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Alexander S. Keenan*

INTRODUCTION

America has become a motorized society, California setting the ultimate example of a culture totally dependent upon the automobile. If yesterday's Westerner, or at least the entertainment media's popular facsimile, was no man at all without a horse, a similar adage applies to today's Californian. Families without an automobile are forced to choose between the financial advantage of city employment and the alleged serenity of suburban living. The weekly visits to the supermarket become a tedious chore: beaches, mountains and golf courses are practically inaccessible. At the present level of dependence upon the automobile, the two-car family has become an obtainable standard for many. Some families who combine affluence with older offspring often own three or four cars.

The price paid for making the luxury of owning at least one automobile commonplace is obvious: air pollution, traffic congestion and automobile accidents. Where do the solutions lie? Barring the dream of mass, self-imposed limitations, or the immediate advent of major technological advances, the remedies lie largely within our legal system.

One of the most urgent problems facing our nation today, associated with the wide-spread use of the automobile, is the increase of automobile accidents. This problem is further complicated by the regularity of alcoholic consumption by the American populace. The consumption of alcoholic beverages has be-

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1. Highway accidents in the United States cause an annual toll of over 50,000 lives, over 2,000,000 disabling injuries, and a cost of eight to ten billion dollars each year. Cramton, The Problem of the Drinking Driver, 54 A.B.A.J. 995 (1968).

2. Studies have shown that while 95,000,000 Americans are operating motor vehicles on public highways, 70,000,000 are consuming alcohol on a regular basis. Cramton, The Problem of the Drinking Driver, 54 A.B.A.J. 995 (1968).
come acceptable at social gatherings, thereby endangering both the social drinker and other drivers as the social drinker departs in his automobile after having consumed several drinks. The possibility of having an automobile accident increases drastically with the consumption of alcohol, thereby putting the lives of innocent, non-drinking drivers and pedestrians in jeopardy each time a drinker operates his vehicle.

The question of liability for such accidents, and upon whom such liability should ultimately fall, is an issue which is receiving increasing attention. California, with its vastly motorized population, has paradoxically been one of the last jurisdictions to recognize the need for a judicial remedy against the purveyor of alcoholic beverages. To date, this recognition has been limited, although the need for expansion is clear.

This article will discuss a judicial remedy designed to provide legal recourse against the purveyor of alcoholic beverages to the victims of harmful acts caused by the purveyor's intoxicated vendee, and, under certain circumstances, to the injured vendee himself. Acceptance of this remedy has been primarily a policy judgment arising out of the need to control the use of the automobile, primarily because victims are usually auto accident casualties. We will examine the early common law regarding the sale of alcohol and its exceptions, the Dramshop Acts, the pre-Vesely California cases regarding liquor vending, the evaluation of liquor vending liability in jurisdictions other than California, and the acceptance of liquor vendor liability in California as delineated in Vesely v. Sager, Brockett v. Kitchen Boyd Motor Company, and Carlisle v. Kanaywer.

THE EARLY COMMON LAW RULE AND SOME EXCEPTIONS

The early common law rule stated that it was not a tort either to sell or to give intoxicating liquor to an ordinary able-bodied man. In the absence of a statute, there was usually no cause of action against the person furnishing liquor in favor of

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3. A comprehensive study in Grand Rapids, Michigan, indicates that impairment of driving ability becomes detectable in accident rates at .05 percent blood alcohol. A driver with a blood alcohol concentration of .06 percent is twice as likely to be involved in an accident as a sober driver. When the concentration increases to .10 percent, the likelihood increases to six times. At .15 or greater the risk of accident multiplies by twenty-five. Cramton, The Problem of the Drinking Driver, 54 A.B.A.J. 995, 996 (1968).
7. For the purposes of this article, the "early common law rule" refers to the rule generally imposed prior to 1958 in the United States.
those injured by the intoxication of the person so furnished. Thus, if excessive drinking caused harm, injured persons could recover only from the individual consumer. Furthermore, if the vendee was himself the plaintiff, the vendor could rely upon the defense of contributory negligence.

The accepted rationale for this rule was that the voluntary consumption, rather than the furnishing of the alcohol, was the proximate cause of a plaintiff’s injury. Since proximate cause is often pictured as a social policy instrument dependent upon the element of foreseeability, its original application in this manner is understandable. Furthermore, since traditional concepts of justice are largely based upon the ethic of individual responsibility, there is always that argument for making a liquor vendee solely responsible for his own excesses. However, with the increased use of the automobile, new dangers have become apparent, and our perpetually expanding population has demanded that new emphasis be placed upon the equally basic principle that each man is his brother’s keeper. Therefore, while it is easy to understand why liquor vendor immunity prevailed during the horse and buggy era, it is difficult to comprehend its popularity during those fully motorized decades immediately preceding 1958.

Refusal to objectively examine the issue of foreseeability in liquor vending cases often was predicated on a legislative argument. The reasoning of this argument, prevalent in nondramshop states, was based on the premise that their legislatures constantly dealt with liquor questions and were fully aware of the existence of dramshop acts in other states. The absence of such statutes in

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10. See discussion concerning the Carlisle decision, note 127 and accompanying text infra.
12. What we do mean by the word ‘proximate’ is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics . . . . Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).
15. The term “dram shop” refers to inns where liquor could be sold in measured quantities of less than a gallon. Dram shop acts are statutes which give to persons injured by an intoxicated person, or in the consequence of the intoxication of any person, a right of action against the one who sold or furnished the liquor which caused the intoxication. 45 AM. JUR. 2d Intoxicating Liquors 561 (1969).
these states, therefore, was evidence that their legislatures did not desire judicial action in this area.\textsuperscript{16} While state legislatures are concerned with, and do establish laws regarding all intoxicants, it is difficult to understand why there should be a bar to a judicial finding of liability in cases which often fit comfortably into a common law negligence action.

\textit{Early Case Law}

There were, however, early decisions which did impose liability upon liquor vendors. They usually involved more than the mere negligent selling or giving of alcoholic beverages to able-bodied men. These cases often presented evidence of intentional, or at least wanton acts, and seldom was the consumer able-bodied. Frequently, the consumer was a known habitual alcoholic who lacked the will to refuse drink.

The foremost example of such a case is \textit{McCue v. Klein},\textsuperscript{17} where the defendant-saloon keepers, with knowledge of the deceased vendee's reputation as an habitual drunkard, conspired to induce him to swallow three pints of whisky in rapid succession. After the deceased had drunk two pints and was lacking self-control, the defendants administered the third pint despite a bystander's admonition that such action might produce death. The court awarded judgment to the deceased's widow, emphasizing both the defendants' knowledge that fatal effects might follow and the deceased's inability to resist the third pint.

Eighty years later in \textit{Nally v. Blanford},\textsuperscript{18} liability was imposed again under similar circumstances. The vendor knew that the vendee had purchased a quart of whisky pursuant to a wager that he could consume the entire quart without stopping. The court held that the complaint stated a cause of action against the liquor vendor, stressing the element of foreseeability.

The alleged conduct in \textit{Ibach v. Jackson}\textsuperscript{19} is equally chilling. In this case the defendant reportedly took the deceased woman to his hotel room, and, with knowledge that she could not


\textsuperscript{17} 60 Tex. 168 (1883). An interesting interpretation of this case is found in King v. Henkie, 80 Ala. 505, 511-12 (1886). This court held that \textit{McCue} rested upon the basis that the administration of liquor, like that of a noxious drug, was an assault, and that the deception by which it was accomplished was a fraud on the victim's will, equivalent to force in overpowering it. For a more detailed discussion comparing liquor to drugs see note 22 and accompanying text infra.

\textsuperscript{18} 291 S.W.2d 832 (Ky. Ct. App. 1965).

