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California Liquor Liability: A Decade after Coulter v. Superior Court

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California Liquor Liability: A Decade After *Coulter v. Superior Court*

I. INTRODUCTION

In 1986, 2,543 persons were killed in alcohol-related accidents in California and an additional 69,876 persons were injured.[1] Over 35% of the persons killed in alcohol-related accidents, and over half the persons injured, were innocent, nondrinking parties.[2]

For years, courts[3] and public interest groups, such as Mothers Against Drunk Drivers (MADD),[4] have expressed alarm at the incidence of drunk driving and the resulting tragedies. The California courts responded to this problem in the 1970's by extending liability to individuals who served or sold alcohol to an intoxicated person subsequently involved in an accident.[5]

In 1978, however, the California Legislature reversed this judicial trend and severely limited third-party liability for supplying alcohol to an intoxicated person who could foreseeably injure others.[6] A decade later, the drunk-driving problem still remains, but the California courts have not been inactive and have recently interpreted certain exceptions to common law immunity to alleviate some of the harshness of the common law rule.[7]

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1. CALIFORNIA HIGHWAY PATROL, 1986 ANNUAL REPORT OF FATAL AND INJURY MOTOR VEHICLE TRAFFIC ACCIDENTS 22 (prepared pursuant to CAL. VEH. CODE § 2408 (West 1987)). These figures represent an increase from the 2,422 deaths and 65,726 injuries in 1982. *Id.*

2. *Id.* at 25.

3. *See* Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Morris v. Farley Enter., Inc., 661 P.2d 167 (Alaska 1983); Ono v. Applegate, 62 Haw. 131, 612 P.2d 533 (1980); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980).

4. Mothers Against Drunk Drivers (MADD) was founded in 1980 by Candy Lightner, a mother whose child was killed by a drunk driver. Leo, *One Less for the Road?*, TIME, May 20, 1985, at 76, 77.

5. See *infra* notes 59-73 and accompanying text for discussion of Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (civil liability imposed on noncommercial suppliers of alcoholic beverages); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (civil liability imposed on commercial vendor of alcoholic beverages).

6. CAL. BUS. & PROF. CODE § 25602 (West 1985); CAL. CIV. CODE § 1714 (West 1985).

7. See *infra* notes 90-167 and accompanying text for discussion of exceptions to the common law rule.

This comment will trace the history of third-party liquor liability and the policies which have shaped judicial and legislative action in the United States, including the countervailing trends of liability being judicially imposed in the face of legislative restraints on such liability. A summary of the historical basis for the law as it stands today in California will also be provided. This comment will then discuss the status and application of third-party liability since the 1978 legislation, dealing specifically with exceptions to the general rule of nonliability and the manner in which those exceptions have been applied. Finally, the impact and possible implications of those exceptions in California as well as in other states will be explored in light of current trends in the liquor liability area.

II. HISTORICAL BACKGROUND

At common law, there traditionally was no civil remedy against servers of alcohol for injuries to third parties caused by an intoxicated person.[8] The rationale behind this strict rule was that drinking, not serving alcohol, was the proximate cause of any resulting injuries.[9] The person being served had the choice of whether or not to drink and therefore, his decision to drink, and not the availability of the alcohol, determined the outcome. However, this view gradually began to change, and legislatures as well as courts sought to create means by which the injured third party could recover damages.

A. Bases of Liability

1. Dram Shop Acts

States first enacted dram shop acts in the mid-to-late 1800's as an outgrowth of the temperance movement.[10] The first such statute was passed in 1849 by Wisconsin and required that tavern-keepers provide some support for "paupers, widows and orphans" injured by the sale of alcoholic beverages.[11] Other states soon followed by enacting stat-

8. *See, e.g.*, State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951) (no cause of action against commercial vendor); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969) (refusal to impose liability on noncommercial server). *See generally* Comment, *Imposition of Liability on Social Hosts in Drunk Driving Cases: A Judicial Response Mandated by Principles of Common Law and Common Sense*, 69 MARQ. L. REV. 251, 254 (1986).

9. 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969).

10. *See* Comment, *Dram Shop Liability in Idaho: A Review of the Past, A Look into the Future*, 23 IDAHO L. REV. 293, 294 (1986-1987) [hereinafter Comment, *Dram Shop Liability in Idaho*]; Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013, 1015 n.13 (1983) [hereinafter Comment, *Torts of the Intoxicated*]; Comment, *California Liquor Liability: Who's to Pay the Costs?*, 15 CAL. W.L. REV. 490, 497 (1980) [hereinafter Comment, *California Liquor Liability*].

11. Goldberg, *One for the Road: Liquor Liability Broadens*, A.B.A. J., June 1, 1987, at 84, 86.

utes which created a civil remedy against the seller or provider of alcoholic beverages for any injuries resulting from the drinker's intoxication.[12]

Several reasons exist for imposing dram shop liability on a commercial vendor of alcohol. First, he is able to insure against the potential loss.[13] Second, the vendor can equalize the cost of this insurance by increasing the price of alcohol.[14] Third, because of his business experience, the vendor is in a position to know whether or not the drinker is intoxicated.[15] Finally, the vendor has the option of refusing to serve alcohol when he knows that the drinker is intoxicated or underage.[16]

The typical dram shop act defines the class of persons to whom the seller cannot serve alcohol without risk of liability and often includes minors, habitual drunkards, or obviously intoxicated persons.[17] Although some statutes are broadly worded in this respect,[18] particu-

12. *See, e.g.*, ALA. CODE § 6-5-71 (1977); ALASKA STAT. § 04.21.020 (Supp. 1986); COLO. REV. STAT. § 13-21-103 (Supp. 1987); CONN. GEN. STAT. § 30-102 (Supp. 1988); FLA. STAT. § 768.125 (1986); GA. CODE ANN. § 3-3-22 (1982); IDAHO CODE § 23-808 (Supp. 1977); IOWA CODE ANN. § 123.92 (West 1987); ME. REV. STAT. ANN. tit. 28-A, §§ 2501-19 (Supp. 1987); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1987); MINN. STAT. ANN. § 340A-801 (West Supp. 1988); MO. ANN. STAT. § 537.053 (Vernon 1988); N.M. STAT. ANN. § 41-11-1 (1986); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1988); N.C. GEN. STAT. §§ 18B-121 to -129 (1983); N.D. CENT. CODE § 5-01-06.1 (1987); OHIO REV. CODE ANN. § 4399.01 (Anderson 1982); OR. REV. STAT. §§ 30.950, 30.960 (1985); R.I. GEN. LAWS §§ 3-14-1 to -13 (1987); UTAH CODE ANN. § 32A-14-1 (1986); VT. STAT. ANN. tit. 7, § 501 (Supp. 1987).

The basic elements a plaintiff must prove in a dram shop case are:

1. a patron on the premises
2. was served intoxicating liquors
3. while he was intoxicated
4. under circumstances from which the defendant knew or reasonably should have known that the patron was then intoxicated;
5. the patron while intoxicated then operated a motor vehicle,
6. as was reasonably foreseeable by the defendant,
7. and a person of ordinary prudence would have refrained from serving liquor to that patron in such circumstances
8. the patron's drunk driving caused the plaintiff's death or injury within the scope of the foreseeable risk.

