6</sup> Although originally considered penal in nature,<sup>7</sup> the DSA was established to create a cause of action for damages against retail vendors of alcoholic beverages because none existed at common law.<sup>8</sup> The first Illinois Supreme Court case to interpret the Act was *Cruse v. Aden*,<sup>9</sup> decided in 1889. Surprisingly, *Cruse* is still often cited as precedent for contemporary dram shop litigation.<sup>10</sup> It was not until 1961 when the Illinois Supreme Court for the first time addressed the issue of whether a common law action existed apart from the DSA against retail vendors of alcoholic beverages for injuries their intoxicated customers caused.<sup>11</sup> Although the Act itself was silent regarding a common law remedy, the court refused to recognize any remedy apart from the Act.<sup>12</sup>

Since 1961, neither the Illinois Supreme Court nor the General

who by selling or giving alcoholic liquor, causes the intoxication of such person." *Id.* (emphasis added).

6. 1871-72 Ill. Laws 552-56. There are two types of actions under the Illinois DSA. The first, "by" or "direct" actions allow all persons who are injured, in person or in property by someone who is intoxicated, a cause of action individually against any person who by selling alcoholic liquor, causes the intoxication of the person causing the injury. For example, an assault or an automobile collision where the direct act of an intoxicated person causes injury is considered a "by" cause of action. See Mullin, *Overview of the Act/Defenses*, DRAM SHOP/STRUCTURAL WORK ACT (IICLE) § 1.5 to 1.7 (1976). "In consequence" actions arise when an intoxicated person causes injuries to the means of the plaintiff's support. For example, a wife of an injured victim of a drunk driver has an "in consequence" action if the accident is caused by the driver's intoxication. *Id.* at § 1.9. See also Moran, *Actions Under Illinois Dram Shop Act: Theories of Liability*, U. ILL. L.F. 191 (1958) (discusses various theories advocated by attorneys seeking to escape the confines of the DSA).

7. See Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, U. ILL. L.F. 175, 181 (1958) (reviews history of DSA from enactment in 1872 until 1958) [hereinafter cited as *History and Appraisal*].

8. See *Cunningham v. Brown*, 22 Ill. 2d 23, 30, 174 N.E.2d 153, 157 (1961) (lack of common law precedent motivated the legislature).

9. 127 Ill. 231, 20 N.E. 73 (1889) (held that no cause of action exists under the Act against one not engaged in the sale of intoxicating liquors).

10. *Heldt v. Brei*, 118 Ill. App. 3d 798, 800, 455 N.E.2d 842, 843 (1983) (common law cause of action sought against social host); *Wienke v. Champaign County Grain Ass'n*, 113 Ill. App. 3d 1005, 1008, 447 N.E.2d 1388, 1390 (1983) (noted that *Aden* recognized that no common law tort liability arises from furnishing liquor to a strong and able bodied man); *Miller v. Moran*, 96 Ill. App. 3d 596, 598, 421 N.E.2d 1046, 1047 (1981) (serving of alcoholic liquors to social guests does not create potential liability to third parties).

11. *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961) (widow sued tavern operator who supplied liquor to husband who became despondent and took his own life).

12. *Id.*

Assembly have sufficiently re-examined policy considerations behind the DSA and its impact on society.<sup>13</sup> Numerous plaintiffs, however, have presented meritorious claims requesting that a distinct common law action be recognized apart from the DSA.<sup>14</sup> In each case the appellate courts have deferred the question to the legislature or have asked the supreme court to re-evaluate the law.<sup>15</sup> Contrary to the Illinois courts' conclusions, other jurisdictions have expanded both statutory and common law remedies involving dram shop liability.<sup>16</sup> Moreover, the Seventh Circuit and one Illinois appellate decision have recognized a non-statutory cause of action against dram shop operators based upon interpretations of the Illinois common law.<sup>17</sup>

Despite the continuous evolution of the common law in other areas, the Illinois Supreme Court and General Assembly have apparently decided to leave the DSA in the antiquated form in which it was originally enacted.<sup>18</sup> This comment will analyze the origins of

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13. The supreme court has only reviewed its decision in *Cunningham* on two occasions. See *Demchuk v. Duplancich*, 92 Ill. 2d 1, 440 N.E.2d 112 (1982); *Graham v. United States Grant Post*, 43 Ill. 2d 1, 248 N.E.2d 657 (1969). In *Demchuk*, the court summarily affirmed its prior holding in *Cunningham*, stating that the statutory dram shop action is the exclusive remedy in Illinois against tavern operators. *Demchuk*, 92 Ill.2d at 10, 440 N.E.2d at 116. The *Demchuk* court, however, refused to review the merits of the plaintiff's case in any detail. In *Graham*, the court stated the plaintiff's contention was without merit because the precise issue of common law negligence for selling alcoholic beverages to an intoxicated person was definitively decided in *Cunningham*. *Graham*, 43 Ill. 2d at 8, 248 N.E.2d at 660.

14. See, e.g., *Ruth v. Benvenuti*, 114 Ill. App. 3d 404, 449 N.E.2d 209 (1983) (dram shop sold liquor to a minor who later injured himself in an auto accident after the minor's mother specifically warned defendant not to serve liquor to her son); *Gora v. 7-11 Food Stores*, 109 Ill. App. 3d 109, 440 N.E.2d 279 (1982) (no cause of action for seventeen year old minor who suffered injuries from falling asleep in snow bank after purchasing liquor from a food store).

15. See *Ruth v. Benvenuti*, 114 Ill. App. 3d 404, 407, 449 N.E.2d 209, 211 (1983) (court suggested that the instant case is an excellent vehicle for a re-examination of the law in the face of legislative inaction).

Because supreme court precedent in effect ties the hands of the appellate courts, a common law breakthrough might only be accomplished when some appellate court takes the radical move of recognizing a common law cause of action. Continued inaction by both the supreme court and legislature will eventually warrant appellate court action.

16. See *infra* note 69.

17. *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980) (army employees found negligent in permitting individuals, who later caused a serious auto accident, to consume excess amounts of liquor); *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (accident occurred outside of Illinois, thus DSA inapplicable). See *infra* notes 46-57 and accompanying text for extended discussion of both *Smith* and *Colligan*.

18. The court in *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982), stated: A common law doctrine which developed in the horse and buggy days may be out of tune with today's society. The serious danger to the public caused by drunken drivers operating automobiles on public roadways is now a matter of common knowledge that was not experienced by the public when the common law doctrine of denying third parties' recovery against tavernkeepers was developed.

dram shop liability and review the history of the Illinois DSA. Additionally, the comment will discuss specific judicial interpretations that have mused over what Illinois dram shop liability would be absent statutory limitations. This comment urges the Illinois Supreme Court to follow trends adopted in other jurisdictions and advocates the abandonment of strict liability in dram shop actions. In closing, the comment explains why equitable solutions to the problems presented by the DSA will only evolve when the Illinois Supreme Court re-evaluates liquor vendor liability<sup>19</sup> through an analysis of the elements of common law fault found in meritorious claims.<sup>20</sup>

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*Id.* at 629, 651 P.2d at 1273.

19. This comment will not discuss, other than in the footnotes, either social host liability or employer liability for serving alcoholic beverages to guest or employee who later cause injuries as a result of their intoxication.