\textsuperscript{19} 148 Ore. 92, 35 P.2d 672 (1943).
tolerate alcohol, pld her with whisky. While intoxicated, the deceased sustained multiple injuries to her extremities and fractured both nasal bones. She died that same night after being abandoned by the defendant. The court overruled defendant's demurrer, and held that a cause of action had been alleged.

The courts in *Riden v. Gremm* 20 and *Dunlap v. Wagner* 21 also imposed liability on the liquor vendor. Although lacking the impact of the cases previously discussed, they still involved acts greater than ordinary negligence. In *Riden*, the deceased widow, pursuant to statute, placed the defendants upon notice that they were not to sell liquor to her husband, who was an habitual drunkard. Defendants continued to serve the husband despite this notice of his habitual drunkenness, thereby causing his death. Violation of the statute, which was a misdemeanor, was held to be negligence per se. In *Dunlap* the defendants first served Mr. Dunlap sufficient liquor to intoxicate him, and then, immediately thereafter, placed him in his horse-drawn sleigh. Due to Dunlap's inability to control the horse properly, an accident occurred resulting in the horse's death. The owner, who had lent the horse to Dunlap, was awarded judgment against the liquor vendor.

Lastly, *Pratt v. Daly* 22 demands special attention. This case was an attempt to expand the application of the common law rule permitting recovery for the improper purveyance of drugs to include the wrongful selling or giving of alcohol. The facts of this case are similar to those of *Riden*. The plaintiff's husband was an habitual drunkard, and, although the defendants had been fully warned of his propensities, they continued to serve him alcoholic beverages. However, no statute controlled in *Pratt* as it did in *Riden*, and apparently the vendee did not die from the effects of his excessive consumption. The trial court awarded the plaintiff damages for loss of consortium.

The Arizona Supreme Court upheld the decision, reasoning that because the vendee had lost the power to refuse drink, his condition was analogous to those of drug victim plaintiffs in several earlier cases. 23 These earlier decisions established the tort

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20. 97 Tenn. 220, 36 S.W. 1097 (1896).
21. 85 Ind. 529 (1882). Two other early cases were found in which liquor vendors were held liable. However, the unusual circumstances involved gave a remedy to a slave owner for the death of her slave who purchased liquor from the defendant vendor. See Skinner v. Hughes, 13 Mo. 440 (1850). The second case held that the wife and children of the deceased liquor vendee had an action upon a liquor license bond. See Hauth v. Sambo, 100 Neb. 160, 158 N.W. 1036 (1916).
23. See, e.g., Hoard v. Peck, 56 Barb. 202 (N.Y. 1867); Holleman v. Har-
liability of drug purveyors, and Pratt held that although "the loss of volition presumption" associated with habit-forming drugs is not applicable to the use of liquor, nevertheless, once such a loss of volition has been established, there is no reason to distinguish between intoxicated.

These pre-1958 cases have much in common. They generally involved a serious injury or death. The defense of contributory negligence was not accepted, a consideration to be discussed in depth at a later point. Furthermore, as stated earlier, the vendor's conduct always exceeded ordinary negligence. However, the most striking similarity is that all the cases, with the partial exception of Dunlap, involved simple two party, vendor-vendee relationships. The vendor supplied the liquor and the vendee sustained the injury. The explanation seems clear. Each of these vendors could foresee the possibility of harm to his obviously intoxicated, or habitually drunk, vendee. Unlike injury to a third person, the possibility of injury to the vendee has not altered with the changing times. Indeed, even in Dunlap, a strong foreseeability element was present. Damage or injury to chattels placed under the direct control of an obviously intoxicated person is foreseeable. Therefore, at early common law, cases recognized vendor liability if the foreseeable harm had been sufficiently established.

Although courts, prior to 1958, were reluctant to impose liability except in extreme situations, many legislatures refused to permit the harsh common law rule denying liability of the vendor to prevail in their jurisdictions. A brief examination of the resulting enactments will be helpful to an overall understanding of our topic.

**DRAMSHOP ACTS**

"Civil damage acts" or "dramshop acts" are outgrowths of the temperance reform movement of the last century. Presently, twenty-three states have such laws. These statutes confer rem-
edies which were unknown at common law, and which are not in any sense common law negligence actions. In place of negligence, the doctrine of strict liability is substituted. The care and diligence, or lack thereof, of the purveyor becomes irrelevant. Consequently, the intervening negligence of the consumer does not constitute a defense.

The scope and particulars of dramshop acts vary from state to state. For example, some jurisdictions have what may be termed "broad form" statutes which provide substantial protection, while others have extremely narrow laws applying only to the sale or gift of alcohol to an habitual drunkard or a minor after the defendant has had notice not to furnish liquor to such a person.

Basically, dramshop acts fall into two categories when describing proper plaintiffs. The first group specifies possible plaintiffs which, in addition to the injured party, may include wives, husbands, children, parents, or even guardians, or employees of the victim. The second group of statutes merely uses broad language which permits any person with some legitimate interest to bring suit.

Defendants under a dramshop act may include the tavern operator, the building owner, involved sureties, bartenders and other tavern employees. Damages may be obtained for injuries to person, property, or to means of support. It should be noted that mere mental anguish or emotional distress has been

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34. Id. at 744-46.
35. Id. at 747.
held not to be covered by dramshop laws.\(^{38}\)

**Prima Facie Case**

A prima facie case under a dramshop act generally includes the following elements:

1) A purveyance of an intoxicating beverage as defined by statute. The furnishing of alcohol may be by sale or technically by gift,\(^{37}\) for consumption on or off the premises, and directly to the intoxicated individual or through an intermediary;

2) A violation of a statute, other than the dramshop act itself.\(^{38}\) For example, illegality may arise from the furnishing of liquor to a visibly intoxicated individual, to a minor, or to an habitual drunkard;

3) Consumption of the liquor, which results in, or contributes to, the vendee's intoxication;

4) An actionable injury to the plaintiff caused by the intoxicated person;

5) Some causal connection between the fact of intoxication and the injury, although intoxication need not be the "proximate cause" of the injury as the term is used in the law of negligence; and

6) A plaintiff within the class of persons covered by the particular dramshop act.\(^{39}\)

A plaintiff suing under certain dramshop acts may be severely limited by a stated maximum sum of recovery. The Illinois statute, for example, limits recovery for personal injury and property damage to $15,000.00, and loss of support to $20,000.00.\(^{40}\) Such restrictions, of course, force the attorney with a seriously injured plaintiff to consider the possibility of additionally suing in common law negligence. The traditional rule, as evidenced by several Illinois cases,\(^{41}\) states that an action in negligence will not be permitted when a dramshop remedy is available. However, the court in a more recent New York case\(^ {42} \) came

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37. There has been a reluctance, however, to hold non-commercial vendors liable under dramshop acts. See notes 109-113 and accompanying text infra.
38. Illinois, however, does not require the sale to be unlawful before liability can be imposed. McGough, *Dramshop Acts*, 1967 A.B.A. Sect. Ins., Neg., and Comp. L. 448, 450.
40. ILL. REV. STAT. ch. 43, § 135 (1949), amending ILL. REV. STAT. ch. 43, § 135 (1934).
to the opposite conclusion, noting the differences between the dramshop and the negligence action with respect to the questions of liability and damages. The court cited Professor Prosser as authority for the general rule that the existence of a statutory remedy does not preclude an action based upon common law negligence, and recognized that the common law is not a static body, unsuceptible to change.

THE EARLY CALIFORNIA CASES

Prior to 1971, four major cases established the California doctrine regarding liability of the vendor of intoxicating beverages, and to the extent those cases do not contradict Vesely v. Sager they remain the law in California. Each of these decisions substantially influenced each of the subsequent decisions, despite the fact that statements regarding liquor vendor liability in the first two cases were mere dicta, and notwithstanding the incorrect interpretation of the common law rule by the courts in the first three cases.