Beitman, *Dram Shop Liability*, 21 TRIAL, Mar. 1985, at 38.

13. Comment, *Torts of the Intoxicated*, *supra* note 10, at 1015.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. "Every person who is injured within the state in person or property, by any intoxicated person has a right of action in his or her own name, severally or jointly, against any person . . . who, by selling or giving alcoholic liquor, . . . causes the intoxication of such person." Liquor Control Act § 6-21, ILL. ANN. STAT. ch. 43, para. 135

larly in the sense of who may be liable,[19] courts have generally declined to impose liability upon social hosts under the dram shop acts.[20] This reluctance may be explained mostly by reference to policy considerations that apply to commercial vendors but do not apply to social hosts. For instance, social hosts do not have the same capacity to cover their potential liability with insurance, and since social hosts do not often charge guests for drinks, they certainly cannot spread the cost as readily as commercial vendors. Furthermore, they also lack expertise in determining whether a guest is intoxicated, since social hosts probably have less contact with intoxicated persons than do commercial servers. Finally, because of social pressures, a host may be reluctant to refuse serving an already intoxicated guest more drinks, whereas a commercial vendor does not generally have the same ties of companionship or friendship with the persons whom he serves.

Courts in two states, Iowa and Minnesota, have applied broadly worded dram shop acts to social hosts.[21] However, the legislatures in both states reacted by amending the statutes to include *only* commercial servers.[22] These states serve as two examples of state legislatures' unwillingness to allow recovery against social hosts under dram shop acts.

2. Negligence Per Se

In addition to dram shop acts, liability may be imposed when a violation of a liquor control statute occurs.[23] All fifty states and the District of Columbia have some form of liquor control statute making it a criminal offense to sell alcohol to certain classes of persons.[24] In

(Smith-Hurd Supp. 1987). The Illinois statute does not in any way specify persons who cannot be served. *Id.*; *see also* ALA. CODE § 6-5-71 (1977).

19. Liquor Control Act § 6-21, ILL. STAT. ANN. ch. 43, para. 135 (Smith-Hurd Supp. 1987) ("*Any person* . . . who, by selling or giving alcoholic liquor, . . . causes the intoxication . . . .") (emphasis added); *see also* ALA. CODE § 6-5-71 (1977); N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1984).

20. Comment, *Torts of the Intoxicated*, *supra* note 10, at 1015; Comment, *Dram Shop Liability in Idaho*, *supra* note 10, at 296.

21. Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972); Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972).

22. IOWA CODE ANN. § 123.95 (West Supp. 1983-1984); MINN. STAT. ANN. § 340.95 (West Supp. 1983-1984).

23. *See, e.g.*, Ono v. Applegate, 62 Haw. 131, 612 P.2d 533 (1980) (tavern liable for furnishing alcohol in violation of statute); Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982) (package store liable for selling alcohol in violation of statute).

24. ALA. CODE § 28-3A-25 (Supp. 1986); ALASKA STAT. § 04.16.051-060 (1987); ARIZ. REV. STAT. ANN. §§ 4-241, 4-244 (Supp. 1987); ARK. STAT. ANN. §§ 3-3-201, 3-3-217 (1987); CAL. BUS. & PROF. CODE §§ 25602, 25658 (West 1985); COLO. REV. STAT. § 12-47-128 (1985 & Supp. 1987); CONN. GEN. STAT. ANN. § 30-86 (West Supp. 1988); DEL. CODE ANN. tit. 4, §§ 712, 713 (1985); D.C. CODE ANN. § 25-121 (Supp. 1988); FLA. STAT. ANN. §§ 562.11, 562.50 (West 1987); GA. CODE ANN. §§ 3-3-22, 3-3-23 (1982 & Supp. 1988); HAW. REV. STAT. § 281-78 (1985 & Supp. 1987); IDAHO CODE §§ 23-312, 23-929 (Supp.

some situations, these criminal statutes may form the basis of a civil claim based on principles of negligence per se.

The theory of negligence per se is predicated on the assumption that a statute may sometimes prescribe the standard of conduct for a community. "When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate."[25] Certain conditions must be met before a statute may be used to impose negligence per se. The court must find that the purpose of the law was:

> (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.[26]

If these conditions exist, violation of the statute is a breach of duty for which the violator may be held civilly liable.[27]

The well-known case of *Rappaport v. Nichols*[28] was the first to impose liability based upon the violation of a liquor control statute. In *Rappaport*, a tavern-keeper was held liable for injuries to a third party caused by a minor who had been served alcohol in violation of a

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1988); ILL. ANN. STAT. ch. 43, para. 131 (Smith-Hurd 1986); IND. CODE ANN. §§ 7.1-5-7-8, 7.1-5-10-14 (Burns 1984 & Supp. 1988); IOWA CODE ANN. § 123.49 (West 1987); KAN. STAT. ANN. § 41-2615 (Supp. 1987); KY. REV. STAT. ANN. §§ 244.070 to .080 (Michie/Bobbs-Merrill 1981); LA. REV. STAT. ANN. §§ 14:91 to :91.12, 26:90 (West 1986 & Supp. 1988); ME. REV. STAT. ANN. tit. 28-A, §§ 354, 705, 2081 (Supp. 1987); MD. ANN. CODE art. 2B, § 118 (1987 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 138, § 34 (West Supp. 1988); MICH. COMP. LAWS ANN. §§ 436.29, 436.33, 436.336 (West Supp. 1987); MINN. STAT. ANN. §§ 340A.502-03 (West Supp. 1988); MISS. CODE ANN. §§ 67-1-81, 67-1-83 (Supp. 1987); MO. ANN. STAT. § 311.310 (Vernon 1963); MONT. CODE ANN. § 16-3-301 (1987); NEB. REV. STAT. 53-180 (1987); NEV. REV. STAT. § 202.055 (1984); N.H. REV. STAT. ANN. § 175:6 (Supp. 1987); N.J. STAT. ANN. § 33:1-77 (West Supp. 1988); N.M. STAT. ANN. §§ 60-7A-16, 60-7B-1.1 (Supp. 1987); N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1987); N.C. GEN. STAT. § 18B-305 (1983); N.D. CENT. CODE § 5-01-09 (1987); OHIO REV. CODE ANN. §§ 4301.69, 4301.22 (Anderson Supp. 1987); OKLA. STAT. ANN. tit. 37, § 537 (West Supp. 1988); OR. REV. STAT. § 471.315 (1987); PA. STAT. ANN. tit. 47, § 4-493 (Purdon Supp. 1988); R.I. GEN. LAWS § 3-8-1 (1987); S.C. CODE ANN. § 61-3-990 (Law. Co-op. Supp. 1986); S.D. CODIFIED LAWS ANN. § 35-4-78 (Supp. 1988); TENN. CODE ANN. § 57-4-203 (Supp. 1987); TEX. ALCO. BEV. CODE ANN. § 106.03 (Vernon Supp. 1988); UTAH CODE ANN. §§ 32A-12-8, 32A-12-9 (1986); VT. STAT. ANN. tit. 7, § 658 (Supp. 1987); VA. CODE ANN. § 4-62 (Supp. 1987); WASH. REV. CODE ANN. §§ 66.44.200, 66.44.270 (1985 & Supp. 1988); W. VA. CODE § 60-3-22 (Supp. 1987); WIS. STAT. ANN. § 125.07 (West Supp. 1987); WYO. STAT. § 12-6-101 (1986).

25. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220 (5th ed. 1984).

26. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

27. *Id.*

28. 31 N.J. 188, 156 A.2d 1 (1959).

liquor control statute. The court reasoned that the statutory provisions "were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well."[29]

Since *Rappaport*, other courts have imposed civil liability on commercial vendors based on negligence per se.[30] However, many courts refuse to apply this analysis when a social host is the defendant, reasoning that these statutes were meant to provide guidelines for the liquor industry and not to set a standard of care for the community.[31]

3. Common Law Negligence

Another theory under which courts may impose liability is common law negligence.[32] Although at common law, the furnishing of alcohol was not considered to be the proximate cause of resulting injuries,[33] some courts are nonetheless willing to extend liability based on common law negligence principles.

Courts consider a number of different policies in determining liability. Because automobile transportation is so common in today's society, it is foreseeable that an intoxicated driver will create a genuine risk to the public.[34] Additionally, the old common law rule has been criticized as being outdated, since it was first developed in an era when the principal mode of transportation was horse and buggy, and before road accidents reached such alarming numbers.[35] In *Kelly v. Gwinnell*,[36] the New Jersey Supreme Court imposed liability on a social host based on negligence even though its decision would "inter-

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29. *Id.* at 202, 156 A.2d at 8.

30. *See, e.g.*, Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).

31. *See, e.g.*, Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (N.Y. Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976). Interestingly, after the court's use of this reasoning, its decision was superseded by statute, as stated in D'Amico v. Christie, 71 N.Y.2d 76, 518 N.E.2d 896, 524 N.Y.S.2d 1 (1987).

32. *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 324-26 (7th Cir. 1959) (common law negligence action based on duty imposed by liquor control statute); Kelly v. Gwinnell, 96 N.J. 338, 476 A.2d 1219 (1984) (common law negligence recognized in absence of dram shop act); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971) (common law negligence allowed even though recovery not available under dram shop act or liquor control statute); *see also infra* notes 36-39 and notes 40-42 and accompanying text.

33. *See supra* note 9.

34. Lopez v. Maez, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982).

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

> 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.

Id.

36. 96 N.J. 538, 476 A.2d 1219 (1984).

fere with accepted standards of social behavior,"[37] because such interference was justified by compensating the victims and deterring future acts.[38]

In *Kelly*, the host entertained Gwinnell at the host's home, serving him thirteen straight shots of scotch. The host then allowed Gwinnell to drive home, but before reaching his home, Gwinnell was involved in a head-on collision with the plaintiff. Although New Jersey did not have a dram shop act, the court allowed the plaintiff's cause of action since it met the common law elements of negligence: "an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable."[39]

Liability based on negligence was also recognized in the Oregon case of *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*.[40] In *Wiener*, the defendant fraternity served an inordinate amount of alcohol to a minor, knowing that he would later be driving. The court refused to impose liability pursuant to Oregon's dram shop act or liquor control statute, but allowed a cause of action based on common law negligence principles.[41] It reasoned that a duty to the public arises when a reasonable, prudent person can see from the behavior of the drinker that the drinker should be given no more alcohol.[42]

B. Legislative Trends

In contrast to the courts, many state legislatures are attempting to limit liability for the acts of intoxicated persons. In 1986, nineteen states enacted laws limiting civil recovery against the server of alcohol in some way.[43]

An example of one of the most comprehensive provisions enacted

37. *Id.* at 543, 476 A.2d at 1224.

38. *Id.*

39. *Id.* at 544, 476 A.2d at 1222.

40. 258 Or. 632, 485 P.2d 18 (1971).

41. *Id.* at 638, 485 P.2d at 21.

42. *Id.* at 639-40, 485 P.2d at 21-22. "It was not the purpose of the statute to protect third persons from injury resulting from the conduct of inebriated minors or of imposing liability upon a person contributing to the minor's delinquency by furnishing him alcohol." *Id.*

43. Goldberg, *supra* note 11, 88; Goldberg, *Dram Shop Update*, 22 TRIAL, Dec. 1986, at 66, 67; *see supra* notes 21-22 and accompanying text (Iowa and Minnesota); *see also infra* notes 75-80 and accompanying text (California).

is the State of Maine's statutory scheme.[44] The Maine statute limits total damage awards in liquor liability cases to $250,000,[45] requires a plaintiff to give notice to the defendant within 180 days of the accident,[46] and preserves all common law defenses for the defendant.[47]

Several reasons are frequently stated to justify such limiting legislation. First, skyrocketing damages awarded by juries and increasingly higher out-of-court settlements suggest that our system of compensation has gone out of control.[48] Second, the cost of insurance for liquor liability has risen dramatically in recent years.[49]

This trend of legislative action limiting liability and damages stands in stark contrast to the judiciary's continued forging of new and broader grounds for imposing liquor liability. At this time it is difficult to tell which branch of government will prevail. Thus far, California has experienced both of these trends in that the courts first imposed broader liability, followed by a swift legislative reaction.

III. CALIFORNIA'S APPROACH

A. Common Law Rule

Before 1971, California courts followed the common law rule[50] in all their decisions regarding third-party liquor liability.[51] In *Cole v. Rush*,[52] Cole's widow and children brought a wrongful death action against the defendant tavern for serving alcohol to Cole. The plaintiffs alleged that Cole was a regular patron of the defendant's establishment, the Tropic Isle, and was known by the defendant to be "belligerent, pugnacious and quarrelsome" when intoxicated.[53] Cole became intoxicated at the Tropic Isle one evening and was involved in a fight with another customer, during which he fell, struck his head, and died. Relying on the general principle that "it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use,"[54] the court denied recov-

44. ME. REV. STAT. ANN. tit. 28-A, §§ 2501-19 (Supp. 1987). Connecticut has enacted a similar statute. CONN. GEN. STAT. § 30-102 (Supp. 1988).

45. ME. REV. STAT. ANN. tit. 28-A, at § 2509.

46. *Id.* § 2513.

47. *Id.* § 2510.

48. Goldberg, *Dram Shop Update*, *supra* note 43, at 66, 68.

49. *Id.*

50. See *supra* notes 8-9 and accompanying text for a general discussion of the common law rule.

51. The rule was first stated in California in the case of Lammers v. Pacific Elec. Ry., 186 Cal. 379, 384, 199 P. 523, 525 (1921) (dictum). For other cases following the rule, see Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Hinton v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

52. 45 Cal. 2d 345, 289 P.2d 450 (1955).

53. *Id.*

54. *Id.* at 356, 289 P.2d at 457.

ery by Cole's widow and children.