In Illinois, numerous plaintiffs have pursued a common law cause of action for social host liability. *See Heldt v. Brei*, 118 Ill. App. 3d 798, 455 N.E.2d 842 (1983) (defendant held a party at his parents' home and collected money from guests, court held DSA inapplicable); *Thompson v. Trickle*, 114 Ill. App. 3d 930, 449 N.E.2d 910 (1983) (employee became intoxicated at a beer and pizza party sponsored by employer and later caused an auto accident); *Coulter v. Swearingen*, 113 Ill. App. 3d 650, 447 N.E.2d 561 (1983) (defendants permitted minor guests to consume intoxicating liquor in their home and minor later drove his vehicle into plaintiff).

Illinois has consistently refused to follow trends in other jurisdictions that have recognized social host liability. *See, e.g., Sosa v. Ackerby Communication*, No. 83-35494 (Dade City Fla. Apr. 12, 1984) (\$2.5 million settlement for brain damage when plaintiff's auto was struck by an employee who allegedly became intoxicated at an office party); *Holmquist v. Miller*, 352 N.W.2d 47 (Minn. App. 1984) (recognized common law negligence action for violation of criminal statute which prohibits furnishing alcoholic beverages to minors), *rev'd*, 367 N.W.2d 468 (Minn. 1985)(en banc); *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984) (held social host who enables adult guest at his home to become drunk is liable to third parties); *Congini v. Portersville Value Co.*, 504 Pa. 157, 470 A.2d 515 (1983) (minor at Christmas party of employer given keys to his auto despite employer's awareness of minor's intoxication).

For a general discussion on the subject of liability to third parties for causing the intoxication of an employee or social host, see Comment, *Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action Under Respondeat Superior*, 19 CAL. W.L. REV. 107 (1982) (lists the jurisdictions that have DSA's and alcohol control statutes); Comment, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D. L. REV. 445 (1983) (contrasts the theories behind DSA's and common law liability for serving liquor either socially or commercially); Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013 (1983) (briefly reviews the theories of liability of the intoxicated and focuses on North Carolina's laws). *See also* Annot., 53 A.L.R. 1285 (1973) (liability of person furnishing intoxicating liquor for negligent acts of minor causing injury to plaintiff).

20. It is the writer's contention that limitations placed upon damage awards to innocent victims of the negligent acts of intoxicated patrons of dram shops makes the current DSA archaic, inadequate, and unjust in light of societal demands and public policy. *See infra* notes 58-76 and accompanying text. Liability insurance covering the intoxicated driver is often inadequate to fully compensate injured plaintiffs. If death or serious injuries occur, who pays for the loss of support or medical bills if the motorist is uninsured and the plaintiff's coverage is inadequate to fully compensate for the loss sustained? Although liability insurance for motorists is mandatory in Illinois ILL. REV. STAT. ch. 95½ § 12-603.1 (1983), numerous motorists still driver without coverage.

## ORIGINS AND HISTORY OF THE ILLINOIS DRAM SHOP ACT

The language and substance of the current DSA is closely related to that of the 1874 act.<sup>21</sup> The 1874 Act was passed in the wake of a national temperance movement spearheaded by "the mighty clamor" of the Women's Crusade of the early 1870's.<sup>22</sup> After the repeal of prohibition, the 1874 Act was re-enacted with only minor changes.<sup>23</sup> Until 1949, virtually all causes of action against dram shops were brought under the statute because it utilized the theory of strict liability, and recoverable damages, both actual and exemplary, were unlimited.<sup>24</sup> A potential common law remedy, as a distinct action apart from the DSA, only became important after a 1949 amendment.<sup>25</sup> The amendment placed limitations on recoverable damages<sup>26</sup> and expunged the statute's provisions for exemplary damages.<sup>27</sup> Just prior to the 1949 amendment, the Illinois Supreme Court held that the liability imposed, and the nature of recoverable damages under the DSA, were exclusively of statutory origin.<sup>28</sup>

In 1961, the Illinois Supreme Court, in *Cunningham v. Brown*,<sup>29</sup> finally addressed the issue whether the common law provided a remedy against a retail vendor of alcoholic beverages for the tortious actions of intoxicated patrons.<sup>30</sup> After acknowledging that the plain-

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21. ILL. REV. STAT. ch. 43 (Hurd 1874).

22. *History and Appraisal*, *supra* note 7, at 176-77. Ogilvie gives a detailed description of the historical setting of the times in which the temperance movement was flourishing across the nation in the 19th Century. In addition, Ogilvie analyzes in detail the evolution of the statute up until 1958. *Id.* at 177-81.

23. *Id.* at 178-79.

24. *Cunningham v. Brown*, 22 Ill. 2d 23, 25-6, 174 N.E.2d 153, 155 (1961). *See supra* note 13 for a discussion of *Cunningham* and its progeny.

25. *See id.* at 26, 174 N.E.2d at 155; *History and Appraisal*, *supra* note 7, at 179.

26. Recoverable damages, unlimited in amount prior to the 1949 amendment, were restricted to a maximum of \$15,000. 1949 Ill. Laws 816.

27. *Id.* Today only three state statutes specifically provide for exemplary as well as actual damages. ALA. CODE § 6-5-71 (1984); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978).

28. *Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708 (1949). The court in *Howlett* noted "[t]he liability imposed and the nature of the damages recoverable is of statutory origin, and is expressly and exclusively defined in the Dram Shop Act." *Id.* at 318, N.E.2d at 713. When the statute was originally enacted, exemplary and actual damages were both unlimited in amount. Thus, the supreme court never occasioned the need to expand the applicable law through the recognition of a common law action.

29. 22 Ill. 2d 23, 174 N.E.2d 153 (1961).

30. *Id.* at 25-6, 174 N.E.2d at 156. The plaintiff sought a common law remedy, in addition to the remedy under the DSA, so that she would not be limited to the damages provided under the Act. *Id.* at 24, 174 N.E.2d at 155. The theory advanced by the plaintiff was that when a sale of intoxicants is made to one already drunk or a minor, and that incapacity is or should be known to the vendor, the sale and consumption are merged and become the act of the seller and the proximate cause of the injury. *Id.* at 30, 174 N.E.2d at 157.

tiff's argument had some merit,<sup>31</sup> the court held that the DSA provided an exclusive remedy against tavern operators for injuries to victims.<sup>32</sup> Since 1961, the supreme court has summarily dismissed all challenges to the DSA based upon a common law theory of recovery.<sup>33</sup>

Recent judicial interpretations concerning the DSA mirror the *Cunningham* decision. History indicates, however, that the public's attitude towards highway safety has changed significantly since the *Cunningham* decision.<sup>34</sup> Since 1961, theories of common law liability in dram shop litigation and other areas of tort law have been overwhelmingly adopted throughout the nation.<sup>35</sup> Based upon a review of trends in other jurisdictions, changes in societal perceptions and the evolution of the common law, it will only be a matter of time before Illinois will recognize a common law action that co-exists with the DSA.<sup>36</sup>

### *Stated Purpose of the Act*

When originally enacted, the underlying purpose of the Illinois DSA was considered penal in nature, and early opinions interpreting the statute confirmed that policy.<sup>37</sup> This stated purpose was expressed in appellate court decisions even in relatively recent times.<sup>38</sup>

31. *Id.*

32. *Id.* at 30-2, 174 N.E.2d at 157.

