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Liability of Liquor Vendors to Third Party Victims: *Holmes v. Circo,* 196 Neb. 496, 244 N.W.2d 65 (1976)

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Note

Liability of Liquor Vendors To Third Party Victims

Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976).

I. INTRODUCTION

Prior to 1959 a third party victim's only recourse against a liquor vendor was through dram shop and civil damage acts. These acts impose liability upon liquor vendors for injuries caused by the sale of alcoholic beverages to certain statutorily proscribed persons.[1] Under the traditional common law, a cause of action against a liquor vendor was virtually unknown.[2] The basis for refusing to impose such liability usually rested on the theory that it was the consumption of the liquor, not the sale, which was the proximate cause of the injury.[3] Other courts refused recovery on the

1. Sixteen states currently have dram shop or civil damage acts in force: ALA. CODE tit. 7, § 120 (1958 & Supp. § 121 1973); CONN. GEN. STAT. ANN. § 30-102 (West Supp. 1975); DEL. CODE tit. 4, § 713 (1974); ILL. ANN. STAT., ch. 43, §§ 135-136 (Smith-Hurd Supp. 1977); IOWA CODE ANN. § 123.49 (West Supp. 1977-1978); ME. REV. STAT. ANN., tit. 17, § 2002 (1964); MICH. COMP. LAWS § 436.22 (Supp. 1977-1978); MINN. STAT. ANN. § 340.95 (West 1972); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1964); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1973); OR. REV. STAT. § 30.730 (1975); R.I. GEN. LAWS § 3-11-1-2 (1976); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1977-1978); WYO. STAT. § 12-34 (Cum. Supp. 1975).

   The history of Nebraska dram shop acts is set out in Holmes v. Circo, 196 Neb. 496, 498-99, 244 N.W.2d 64, 67 (1976). Various versions of the dram shop act were in effect in Nebraska from 1881 to 1935. *Id.*

   For cases decided under the Nebraska dram shop acts, see Kraus v. Schroeder, 105 Neb. 809, 182 N.W. 364 (1921); Hauth v. Sambo, 100 Neb. 160, 158 N.W. 1036 (1916); Forrest v. Koehn, 99 Neb. 441, 156 N.W. 1046 (1916); Buckmaster v. McElroy, 20 Neb. 557, 31 N.W. 76 (1886). For a general discussion of dram shop and civil damage acts see Comment, 57 CALIF. L. REV. 995 (1969); Annot., 65 A.L.R.2d 923 (1959).
2. Buntin v. Hutton, 206 Ill. App. 194, 199 (1917); Demge v. Feierstein, 222 Wis. 199, 203, 268 N.W. 210, 212 (1936).
3. "[T]here may be a sale without intoxication, but no intoxication without drinking." Collier v. Stamatis, 63 Ariz. 285, 290, 162 P.2d 125, 127 (1945). *See also* Annot., 54 A.L.R.2d 1152 (1957).

basis of contributory negligence,[4] the rationale being that it was not a tort to sell or give away intoxicating liquor to one who was strong and able-bodied.[5] Still other courts held that civil damage acts had preempted the field of civil liability.[6] The courts have recognized only a very few exceptions.[7]

In 1959, the landmark case of *Rappaport v. Nichols*[8] was decided by the New Jersey Supreme Court. *Rappaport* began a trend of decisions which recognized a common law cause of action against liquor vendors who sold alcoholic beverages in violation of criminal statutes. This view has now been adopted in fifteen states and the District of Columbia,[9] while in three additional states it has been