In support of its adherence to the common law rule, the court in *Cole* noted that the state legislature had knowledge of previous cases following the strict common law rule[55] but chose not to act; therefore, it must have intended that the law remain the same.[56] The court maintained that this was a problem strictly in the domain of the legislature.[57] One rationale supporting this argument is that legislators have a general awareness of statutes and trends in the law of other states as well as their own. In addition, they play an active role in regulating and dealing with liquor questions in contexts other than liability.[58]

B. The Vesely *Trilogy*

In 1971, the California Supreme Court discarded the common law rule by its decision in *Vesely v. Sager*.[59] In *Vesely*, civil liability was first imposed on a commercial vendor of alcoholic beverages for injuries resulting from the consumption of such beverages. The defendant Sager, owner of the Buckhorn Lodge, served alcohol to defendant O'Connell, knowing that he was intoxicated and would later drive on a steep and winding mountain road leading away from the lodge.[60] Upon leaving the establishment, O'Connell drove his car into the wrong lane and struck the plaintiff's automobile.

The *Vesely* court imposed liability based on a statutory presumption of negligence[61] arising from the violation of section 25602 of the

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55. *See supra* note 8 (common law rule).

56. *Cole*, 45 Cal. 2d at 356, 289 P.2d at 456. The court also noted that "[t]he common law . . . so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all courts of this State." *Id.*; *see also In re* Estate of Apple, 66 Cal. 432, 6 P. 7 (1885). Accordingly, the common law was deemed to be controlling. *Cole*, 45 Cal. 2d at 356, 289 P.2d at 456.

57. *Cole*, 45 Cal. 2d at 354, 289 P.2d at 456-57; *see also* Buckley v. Chadwick, 45 Cal. 2d 183, 200, 288 P.2d 12, 22 (1955) (legislature presumed to have knowledge of existing judicial decisions), *reh'g denied*, 45 Cal. 2d 208, 289 P.2d 242 (1956); Marchiondo v. Roper, 90 N.M. 367, 369, 563 P.2d 1160, 1162 (1977) (legislature presumed to be aware of problem of alcohol abuse, so decision to impose liability remains with the legislature), *overruled by* Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982).

58. Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA L. REV. 46, 48-49 (1973).

59. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

60. *Id.* at 157-58, 486 P.2d at 154, 95 Cal. Rptr. at 626.

61. This presumption of negligence is codified in California Evidence Code section 669(a):

(a) The failure of a person to exercise due care is presumed if:
(1) He violated a statute, ordinance, or regulation of a public entity;

California Business and Professions Code, California's liquor control statute.[62] Negligence principles were also discussed and the court held that the defendant was not relieved of liability by the intervening act of a third person (O'Connell's consumption of the alcohol) if that act was foreseeable.[63]

The *Vesely* court opposed leaving liquor liability decisions to the legislature for two reasons. First, since the original common law rule was judicially created, it could be struck down by the judiciary if found to be in error.[64] Second, the legislature had sufficiently expressed its intent in Evidence Code section 669 and Business and Professions Code section 25602 to allow the court to impose liability.[65]

In 1976, *Bernhard v. Harrah's Club*[66] extended the liability of vendors to actions based on common law negligence rather than on the violation of a statute, and in so doing, paved the way for even broader liability. In *Bernhard*, the California Supreme Court was forced to deal with this issue because the defendant, Harrah's Club, was an out-of-state entity. Since section 25602 of the Business and Professions Code did not cover persons or entities acting outside the state, the defendant argued that it was not civilly liable under the statute.[67] The court decided that the traditional rule "was patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law."[68] Therefore, the court applied principles of common law negligence to alcohol injuries and found the defendant liable.

In 1978, the California Supreme Court in *Coulter v. Superior Court*[69] took a further step by imposing civil liability on noncommercial suppliers of alcoholic beverages. In *Coulter*, the defendant furnished alcohol to Janice Williams at an apartment complex party with the knowledge that Williams often drank to excess, was in fact

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(2) The violation proximately caused death or injury to person or property;
(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance or regulation, was designed to prevent; and
(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

CAL. EVID. CODE § 669(a) (West Supp. 1988).

62. At that time, section 25606 of the California Business and Professions Code provided that "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." *Vesely*, 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

63. *Vesely*, 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631.

64. *Id.* at 166, 486 P.2d at 160, 95 Cal. Rptr. at 632.

65. *Id.*

66. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

67. *Id.* at 323-24, 546 P.2d at 726, 128 Cal. Rptr. at 222.

68. *Id.* at 324, 546 P.2d at 726, 128 Cal. Rptr. at 222 (quoting *Vesely*, 5 Cal. 3d at 166, 486 P.2d at 160, 95 Cal. Rptr. at 632).

69. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

doing so at the time, and intended to drive later that evening. The plaintiff, a passenger in Williams' car, was injured when the car crashed into roadway abutments due to Williams' impaired driving ability.[70]

The court in *Coulter* recognized that section 25602 applied to social hosts as well as commercial vendors, since the language of the statute refers to "every person" who serves alcohol to an obviously intoxicated person.[71] Therefore, the court utilized the same statutory presumption of negligence concerning a noncommercial supplier of alcohol as it did concerning a commercial supplier such as the one in the earlier *Vesely* decision. In addition, liability of a social host was not found to be inconsistent with common law principles of negligence; serving alcohol to an obviously intoxicated person, who one knows, or should know, intends to drive, "creates a reasonably foreseeable risk of injury to those on the highway."[72] The court further emphasized that the legislature, although on notice of the judicial decisions imposing liability on the providers of alcohol under section 25602, had chosen not to preclude such liability by amending the statute.[73] The court's emphasis is somewhat ironic in light of the state legislature's prompt reaction after the *Coulter* decision.

C. The Legislative Response

In 1978, the same year that *Coulter* was decided, the California Legislature clarified its intent as to the effect of section 25602 by drafting amendments in such a way as to leave little doubt regarding the statute's application. It expressly abrogated the holdings in

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70. *Id.* at 147-48, 577 P.2d at 671, 145 Cal. Rptr. at 536.

71. *Id.* at 150, 577 P.2d at 672, 145 Cal. Rptr. at 537. The court noted that when limiting application to commercial suppliers, other sections of the code use more specific terminology such as "licensee." *Id.*; *see* CAL. BUS. & PROF. CODE § 25601 (West 1985).

72. 21 Cal. 3d at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539. The existence of a duty to third persons was based on an analysis which had been recognized by California courts which applies factors other than foreseeability, including:

> [T]he degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539 (quoting Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968)).

73. *Id.* at 151-52, 577 P.2d at 673, 145 Cal. Rptr. at 538.