33. See *Demchuk v. Duplancich*, 92 Ill. 2d 1, 440 N.E.2d 112 (1982) (see *supra* note 13 for a discussion of the case); *Graham v. United States Grant Post*, 43 Ill. 2d 1, 248 N.E.2d 657 (1969) (brief statement that DSA was exclusive remedy; the court did not discuss the merits of a common law action). Note, however, that an appellate court, in 1963, recognized a common law cause of action. See *infra* notes 48-52 and accompanying text.

34. See *infra* notes 58-76 and accompanying text.

35. *E.g.*, *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (adoption of comparative negligence); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (contribution recognized against joint tortfeasors), *cert. denied*, 436 U.S. 946 (1978).

36. The Illinois common law has witnessed major changes in the past decade. For example, the concept of comparative negligence was once thought to be too radical and an opening of the floodgates to lawsuits where contributory negligence was present. See *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968), *rev'd*, *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886 (1981). The supreme court in *Maki* believed that the adoption of comparative negligence should be mandated by the Illinois General Assembly. Therefore, as a result of legislative inaction, the *Alvis* court adopted comparative negligence in 1981. *Alvis*, 85 Ill. 2d at 43, 421 N.E.2d at 905.

37. *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889) (court remarked that the DSA is a statute of a highly penal character and should receive a strict construction). See also *History and Appraisal*, *supra* note 7, at 181. Ogilvie noted that the purpose of the DSA was temperance. There was no concern for the potential disastrous type of multi-car accidents that began to occur in the twentieth century.

38. See *Maras v. Bertholdt*, 126 Ill. App. 3d 876, 886, 467 N.E.2d 599, 606 (1984) (courts interpret the DSA strictly because the Act is penal in nature); *Camille v. Berry Fertilizers, Inc.*, 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975) (DSA is penal in character and must be strictly construed); *Miller v. Owens-Illinois Glass Co.*, 48 Ill.

Most courts, however, proclaim the remedial nature of the Act as dominant, noting its purpose is "to impose the costs resulting from its violation upon those profiting from the sale of liquor to the public."<sup>39</sup> Some courts commingle the two acknowledged purposes of the Act without judicially resolving its dominant purpose.<sup>40</sup>

All legislation needs either an express purpose or one that is reasonably inferable from its language to support the public policy behind it. Societal concerns have changed dramatically since the DSA was originally enacted in 1874. Judicial interpretations of the Act should likewise reflect those changes. Additionally, because the legislature has failed to adequately articulate the purpose behind the DSA, the Illinois Supreme Court should undertake that task.<sup>41</sup>

### *Judicial Recognition of Common Law Liability for the Gift or Sale of Alcohol*

The Illinois Supreme Court has stated that the liability imposed and the nature of damages recoverable under the DSA are expressly and exclusively defined in the Act.<sup>42</sup> Both the Seventh Cir-

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App. 2d 412, 199 N.E.2d 300 (1964) (being penal in character, the DSA must be strictly construed).

39. *Fabian v. Polish American Veterans Ass'n*, 126 Ill. App. 3d 80, 466 N.E.2d 1239 (1984). See also *History and Appraisal*, *supra* note 7, at 182 (the idea of strict construction of the Act as being penal in nature has been abandoned); *Peterson v. Jack Donelson Sales Co.*, 4 Ill. App. 3d 792, 281 N.E.2d 753 (1972) (DSA embraces both regulation of liquor traffic and redress for injury, and its purpose is to place burden of evils of liquor traffic on those who profit therefrom).

Various authors have also commented that the purpose of the DSA is one of a remedial rather than a penal nature. See, e.g., *Moran, Actions Under Illinois Dram Shop Act: Theories of Liability*, 1958 U. ILL. L.F. 191; *Voelker, Parties to Dram Shop Actions*, 1958 U. ILL. L.F. 207 (the purpose of the DSA is to place burden of evils of liquor on those who profit from it). *Moran* stated that the Illinois legislature, in its exercise of the power to regulate the sale of liquor, enacted section 135 to impose on those who furnish the means of intoxication liability for damages which flow from it. *Moran, supra*, at 194.

The court in *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980), suggested that the employment of strict liability in the Act showed its remedial purpose, in that elements of proof of wrongdoing were cast aside to make the profiteers of selling intoxicants pay for injuries caused by customers.

40. See, e.g., *Hernandez v. Diaz*, 31 Ill. 2d 393, 202 N.E.2d 9 (1964) (Liquor Control Act is designed to give a remedy and should be allowed to have effect according to its natural and plain meaning); *Geocaris v. Bangs*, 91 Ill. App. 2d 81, 234 N.E.2d 17 (1968) (DSA is penal in nature and has as its objective and purpose protection of the public and placing responsibility for injuries caused by intoxication).

41. If truly remedial in nature, the DSA fails to accomplish that purpose. One definition of a remedial action is that "which is brought to obtain compensation or indemnity." *Cummings v. Board of Educ. of Okla. City*, 190 Okla. 533, 539, 125 P.2d 989, 994 (1942). Since injured parties are infrequently restored to their former position due to the limitations of the DSA, (see *Gustafson*, 109 Ill. App. 3d 884, 441 N.E.2d 388 (1982)), a compensatory lable on the purpose of the Act is inaccurate.

42. *Howlett v. Doglio*, 402 Ill. 311, 318, 83 N.E.2d 708, 712 (1949) (not an actionable tort at common law either to sell or give intoxicating liquor to a strong and able-bodied man).



cuit,<sup>43</sup> and an Illinois appellate court,<sup>44</sup> however, have imposed liability under the common law against a commercial supplier of alcohol for injuries to third parties that were caused by an intoxicated customer. Each court held that Illinois law would recognize a common law remedy in situations where the DSA was not applicable.<sup>45</sup>

The Seventh Circuit, in *Smith v. Pena*,<sup>46</sup> found it necessary to decide what the Illinois common law would be absent the DSA. Notwithstanding the strict liability theory of the DSA, the *Smith* court raised the question of whether a commercial supplier of liquor was negligent in serving drinks to an intoxicated patron. The plaintiffs in *Smith* were seriously injured when an intoxicated driver crossed the center line and struck their vehicle head on. Excessive drinking allegedly caused the driver's reckless conduct. The intoxicated driver obtained the liquor from Army employees at a base facility located in Illinois. The Federal Tort Claims Act (FTCA) governed jurisdiction over the lawsuit. Because the FTCA did not recognize strict liability in tort claims against the government, the court needed to determine culpability under a negligence standard based upon Illinois common law. The court held that when the DSA is inapplicable, the Illinois Supreme Court would find a dram shop licensee negligent for selling liquor to an intoxicated person who subsequently causes an injury to an innocent victim.<sup>47</sup>

In an Illinois appellate court decision, *Colligan v. Cousar*,<sup>48</sup> a thirteen year old Indiana resident was seriously injured when an au-

43. *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980) (see *infra* notes 45-47 and accompanying text).

44. *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963). Although the supreme court rubber stamped its holding in *Cunningham* after the *Colligan* decision, (see *Graham v. United States Grant Post*, 43 Ill. 2d 1, 248 N.E.2d 657 (1969)), the holding in *Colligan* has never expressly been overruled.

45. In *Smith*, the defendant was the U.S. Army and jurisdictional coverage was through the Federal Tort Claims Act (FTCA). *Smith*, 621 F.2d 873 (7th Cir. 1980). In all suits involving federal employees, the exclusive remedy is under the FTCA because the United States government cannot be sued under a common law *respondeat superior* theory. See Note, *Strict Liability Within the Federal Tort Claims Act: Does it Belong?*, 57 CHI[-]KENT L. REV. 499 (1981).