4. James v. Wicker, 309 Ill. App. 397, 402, 33 N.E.2d 169, 171 (1941); Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 534, 298 A.2d 84, 88 (1972).
5. Megge v. United States, 344 F.2d 31, 32 (6th Cir. 1965); James v. Wicker, 309 Ill. App. 397, 402, 33 N.E.2d 169, 171 (1941); Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889).
6. Farmer's Mutual Automobile Ins. Co. v. Gast, 17 Wis. 2d 344, 350, 117 N.W.2d 347, 350 (1962).
7. "A man who, in violation of law makes another helplessly drunk, and then places him in a situation where his drunken condition is likely to bring harm to himself or injury to others, may well be deemed guilty of an actionable wrong independently of any statute." Dunlap v. Wagner, 85 Ind. 529, 530 (1882). *See also* Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940) (wife allowed to maintain action against a liquor vendor who sold liquor to her spouse knowing of his lack of control over consumption of liquor); Skinner v. Hughes, 13 Mo. 440 (1850) (master able to bring action against vendor who sold liquor to his slave without the master's consent); Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940) (wife allowed to recover where she had warned the liquor vendor on repeated occasions not to furnish alcoholic beverages to her husband); McCue v. Klein, 60 Tex. 168 (1883) (recovery allowed where the court found that there was a complete and wanton disregard for the welfare of the decedent at a time when he was in no condition to observe ordinary care for self-preservation).
8. 31 N.J. 188, 156 A.2d 1 (1959). *Rappaport* allowed recovery of damages in an action against a tavern keeper who sold alcoholic beverages to minors. After the sale the minors became involved in an automobile accident with the plaintiff.
9. Marusa v. Dist. of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973); Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Prevatt v. McClennan, 201 So. 2d 780 (Dist. Ct. App. Fla. 1967); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959);

recognized as sound.[10] The Nebraska Supreme Court, in *Holmes v. Circo*,[11] rejected this line of decisions. This note will analyze the court's reasoning and the reasoning which supports the trend toward establishing liability against liquor vendors.

II. THE DECISION

The plaintiff in *Holmes* brought an action to recover for injuries she sustained when the automobile in which she was a passenger collided with an automobile driven by George Archer. The plaintiff alleged that the defendants, Louis S. Circo, owner of Circo's Bar, and his employee, Theresa Jones, had served alcoholic beverages to Archer on the day of the collision knowing that he was intoxicated and knowing that he had at his disposal an automobile which he intended to drive. The plaintiff contended that such actions on the part of defendants constituted negligence and a violation of section 53-180 of the Nebraska Revised Statutes.[12] These actions were alleged to be the proximate cause of her injuries.[13] The Nebraska Supreme Court affirmed the district court's holding that the plaintiff's petition failed to state a cause of action. The court found that the statute did not create a civil remedy nor impose a duty on the

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Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965); Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1964).

Contra, Pierce v. Lopez, 16 Ariz. App. 54, 490 P.2d 1182 (1971); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Hull v. Rund, 150 Colo. 425, 374 P.2d 351 (1962); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966); Farmer's Mutual Automobile Ins. Co. v. Gast, 17 Wis. 2d 344, 117 N.W.2d 347 (1962); Parsons v. Jow, 480 P.2d 396 (Wyo. 1971).

10. Moore v. Riley, 487 S.W.2d 555 (Mo. 1972); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Shelby v. Keck, 85 Wash. 2d 911, 541 P.2d 365 (1975).
11. 196 Neb. 496, 244 N.W.2d 64 (1976).
12. NEB. REV. STAT. § 53-180 (Reissue 1974) reads as follows:

> No person shall sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquors, to or for any minor, any person who is mentally incompetent, or any person who is physically or mentally incapacitated by the consumption of such liquors.

Sanctions are provided in NEB. REV. STAT. § 53-180.05 (Reissue 1974) as follows:

> Any person . . . violating any of the provisions of section 53-180 shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than two hundred fifty dollars nor more than five hundred dollars or imprisoned in the county jail for fifteen days or be both so fined and imprisoned.

13. 196 Neb. at 497, 244 N.W.2d at 66.

part of the bar or tavern operator toward injured third parties.[14] The court accepted the traditional common law theory that the proximate cause was the act of consumption by the purchaser, not the act of the vendor in selling the liquor.[15] While the court noted the recent trend toward allowing recovery in situations such as the one presented in *Circo*, it expressed its opinion that the issue was one of public policy which could be better decided by the legislature than by the courts.[16] The court concluded by expressing its concern that imposition of a common law cause of action would create uncertainty. The court noted that this uncertainty would especially be prevalent in cases involving social gatherings or "bar hopping" excursions, and in deciding what standard of care should be applied.[17] As will be discussed, the fears and considerations which were found by the Nebraska Supreme Court to be obstacles to imposing liability, where none had been recognized before, have led other courts to reexamine the traditional rules in light of present day needs and theories of law. This reexamination has led some courts to change the traditional rule to reflect a more realistic attitude.