The facts of Lammers v. Pacific Electric Ry. Co., decided by the California Supreme Court in 1921, indicate that the defendant railroad had removed the plaintiff passenger from its train to the tracks near one of its stations because he had failed to produce his ticket. It was never clearly established, nor was it held to be relevant, whether at the time of the removal the helpless plaintiff was intoxicated or suffering from a seizure. The next morning he was found on a train track three-fourths of a mile from the station badly mangled after having been struck by another train. In its decision for the defendant the court reasoned that regardless of how dangerous the point of removal might have been, because the plaintiff had immediately departed that area for the safety of a ditch, the accident would not have occurred “but for” his voluntary act of returning to a position of danger. Therefore, the defendant's act, whether negligent or not, was not the proximate cause of plaintiff's injury. Only in its general discussion of proximate cause did the court mention the common law liquor liability rule, stating:

The only connection between the ejection and the injury would be the fact that if there had been no ejection there

43. Id. at 383, 262 N.Y.S.2d at 292.
46. 186 Cal. 379, 199 P. 523 (1921).
would have been no injury. . . . The peril arising from the ejection ceased the moment the passenger left the position where he could be struck by defendant's trains, while the peril arising from the use of the intoxicating liquor continued in operation up to the time of the injury and contributed thereto, and yet it has been uniformly held, in the absence of statute to the contrary, that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. 47

It is noteworthy that in this statement the term "purchaser" is not qualified by the adjectives "able-bodied" or even "ordinary". This deletion is significant for it implied that in California, liquor vendor liability could not be established under any circumstances. This deletion, finally corrected in Cole v. Rush, 48 may have contributed to the acceptance of the traditional non-liability position 49 still evidenced in California.

Hitson v. Dwyer, 50 decided twenty-two years after Lammers, involved a typical liquor vendor liability situation. The plaintiff alleged that although obviously intoxicated, he was wrongfully served alcohol at the defendant's tavern, causing him to fall from a bar stool and sustain injuries. His injuries resulted either from the fall, or from the defendant's subsequent act of dragging the plaintiff across the floor, or from both. Although a procedural question was the only issue, 51 the court obliquely discussed the defendant's negligence in reply to plaintiff's contention that the involved sale of liquor was in violation of Section 3796 of the Alcoholic Beverages Control Act, 52 and hence negligence per se. 53 While noting that the act did make it a misdemeanor to sell alcoholic beverages to an obviously intoxicated person, the

47. Id. at 384, 199 P. at 525.
49. These early California cases are still the law in this state except as changed by Vesely. See discussion on Vesely, note 90 and accompanying text infra; Brockett, note 103 and accompanying text infra and Carlisle, note 127.
51. The sole question before the court was the propriety of sustaining a special demurrer which alleged uncertainty of the complaint. The defendant claimed uncertainty as to which of the injuries raised by the plaintiff's complaint resulted from the fall, and which from the alleged dragging. Hitson v. Dwyer, 61 Cal. App. 2d 803, 807, 143 P.2d 952, 954 (1943).
52. CAL. GEN. LAWS act 3796, § 1 (Deering 1938), now CAL. BUS. & PROF. CODE § 23001 (West 1964). For a discussion concerning the current statute see note 97 and accompanying text infra.
53. Once a statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has occurred as a result of its violation—a majority of courts hold that an unexcused violation is conclusive on the issue of negligence. This usually is expressed by saying that the unexcused violation is negligence "per se" or in itself. PROSSER, HANDBOOK OF THE LAW OF TORTS 200 (4th ed. 1971).
court reasoned that since the primary purpose of the act involved "... in the highest degree the economic, social and moral well being and the safety of the state and of all its people," the plaintiff was not a member of the class whom the act was intended to protect. This statement was conclusionary and made no attempt to explain why a liquor vendee was not to be considered one of the members of the statutorily protected class. Notwithstanding the court's lack of explanation, this interpretation of the protected class continues to survive without challenge, and its soundness is undoubtedly suspect.

Fleckner v. Dionne, a court of appeal case decided in 1949, was the first reported California decision which dealt with a liquor vendor's liability for injuries sustained by a third party as a result of a patron's intoxication. The plaintiff, a victim of an auto accident involving a car driven by the vendee, alleged that the defendants continued to serve the vendee despite knowledge that he was a severely intoxicated minor, who would be leaving the tavern at the wheel of an automobile. The court rejected plaintiff's argument, and although expressly recognizing that the only California "precedents" were dictum, quoted extensively from both Lammers v. Pacific Electric Ry. Co. and Hitson v. Dwyer and relied upon several decisions from other jurisdictions. While agreeing that there was no supporting California authority for his position, Justice Dooling dissented in Fleckner on the basis that the alleged foreseeability factors were sufficient to establish negligence. In his well-reasoned dissent, he posits a hypothetical involving a well established liability situation where-in a car owner who had lent his auto to an intoxicated person or an habitual drunkard was held liable for the damages produced by the driver. This hypothetical situation imposing liability on the car owner was startlingly similar to the actual situation in Fleckner. Dooling pointed out the inconsistency of the Fleckner majority with his hypothetical case in which liability would be established and implied that because liability would be found in the hypothetical case, it should also be found in Fleckner.

Cole v. Rush, decided in 1955, was the last and most important of the major pre-Vesely cases. In a better reasoned opin-
ion than its predecessors, the California Supreme Court addressed a factual situation which presents the most sophisticated liquor vendor problem reported in California. Although the Cole decision, which held for the defendant tavern keeper, plus the decisions of Lammers, Hitson, and Fleckner were later termed a “back eddy” in California law, even today, fifteen years subsequent to the advent of the new interpretation of liquor law liability, a careful analysis of Cole still presents doubt as to the correct analysis of its facts.

In Cole, Mrs. Cole and her minor children brought an action against a tavern keeper for the death of Mr. Cole, who was killed in a fistfight with another patron of defendant’s bar. The complaint alleged that the deceased had patronized the defendant’s establishment on numerous occasions and was well known to defendant to be a man “normally of quiet demeanor” but that when intoxicated, one who became “belligerent, pugnacious and quarrelsome.” The complaint alleged further that on numerous occasions Mrs. Cole had requested the defendant not to sell or furnish intoxicating beverages to her husband in quantities sufficient to cause intoxication. The defendant, nevertheless, continued to serve liquor to Mr. Cole, and death ensued. It was additionally alleged (although in all probability this allegation was intended to be used only as an indication of the amount of damages that the plaintiffs would suffer) that the deceased was, at the time of his death, an “able-bodied” man of 39 years, earning approximately $4,000.00 annually.

Although the court placed substantial reliance upon the three California cases previously discussed, Cole properly stated the common law rule that there was no remedy for injury or death following the sale of liquor to an ordinary man. The allegation that the deceased was able-bodied permitted the court, although perhaps unfairly, as implied in Justice Carter’s dissent, to place this case squarely within the accepted version of the traditional common law doctrine, and to distinguish it from Pratt v. Daly. In its discussion, the court emphasized that while Pratt dealt with an habitual drunkard who, by definition, is a person who has lost the will power to avoid the temptation of liquor, the Cole plaintiffs alleged no such lack of volition on the part of the de-

63. 45 Cal. 2d 345, 289 P.2d 450 (1955).
65. 55 Ariz. 535, 104 P.2d 147 (1940).
ceased. Rather, Mr. Cole was reported to be not only able-bodied but sober upon entering the defendant's tavern. Based on these allegations the court concluded that the deceased's acts constituted contributory negligence.

The plaintiffs were also hampered by the inherent weakness of their allegation of foreseeability. The court noted that the knowledge alleged in Fleckner was more specific and extensive than that alleged in Cole, because in Cole the defendant had only been informed that the deceased was belligerent when intoxicated. Indeed, apart from the contributory negligence question, foreseeability of danger was the principal issue, although the court was reluctant to examine this issue thoroughly, apparently believing that its reliance on Fleckner was sufficient to deal with the question.