In *Colligan*, the plaintiff was unable to sue the defendant dram shop under the DSA because the tort occurred outside the State of Illinois. *Colligan*, 38 Ill. App. 2d at 395, 187 N.E.2d at 294. The DSA has no extra-territorial effect. *Eldridge v. Don the Beachcomber, Inc.*, 342 Ill. App. 151, 95 N.E.2d 512 (1950) (intoxication occurred in Illinois and accident arising as a result thereof in another state). See also *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959) (cause of action under Michigan law held that Illinois dram shop was liable for damages for unlawfully selling intoxicating liquor because of the general duty owed to plaintiffs under a common law negligence theory).

46. 621 F.2d 873 (7th Cir. 1980).

47. *Id.* at 875-80. The *Smith* court relied upon the decision in *Colligan*. *Id.* The court noted that the problem with finding negligence under the DSA that it contravenes traditional notions of proximate cause. *Id.*

48. 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

tomobile struck him 250 feet outside the Illinois border. Prior to the accident the driver of the automobile purchased liquor from several Illinois dram shops located near the Indiana border. The defendant sold liquor to the driver in violation of a liquor control law which made it a crime to sell liquor to an intoxicated person.<sup>49</sup> Because the accident actually occurred in Indiana, the DSA was inapplicable because the DSA has no extra-territorial effect.<sup>50</sup> The *Colligan* court, however, reasoned that the victim was entitled to a remedy against the defendant, and therefore it held that the Illinois common law afforded the plaintiff a cause of action.<sup>51</sup> The court noted that when a defendant retail vendor sells alcohol to an intoxicated party, he violates a duty that the DSA imposes on him. Additionally, the court noted that defendants violate a common law duty to use due care when they set in operation any agency capable of causing injury to others.<sup>52</sup>

The *Colligan* decision fails to comport with traditional ideas expressed in earlier Illinois decisions regarding dram shop litigation. The supreme court, in *Cunningham*, specifically stated that the courts have never recognized a common law remedy.<sup>53</sup> In addition, the legislature, when it enacted the DSA, intended to create a new statutory remedy where none previously existed.<sup>54</sup> Therefore, the *Colligan* decision conceives a non-existent common law cause of action, albeit one based upon sound principles of tort law. Since *Colligan* and *Smith*, appellate courts have given mere lip service to the *Cunningham* holding and have summarily refused to recognize a common law remedy apart from the Act.<sup>55</sup> These appellate courts have often recognized the need to review the limitations of the DSA,

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49. *Id.* at 393, 187 N.E.2d at 293. The plaintiff alleged that the defendant violated ILL. REV. STAT. ch. 43, § 131 (1955), which prohibited the sale of alcohol to an already intoxicated person. *Id.*

50. *See supra* note 45.

51. *Colligan*, 38 Ill. App. 3d at 414-15, 187 N.E.2d at 300. Note that no common law existed in Indiana concerning dram shop liability; therefore, even though the tort occurred in Indiana, Illinois law was used. *But cf.* *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959) (accident occurred in Michigan and the court used Michigan law, even though the defendant's tortious conduct occurred in Illinois).

52. *Colligan*, 38 Ill. App. 2d at 414-15, 187 N.E.2d at 300.

53. 22 Ill. 2d 23, 28, 174 N.E.2d 153, 156 (1961).

54. *Id.* at 29, 174 N.E.2d at 157.

55. *See, e.g.*, *Graham v. United States Grant Post*, 43 Ill. 2d 1, 248 N.E.2d 657 (1969) (the court devoted two sentences in its opinion to *Cunningham*, but failed to acknowledge the *Colligan* decision); *Wienke v. Champaign County Grain Ass'n*, 113 Ill. App. 3d 1005, 1009, 447 N.E.2d 1388, 1391 (1983) (any precedent of *Colligan* was apparently overruled by *Graham*).

Based upon subsequent decisions, the *Colligan* opinion can only be explained under one of two theories. The Illinois Supreme Court believed that a common law action exists apart from the DSA, or it quietly acquiesced in the decision because of the need to compensate the plaintiff.

but defer that task to the legislature or the supreme court.

The *Smith* and *Colligan* decisions indicate that a remedy against dram shops may exist based upon common law negligence. These decisions have initiated an assault on the barriers plaintiffs' face in pleading a common law action.<sup>56</sup> The logic behind the principles set forth in those decisions is persuasive and should be recognized.<sup>57</sup>

## SOCIAL CHANGE AND THE DOCTRINE OF STRICT LIABILITY

### *Social Change and Trends in Sister States*

Society can no longer tolerate individuals who drive automobiles while intoxicated. Citizens' organizations have lobbied for stiffer criminal penalties against convicted drunk drivers. Federal and state governmental agencies have recently initiated proposals seeking new legislation designed to prevent drunken drivers from using the nation's highways.<sup>58</sup> These proposals acknowledge a social awareness of the problems and the serious financial impact that drunk driving has on victims of accidents.<sup>59</sup> Specifically, the Illinois legislature recently considered legislation designed to help prevent the occurrence of drunk driving accidents.<sup>60</sup> Similar legislative and

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56. Illinois courts have consistently held that the drinking, not the selling, of alcohol is the proximate cause of intoxication. See *Cunningham*, 22 Ill. 2d at 30, 174 N.E.2d at 157; *Colligan*, 38 Ill. App. 2d at 410-11, 187 N.E.2d at 298. See also Annot., 98 A.L.R. 3d 1235 (1973) (drinking, not selling, held proximate cause of intoxication).

57. The *Smith* court noted that the main concern in *Colligan* was finding a remedy under Illinois law. *Smith*, 621 F.2d at 879-80. Under the holdings in *Smith* and *Colligan*, if a minor purchases beer in Illinois, drives out of state, and seriously injures a third party as a result of his intoxication, there exists common law negligence. However, if the same thing happens within Illinois, there is no negligence.

58. The federal government has joined the fight against drunk driving. Under a recently enacted bill, states are directed to pass statutes that make it illegal for persons under twenty-one to purchase or possess liquor. See 70 A.B.A.J. 35, col. 2 (Nov. 1984).

59. For example, if an innocent third party is seriously injured or killed by an intoxicated motorist who has inadequate insurance coverage or none at all. Additionally, there are situations where the defendant's conduct approaches willful and wanton standards. *E.g.*, *Gustafson v. Mathews*, 109 Ill. App. 3d 884, 441 N.E.2d 388 (1982) (helping a visibly intoxicated customer to car in which children were located); *Ruth v. Benvenuti*, 114 Ill. App. 3d 404, 449 N.E.2d 209 (1983) (mother of minor specifically asked defendant dram shop operator not to sell liquor to her son).

60. See *Chicago Tribune*, Dec. 13, 1983 at 1, col. 6. This article noted that Illinois has a Task Force on Drunken Driving chaired by Secretary of State, Jim Edgar. The Task Force recently completed a report for the governor containing forty-nine recommendations designed to curb the drunken-driving problem. *Id.* These recommendations included: (1) increasing criminal penalties for persons convicted of reckless homicide involving drunken drivers; (2) require bars to serve foods; (3) require that bartenders and waitresses receive special training to enable them to more easily recognize intoxicated customers. *Id.*

The article also noted that the Illinois Senate approved legislation that required drivers and their front-seat passengers to wear seat belts. The measure was signed by

judicial efforts are needed to provide remedies against an institution that profits from the creation of disasterous situations.