III. ANALYSIS

A. Theories Used to Modify the Traditional Approach

The common law as it has been interpreted in recent opinions imposes liability under two closely related theories. The first theory is that a duty is imposed upon persons by a criminal statute which provides that no person shall sell or give away alcoholic liquor to a minor or intoxicated person, and that a violation of this duty is the proximate cause of the injury to plaintiff. This theory will be referred to as the first modified common law theory. The second theory is that a duty is imposed on every person not to do an act the consequences of which are foreseeable, and which results in harm to another.[18] This theory will be referred to as the second modified common law theory.

1. The First Modified Common Law Theory

The basis of the first modified common law theory is that there is a duty.[19] This duty arises when the court adopts the criminal

14. *Id.* at 499, 244 N.W.2d at 67.
15. *Id.* at 501, 244 N.W.2d at 68.
16. *Id.* at 505, 244 N.W.2d at 70.
17. *Id.* at 504-05, 244 N.W.2d at 70.
18. Shelby v. Keck, 85 Wash. 2d 911, 917, 541 P.2d 365, 369 (1975). *See also* Colligan v. Cousar, 38 Ill. App. 2d 392, 413, 187 N.E.2d 292, 296 (1963).
19. Vance v. United States, 355 F. Supp. 756, 759 (D. Alaska 1973).

statute as defining a minimum standard of care. Violation of the statute is then evidence of negligence, provided the court views at least one of the purposes of the statute to be the protection of injured third party victims from conduct proscribed by the statute.[20] Thus, where there is a criminal statute prohibiting the serving of alcoholic liquor, which is intended to protect a class of persons of which the injured party is a member, the serving of such liquor is negligence per se. The statute sets a minimum standard of care, which, when breached, results in a finding of negligence per se.[21] It is the illegal sale which violates this duty to the consumer or third party. The sale, not the consumption, becomes the proximate cause of the resulting injury.[22] Under this view, it has been held that contributory negligence is not a defense.[23]

At least one court has viewed the rule that contributory negligence is not a defense as being equivalent to strict liability.[24] The court in *Vance v. United States*[25] pointed out that a contributory negligence defense would be inappropriate because such statutes are intended to place the entire responsibility for the resulting harm upon the violator. The court noted that it would be virtually impossible for the statute to be violated without contributory negligence on the part of plaintiff-consumer.[26] A concurring opinion in *Meade v. Freeman*[27] stated that there can be no contributory negligence charged against an innocent third party injured by the intoxicated person.[28]

In order to gain the protection of the statute, it is necessary that the person seeking recovery be a member of the class which the statute seeks to protect.[29] It is generally accepted by the cases

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20. [A]n unexcused violation of a statute or regulation is negligence in itself if the court adopts the statute as defining the conduct of a reasonable man. . . . The court may and usually must adopt the statute as the minimum standard of care if the purpose of the statute is at least 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 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.

    Id.

21. Stachniewicz v. Mar-Cam Corp., 259 Or. 583, 586, 488 P.2d 436, 438 (1971).
22. Mitchell v. Ketner, 54 Tenn. App. 656, 665, 393 S.W.2d 755, 759 (1964).
23. Vance v. United States, 355 F. Supp. at 759.
24. Shelby v. Keck, 85 Wash. 2d 911, 917, 541 P.2d 365, 370 (1975).
25. 355 F. Supp. 756 (D. Alaska 1973).
26. *Id.* at 759.
27. 93 Idaho 389, 462 P.2d 54 (1969).
28. *Id.* at 399, 462 P.2d at 64 (concurring opinion).
29. Vance v. United States, 355 F. Supp. at 759.

adopting the first modified common law approach that statutes such as the one in force in Nebraska are for the protection of the public in general[30] or for the protection of those persons who may potentially be harmed if the statute is violated.[31] Cases decided under the traditional common law view take the narrower attitude that the statute was enacted to regulate sales, or, more broadly, that it protects those persons to whom the sale of liquor is prohibited by the statute.[32] By basing liability on breach of a duty, some courts have circumvented the traditional common law view that it is the consumption of the liquor, not the sale, which is the proximate cause of the injury.[33]