Vesely, *Bernhard*, and *Coulter*, and provided civil immunity for suppliers of alcohol, specifically including social hosts as immune parties.[74] The single statutory exception to this broad-based immunity applied only to licensed sellers who provided alcohol to obviously intoxicated minors.[75]

Many suggest that the court's decision in *Coulter* prompted the legislature's action. Supporting this proposition is the fact that the legislature did not act after *Vesely*, yet passed legislation immediately after the *Coulter* decision.[76] Perhaps the legislature found the expansion of liability to social hosts in *Coulter* to be the final straw.[77] Since the legislature's findings and debates on this issue are not published, it is difficult to pinpoint its rationale for passing these amendments. Amid abundant speculation concerning the legislature's intent, some suggest that since proximate cause is often an instrument of policy, the legislature probably based its amendments entirely on policy considerations.[78] Others believe that the legislature

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74. The following sections were added to section 25602:

> (b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.
>
> (c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313) and Coulter v. Superior Court (21 Cal. 3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602 (West 1985). In addition, the Legislature added subsections (b) and (c) to section 1714 of the Civil Code:

> (b) It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313), and Coulter v. Superior Court (21 Cal. 3d 144) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.
>
> (c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

CAL. CIV. CODE § 1714 (West 1985).

The legislature in Missouri followed a similar course of action by also abrogating specific cases and returning to the "prior judicial interpretation" of the common law. MO. ANN. STAT. § 537.053 (Vernon Supp. 1988).

75. *See infra* notes 91-117 and accompanying text for a discussion of the "obviously intoxicated minor" exception.

76. Comment, *California Liquor Liability*, *supra* note 10, at 521 n.231.

77. *Id.*

78. Comment, *Liquor, The Law, and California: One Step Forward—Two Steps Backward*, 16 SAN DIEGO L. REV. 363 (1979) (discussing possible policy justifications for the law).

acted in response to pressures exerted by the liquor lobby and other groups affected adversely by the *Vesely* and *Coulter* decisions.[79]

The constitutionality of the 1978 amendments was challenged in *Cory v. Shierloh*.[80] The plaintiff Cory, a minor, was injured when he lost control of his vehicle after becoming intoxicated at a party. He brought suit against various defendants, including the owner of the premises where the party was held and the host of the party.[81] The complaint was dismissed in light of the amendments to section 1714 of the Civil Code and section 25602 of the Business and Professions Code.[82] On appeal, Cory challenged the constitutionality of the 1978 amendments. The California Supreme Court somewhat reluctantly upheld the constitutionality of the statute,[83] finding itself "forced to agree" with the trial court's disposition of the case.[84] Although the court felt there were "ample reasons for concluding" that the 1978 amendments were not "wise, sound, necessary, or in the public interest,"[85] the court would not substitute its judgment for that of the legislature.[86] "With effort," it found a reasonable basis for the amendments.[87]

Regardless of the reasons for the legislature's actions, the fact remains that the courts are once again bound by "prior judicial interpretation" of proximate cause issues where the consumption of alcohol is concerned.[88] After the legislation was passed and the constitutionality of the amendments was upheld, the courts faced the task of determining exactly what the judicial interpretations were prior to the *Vesely* trilogy, and what exceptions, if any, would apply to the general rules of civil immunity.

D. Modern Application of the Early Common Law

The passage of the 1978 amendments to section 25602 of the Business and Professions Code and section 1714 of the Civil Code re-

79. Note, *Strang v. Cabrol: Whose Interests are Being Served?*, 13 W. ST. L. REV. 343 (1985).

80. 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

81. *Id.* at 434, 629 P.2d at 9, 174 Cal. Rptr. at 501.

82. *Id.* at 433, 629 P.2d at 9, 174 Cal. Rptr. at 501.

83. *Id.* at 436-37, 629 P.2d at 11, 174 Cal. Rptr. at 503.

84. *Id.* at 441, 629 P.2d at 14, 174 Cal. Rptr. at 506.

85. *Id.* at 436-38, 629 P.2d at 12, 174 Cal. Rptr. at 504.

86. *Id.* at 438, 629 P.2d at 12, 174 Cal. Rptr. at 504.

87. *Id.* at 441, 629 P.2d at 14, 174 Cal. Rptr. at 506.

88. *See* CAL. BUS. & PROF. CODE § 25602(c) (West 1985); *see also* CAL. CIV. CODE § 1714(b) (West 1985).

quired California courts to return to the common law as applied prior to *Vesely*.[89] Although confined to these traditional rules, it became necessary for the courts to reconsider the limitations of the common law scheme.[90] Therefore, they were able to apply any exceptions that existed at common law, as well as the statutory exception in section 25602.1 of the Business and Professions Code.

1. Statutory Exception—"Obviously Intoxicated" Minor

When the legislature amended section 25602 in 1978, section 25602.1 was also added to the statutory scheme imposing civil liability on the licensed seller of alcohol who sold to an obviously intoxicated minor.[91] The suggested reasons[92] for this narrow exception to the general rule of civil immunity seem to focus on the increased need for protecting minors from the adverse effects of intoxication.[93] This need for greater protection stems from a minor's relative inexperience in both consuming alcohol and driving automobiles, and reflects society's special concern in all areas which affect the well-being of minors.[94]

This special concern for minors may have partially contributed to the California Court of Appeal's decision in *Burke v. Superior*

89. For a discussion of the early common law in California, see *supra* notes 51-59 and accompanying text.

90. Cantor v. Anderson, 126 Cal. App. 3d 124, 130, 178 Cal. Rptr. 540, 544 (1981).

91. CAL. BUS. & PROF. CODE § 25602.1 (West 1985).

> Notwithstanding subdivision (b) of section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person.

Id. In Burke v. Superior Court, 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1982), *disapproved on other grounds*, 37 Cal. 3d 720, 728, 691 P.2d 1013, 1019, 209 Cal. Rptr. 347, 353 (1984), the court found that although the legislature had changed the general age of majority from 21 to 18, the age of majority remained 21 in statutes relating to sale of alcoholic beverages. *Id.* at 577-78, 181 Cal. Rptr. at 153; *see also* CAL. BUS. & PROF. CODE § 25658 (West 1985).

92. Since the California Legislature does not publish legislative history or findings, the true reasons for the amendments are not known. See *supra* text accompanying notes 77-80 for suggested reasons.

93. Cory v. Shierloh, 29 Cal. 3d 430, 441, 629 P.2d 8, 14, 174 Cal. Rptr. 500, 506 (1981). For a discussion of *Cory* in the context of the constitutionality of the 1978 amendments, see *supra* notes 81-87 and accompanying text.

94. *Cory*, 29 Cal. 3d at 441, 629 P.2d at 14, 174 Cal. Rptr. at 506. In upholding the constitutionality of the amendments, the California Supreme Court found that because of this special concern for the well-being of minors, the legislature could reasonably have limited the class of persons protected under the statute to minors. *Id.* Referring to California Business and Professions Code section 25658 as evidence of society's concern, the court determined that a reasonable basis existed for holding liable only defendants who served to minors. *Id.*

Court.[95] In *Burke*, a licensed seller was held liable for injuries occurring after the sale of alcoholic beverages to a *sober* minor in violation of Business and Professions Code section 25658.[96] The court found that the legislature had not specifically addressed the question of liability in the case of selling alcoholic beverages to a sober minor.[97] Because of this silence, the court applied the common law, which granted no immunity in such a situation.[98] In the court's view, foreseeability was found to be the key in determining liability, and foreseeability would not be difficult to find where "public transportation is the exception and driving the rule, and where keeping drunk drivers off the road is a major social concern."[99]

Two years later, *Burke* was disapproved by *Strang v. Cabrol*.[100] Since the legislature provided only one exception to civil immunity, the *Strang* court applied the maxim *expressio unius est exclusio alterius*,[101] which means "the expression of one thing is the exclusion of another."[102] The court found that "an express exclusion from the operation of the statute indicates the legislature intended no other exceptions are to be implied."[103] The court reasoned that had the legislature intended to hold one who sold alcohol to a sober minor civilly liable, it would have amended the statute to expressly provide for such a cause of action.[104] Thus, the first attempt to judicially alleviate the harshness of the new statutory scheme was foiled.