It is my opinion that the foreseeability of danger connected with the serving of liquor either to an obviously intoxicated person, or to an habitual drunkard, both of whom may be rendered completely helpless by such service, is greater than the furnishing of alcoholic beverages to a person who merely has a tendency to become belligerent while drinking. The possibility of death or serious injury arising out of a barroom brawl, providing there is no knowledge that weapons other than fists will be used, seems fairly remote, the occasional Cole type of tragedy notwithstanding. On the other hand, the effect of additional alcohol on the previously intoxicated patron, or even the effect of the first drink on a man well-known to lack the will power to control his drinking, is clear indeed. The moment that such a person leaves the tavern premises, he becomes a potential highway hazard to himself and others. The basic difference is probably one of degree: the man with the tendency to become pugnacious after drinking generally retains some reason and at least some ability, either physical or mental, to protect himself; the obviously intoxicated individual or the habitual drunkard, on the other hand, lacks any such ability to protect himself.

An additional area of interest in Cole was plaintiff's attempt to impose a more complicated duty requirement on the defendant than that found in earlier cases with similar factual situations. The Cole plaintiffs alleged that Mrs. Cole had frequently requested the defendant not to sell or furnish intoxicating beverages to her husband "sufficient to allow him to become intoxicated thereon." This allegation differs from those in Rid-

where the plaintiffs placed the defendants upon notice that they should not sell any intoxicating beverages to the plaintiffs' husbands. Through necessity, equity demands that courts impose upon defendants only those duties which, in practice, can be reasonably performed and enforced. The complaints in *Riden* and *Pratt* alleged such enforceable duties, while the duty alleged in *Cole* and its enforceability was questionable. That the enforceability of the duty in *Cole* was questionable becomes readily apparent when one considers the other allegations. One must infer from these allegations that the term "intoxication" does not mean obvious intoxication, but refers to a lesser state whereby a particular individual such as Mr. Cole becomes pugnacious. While the court did not discuss this issue in the text of its opinion, it did place this particular allegation in italics and stated in a footnote, "[B]y what standards or tests the defendants on any occasion might determine the amount which properly could be furnished is not disclosed." Undoubtedly, the court felt that its finding of nonliability was sufficiently supported without a discussion of what today might be a substantial issue, although this statement in the footnote was indicative of the court's cognizance of the problem.

**THE NEW COMMON LAW RULE**

Since 1958, a series of cases have arisen which are now recognized as precedential exceptions to the traditional nonliability rulings. Indeed these decisions are often hailed as formulating a new common law rule which permits recovery for the negligent sale of intoxicating beverages. This designation, however, is misleading since only one case has stated that liability would be imposed for ordinary negligence independent of a statute imposing a standard of care upon liquor vendors. Thus, when these cases

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68. 97 Tenn. 220, 36 S.W. 1097 (1896).
69. 55 Ariz. 535, 104 P.2d 147 (1940).
71. Hollerud v. Malamis, 20 Mich. App. 748, 757, 174 N.W.2d 626, 631 n.14, 632 n.17 (1969). In this discussion of the new common law only three principal cases will be discussed. However, the reader's attention is called to the fact that all the subsequent sections of this article contain discussions of decisions which are new common law cases. Attention is also called to the fact that not all jurisdictions have followed the new rule. See Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969).

The first prime requisite to deintoxicate one who has, because of
are said to be founded upon common law principles, what is generally meant is that the accepted rule being applied or the standard of conduct imposed has been established either by a statute or an ordinance. Therefore, the new common law rule seldom means the old common law "reasonable man standard" unaided by statute, when imposing liability on a vendor of liquor. Confusion regarding application of the new liquor vendor liability is due to the difficulty in correctly interpreting the early precedent cases, *Schelin v. Goldberg*, and *Waynich v. Chicago's Last Department Store*, another leading decision decided the following year. Only after reading *Rappaport v. Nichols*, which is generally considered the leading decision in this field, can the true nature of the trend be correctly analyzed.

In *Schelin*, the plaintiff had an extraordinary ability to consume alcohol. During the four to five hour period prior to entering defendant's establishment, he consumed 12 or 13 double shots of whiskey and an equal amount of beer. At the defendant's tavern he consumed an additional quantity of beer. The plaintiff obviously was not "feeling any pain," a fact further evidenced by his attempt to pin a flower on another patron, who assaulted the plaintiff, causing him to lose an eye.

The Pennsylvania Supreme Court in *Schelin* granted recovery to the plaintiff, holding the tavern keeper liable. Later, confusion arose regarding the correct analysis of the basis for recovery used in *Schelin*. The court in *Rappaport* implied that the *Schelin* decision was based entirely on common law principles unaided by statute. Another authority emphasized that the plaintiff's cause of action was based upon the violation of a statute prohibiting liquor sales to obviously intoxicated persons, and was therefore, under Pennsylvania law, negligence per se. However, perhaps the best analysis is found in a footnote of a Michigan decision, which states:

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alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute.

It is submitted that theoretically this is a correct position, but for practical purposes the application of a criminal statute to determine the standard of care is to be preferred. See discussion p. 58-59 infra. See also Comment, *Dram Shop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 1015-1019 (1969).

74. 269 F.2d 322 (7th Cir. 1959).
75. 31 N.J. 188, 156 A.2d 1 (1959).
In *Schelin* the intoxicated patron was allowed to recover for his injuries on the theory that the sales to him in violation of a statute prohibiting the sale of liquor to a visibly intoxicated person was a breach of a duty owed the patron and, thus, negligence. The statute relied on (making it unlawful to sell or give liquor to a visibly intoxicated person) repealed an earlier statute which provided that any person who furnished liquor in violation of law shall be civilly responsible for any consequential injury to person or property; repeal of the specific remedy was held not to preclude recovery for violation of the new statutory provision even though it did not expressly provide a remedy.  

*Schelin* did use a liquor vendor statute as a basis for determining the standard of care to be applied. However, unlike the previously repealed statute which imposed liability on the vendor for damages resulting from the intoxication, this statute did not expressly state that a violator could be held civilly responsible for resulting damages. The court in *Schelin* discussed the effect of repealing the statute which imposed strict liability, stating, "[w]hen an act embodying in expressed terms a principle of law is repealed by the legislature, then the principle as it existed at common law is still in force."  

Therefore, while the court in *Schelin* juxtaposed the principle of applicable common law to statutory law in reaching its decision to hold the tavern keeper liable, the court in *Waynich v. Chicago's Last Department Store*, in a manner analogous to the court in *Schelin*, combined a broad principle of common law with a statutory provision. In *Waynich*, wherein third parties were injured, the dramshop acts of both Illinois, where the vendees had purchased the liquor, and of Michigan, the situs of the automobile accident, were initially held inapplicable. However, to fill what was termed a "vacuum" in the law the court looked first to Michigan, acknowledging that the law of the place of injury controlled. Michigan law provided the court with only a broad general rule stating that, "whenever the law gives a right, or prohibits an injury, it also gives a remedy by action." To determine the applicable standard of care, the court then applied that part of the Illinois dramshop law previously declared inapplicable,

82. 269 F.2d 322 (7th Cir. 1959).
83. *Id.* at 324.
84. *Id.* at 325.
which stated that liquor sales to intoxicated persons were unlawful. The court concluded that because this act provided protection for any member of the public who might be endangered as a result of the drunkenness to which such a sale contributed, the plaintiffs were entitled to its protection but did not imply that it was placing reliance upon those parts of the act which imposed dramshop damages.