2. The Second Modified Common Law Theory

Although several courts have applied the first modified common law theory, more frequently courts have not been so concerned with "getting around" the traditional concept of proximate cause. These courts have instead focused their attention on the foreseeability of the resulting harm. This is the approach suggested by the second modified common law theory.[34] As one court stated:

30. Waynick v. Chicago's Last Dept. Store, 269 F.2d 322, 325 (7th Cir. 1959); Veseley v. Sager, 5 Cal. 3d 153, 165, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971); Adamian v. Three Sons, Inc., 353 Mass. 498, 500, 233 N.E.2d 18, 19 (1968); Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 8 (1959).

31. Giardina v. Solomon, 360 F. Supp. 262, 263 (M.D. Pa. 1973); Meade v. Freeman, 93 Idaho 389, 394, 462 P.2d 54, 59 (1969); Thaut v. Finley, 50 Mich. App. 611, 613, 213 N.W.2d 820 (1973); Majors v. Brodhead Hotel, 416 Pa. 265, 268, 205 A.2d 873, 875 (1966).

32. Collier v. Stamatis, 63 Ariz. 285, 289, 162 P.2d 125, 127 (1945); Carr v. Turner, 238 Ark. 889, 890, 385 S.W.2d 656, 657 (1965); Lee v. Peerless Inv. Co., 248 La. 982, 991, 183 So. 2d 328, 331 (1966).

33. Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955) and its California antecedents approach the initial adjudication of negligence through the obsolete gateway of proximate cause rather than duty. Thus these cases may be unreliable and ripe for qualification or disapproval. Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 691-94, 58 Cal. Rptr. 792, 794-96 (1967).

For cases basing liability on a breach of duty, see Marusa v. Dist. of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Waynick v. Chicago's Last Dept. Store, 269 F.2d 322 (7th Cir. 1959); Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973); Shelby v. Keck, 85 Wash. 2d 911, 541 P.2d 365 (1975); Stachniewicz v. Mar-Cam Corp., 259 Or. 583, 488 P.2d 436 (1971); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Soronen v. Olde Milford Inn, 84 N.J. Super. 372, 202 A.2d 208 (1964), *rev'd* 46 N.J. 582, 218 A.2d 630 (1966); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965).

34. *See* text accompanying note 16, *supra*. For cases based primarily on

> Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication. Under the above principles of proximate cause, it is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct . . . is one of the hazards which makes such furnishing negligent.[35]

Thus, some courts are no longer willing to refuse recovery on the basis of technicalities. They are taking into account the present state of our society instead of blindly following rules set down years ago. This view was emphasized in *Deeds v. United States*,[36] where it was noted that travel by automobile to and from the tavern is so commonplace and that accidents resulting from drinking are so frequent, that the risk of harm resulting from a sale of liquor to a minor or intoxicated person can be readily recognized and foreseen.[37] The courts that apply the second modified common law theory have not been willing to insulate liquor vendors from liability merely because of intervening factors. This is especially true when the intervening factors and the possibility of injury resulting from the unlawful sale are reasonably foreseeable at the time of the sale:

> There may be any number of causes and effects intervening between the first wrongful act and the final injurious occurrence and if they are such as might, with reasonable diligence, have been foreseen, the last result as well as the first, and every intermediate

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this theory, see Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1964).

35. Veseley v. Sager, 5 Cal. 153, 164, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971). Other opinions have not been so tactful in their consideration of the traditional common law rule of proximate cause: "Some courts cling steadfastly to the myth that it is the drinking and not the sale that is the proximate cause of the ensuing injury and are wearing blinders when it comes to observing the ordinary course of human events." Meade v. Freeman, 93 Idaho 389, 399, 462 P.2d 54, 64 (1969) (concurring opinion).
36. 306 F. Supp. 348 (D. Mont. 1969).
37. *Id.* at 355.