When it was originally enacted, a victim's potential recovery under the DSA was unlimited. Even when limitations were first placed upon the amount recoverable, the remedy remained adequate to justly compensate victims.<sup>61</sup> Because an accepted purpose of the DSA is its remedial nature, the Illinois Supreme Court and General Assembly should recognize that severe limitations on recoverable damages transgress social concerns.

Other jurisdictions have re-evaluated their common law regarding commercial and social host liability for furnishing liquor to customers and guests.<sup>62</sup> Concerning commercial liability, remedies have been recognized under at least four general theories of liability: (1) common law negligence without reference to any statute;<sup>63</sup> (2) com-

the governor and became effective July 19, 1985. Illinois became the third state, behind New York and New Jersey, to adopt a mandatory seat-belt law. It is somewhat ironic that Illinois is in the forefront of preventive legislation, being only one of three states adopting a mandatory seat-belt law, yet lags behind the field of jurisdictions providing adequate compensation for injuries under dram shop legislation.

61. See Comment, *The Illinois Dram Shop Act: Recent Developments and Alternative Solutions*, 51 Nw. U. L. Rev. 778 (1957). This comment stated, "it seems fair to conclude that the present act does accomplish its basic purpose of assuring compensation to the injured party." *Id.* at 779-80. Since the limits on compensation have not changed since 1949, this statement is no longer true.

62. The jurisdictions that recognize a common law cause of action against commercial suppliers of liquor reason that personal injury is an eminently foreseeable consequence of serving an intoxicated customer more liquor. See, e.g., *Nazareno v. Urie*, 638 P.2d 671 (Alaska 1981) (furnishing liquor may be the proximate cause of injuries inflicted on a third person by an intoxicated customer); *Ono v. Appelgate*, 62 Hawaii 131, 612 P.2d 533 (Hawaii 1980) (violation of statute was properly submitted to jury as evidence of negligence); *Hoyt v. Tilton*, 81 N.H. 477, 128 A. 688 (1925) (common law recovery allowed if it appeared that the decedent was in a condition not to be responsible for his own acts when he accepted the liquor); *Tiger v. American Legion*, 125 N.J. Super. 361, 311 A.2d 179 (1973) (jury question if defendant is negligent in serving visibly intoxicated plaintiff liquor, and if it was reasonably foreseeable that she might not be able to care for herself); *Sorensen v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984) (clear trend in United States has been to impose liability upon a seller in derogation of the common law rule of immunity). The *Sorensen* opinion noted that twenty-four jurisdictions, other than Wisconsin, had abrogated the common law rule of nonliability for a liquor vendor. *Sorensen*, 119 Wis. 2d at 627, 350 N.W.2d at 108. Of those twenty-four states, six also have dram shop acts. See, e.g., COLO. REV. STAT. § 13-21-103 (1974); IOWA CODE ANN. § 123.92 (West Supp. 1984); MINN. STAT. ANN. § 340.95 (West Supp. 1984).

In the area of host liability significant change has taken place. See *supra* note 19. In California, the supreme court, in *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 699, 145 Cal. Rptr. 534 (1978), recognized a common law action against dram shop operators in conflict with the old rule of nonliability. Shortly after the *Coulter* decision, however, the California legislature abrogated the decision by amending CAL. CIV. CODE § 1714 (1978), which was later upheld in *Cory v. Shierlok*, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981) (statute aimed at immunizing nonlicensed providers of liquor from civil liability for injuries attributable to intoxication is constitutional).

63. *Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977).

mon law negligence evidenced by a violation of a criminal statute;<sup>64</sup> (3) negligence proved as a matter of law by violation of Liquor Control Laws;<sup>65</sup> and (4) statutory tortious conduct based upon the theory of strict liability.<sup>66</sup> The State of Oregon allows a plaintiff to state a cause of action based upon three separate theories.<sup>67</sup> Illinois, however, has consistently rejected recognizing these trends by refusing to undertake a re-evaluation of the law.<sup>68</sup> Additionally, limitations on recoverable damages based on the Illinois DSA are inconsistent with virtually all other dram shop acts.<sup>69</sup>

Fifteen states currently have dram shop legislation in effect.<sup>70</sup> Of those jurisdictions, only Connecticut and Illinois place dollar limits on recovery.<sup>71</sup> Connecticut allows recovery up to \$20,000 per injured victim with an aggregate limitation of \$50,000 per accident;<sup>72</sup> Illinois allows recovery of \$15,000 per injured victim with an aggregate of \$20,000 for loss of support.<sup>73</sup> In addition, three states provide for exemplary damages under their statutes.<sup>74</sup>

64. See ALASKA STAT. § 04.21.020 (1984); IND. CODE ANN. § 7.1-5-10-15 (Burns 1985).

65. See *infra* note 101 and accompanying text.

66. ILL. REV. STAT. ch. 43, § 135 (1983).

67. See *Chartrand v. Coos Bay Tavern*, 298 Or. 689, 696 P.2d 513 (1985).

68. Illinois courts have held that the DSA was intended only to apply to the commercial aspects of selling, distributing, manufacturing, and wholesaling of alcoholic beverages for profit, and exists to regulate those in the commercial trafficking of liquor. See *Miller v. Moran*, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981) (recognition of host liability would be a drastic move for Illinois, yet numerous other states have recognized the cause of action); *Lowe v. Rubin*, 98 Ill. App. 3d 496, 424 N.E.2d 710 (1981). The *Lowe* court stated that the legislature might reasonably have assumed that the imposition of the sole and exclusive liability upon the consumer of alcoholic beverages would encourage some heightened sense of responsibility in the drinker for his acts, thereby ultimately reducing the frequency of alcohol-caused injuries. *Id.* at 500, 424 N.E.2d at 713. This is a rather absurd statement because if the lack of responsibility for one's own safety, evinced by intoxication, does not deter irresponsible acts, nothing will. See also Comment, *Host Liability for Civil Damage Under Dram Shop Act*, 37 CHI.-KENT L. REV. 123 (1960) (discusses host liability and concludes that § 135 of DSA will allow third parties to sue hosts in the event a guest becomes inebriated and causes harm); Stanner, *Liability of Social Host for Off Premises Negligence of Inebriated Guest*, 68 ILL. B. J. 396 (1980) (modern case law in Illinois and other jurisdictions is broadening the scope of social host liability).

69. See *infra* notes 70-74 and accompanying text.

70. See ALA. CODE § 6-5-71 (1984); COLO. REV. STAT. § 13-21-103 (1974); CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. REV. STAT. ch. 43, § 135 (1983); IOWA CODE ANN. § 123.92 (West. Supp. 1984); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MICH. STAT. ANN. § 18.933 (Callaghan 1985); MINN. STAT. ANN. § 340.95 (West Supp. 1984); N.M. STAT. ANN. § 41-11-1 (1984); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1984); N.D. CENT. CODE § 5-01-06 (1983); OHIO REV. CODE ANN. § 4399.01 (Page 1983); R.I. GEN. LAWS § 3-11-1 (1976); UTAH CODE ANN. § 32A-14-1 (Supp. 1985); VT. STAT. ANN. tit. 7, § 501 (1972).

71. CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. REV. STAT. ch. 43, § 135 (1983).

72. CONN. GEN. STAT. ANN. § 30-102 (West 1975).

73. ILL. REV. STAT. ch. 43, § 135 (1983).

74. See *supra* note 27.

A review of trends in other jurisdictions, coupled with consistent Illinois legislative inaction, suggests that the supreme court should initiate legislative review through the recognition of a common law cause of action.<sup>75</sup> Advocates favoring the recognition of a distinct common law action apart from the DSA are not seeking widespread revisions, but only reasonable expansion of the law to provide adequate compensation to injured victims. The recognition of a fault theory of liability would create a more equitable result for plaintiffs as well as defendants.<sup>76</sup>

### *Unjust Reliance on the Doctrine of Strict Liability*

One of the major problems with the current DSA is its reliance on strict liability.<sup>77</sup> Of the fifteen states that currently have dram shop legislation in effect, Illinois is the only state that employs the doctrine of strict liability in the absence of a liquor control law violation.<sup>78</sup> Under Illinois strict liability principles, a dram shop will be held strictly liable for injuries an intoxicated patron causes if the sale or gift of liquor induces the intoxication.<sup>79</sup> Liability regardless of fault causes conceptual problems because it is contrary to the traditional notion that liability, and thus compensation, should flow from the party at fault to the injured victim.

The strict liability standard, however, has been expressed as a desirable element for plaintiffs because it imposes a higher standard of conduct on defendants, and thus accomplishes more for plaintiffs

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75. This suggestion stems from observations of how other jurisdictions have initiated action by their legislatures. See, e.g., *supra* note 62. The California Supreme Court initiated action by the legislature, when it recognized a common law action against dram shops.

The Illinois Supreme Court similarly used the common law to create a cause of action after deferring the issue of comparative negligence for legislative action. See *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). In *Alvis*, the court noted the number of jurisdictions that recognized the comparative form of negligence for tort liability. The court further noted that inaction by the legislature in this area of the law no longer was supported by current public policy. *Id.* Legislative inaction in the area of the dram shop statute can similarly be interpreted as an invitation to the supreme court to act in conformity with changing social attitudes.

76. Imposing liability without fault is harsh treatment of defendants who act responsibly.

77. Although the DSA relies upon strict liability, fault or negligence is not totally abrogated by the statute. See Note, *The Fault Concept in Illinois*, 1968 U. ILL. L.F. 379. This law review article points out that fault or negligence of the defendant is immaterial under the statute. However, fault of the person seeking recovery might still be fatal to the action (e.g., contributory negligence or assumption of risk of the victim). Therefore, the civil liability section of the DSA is not a total abrogation of the fault concept, but rather renders immaterial only the fault of one party—the person against whom recovery is sought. *Id.* at 398.

78. See *supra* note 70. All the other dram shop statutes require that the plaintiff show a statutory violation involved with liquor or that the establishment caused the patron's intoxication.

79. See *supra* note 5.

than a simple negligence standard would.<sup>80</sup> While the current DSA eases the burden on plaintiffs to prove that the defendant is liable, the limitation on recoverable damages makes the statute unjust. Moreover, strict liability is manifestly unfair to retailers who take adequate precautions against violating liquor control laws, and otherwise use due care to avoid creating a potentially dangerous situation.<sup>81</sup>

The doctrine of strict liability also forms the basis of liability in Illinois products liability laws. In 1965, the Illinois Supreme Court adopted the concept of strict liability in tort for a defective product.<sup>82</sup> Comparisons of the two applications of the strict liability concept are unavoidable. Both applications of the doctrine comport with cited public policy concerns. Specifically, those concerns are public safety and the equity of imposing the economic burden of injury on the party who creates the risk of injury and reaps a profit.<sup>83</sup> The fact that defendants can increase the price of their products in order to compensate for increases in liability insurance supports this risk shifting theory. An additional similarity between the DSA and the products liability application of strict liability is that fault is a factor when considering the injured victim's conduct, but the conduct of the defendant is not considered. For example, defendants can defeat the cause of action or significantly mitigate recoverable damages, through comparative negligence claims.<sup>84</sup>

Plaintiffs who plead a products liability action, however, have a clear advantage over their counterparts pleading a strict liability theory in a dram shop action. Because products liability is a creature of the common law, it has had the benefit of evolving with societal change over its twenty year history. In addition, recoverable damages for a defective product are unlimited, thus allowing for adequate compensation to injured victims. In comparison, the DSA was enacted in horse and buggy days when vehicular catastrophes were unknown.<sup>85</sup> The Act remains a relic of the nineteenth century and has not benefited from consistent judicial re-evaluation as has products liability law.

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80. *Smith*, 621 F.2d at 878 n.4. (the significance of strict liability upon which the DSA is based is that non-negligent as well as negligent tavern owners are liable).

81. See Foltz, *Alcohol on the Rocks*, NEWSWEEK, Dec. 31, 1984, at 52. This magazine article highlights a new sobriety policy at a bar in Amherst, Massachusetts. The bar did away with its "happy hour," 50-cent beer specials, and half-price drinks. It placed notices on every table warning patrons not to mix drinking with driving, and sends home customers who ignore the caution in taxis. *Id.*

82. *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (court followed decisions from several other jurisdictions).

83. *Id.* at 619, 210 N.E.2d at 186.

84. See *supra* note 77.

85. See *supra* note 18.

Numerous appellate decisions have deferred the issue of expanding the remedies under the DSA to the Illinois General Assembly.<sup>86</sup> The General Assembly, however, has not acted substantively on the issue of recoverable damages since 1949.<sup>87</sup> Therefore, supreme court action is necessary to force the legislature's hand in amending the DSA.

The genius of the common law is that it constantly expands to meet new and unique conditions.<sup>88</sup> The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions.<sup>89</sup> Even where there is some evidence of the legislative intent by its failure to act, the supreme court is not foreclosed from amending the common law. A failure to pass or amend legislation is so equivocal that it is meaningless.<sup>90</sup>

The supreme court has noted in dicta that justice requires more than simple honor and respect for prior decision because if these were our only guides "the path of jurisprudence would never change irrespective of a changing world."<sup>91</sup> If the supreme court found that a common law remedy existed apart from the DSA, the legislature could amend or pre-empt the courts' holding. Legislative acquiescence to societal change, however, should not bind Illinois courts in adhering to the common law as it existed in 1889.<sup>92</sup> Because the common law rule of non-liability originated in the nineteenth century, the Illinois Supreme Court should recognize that the DSA, in its present form, is inconsistent with generally accepted contemporary tort law.

86. See *Heldt v. Brei*, 118 Ill. App. 2d 798, 455 N.E.2d 842 (1983) (any enlargement of its scope is the prerogative of the legislature, not the judiciary); *Thompson v. Trickle*, 114 Ill. App. 3d 930, 449 N.E.2d 910 (1983) (change in the law with such a great impact is best done by legislature). Cf. *supra* note 15.

87. See *supra* notes 24-7 and accompanying text.

88. *Colligan*, 38 Ill. App. 2d at 414, 187 N.E.2d at 300.

89. *Sorensen v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984) (vendor sold to minor who caused injury to third party). The *Sorensen* court made a number of statements about our common law heritage that the Illinois Supreme Court should heed. "[A]s a part of our common law heritage, this court is free to amend the common law." *Id.* at 633, 350 N.E.2d at 112. The legislature may amend or change the court's determination of the common law, but Illinois courts should not be bound to adhere to holdings in the common law as it existed in 1949 under the *Howlett* decision. The *Howlett* court recognized the DSA as the exclusive remedy for victims against dram shop operators. 402 Ill. 311, 83 N.E.2d 708 (1949).