*Rappaport v. Nichols*\(^{85}\) involved a wrongful death action by a widow against four tavern keepers for selling liquor to an intoxicated minor, Nichols, who had accidently killed the plaintiff's husband in an automobile collision. The plaintiff alleged that the sales were made with the knowledge that Nichols was underage and that some of the defendants made these sales with the knowledge that Nichols was intoxicated. In its decision, the New Jersey Supreme Court favored the proposition that liquor vendors can be held liable to third persons, citing *Schelin* and *Waynich* with approval. The court examined certain cases which imposed liability under analogous tort situations, and presented a well-reasoned analysis of both the negligence and proximate cause issues. Once it was established that New Jersey's repeal of its Dram Shop Act had left unimpaired the common law tort principles, the court emphasized the foreseeability factor in its reasoning:

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.\(^{86}\)

The court, however, continued to rely on statutory law when it determined that the New Jersey act prohibiting liquor sales to minors and intoxicated persons was not to be narrowly construed for the sole protection of minors and intoxicated persons, but rather was to be construed as intending to protect members of the general public. The court, therefore, found that under this statute the plaintiff had alleged a valid cause of action. *Rappaport* has been widely and favorably commented upon,\(^{87}\) and frequently,\(^{88}\) but not always, followed,\(^{89}\) as will be seen in the discussion of liquor vendor liability in California.

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85. 31 N.J. 188, 156 A.2d 1 (1959).
86. *Id.* at 202, 156 A.2d at 8.
88. *Id.* at 757, 174 N.W.2d at 631 & n.15.
89. *Id.* at 757, 174 N.W.2d at 631 & n.16.
VESELY: THE THIRD PARTY PLAINTIFF

In Vesely v. Sager,\(^9\) decided in 1971, the California Supreme Court declared that a commercial vendor of alcoholic beverages may be liable in a civil action for damages to third parties injured as a result of a vendee’s intoxication. This was the first acceptance of such liability in California. The opinion written by Chief Justice Wright presents a studious, concise examination of California law and the new common law cases, Waynich and Rappaport. Although Vesely analyzes all of the issues traditionally associated with this type of decision,\(^9\) it has only limited application since it expressly refrains from holding that a non-commercial liquor vendor will be liable or that a vendee may recover for injuries which he, himself, has suffered. Perhaps of greater significance is the fact that Vesely is a typical new common law case,\(^9\) the court relying upon statutory law as one of its essential ingredients.

The Factual Setting

The facts in Vesely evidenced a strong foreseeability factor between the defendant's conduct and the plaintiff's injury. The complaint stated that Sager, a mountain roadhouse operator, served alcoholic beverages to his customer, O'Connell, from 10 p.m. until 5:15 a.m., more than three hours after the normal closing time. Sager continued to serve O'Connell with knowledge that he was becoming increasingly intoxicated and upon departure would be driving down the only route leading from the tavern, a steep and winding, narrow road. During that drive, O'Connell veered into the plaintiff's on-coming truck, resulting in personal injuries to the plaintiff. The plaintiff brought an action naming O'Connell, Sager, and the car owner as parties defendant.

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90. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). A most interesting recent California settlement is discussed in 17 JURY VERDICTS WEEKLY, June 29, 1973, at 15, in the case of Bennett v. Sailors Union of the Pacific, where one plaintiff received a settlement of $800,000 and the other a settlement of $300,000 from the defendants (the bar owner, the bartender and the bar manager). The plaintiffs were innocent third parties, similar to the plaintiff in Vesely. They were severely injured in a head-on auto collision with the intoxicated vendee. The facts indicate that the vendee was obviously intoxicated at the bar and later when driving. Immediately before the accident he drove the wrong way on a one way street, was speeding, ran a stop sign, and was driving on one rim without a tire.

91. The issues normally associated with this type of case are duty, proximate cause, and the applicability of a criminal statute to a civil matter.

92. The new common law cases are decisions based partially on common law principles and partially on existing statutory law to determine an applicable standard of conduct and the ensuing duties imposed on the liquor vendor.
The Imposition of Liability

In reviewing the lower court's dismissal of the plaintiff's complaint, the California Supreme Court found that the principles of proximate cause utilized in the new common law cases were consistent with those already employed in California:

Under these principles an actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct.\(^3\)

Thus, there are only two necessary ingredients for the imposition of liability: 1) the defendant's act must be a substantial factor in producing the harm, and 2) the harm must have been reasonably foreseeable. Under this test, the liquor vendee's intervening act of consumption, though voluntary, can no longer be considered a bar to recovery.

Once the issue of proximate cause had been decided, the court considered the more important issue of whether Sager owed a duty of care to the plaintiff.\(^4\) This duty and the concomitant standard of conduct were found in California Business and Professions Code, section 25602, which provides that: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverages to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."\(^5\)

The application of this statute to the facts was aided by California Evidence Code, section 669,\(^6\) which codifies the well established California rule that a presumption of negligence arises from the violation of a statute enacted to protect a class of which the plaintiff is a member against the type of harm which the plaintiff suffered. By employing yet another statute,

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93. Vesely v. Sager, 5 Cal. 3d 153, 163, 486 P.2d 151, 158, 95 Cal. Rptr. 623, 630 (1971). Note the interesting situation in Massachusetts with respect to the issue of foreseeability. Compare Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968) with Dimond v. Sacilotto, 353 Mass. 501, 233 N.E.2d 20 (1968). In Adamian it was held that a defendant vendor who solicited the patronage of the motoring public and maintained a public parking facility should have foreseen that a sale to an intoxicated patron created a risk for third person plaintiffs on highways, while in Dimond it was held that a defendant vendor who did not maintain a public parking facility, should not, as a matter of law, have foreseen that sale to an intoxicated patron created a risk for third person plaintiffs on highways. It is submitted that the universal use of the auto makes this Massachusetts distinction inappropriate.


95. CAL. BUS. & PROF. CODE § 25602 (West 1964).

96. CAL. EVID. CODE § 669 (West 1968).
section 23001,97 of the California Business and Professions Code, which declares that the purpose of the Alcoholic Beverage Control Act is to protect the safety of the people of California, the court concluded that the plaintiff was a member of the class entitled to protection under section 25602 of California Business and Professions Code.98

The defense of assumption of risk was not discussed in Vesely, nor is it applicable to a case in which the plaintiff is either the driver of, or a passenger in, an automobile other than the one being driven by the intoxicated vendee. However, the feasibility of this defense becomes apparent if the plaintiff is the passenger of the intoxicated vendee. While several other jurisdictions have faced such situations,99 noteworthy direction has not been provided. Nevertheless, it can be assumed that such a defense would not be sustained in California so long as the plaintiff was able to show that the defendant had breached an applicable statute as in Vesely. The well established California doctrine states that assumption of risk is not a valid defense to an action based upon the violation of a safety law, when the plaintiff is a member of the class intended to be protected by the safety law.100 The question, therefore, would be whether a vendee's passenger, as a member of the general public, would qualify for protection under the statute. Although we have no direct authority, we may assume that such a person would qualify.101 In the absence of such a statute, however, the defense of assumption of risk would be valid. Furthermore, in the case of a negligent third party motorist, the defense of contributory negligence may be valid even if the plaintiff is aided by statute.102

98. CAL. BUS. & PROF. CODE § 25602 (West 1964).
101. Note the discussion in this paper concerning the fact that a vendee plaintiff has been determined not to be a member of the class protected by California Business and Professions Code § 25602. See notes 146-149 and accompanying text infra. See also notes 50-55 and accompanying text supra. Since it is later submitted that a vendee should be considered a member of the protected class, it is naturally contended that a third party passenger should be granted the same protection.
There are some decisions that hold that contributory negligence is not a defense in actions based upon violation of a statute enacted for the protection of a particular class of persons who are incapable of protecting themselves . . . . This is the view of the Restatement of Torts. Section 483 provides that: 'If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their
BROCKETT: THE SOCIAL HOST DEFENDANT

In Brockett v. Kitchen Boyd Motor Company, a California court of appeal had the opportunity on two separate occasions to determine the liability of a non-commercial liquor vendor. However, decisions imposing liability upon non-commercial liquor vendors are limited to unusually strong factual situations and thus cannot be considered as substantial precedent for subsequent social host situations.