> result, is to be considered in law as the proximate result of the first wrongful cause. A tort-feasor is not relieved from liability for his negligence by the intervention of the acts of thirds, including the act of a child, if those acts were reasonably foreseeable. The theory being that the original negligence continues and operates contemporaneously with an intervening act which might reasonably have been anticipated so that the negligence can be regarded as a concurrent cause of the injury inflicted. One who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof although the act of a third person may have contributed to the final result. The law of negligence recognizes that there may be two or more concurrent and directly cooperative and efficient proximate causes of an injury.[38]

It is apparent from these and other decisions based on the same theories[39] that many courts have been willing to reexamine the logic of the traditional common law approach and have found that it is out of step with current notions of fairness and responsibility.

B. The Nebraska Supreme Court's Response

Although the Nebraska Supreme Court implied its approval of the traditional common law theory of proximate cause,[40] it apparently considered only the first modified common law theory of liability[41] in reaching its decision in *Holmes*. The court concluded that "section 53-180, R.R.S. 1943, does not create a duty toward third parties, and, as such, the statute does not fix a standard of care, the violation of which could be proof of negligence in actions by third parties. To rule otherwise would thwart the intention of the Legislature."[42] The supreme court apparently did not consider the plaintiffs in this action to be in the class intended to be protected by the legislation.[43] Instead, the court stated that the purpose of the statute was to prohibit the dispensing of liquor to certain persons, and to regulate the manufacture, sale, and distribution of alcoholic beverages.[44] It refused to find that either a civil remedy

38. Rappaport v. Nichols, 31 N.J. 188, 204-05, 156 A.2d 1, 10 (1959) (citing from Menth v. Breeze Corp., 4 N.J. 428, 441-42, 73 A.2d 183, 189 (1950)).
39. *See* notes 33-34 *supra*.
40. Holmes v. Circo, 196 Neb. 496, 501, 244 N.W.2d 65, 68 (1976).
41. *See* text accompanying notes 19-33, *supra*.
42. 196 Neb. at 504, 244 N.W.2d at 70.
43. *Id.* at 499, 244 N.W.2d at 67.
44. The present law prohibits the dispensing of intoxicating liquors to certain classes of persons, and is a comprehensive act to regulate the manufacture, sale, and distribution of alcoholic liquors.

    There are cases from other jurisdictions holding that the purpose of a prohibitory statute such as the above is to regulate the business of selling intoxicants, and not to enlarge civil

or a duty was created by the statute.[45]

By taking this narrow stand, the court ignored the second and more prevalent modified common law theory of liability, and the rationale upon which it was based. Instead, it simply disposed of the matter by stating that the ultimate decision of whether to impose a civil duty on the tavern owner because of a statute drawn to protect the public by preventing the sale of liquor to those intoxicated or under age is clearly a question of policy.[46] The court stated:

> We are mindful of the misery caused by drunken drivers and the losses sustained by both individuals and society at the hands of drunken drivers, but the task of limiting and defining a new cause of action which could grow from a fact nucleus formed from any combination of numerous permutations of the fact situation before us is properly within the realm of the Legislature.[47]

C. A Question for the Legislature or for the Courts?

While the Nebraska Supreme Court is not alone in its feeling that the legislature should adopt a cause of action,[48] several courts have pointed out that a failure of the legislature to act is not fatal to finding such a cause of action.[49] These courts have found the common law to be a flexible instrument which may be used to make the changes necessary to keep the law in step with the times, rather than an unchanging hinderance to progress.[50]

> remedies. . . . We agree that statutes of this type do not create a civil remedy or impose a duty on the part of the bar or tavern operator toward injured third parties.

Id.

45. *Id.*
46. *Id.* at 504, 244 N.W.2d at 70.
47. *Id.*
48. Carr v. Turner, 238 Ark. 889, 890-91; 385 S.W.2d 656, 658 (1965); Hall v. Budagher, 76 N.M. 591, 595, 417 P.2d 71, 74 (1966).
49. *See* Adamian v. Three Sons, Inc., 353 Mass. 498, 500, 233 N.E.2d 18, 19 (1968); Benevolent Protective Order of Elks Lodge #97 v. Hanover Ins. Co., 110 N.H. 324, 326, 266 A.2d 846, 847 (1970); Ramsey v. Anctil, 106 N.H. 375, 376, 211 A.2d at 900, 901 (1965).
50. > Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose. If this were not so, we must succumb to a rule that a judge should let others 'long dead and unaware of the problems of the age in which he lives, do his thinking for him.'