A second problem arising in the application of section 25602.1 was first recognized in *Cory v. Shierloh*,[105] wherein the court discussed the "patchwork of apparent inconsistencies and anomalies" contained in the statute. For instance, under section 25602.1, a licensed seller

95. 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1982), disapproved *on other grounds*, 37 Cal. 3d 720, 728, 691 P.2d 1013, 1019, 209 Cal. Rptr. 347, 353 (1984).

96. *Id.* at 579, 181 Cal. Rptr. at 154. Section 25658 provides that "[e]very person who sells, furnishes, gives, or causes to be sold, furnished or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25658(a) (West 1985).

97. 129 Cal. App. 3d at 574, 181 Cal. Rptr. at 150.

98. *Id.* at 576, 181 Cal. Rptr. at 152.

99. *Id.* at 577, 181 Cal. Rptr. at 153.

100. 37 Cal. 3d 720, 728, 691 P.2d 1013, 1019, 209 Cal. Rptr. 347, 353 (1984).

101. *Id.* at 725, 691 P.2d at 1016, 209 Cal. Rptr. at 350.

102. BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

103. 37 Cal. 3d at 726, 691 P.2d at 1016, 209 Cal. Rptr. at 350; *see also* BLACK'S LAW DICTIONARY 521 (5th ed. 1979). "Under this maxim, if a statute specifies one exception to a general rule . . . other exceptions or effects are excluded." *Id.*

104. 37 Cal. 3d at 725, 691 P.2d at 1016, 209 Cal. Rptr. at 350.

105. 29 Cal. 3d 430, 440, 629 P.2d 8, 13, 174 Cal. Rptr. 500, 505 (1981). For a discussion of *Cory* in context of the constitutionality of the 1978 amendments, see *supra* notes 81-87 and accompanying text.

could be liable after selling alcohol to an obviously intoxicated minor while a nonlicensed, illegal seller performing the same act would not be liable, since the statute used the limiting term "licensed seller."[106] This, in effect, gave a "preferred liability status" to those sellers of alcohol required to obtain a license but who neglect or refuse to do so.[107]

In 1986, an unexpected variation of the problem addressed in *Cory* arose. In *Gallea v. United States*,[108] two obviously intoxicated minors were served more alcohol at a club on a naval base.[109] They left the club on a motorcycle and one of the minors was killed when the motorcycle crashed.[110] Although the club operated as a commercial establishment, the State of California could not require it to be licensed since it was controlled by the Department of Defense.[111] Since the club was not a "licensed seller," the plaintiffs were denied any recovery under section 25602.1.[112]

In response to the *Gallea* case and the criticisms voiced in *Cory*, the legislature in 1986 amended section 25602.1 to include clubs on military bases and all sellers required to be licensed, regardless of whether they actually obtain a license.[113]

This statutory exception, as amended, will be narrowly construed for several reasons. First, the *Strang* court's emphasis on the maxim *expressio unius est exclusio alterius*—one exception to the exclusion of all others—indicates the judiciary's unwillingness to expand legislative enactments.[114] Second, the legislature has expressly addressed the statutory construction problems courts have had in applying section 25602.1,[115] indicating the legislature's intent to keep a tight rein on how the courts interpret this particular statute. Finally, the

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106. *Id.*
107. *Id.*
108. 779 F.2d 1403 (9th Cir. 1986).
109. *Id.* at 1403-04.
110. *Id.* at 1404.
111. *Id.* at 1403.
112. *Id.* at 1406.
113. Section 25602.1 now provides that:

> Notwithstanding subdivision (b) of section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, *or required to be licensed*, pursuant to section 23300, *or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave*, who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage, *and any other person who sells, or causes to be sold, any alcoholic beverage*, to any obviously intoxicated minor where the furnishing, sale or giving of *that* beverage to the minor is the proximate cause of the personal injury or death sustained by *that* person.

CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1988) (emphasis indicates changes or additions by amendment).

114. *See supra* notes 101-103 and accompanying text.
115. *See supra* notes 105-113 and accompanying text.

courts, as recently as 1987, have rejected the argument that social hosts may in some situations be deemed "constructive licensees."[116] This suggests that courts will construe "licensed or required to be licensed" language of the statute narrowly. In their application of section 25602.1, the courts of appeal have quoted the Senate Committee Judiciary staff report on Senate Bill No. 1053 (amending section 25602.1): "The bill would not, however, affect the existing immunities for social hosts as it would not impose any liability for the free furnishing of alcohol."[117] Therefore, it is difficult to see how courts can extend application of section 25602.1 any further than they already have.

2. Common Law Exception—Person Not of Ordinary Capacity

The *Strang* court noted that although the *Burke* decision was no longer good law, selling alcohol to a minor who was "incompetent, incapable of voluntary action, or otherwise suffers from some peculiar mental disability" could trigger the seller's liability under the common law rule in *Cole*.[118] This question had previously been addressed by the court in *Cantor v. Anderson*.[119] In that case, the plaintiff, Cantor, operated a home for the developmentally disabled. A neighbor gave one of the home's residents alcoholic beverages and he became intoxicated. While intoxicated, he returned to the home and attacked Cantor, injuring her.[120] Cantor brought suit against the neighbor who supplied the alcohol. The court, quoting *Cole* extensively, reasoned that the general rule of nonliability for furnishing alcoholic beverages applied only to those serving liquor to ordinary, competent individuals.[121] It was also noted that the court in *Cole* made a special effort to distinguish an Arizona case, *Pratt v. Daly*,[122] which imposed liability on a vendor who sold alcohol to the plain-

116. Baker v. Sudo, 194 Cal. App. 3d 936, 941 n.6, 240 Cal. Rptr. 38, 41 n.6 (1987).
117. *Id.* at 944 n.10, 240 Cal. Rptr. at 43 n.10.
118. Strang v. Cabrol, 37 Cal. 3d 720, 726, 691 P.2d 1013, 1017, 209 Cal. Rptr. 347, 351 (1984).
119. 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).
120. *Id.*
121. *Cantor*, 126 Cal. App. 3d at 130, 178 Cal. Rptr. at 544. "There is 'no remedy for injury or death following the mere sale of liquor to the *ordinary man* . . . .' " *Id.* (quoting *Cole*, 45 Cal. 2d at 348, 289 P.2d at 452). The court in *Cole* held that "as to a *competent* person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use," and "that the *competent* person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby . . . ." *Cole*, 45 Cal. 2d at 356, 289 P.2d at 457 (emphasis added).
122. 55 Ariz. 535, 104 P.2d 147 (1940).