The Brockett setting was an office party, and the fact that the intoxicated individual was a minor was well-known to the defendant employer-host. Furthermore, not only did the defendant's personnel provide the minor with liquor, but subsequently escorted him, in his intoxicated condition, to his automobile, instructing him to drive home through city traffic. During that drive, an accident occurred in which the plaintiff was injured.

This case was first decided in 1968, three years prior to the Vesely decision. The court was forced, therefore, to recognize the pre-Vesely controlling law which denied liquor vendor inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute.'

This rule is generally applied in interpreting statutes passed for the protection of children, insane persons, or patrons of bars, etc. But even as to the limited class included within this exception to the general rule, the overwhelming weight of authority is that contributory negligence is a defense. . . . This conclusion has been reached even in cases where the violation of the statute was regarded as negligence per se. (emphasis added)

Therefore, while a negligent third party motorist is clearly within the protected class of California Business and Professions Code section 25602, it appears that such a motorist may still be vulnerable to the defense of contributory negligence. See Comment, Dram Shop Liability—A Judicial Response, 57 CAL. L. REV. 995, 1025-26 (1969).

103. 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968) rev'd on rehearing, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972). See Dwan v. Dixon, 216 Cal. App. 2d 260, 263-64, 30 Cal. Rptr. 749, 751 (1963). This was a social host situation in which the intoxicated guest injured and killed third parties in an auto accident. In order to avoid the then controlling Fleckner and Cole cases, the plaintiffs filed an amended complaint containing allegations that defendants had procured the intoxication of their drunken guest, and then knowing him to be intoxicated, had conducted him to his car, put him into the car and headed him for the highway, and assisted, aided and abetted him in driving his car away from the premises. The court denied the plaintiffs a right to transform the defendants from what was termed the "mere passive suppliers" of liquor into "active tortfeasors."

This fact situation is strikingly similar to those found in both Brockett and Dunlap. See also Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961). The inference from this similarity and from one's personal experience is that this is a common situation. See note 131 infra, for a discussion concerning the possible applicability of the last clear chance doctrine to this situation.

104. The court heard Brockett both on appeal and on rehearing.

liability. Notwithstanding pre-Vesely decisions, liability was imposed upon the employer by stressing the special relationship between the employer and his minor employee. The court concluded that the minor employee was deemed to have come under the protection of the defendant employer, not only for his own safety, but also for the protection of the general public. Thus, the employer's alleged acts constituted a violation of his duty of protection.

In 1972, one year after Vesely was decided, Brockett\textsuperscript{106} was again presented to the same court of appeal. Justice Gargano stated that on rehearing the court was called upon to "squarely" decide "whether the umbrella of social drinking, in an era in which social drinking is a way of life for many, shields from civil liability, the actor who knowingly and wilfully plies a minor with intoxicating liquor with the knowledge that the minor is going to drive an automobile on the public highways."\textsuperscript{107}

As in Vesely, a controlling statute\textsuperscript{108} existed. Given this statute, and the Vesely precedent, the court expanded the acceptance of liquor vendor liability to the non-commercial vendor. Simultaneously, the court circumvented the policy question of whether such a ruling might place an unjustifiable burden of determining when a guest has reached his alcoholic tolerance upon the unsophisticated social host by expressly limiting the decision to cases involving consumers who are minors.

The limitation of Brockett to situations involving minor drinkers requires analysis of decisions from other jurisdictions to determine the parameters of imposing liability upon non-commercial liquor vendors. Unfortunately, much of this authority is to be found in dicta or dissenting opinions.

**THE IMPOSITION OF LIABILITY AS APPLIED IN OTHER JURISDICTIONS**

Traditionally, courts have been more reluctant to find liability in non-commercial donor cases than in their more common commercial counterparts. This statement is best illustrated by the fact that, although dramshop acts usually provide for the recovery of damages from "any person" who sells or gives intoxicating liquor, it generally has been held that such statutes were not intended to, and do not, create a right of action against a person


\textsuperscript{107} Id. at 88, 100 Cal. Rptr. at 752.

\textsuperscript{108} CAL. BUS. & PROF. CODE § 25658 (West 1964). This statute makes it a misdemeanor to furnish alcoholic beverages to a minor.
who gives another an alcoholic beverage as a mere act of hospitality without pecuniary gain. As might be expected, non-dramshop act states also overwhelmingly endorse the non-liability position. Even Rappaport has been cited as authority for this rule, since in the court's demand that a careful balancing of the conflicting social policies be made, emphasis was placed on the fact that only commercial vendors were involved. More substantial support is found in Carr v. Turner, wherein the Arkansas Supreme Court rejected any reasoning that would compel the casual host entertaining in his home to "maintain supervision over all his guests and to refuse to serve drinks to those nearing the point of intoxication."

The Wisconsin Supreme Court, in Garcia v. Hargrove, explained the policy underlying the majority decision when it stated:

... extending liability to the non-commercial vendor would result in great social pressure being applied to such individuals and require their policing the activities of friends and social guests. Assuming for the moment that such results are beneficial, it is questionable just how much success an individual would have in playing out his role in the atmosphere of a private gathering. In addition, such a restriction of social activity encompasses changes far beyond the framework of negligence law previously interpreted and applied by this court.

The Oregon Supreme Court, in a recent decision, however, found that a valid cause of action may exist against a non-commercial vendor in certain circumstances. Although the factual situation, as in Brockett, involved an intoxicated minor, the Oregon decision could have wider application than Brockett. The court recognized the majority position of a host's non-liability for injuries sustained by third parties as a result of the guest's intoxication, but discussed certain circumstances under which a host might be under a duty to refuse to serve his guest additional alcohol. Where the host has knowledge that his guest is severely intoxicated, is a minor, or is one whose behavior is adversely affected by the consumption of alcoholic beverages, such a duty might be imposed upon him. The host, by failing to comply

111. 238 Ark. 889, 385 S.W.2d 656 (1965).
112. ld. at 892, 385 S.W.2d at 658.
113. 46 Wis. 2d 724, 734, 176 N.W.2d 566, 570-71 (1970).
with this duty, might render himself liable for injuries caused to third persons as a result of his guest's intoxication. The Supreme Court of Oregon expressly rejected the majority rule that furnishing alcohol to others in a social setting, even where the host acts unreasonably, can never give rise to liability.¹¹⁵

The minority position elucidated by the Oregon Supreme Court is persuasive because the foreseeability factor remains the same in both commercial and non-commercial situations. Furthermore, the ability to police alcoholic consumption appears in most cases to to be approximately the same, although every social host is undoubtedly repelled at the task of telling his guest that he may have no more to drink. The social host would appear to have at least one distinct advantage over his commercial counterpart. He generally can insure the safety of an intoxicated guest with relative ease by permitting that person to stay the night, or by having a sober guest escort the intoxicated guest home. These alternatives to insure the safety of the guest and third parties are unlikely to be available to the commercial liquor vendor.

Undoubtedly, such a duty imposed by the minority position places additional obligations upon the social host in order to effectively police the consumption of his guests. The host, for example, should not permit himself to become intoxicated. This duty would not seem to be an unreasonable burden considering that most host-invitee relationships are based upon friendship. In the words of Chief Justice Hallows, of the Wisconsin Supreme Court, “[w]e are still our brothers’ keepers, and it would be a rare host at a social gathering who would knowingly give more liquor to an intoxicated friend when he knows his invitee must take care of himself on the highway and will potentially endanger other persons. Social justice and common sense require the social host to see within reason that his guests do not partake too much of his generosity.”¹¹⁶

The principal problem is to establish a reasonable standard of care, so that the social host is not burdened with inequitable obligations, and is given some protection against frivolous lawsuits. For instance, the Arkansas Supreme Court¹¹⁷ rejected any requirement which would compel the host to refuse to serve drinks to those nearing the point of intoxication. The author of this article concurs. Rather, in California, the standard of care for both commercial and non-commercial vendors should be predi-

¹¹⁵. *Id.* at 639-40, 485 P.2d at 21-22.
¹¹⁷. *See* note 102 *supra.*
cated upon the aforementioned Business and Professions Code statutes forbidding the sale or gift of alcohol to minors and obvious or common drunkards. With respect to minors and common drunkards, the standard is rigid yet simple: no drink whatsoever. In the case of the obviously intoxicated person there are judicial guidelines which clearly show that the surveillance of such an individual is a much easier task than the attempt to determine what particular drink will push a presently “sober” invitee into a state of intoxication.