Trail v. Christian, 298 Minn. 101, 112, 213 N.W.2d 618, 624 (1973) (citing from Bielski v. Schulze, 16 Wis. 2d 1, 11, 114 N.W.2d 105, 110 (1961)).

In making their decisions as to whether or not the common law should be changed, the courts of other jurisdictions have taken into account: (1) the high number of accidents caused by drunken drivers,[51] (2) the fact that someone saddled with the risk of liability would have a better opportunity to anticipate and prevent harm,[52] (3) the burden which such potential liability would place on liquor vendors,[53] and (4) the possibility that the courts would be flooded by unwarranted litigation.[54] At least one court has considered the attitude of society toward liquor in reaching its decision:

> We are convinced that [courts which have modified the common law] are basically unable to disenthrall themselves of the lurking suspicion that liquor in and of itself is evil. This, in spite of the fact that the legislature here, as in almost every other state, has determined as public policy that liquor is part and parcel of our social scene. Abused it may be; evils it may produce; accidents, injury and death it may cause; marriages and homes it may rupture; unemployment, insolvency and degradation may result from its over use—but legitimate the selling and consuming of it is declared.[55]

In *Rappaport*, the New Jersey Supreme Court expressed its opinion that a finding of such common law liability would afford a fairer measure of justice to innocent third parties and strengthen and give greater force to the enlightened statutory and regulatory

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51. Adamian v. Three Sons, Inc., 353 Mass. 498, 501, 233 N.E.2d 18, 20 (1968); Mitchell v. Ketner, 54 Tenn. App. 656, 665-66, 393 S.W.2d 755, 759 (1964).

52. Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 101, 450 P.2d 358, 359 (1969) (it is best to place liability on one who can anticipate potential injury). *Cf.* Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970) (rejected argument that liquor vendors should be held liable because they can best anticipate possible harm).

53. Hamm v. Carson City Nugget, Inc., 85 Nev. at 101, 450 P.2d at 359 (imposing liability would subject tavern owners to ruinous exposure every time they pour a drink); Garcia v. Hargrove, 46 Wis. 2d 724, 730, 176 N.W.2d 566, 570 (1970) (concerned with the difficulty in determining where to cut off the line of liability).

54. > We obviously do not accept the "too much work to do" rationale. We place the responsibility exactly where it should be: not in denying a relief to those who have been injured *but on* the judicial machinery of the Commonwealth to fulfill its obligation to make itself available to litigants. Who is to say which class of aggrieved plaintiffs should be denied access to our courts because of speculation that the work load will be a burden?
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> Manning v. Andy, 454 Pa. 237, 250, 310 A.2d 75, 81 (1973) (dissenting opinion) (emphasis in the original) (citing from Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 595, 305 A.2d 877, 882 (1973)).
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> This attitude was adopted by the court in Brattain v. Herron, 309 N.E.2d 150, 157 (Ind. App. 1974).

55. Meade v. Freeman, 93 Idaho 389, 395, 462 P.2d 54, 60 (1969).

precautions against such sales and their frightening consequences.[56]

While the Nebraska Supreme Court was reluctant to consider the factors enumerated above, it did express its concern that imposing a common law duty of care would create uncertainty as to whether or not hosts of social gatherings should be held liable. The court also expressed concern on the question of how liability should be distributed among owners of various bars visited on "bar hopping" excursions, if a common law cause of action were recognized.[57]

D. Liability of Social Hosts

In defining the liability of liquor vendors to "barhoppers" and persons injured by them, the Nebraska Supreme Court has at its disposal a great number of cases, which set forth theories of proximate cause, foreseeability, and intervening causes.[58]