tiff's husband, knowing that he was "incapable of voluntary action."[123] The court therefore concluded that an exception to the common law rule could be found where "an injury is the joint product of an exceptional mental or physical condition and alcohol."[124]

The court in *Cantor* clearly stated the elements which a plaintiff must plead and prove to assert this exception: (1) the drinker had an exceptional mental or physical condition;[125] (2) the defendant knew of the condition;[126] and (3) the defendant knew or should have known the effect the alcohol would have on the drinker.[127] The court warned, however, that a retarded or developmentally disabled person is not automatically presumed to be "incapable of handling alcohol consumption."[128] The alcohol must cause some known extreme effect on the disabled person because of the disability.[129]

The court in *Bass v. Pratt*[130] grappled with the question of capacity in cases involving a minor. The plaintiffs brought suit against parents who served alcohol at a party, knowing that some of the guests present were under twenty-one years of age.[131] Since section 25602.1 allowed liability only in the case of licensed sellers, the plaintiffs could not recover under that statute.[132] The plaintiffs then brought in an expert witness to testify that a young person was affected to a greater extent by alcohol than the ordinary competent adult.[133] In other words, youth alone could be an "exceptional mental or physical condition" falling under the exception to the common law rule.[134] The court rejected this argument on the basis that "[t]he *Cole* definition of 'ordinary [person]' who voluntarily consumes liquor embraces a minor engaging in the same conduct, absent some additional showing that the minor is incompetent, incapable of voluntary action, or otherwise suffers from some peculiar mental disability."[135]

One possible application of the capacity exception not yet addressed by the California courts is the effect of alcoholism on compe-

123. *Cantor*, 126 Cal. App. 3d at 130, 178 Cal. Rptr. at 545 (quoting *Cole*, 45 Cal. 2d at 354, 289 P.2d at 455).
124. *Id.*
125. *Id.*
126. *Id.* at 131, 178 Cal. Rptr. at 545.
127. *Id.*; *see also* Bass v. Pratt, 177 Cal. App. 3d 129, 136, 222 Cal. Rptr. 723, 728 (1986).
128. 126 Cal. App. 3d at 132, 178 Cal. Rptr. at 546.
129. *Id.*
130. 177 Cal. App. 3d 129, 222 Cal. Rptr. 723 (1986).
131. *Id.* at 130, 222 Cal. Rptr. at 724.
132. *Id.* at 134, 222 Cal. Rptr. at 727.
133. *Id.* at 136, 222 Cal. Rptr. at 728.
134. *Id.*
135. *Id.* (quoting Strang v. Cabrol, 37 Cal. 3d 720, 726, 691 P.2d 1013, 1017, 209 Cal. Rptr. 347, 351 (1984)); *see also* Collier v. Stamatis, 63 Ariz. 285, 287, 162 P.2d 125, 126-27 (1945). "It cannot be said as a matter of law that a child of fifteen has neither will nor choice nor discretion . . . ." *Id.*

tency. In denying liability in *Cole*, the court distinguished an Arizona case, *Pratt v. Daly*,[136] wherein the defendant sold alcohol to the plaintiff's husband with knowledge that he was a "habitual drunkard."[137] The court noted that traditionally, a habitual drunkard was one who had lost the will power to refuse a drink.[138] A habitual drunkard who was "incapable of voluntary action" was contrasted with the drinker in *Cole*, who showed no such lack of volition.[139] This analysis suggests that if proven that an alcoholic is a person without control over his drinking habits and that the defendant knew this, yet still served him, the defendant could be liable for the resulting injuries.[140]

3. Common Law Exception—Respondeat Superior

The California Court of Appeal discussed a third exception to the general rule of nonliability for serving alcohol in *Childers v. Shasta Livestock Auction Yard, Inc.*[141] In *Childers*, the plaintiff was an employee of the defendant Shasta.[142] On the suggestion of their supervisor, the plaintiff and two other employees went to the supervisor's office to drink beer normally kept there.[143] Later that same evening, the plaintiff and Abbott, one of the employees, also drank hard liquor in the supervisor's office with one of Shasta's customers.[144] Later, the plaintiff and Abbott went on an errand in Abbott's truck.[145] On the way, Abbott drove her truck off the road, killing herself and injuring the plaintiff.[146] The plaintiff brought suit against Shasta based on the theory of respondeat superior.[147] After

136. 55 Ariz. 535, 104 P.2d 147 (1940).
137. Cole v. Rush, 45 Cal. 2d 345, 353, 289 P.2d 450, 454-55 (1955).
138. *Id.* at 353, 289 P.2d at 455.
139. *Id.* at 354, 289 P.2d at 455.
140. The decision in Pratt v. Daly was based on the common law rule allowing a spouse to recover for injuries resulting from habit-forming drugs. *Id.* at 353, 289 P.2d at 455. Although recovery in such cases is usually limited to a spouse as plaintiff, the court's reliance on *Pratt* in Cantor v. Anderson, 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981), where no such relationship existed, suggests that recovery will not be subject to such a limitation.
141. 190 Cal. App. 3d 792, 235 Cal. Rptr. 641 (1987).
142. *Id.* at 799, 235 Cal. Rptr. at 642.
143. *Id.* at 799, 235 Cal. Rptr. at 643.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* The respondeat superior theory is codified in the California Civil Code which provides that:

> [A] principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts commit-

discussing the application of respondeat superior to the case at hand, the court determined that the plaintiff's cause of action was not barred by Civil Code section 1714 or Business and Professions Code section 25602.[148] The court stated that the common law as it existed before the *Vesely*, *Bernhard*, and *Coulter* decisions allowed recovery from an employer based on respondeat superior where one was injured by an employee who drank while within the scope of his employment.[149] Thus, respondeat superior constitutes a third exception to nonliability for servers of alcohol.

The *Childers* court then decided that in any event, section 1714 and section 25602 were inapplicable to a respondeat superior claim.[150] Those sections state that the consumption, rather than the serving of alcoholic beverages, is the proximate cause of any resulting injuries.[151] Under respondeat superior, it is the employee's consumption of alcohol while within the scope of employment, not the employer's furnishing it, that creates liability.[152] The court cited two examples of liability being imposed without the employer supplying the alcohol: (1) when an employee drinks alcohol supplied by other employees with the employer's permission; and (2) when a client serves alcohol at a function which the employee is required by his employer to attend.[153] In these cases, liability is based on consumption not on the employer serving the alcohol, and therefore, the claim is not barred by statute.

Similarly, the court in *Childers* found this result to be consistent with the reasoning in *Cole*.[154] The *Cole* decision distinguished situations where liability was based upon duties independent of serving alcohol.[155] Under respondeat superior, liability is founded upon an employee's consumption of alcohol within the scope of his employment, and in no way relates to the serving of alcohol. Therefore, this

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ted by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

CAL. CIV. CODE § 2338 (West 1985).

148. 190 Cal. App. 3d at 806-10, 235 Cal. Rptr. at 648-50.