In the early case of People v. Johnson, it was held that a liquor seller was under a duty, before serving the intended purchaser, to use his powers of observation regarding the condition of the prospective vendee under the existing circumstances. He was not required to subject his patrons to tests which would disclose symptoms not readily apparent to anyone having normal powers of observation. Furthermore, People v. Smith held that the conclusion of the court that the patron was “obviously” intoxicated at the time the defendant served him was sustained by evidence that the customer spoke loudly, spilled beer, fell against a witness, continually banged his glass on the bar, requested service in a loud voice, and had poor balance, a flushed face, thick speech, bloodshot eyes, disheveled clothing, and an argumentative behavior.

Therefore, by applying the strict standards of criminal cases based upon criminal statutes, a just median is obtained; while

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118. CAL. BUS. & PROF. CODE §§ 25602, 25658 (West 1964).
119. 81 Cal. App. 2d Supp. 973, 185 P.2d 105 (1947). Fear of frivolous lawsuits is probably the basic reason for non-acceptance of the new rule even in commercial situations. The following words of the Nevada Supreme Court are interesting in this respect: “Those opposed to extending liability point out that to hold otherwise would subject the tavern owner to ruinous exposure every time he poured a drink and would multiply litigation needlessly in a claims-conscious society. Every liquor vendor visited by the patron who became intoxicated would be a likely defendant in subsequent litigation flowing from the patron’s wrongful conduct. They urge that if civil liability is to be imposed, it should be accomplished by legislative act after appropriate surveys, hearing, and investigations to ascertain the need for it and the expected consequences to follow. We prefer this point of view. Judicial restraint is a worthwhile practice when the proposed new doctrine may have implications far beyond the perception of the court asked to declare it.” Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 101, 450 P.2d 358, 359 (1969).
120. 94 Cal. App. 2d Supp. 975, 210 P.2d 98 (1949). Also of interest is the following passage from a Pennsylvania case on the issue of whether the vendee was visibly intoxicated:

The doctor described Gross’s (the vendee motorist who struck the plaintiff pedestrian) condition, at the time of the examination, as: “Eyes bloodshot, speech thick, he was very upset, emotionally disturbed, his gait was unsteady, his co-ordination was poor.” Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 629, 198 A.2d 550, 552 (1964).
the foreseeability rule is permitted to be applied to the social host, only a reasonable, restricted duty may be imposed upon him.\footnote{121}

An additional problematical area arises with the concern of whether parties other than the immediate host should be burdened with this duty of foreseeability. The decision of the Supreme Court of Oregon\footnote{122} supporting the minority position is applicable because that case involved a plaintiff who had joined as defendants not only the immediate host but other parties as well, including the hotel which rented the room for the fraternity party in issue. The majority refused to extend this duty beyond the immediate host, although it was unclear whether the holding was based on the applicable law or a result of insufficient pleading.\footnote{123}

The dissent objected, stating that if the fraternity could have foreseen the danger involved, it was entirely likely that the other named defendants could also have foreseen the danger.\footnote{124} While it is my contention that arbitrary limitations should not be placed upon the foreseeability rule, the evidence, nevertheless, should be substantial before parties other than the immediate host are made to share such obligations.\footnote{125}

**CARLISLE: THE VENDEE PLAINTIFF**

Thus far, this article has been concerned with liability to third parties injured by an intoxicated vendee. At this point, the discussion will focus on the complex liquor vendor question of whether the erring vendor should be held responsible for injuries sustained by the vendee. A vendor in this situation would heavily rely upon the defense of contributory negligence. The vendee might seek to rebut this defense by showing that the vendor's acts constituted more than mere negligence, or by estab-

\footnote{123} *Id.* at 643-44, 485 P.2d at 30.
\footnote{124} *Id.* at 645, 485 P.2d at 33.
\footnote{125} It should be noted that present in *Brockett*, although not discussed, is a factor of some significance, namely, that in both the commercial tavern and such ventures as the office Christmas party a benefit is sought by the purveyor of alcoholic beverages. This similarity provides one social policy argument for establishing the liability of such "social" hosts which is often favored by the courts. That the tavern owner is seeking economic profit from the sale of liquor is clear; but just as real is business management's attempt to create employee or customer good will from such social endeavors. Often this fact is confirmed by a business deducting the costs of such an event as a business expense for federal tax purposes. Of equal importance, a business may insure such operations and in this manner, like the prudent tavern owner, spread the risk of loss of such activity. *See, e.g.*, Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 764, 458 P.2d 897, 903 (1969).
lishing that an intoxicated individual is incapable of contributory negligence. Under the circumstances, both these tasks are formidable. Furthermore, in California the injured vendee is faced with the additional obstacle of being outside statutory protection, for it has been determined that the consumer is not a member of the class intended to be protected by applicable statutory law. These problems shall be examined in the following discussion of the recent decision of the California court of appeal in Carlisle v. Kanaywer.

The plaintiffs in Carlisle sought damages for the alleged wrongful death of their husband and father, stating that the defendants knew the decedent was an habitual drunkard lacking the will to resist alcohol, yet continued to serve him alcohol in violation of section 25602 of the California Business and Professions Code. The decedent became violently ill, and died in the tavern, strangling on his own vomit.

At the time the trial court rendered judgment for the defendants, the ruling was unquestionably in accord with prevailing California law. In the interim between the trial and appeal, however, Vesely was decided. The issue on appeal, therefore, was whether the Vesely rule should be extended to cover injured vendees.

In holding for the defendants on the liability issue, the

127. 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972). Soon after Carlisle, the Second District Appellate Court handed down Sargent v. Goldberg, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972). Here the court correctly upheld the trial judge who had sustained the defendant's demurrer. The pleadings were clearly lacking. The court stated:

It is alleged that at the time decedent entered defendant's liquor store (presumably a package store) he was in a state 'approaching drunkeness,' (sic) There is no allegation that decedent consumed any of the alcoholic beverages sold to him or that his condition deteriorated in any degree as a result of his purchase at the liquor store and prior to the events causing his death. No facts are alleged from which it can be inferred that a violation of section 25602, if such existed, proximately caused the death.

Id. at 943-44, 102 Cal. Rptr. at 302.
129. Carlisle upheld as valid the plaintiff's second cause of action which alleged that the respondent tavern keepers, having negligently served liquor to plaintiff's decedent, failed to render him aid when he became sick, unconscious, and helpless upon their premises as a result of his intoxication. The court stated that:

It is well settled that one whose negligence injures another is bound to render him aid, and that the injured party's contributory negligence in causing the injury is not a defense in such a case (Brooks v. E.J. Willig Truck Transp. Co., 40 Cal. 2d 669, 678-79, 255 P.2d 802; Summers v. Dominguez, 29 Cal. App. 2d 308, 313, 84 P.2d 237). 24 Cal. App. 3d at 592, 101 Cal. Rptr. at 248-49.

The court is undoubtedly correct in this analysis, and perhaps we may as-
court in *Carlisle* made a distinction between the role that the vendee's consumption plays in an innocent third-party case and its role in a vendee-plaintiff action. In the former situation, the vendee's consumption represents an intervening, but foreseeable act of a second party. Thus the vendor's negligence remains an actionable proximate cause, notwithstanding the fact that the vendee's consumption is a contributing cause. However, what would constitute the consumer's concurrent negligence in an innocent third-party situation is viewed as the consumer's contributory negligence when he, himself, is the plaintiff.