In recent years, several courts have considered the liability of social hosts to injured third persons.[59] The most recent case to be decided on the subject is *Linn v. Rand*.[60] In *Linn*, the plaintiff-pedestrian charged Nacnodovitz, Rand's host, with negligently serving excess amounts of alcoholic beverages to Rand while a guest in his home. Nacnodovitz then permitted Rand to drive his car. Rand proceeded to run into the plaintiff and serious injuries resulted. In imposing liability, the court stated that "[i]t makes little sense to say that the licensee . . . is under a duty to exercise care, but give immunity to a social host who may be guilty of the

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56. Rappaport v. Nichols, 31 N.J. 188, 205, 156 A.2d 1, 10 (1959).
57. Holmes v. Circo, 196 Neb. at 504-05, 244 N.W.2d at 70.
58. *See* text accompanying notes 18-38 *supra*.
59. For those cases imposing liability, see Giardina v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973) (fraternity party); Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 90, 100 Cal. Rptr. 752 (1972) (company Christmas party); Brattain v. Herron, 309 N.E.2d 150 (Ind. App. 1974) (drinking in a private home); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973) (wedding reception); Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976) (liquor served to a minor in a private home).

    For those cases denying liability, *see* Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 298 A.2d 84 (1972) (club dinner meeting); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971) (fraternity party) (the court rejected the argument that a host can never be held liable); Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973) (party by employer); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969) (company Christmas party); Hulse v. Driver, 11 Wash. App. 509, 524 P.2d 255 (1974) (drinking in private home).
60. 140 N.J. Super. 212, 356 A.2d 15 (1976).

same wrongful conduct merely because he is unlicensed."[61] The court further stated that its goal was to do substantial justice in light of the mores and needs of modern day life.[62]

Of special interest is *Brattain v. Herron*.[63] In *Brattain*, the defendant allowed her minor brother and his friend to drink beer and whiskey at her home knowing that they would later be driving. In holding defendant liable, the court noted that the criminal statute on which they based their decision referred to "any person." Such statutory reference was found to be broad enough to include a social host under the modified common law approach.[64] The Nebraska statute uses the phrase "no person" rather than "no commercial vendor." Under the reasoning of *Brattain*, the Nebraska statute could be read broadly to include social hosts.

The imposition of liability on social hosts is not without opposition. The court in *Hulse v. Driver*[65] refused to extend liability to persons engaged in a social activity. Instead, the court restricted liability to those engaged in the commercial furnishing of liquor. It is therefore clear that should the controversy ever arise, the Nebraska Supreme Court would not be without precedent on either side of the issue. In any event, fears of a potential controversy arising should not serve to hinder the court in deciding the case at hand.

IV. CONCLUSION

The position of the Nebraska Supreme Court can properly be described as a "back-eddy running counter to the mainstream of modern tort doctrine."[66] Even though nineteen jurisdictions now recognize the validity of a common law cause of action against liquor vendors,[67] and even though sixteen states have recognized the need for such a cause of action by enacting dram shop and civil damage acts,[68] the Nebraska Supreme Court has refused to act. Instead, it has preferred to let the legislature make the decision.

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61. *Id.* at 217, 356 A.2d at 18.
62. *Id.* at 218, 356 A.2d at 18-19.
63. 309 N.E.2d 150 (Ind. App. 1974).
64. *Id.* at 156.
65. 11 Wash. App. 509, 524 P.2d 255 (1975).
66. Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 691, 58 Cal. Rptr. 792, 794 (1967).
67. *See* notes 9-10 *supra*.
68. *See* note 1 *supra*. Illinois, Michigan, Minnesota, New York, and Oregon recognize both a common law and a statutory cause of action. Therefore, a total of 30 states allow an action to be maintained against liquor vendors for damages caused by their unlawful sales of alcoholic beverages.

The court has ignored the reasoning offered by other courts in their attempts to adjust legal principles to reflect the current needs and values of our society. It has been persuaded to rest its decision on a common law rule made when the needs of the country and the presence of danger from the violation of such criminal statutes were much different from the needs and dangers facing society today. The court has allowed fears of future potential litigation, which other courts have already successfully dealt with, to prevent a needed remedy in the present litigation. Such inaction is surely an unwarranted gift to liquor vendors and a hardship on those who are harmed by the actions of those who now stand protected.

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