149. *Id.* at 809, 235 Cal. Rptr. at 650 (citing Boynton v. McKales, 139 Cal. App. 2d 777, 294 P.2d 733 (1956)).

150. 190 Cal. App. 3d at 807, 235 Cal. Rptr. at 649. This rule was traced back to Debolt v. Kragen Auto Supply, Inc., 182 Cal. App. 3d 269, 227 Cal. Rptr. 258 (1986), and eventually to Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981).

151. CAL. BUS. & PROF. CODE § 25602 (West 1985); CAL. CIV. CODE § 1714(c) (West 1985).

152. 190 Cal. App. 3d at 808, 235 Cal. Rptr. at 649.

153. *Id.*

154. *Id.* at 809, 235 Cal. Rptr. at 650. See *supra* notes 50-58 and accompanying text for a discussion of *Cole v. Rush*.

155. 190 Cal. App. 3d at 809, 235 Cal. Rptr. at 650 (citing Cole v. Rush, 45 Cal. 2d 345, 352-53, 289 P.2d 450, 454 (1955)).

theory is not at odds with *Cole* since it has an independent basis for imposing liability.

Finally, the *Childers* court emphasized the fairness of its decision.[156] For an employer to be responsible for injuries resulting from the consumption of alcohol by employees, this consumption must in some sense benefit the employer.[157] Because the employer stands to benefit from the employee's consumption of alcohol in some settings, "fairness requires that the enterprise should bear the burden of injuries proximately caused by the employees' consumption."[158]

4. Other Judicial Limitations on the Common Law Rule

The California courts have also expressed a willingness to limit the common law rule in instances where reckless behavior is involved and in certain other social host situations. A commercial server's liability for reckless behavior was discussed in *Ewing v. Cloverleaf Bowl*.[159] In *Ewing*, an employee of the defendant bowling alley served the decedent ten straight shots of 151-proof rum, two beers, and a mixed drink, all within the time period of an hour and a half.[160] The decedent later died of acute alcohol poisoning. The court addressed the case under a recklessness standard of conduct, as well as negligence standards,[161] and held that in some cases, the service of alcohol which leads to alcohol poisoning could be considered willful misconduct by the bartender.[162]

Although decided before the 1978 amendments to section 25602 of the Business and Professions Code and section 1714 of the Civil Code, the *Ewing* case was not rendered ineffective in those amendments primarily because it does not fall into the same class as the *Vesely*, *Bernard*, and *Coulter* cases which were specifically abrogated. Those

156. *Id.* at 810, 235 Cal. Rptr. at 651.

157. *Id.* at 805, 235 Cal. Rptr. at 647.

158. *Id.* at 810, 235 Cal. Rptr. at 651. Liability under respondeat superior depends upon a finding that alcohol was consumed within the scope of the employment. The court set forth the tests first posed in Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (1975) which were: (1) foreseeability of the risk; and (2) risk of industrial origin. See *Cole*, 190 Cal. App. 3d at 803-04, 235 Cal. Rptr. at 646 for further discussion of these tests.

159. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

160. *Id.* at 394, 572 P.2d at 1156, 143 Cal. Rptr. at 15.

161. *Id.* at 398-407, 572 P.2d at 1159-64, 143 Cal. Rptr. at 17-23.

162. If the bartender was guilty of willful misconduct and the drinker did not assume the risk of alcohol poisoning, the plaintiff would be able to recover despite any contributory negligence. *Id.* at 401, 572 P.2d at 1161, 143 Cal. Rptr. at 19; *Accord* Davies v. Butler, 95 Nev. 763, 769, 602 P.2d 605, 609 (1979) (recovery on basis of willful or wanton misconduct not barred by contributory negligence).

three cases were all based on common law negligence principles and violations of California's liquor control statute.[163] Furthermore, the language of the statutory amendments speaks in terms of the negligence element of "proximate cause" without mentioning a more egregious level of conduct, such as recklessness or willful misconduct.[164] For these reasons, it appears that the statutory immunity could be interpreted as not prohibiting liability when the drinker is injured or killed due to recklessly serving alcoholic beverages.

A second situation where California courts have expressed reluctance to extend the boundaries of the common law rule of nonliability is found in *Blake v. Moore*.[165] The social host in *Blake* not only furnished alcohol to a guest, but also negligently entrusted the intoxicated person with his vehicle.[166] The court refused to extend statutory immunity in such a case[167] and held that immunity does not encompass all circumstances in which a social host furnishes alcohol.[168] Even if alcohol is provided and its consumption contributes to an accident, a server may still be held liable based on other concurrent causes of action.[169]

These two examples, as well as the other recognized exceptions to the common law rule of nonliability,[170] suggest that California courts are willing to impose reasonable limitations on the common law rule and discover means by which to temper its harshness.

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163. See text accompanying notes 63-65, 69, and 72-73 for a discussion of the various bases of liability. For a more general treatment of each of the bases of liability, see *supra* text accompanying notes 10-42.

164. *See* CAL. BUS. & PROF. CODE §§ 25602(c), 25602.1 (West 1985 & Supp. 1988); *see also* CAL. CIV. CODE § 1714(b) (West 1985); *cf.* Grasser v. Fleming, 74 Mich. App. 338, 253 N.W.2d 757 (1977) (action for willful, wanton, or intentional conduct not precluded by dram shop act when bartender served alcohol to known compulsive alcoholic in spite of agreement not to serve).

165. 162 Cal. App. 3d 700, 208 Cal. Rptr. 703 (1984).

166. *Id.* at 701, 208 Cal. Rptr. at 704.

167. *Id.* at 704, 208 Cal. Rptr. at 706. *But cf.* Debolt v. Kragen Auto Supply, Inc., 182 Cal. App. 3d 269, 227 Cal. Rptr. 258 (1986) (social host not liable for ordering an intoxicated guest to leave); Andre v. Ingram, 164 Cal. App. 3d 206, 210 Cal. Rptr. 150 (1985) (social host not liable for forcing guest to leave or failing to provide transportation).

168. 162 Cal. App. 3d at 704, 208 Cal. Rptr. at 706.

169. *Id.* The court relied heavily on the Restatement of Torts:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself or others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

RESTATEMENT (SECOND) OF TORTS § 390 (1965).

170. *See supra* notes 91-117 and accompanying text (obviously intoxicated minor), notes 118-141 and accompanying text (person not of ordinary capacity), and notes 142-159 and accompanying text (respondeat superior).

IV. CONCLUSION

The California courts have subtly whittled away at the statutorily enforced common law rule of nonliability with respect to servers of alcohol. Since the California Supreme Court expressed its doubts concerning the statute's wisdom, necessity, and furtherance of the public interest, the common law rule has been eroded by exceptions and judicial refusals to extend the rule to seemingly logical lengths.

Although the California Legislature led the trend to curtail liability for serving alcohol, the courts have taken a more realistic approach, providing redress for injuries in certain situations. This judicial action may reflect social awareness of the problem of driving under the influence of alcohol, and could signal a new trend—a practical approach to solving the problem of drunk driving.

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