90. *Sorensen*, 119 Wis. 2d at 635, 350 N.W.2d at 112.

91. *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 82, 117 N.E.2d 74, 80 (1954). In *Ney*, the owner of a parked car left his keys in it and a thief took the car and injured another person. The Illinois Supreme Court held that the owner's act of negligently leaving his keys in the car was a proximate cause of the injury. *Id.* Note the defendant's acts in *Ney* were in violation of a statute that made it illegal to leave a car unattended with the engine running. See ILL. REV. STAT. ch. 95 ½, § 189 (1957). The court thus used a criminal statute to impose civil liability under the common law.

92. In 1889, the supreme court in *Cruse v. Aden* established the common law rule of non-liability to dram shops. 127 Ill. 231, 20 N.E. 73 (1889).



## ANALYSIS OF A COMMON LAW ACTION

The supreme court in *Cunningham v. Brown* recognized the need for "serious consideration" to re-evaluate the purpose and limitations of the DSA.<sup>93</sup> The court noted that the plaintiff's argument had some merit, and, if no more was involved than establishing a new rule of liability it would warrant more serious consideration. Apparently, the court was reluctant to change the common law rule of non-liability that existed for over seventy years. Those fears that prevented the court in 1961 from recognizing a new common law cause of action, however, have effectively been overcome in other areas of the law.<sup>94</sup> For example, barriers to comparative negligence, products liability in tort, and the recognition of concurrent proximate causes have all been effectively overcome without significant hardships to defendants or the court system.<sup>95</sup>

Additionally, Illinois historically has used criminal statutes as a basis for establishing minimum standards of conduct for imposing civil liability.<sup>96</sup> Illinois, however, refuses to use liquor control laws ("LCL") for this purpose. The most common LCL are the prohibition of sales of liquor to minors,<sup>97</sup> to intoxicated persons,<sup>98</sup> and to

93. 22 Ill. 2d 23, 30, 174 N.E.2d 153, 157 (1961).

94. See, e.g., *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (see *supra* note 75); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (recognized strict liability in tort for a defective product). Prior to the *Alvis* and *Suvada* decisions, Illinois courts were concerned about broadening the common law because of the expected increase in litigation and liability to potential defendants.

95. See *supra* note 94.

96. See, e.g., *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74 (1954) (see *supra* note 91). In order for a criminal statute to be used as a basis of imposing civil liability on the violator, the courts have to adopt and adapt the statute into the common law.

The Restatement (Second) of Torts notes that a duty of care and the attendant standard of conduct may be found in a statute silent on the issue of civil liability. RESTATEMENT (SECOND) OF TORTS § 286, Comment d (1965). Section 286 states:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is being invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

97. ILL. REV. STAT. ch. 43, § 131 (1983).

98. *Id.* See *Demchuk v. Duplancich*, 92 Ill. 2d 1, 440 N.E.2d 112 (1982) (plaintiff sought common law remedy on basis that defendant dram shop sold liquor to intoxicated customer; court denied cause of action); *Gustafson v. Mathews*, 109 Ill. App. 3d 884, 441 N.E.2d 388 (1982) (see *supra* notes 1-5 and accompanying text). *But cf.* *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980); *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959); *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963). The *Smith*, *Waynick*, and *Colligan* courts all developed a theory of recovery under the common law by using the violation of a criminal statute, ILL. REV. STAT. ch. 43, § 131 (1983), as a basis for recognizing foreseeability to find negligence and proximate cause.

habitual and known drunks.<sup>99</sup> Other states that have dram shop statutes,<sup>100</sup> however, have adopted LCL as a basis for finding negligence and for imposing civil liability against retail liquor vendors.<sup>101</sup> A brief analysis of the common law elements of negligence, proximate cause, duty, and breach of duty, shows how Illinois dram shop liability could change, absent the adherence to the doctrine of strict liability.

The question of whether the defendant owes the plaintiff a duty to act in a specific manner is the first element of common law negligence, and it is specifically a question of law for the court to decide. Based upon the United States Constitution, there exists a clear public policy which favors the right of dram shops to operate.<sup>102</sup> The Illinois legislature has expanded upon this public policy by specifically placing limitations on recoverable damages under its DSA. Such a strong statement of public policy indicates that any court-fashioned imposition of a common law duty should only occur after careful scrutiny of what constitutes culpable conduct on the part of a dram shop defendant.

The duty standard should be determined through the recognition of LCL violations as a basis for imposing civil liability. Alternatively, a duty should be recognized when a dram shop operator or employee has a clear opportunity to defuse a potentially life threatening situation.<sup>103</sup> Thus, a showing of utter disregard for the safety

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99. ILL. REV. STAT. ch. 43, § 131 (1983).

100. See *supra* note 70.

101. See, e.g., ALA. CODE § 6-5-71 (1984) (liability based upon sales to already intoxicated patrons); UTAH CODE ANN. 32A-14-1 (1985) (liability based upon violation of liquor control laws).

There seems little doubt that the Illinois LCL found in section 131 of the DSA satisfies the requirements of The Restatement (Second) of Torts for imposing civil liability based upon a statute. See *supra* note 96. Plaintiffs seeking a common law remedy are members of the public (the protected class), whose physical well being, is sought to be protected against a hazard (the irresponsible acts of intoxicated persons). See *Nazareno v. Urie*, 638 P.2d 671, 675 (Alaska 1981).

102. U.S. CONST. amend. XXI, §§ 1 and 2 (repeals amendment XVIII forbidding manufacture and sale of intoxicating liquors).

103. For example, in addition to using the liquor control laws as a basis of imposing civil liability, (see *supra* notes 96-101), the courts could fashion a standard based upon conduct approaching willful and wanton proportions. See, e.g., *Ruth v. Benvenuto*, 114 Ill. App. 3d 404, 449 N.E.2d 209 (1983) (see *supra* note 14); *Gustafson v. Mathews*, 109 Ill. App. 3d 884, 441 N.E.2d 388 (1982) (see *supra* notes 1-4 and accompanying text). In both *Ruth* and *Gustafson*, the defendant's alleged negligent conduct involved more than merely selling liquor to customers in violation of liquor control laws.

Illinois courts should recognize a duty of tavern owners, and other dram shops, who reap profits from the sale of liquor, to care for someone who is visibly unable to care for himself. For example, dram shop operators should ensure that drunk patrons are with friends who are driving or otherwise call a cab or the police. Prosser has stated "[t]here may be no duty to take care of a man who is ill or intoxicated, and unable to look out for himself, but it is another thing to eject him into the danger of a railroad yard, and if he is injured there will be liability." W. PROSSER, HANDBOOK OF

of an intoxicated patron or others would rise to the level of willful or wanton conduct upon which liability could be based.

The second element of common law negligence involves the breach of a judicially recognized duty. Undoubtedly, all dram shop operators should be able to foresee potential injury resulting from the actions of their intoxicated patrons.<sup>104</sup> The use of a simple foreseeability standard, however, would contribute to the same problems that the supreme court and the legislature presumably desire to avoid. These problems include shifting the burden of liability for compensating victims from the intoxicated customer to the potentially deep pocket: the dram shop or the insurance carrier. A breach of duty on the part of the defendant should appropriately be established upon a showing of an operator's lack of due care in identifying potential problems. Evidentiary considerations for establishing a breach of duty should be developed through the adoption of criminal standards set forth in LCL<sup>105</sup> or negligent conduct that approaches willful and wanton proportions.<sup>106</sup>

Finally, Illinois courts, in accord with the old common law principles,<sup>107</sup> have consistently held that the consumption and not the serving of alcoholic beverages is the proximate cause of intoxication.<sup>108</sup> Over the past decade, however, Illinois has significantly modified its common law theories of contributory negligence, assumption of risk, and comparative negligence.<sup>109</sup> Moreover, a large number of jurisdictions subsequently began to recognize the sale of alcoholic beverages as the proximate cause of injuries in cases involving ven-

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THE LAW OF TORTS § 56, at 343 (4th ed. 1971). The same reasoning can be applied to one who escorts a visibly intoxicated man to his auto.

104. See *Waynick v. Chicago's Last Department Store*, 269 F.2d 322, 325 (1959) (every person has a general duty to use due care or ordinary care not to injure others or to avoid injury to others by any agency set in operation by him).

105. See *supra* notes 96-101.

106. See *Gustafson*, 109 Ill. App. 3d at 886, 441 N.E.2d at 389. The court noted that the tavern employees' responsibility and undertaking ended when they deposited *Gustafson* in his car safely. *Id.* at 888, 441 N.E.2d at 392.

107. See *Meade v. Freeman*, 93 Idaho 389, 462 P.2d 54 (1969) (selling of intoxicants to intoxicated person is not proximate cause); *Griffin v. Sebek*, 245 N.W.2d 481 (S.D. 1976) (no common law cause of action); *Garcia v. Hargrove*, 46 Wis. 2d 724, 176 N.W.2d 566 (1970) (it is not a tort to sell intoxicating liquor to able-bodied men).

108. *Colligan*, 38 Ill. App. 2d 411, 187 N.E.2d at 307.

109. See *Coney v. J.L.G. Industries*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983) (merged contributory negligence and assumption of risk into a form of comparative negligence used to offset liability in tort for a defective product). See *Dripps, Comparative Fault and Comparative Negligence—Is There a Difference?*, 72 ILL. B.J. 16(5) (1983) for an excellent analysis of the *Coney* decision and its effect on Illinois common law. See also *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977) (recognized contribution among joint tortfeasors, thus furthering the recognition of concurrent proximate causes and comparative negligence), *cert. denied*, 435 U.S. 946 (1978). See also *Alvis v. Ribar*, 85 Ill. 2d 21, 421 N.E.2d 886 (1981) (see *supra* note 75).

dor liability.<sup>110</sup> Accordingly, these changes acknowledge the notion that proximate cause, because it is a matter of public policy,<sup>111</sup> is subject to the changing attitudes and needs of society. Therefore, it is difficult to comprehend Illinois' continued adherence to the idea that serving alcoholic beverages is not a proximate cause of intoxication.

After pleading a *prima facie* case, plaintiffs would still have the burden of proving by a preponderance of the evidence that they are entitled to a recovery. Moreover, adequate defenses based upon a common law negligence standard would likewise be available to defendants who take precautions to avoid violating liquor control statutes.<sup>112</sup> For example, commercial vendors could regularly verify identification of customers, and tavern owners could give special training to bartenders and waitresses to allow them to spot inebriated customers. Therefore, numerous arguments against expanding dram shop liability are largely without merit.

The best defense available to a dram shop operator under a fault concept is a due care argument of operating a reputable establishment.<sup>113</sup> Elements of proving due care would include evidence of a clean record concerning LCL violations. Additionally, proper training of employees, verifying identifications of patrons, and monitoring customer consumption to the extent plausible would all indicate a total lack of willful or wanton conduct.<sup>114</sup> Moreover, potential liability would be offset by the comparative negligence of the intoxicated person and any assumption of risk a plaintiff voluntarily undertakes.

Because one of the goals of imposing dram shop liability is to help decrease the risks of injury that intoxicated persons create, the recognition of a fault concept of liability, as opposed to a strict standard, would only further encourage operators to use a high degree of care when serving liquor. Illinois should thus follow the well-recognized trend in other jurisdictions and acknowledge that personal in-

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110. See, e.g., *Vance*, 355 F. Supp. 756 (D. Alaska 1973); *Deeds v. United States*, 306 F. Supp. 348 (D. Mont. 1969); *Elder v. Fisher*, 247 Ind. 589, 217 N.E.2d 847 (1966) (selling of liquor may be proximate cause of resulting injury); *Chartrand v. Coos Bay Tavern*, 298 Or. 689, 696 P.2d 513 (1985).

111. *Vance*, 355 F. Supp. at 761 (states that the modern view, and probably the majority view, in cases involving a liquor vendor's liability to third persons is that the furnishing of intoxicants may be the proximate cause of the injuries).

112. See *supra* note 60. The Task Force on drunken driving has recommended various proposals to prevent the problem from increasing. If dram shops voluntarily adopt the recommendations, they could use such as a defense to culpable conduct when faced with a lawsuit for violation of liquor control laws.

113. See *supra* note 81 and accompanying text.

114. Additionally, bar owners could serve food and coffee at relatively cheap prices near closing to help sober patrons who would shortly be driving an automobile after a night of drinking liquor.

jury is an eminently foreseeable consequence of serving a customer too much liquor. Moreover, furnishing liquor may be recognized as the proximate cause of injuries that an intoxicated customer inflicts on a third person.

### CONCLUSION

The limitations which the DSA imposes upon both plaintiffs and defendants are outdated. These limitations do not comport with fundamental principles of modern tort law which look to culpable wrongdoers for compensation of injuries to innocent victims. Revised interpretations of proximate cause and legal duties of commercial vendors initiated in a large number of other jurisdictions are acceptable platforms from which to launch judicial change. Additional support for recognizing a common law cause of action can be found in existing penal statutes and situations where a defendant's conduct approaches willful and wanton proportions.

The task of modifying the DSA should properly be put to the legislature. However, the exigency of the situation will only be spearheaded if the Illinois Supreme Court recognizes a common law action.<sup>116</sup> By granting injured third parties a common law cause of action against dram shops, legislative action is not impinged nor are *stare decisis* principles ignored.<sup>116</sup> In addition, parties injured by the negligent acts of both bar patrons and dram shop operators would be given an opportunity to have a trier-of-fact decide the merits of their claim. The end result will force tavern owners to bear more responsibility for their actions in the high incidence of deaths and injuries caused by intoxicated individuals.

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115. Shortly before publication, the Illinois Supreme Court affirmed its holding in *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961), that the common law provided no remedy against a retail vendor for the tortious actions of its patrons. *Wimmer v. Koenigseder*, 108 Ill. 2d 435, 484 N.E.2d 1088 (1985). The *Wimmer* court's reasoning goes no further than to reiterate that no common law duty is owed to refrain from serving alcoholic beverages under any circumstances. In recent years Illinois appellate courts have urged the supreme court to perform a re-examination of the potential application of common law dram shop liability. See *supra* note 15 & 86. The *Wimmer* court not only failed in performing a re-examination, but also failed to articulate any reason for clinging to outdated precedent.

116. *Stare decisis* is an important factor in the judicial process, but we must not forget it is not the whole process. *Colligan*, 38 Ill. App. 2d at 400, 187 N.E.2d at 298.