The court rejected the plaintiff's argument that an act must be wholly volitional to constitute negligence on the grounds that such a theory, if accepted, would wrongly free the alcoholic from the reasonable person standard. The court stated that if such a position were adopted, it "logically should apply to a defendant as well as to a plaintiff, with resulting immunity to the drunken driver who wreaks havoc on the highways, providing only that he could show a 'compulsion' to take the drink which caused his intoxication".180

Although *Carlisle* is representative of the majority opinion not only in California but throughout the nation,181 precedent and persuasive arguments unsupported by precedent exist for permitting a vendee-plaintiff's cause of action. Precedent existed at common law, as seen in the preceding

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sume that because the plaintiffs were found to have alleged one valid cause of action, the court did not feel particularly pressed to uphold their other cause of action.

An analogous situation is the tavern keeper's duty to protect a patron from the attacks of other patrons, a possibility that may be influenced by the consumption of alcohol as shown in *Cole* and *Schelin*. The court in Slawinski v. Mocettini, 217 Cal. App. 2d 192, 31 Cal. Rptr. 613 (1963) explicated this situation, stating:

A review of the authorities in our own and other jurisdictions indicates that (this duty) . . . arises only when one or more of the following circumstances exists: (1) a tavern keeper allowed a person on the premises who has a known propensity for fighting; (2) the tavern keeper allowed a person to remain on the premises whose conduct has become obstreperous and aggressive to such a degree the tavern keeper knew or ought to have known he endangered others; (3) the tavern keeper had been warned of danger from an obstreperous person and failed to take suitable measures for the protection of others; (4) the tavern keeper failed to stop a fight as soon as possible after it started; (5) the tavern keeper failed to provide a staff adequate to police the premises; (6) the tavern keeper tolerated disorderly conditions.


131. See, e.g., *Ramsey* v. Ancil, 106 N.H. 375, 377, 211 A.2d 900, 901 (1965). This case expressly rejects the reasoning of New Jersey and Pennsylvania decisions (see following text discussion) stating that "we are convinced that our statutes were not designed to eliminate the defense of contributory negligence or to place the entire responsibility on the liquor licensee." (citations omitted).
discussion of McCue,132 Ibach,133 Riden,134 and Pratt.135 In fact, when comparing Carlisle to these earlier decisions, striking similarities exist between the fact situations. The sordid fatality in Carlisle, for example, suggests a wantonness which approaches that found in Ibach. In comparing these early cases with present trends in the law, a certain irony becomes apparent. Some of these earlier decisions were the products of what were probably little more than frontier tribunals, yet there was an "each man is his brother's keeper" philosophy which is usually assumed to be foreign to early America, yet more attuned to present judicial trends.

As a practical matter, this comparison raises the possibility that a plaintiff-vendee might avoid the defense of contributory negligence by arguing that the defendant's conduct surpassed mere ordinary negligence, and was wanton in nature. In California, wanton conduct has been described as reckless conduct, and the defense of contributory negligence is unavailable once such conduct has been established.136 Furthermore, if the defendant's acts approached those found in McCue or Nally, the plaintiff-vendee would be amiss if he did not allege that the defendant's conduct was willful.

Severe restrictions, however, are placed upon the use of such a tactic. As we have seen, California is in accord with the new trend in liquor vendor cases which look to statute to establish the standard of care. As analyzed in Brockett, this statutory mandate does not require great vigilance on the part of the liquor vendor. Indeed, all that one is required to do is to protect against the obvious. Thus, serving the habitual drunkard or the clearly intoxicated individual constitutes only ordinary negligence. In liquor vendor cases, therefore, the defendant's conduct must indeed be reckless for the plaintiff-vendee to successfully argue that wanton negligence is involved. I would argue that the facts in Carlisle suggest such recklessness, for they imply a level of conduct which exceeds that exhibited in Vesely, although less extreme than the intentional mischief displayed in McCue and Nally.

While the older cases point to one ramification of Carlisle, the possibility of wanton conduct, the more recent decisions reflect an additional ramification, as shown by the following dis-

132. 60 Tex. 168 (1883).
133. 148 Ore. 92, 35 P.2d 672 (1943).
134. 97 Tenn. 220, 36 S.W. 1097 (1896).
136. The defense of contributory negligence is unavailable where the defendant's conduct appears to have been willful (intentional) or wanton (reckless). But to have the benefit of this rule, the plaintiff must specifically plead the defendant's willfulness or wantonness.

discussion of two principal opinions of the leading new common law jurisdictions, Pennsylvania and New Jersey.

Statutory Protection

It will be recalled that Schelin, the first of the new common law decisions, involved a vendee-plaintiff. Furthermore, a liquor vendor statute similar to the one found in California was employed. In Majors v. Brodhead Hotel, the Supreme Court of Pennsylvania reaffirmed and extended Schelin. The undisputed facts of the case demonstrate that the plaintiff was sober at the time that he arrived at defendant's hotel to attend a dance sponsored by a local club. The hotel both provided and served the alcoholic refreshments. Four hours later, the plaintiff had become so inebriated and troublesome that he was confined to the men's room. In attempting to escape his captivity, he either jumped or fell approximately forty-five feet, sustaining injuries which were the basis for his action.

The court curtly dismissed the defendant's argument that the plaintiff was not a member of the class of persons intended to be protected by the statute because he had "consciously" reduced himself to a state of intoxication. The court concluded that the statute was intended to protect persons when they are visibly intoxicated regardless of the means by which they became intoxicated. Pennsylvania thus recognizes all vendees as protected parties under the liquor vendor statute. In holding that contributory negligence was an invalid defense, the court applied section 483 of the Restatement of Torts, which states:

If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute.

138. 416 Pa. 265, 205 A.2d 873 (1965). The basic factual distinction between Schelin and Brodhead is that in Schelin the plaintiff entered the defendant's tavern in an already stuporous state, while in Brodhead the plaintiff was sober when he arrived at the defendant's hotel. The Pennsylvania court found the difference irrelevant. The Cole court used this distinction—habitual drunkard as opposed to sober patron—to contrast its facts from those found in Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940). However, apparently now in California, whether a vendee, who is not a minor or a known drunkard, arrives at the defendant's tavern in a sober or an intoxicated condition is a moot issue. At least this is the logical conclusion from reading both California Business and Professions Code § 25602 and Vesely. In Vesely the vendee, O'Connell, was sober upon beginning his marathon drinking bout at the defendant's roadhouse seven hours before he left that establishment.
Soronen v. Olde Milford Inn, Inc., 1 decided one year subsequent to Majors by the Supreme Court of New Jersey, relied on similar reasoning. In this case, an obviously intoxicated vendee entered defendant’s tavern, consumed two shots of whiskey and three glasses of beer within a two-hour period, rose from his bar stool, took several steps, fell, fractured his skull and died.

The court relied upon Rappaport in holding that the statute prohibiting liquor sales to “anyone actually or apparently intoxicated” was intended to protect both the general public and intoxicated vendees. Furthermore, the court found that the vendor’s duty to the protected vendee would be rendered meaningless if a tavern keeper could avoid responsibility by claiming that it was the fault of the vendee if he consumed too much liquor. As in Majors, contributory negligence was held inapplicable.

In contrast to the Pennsylvania and New Jersey decisions, California has consistently held that its liquor vendor statute protects only the general public, and for purposes of the statute, the intoxicated vendee is not considered to be a member of that class. Regarding this issue, Carlisle refers to Vesely, stating that Vesely “holds that the purpose of section 25602 is to protect ‘members of the general public from injuries to persons . . . resulting from the excessive use of intoxicating liquor.’ . . . That purpose would be defeated by the immunity appellants seek for the drinker himself.” 142 As discussed earlier, this position holding the vendee to be outside the scope of statutory protection was first enunciated in Hitson. 143 No explanation was given at that time for its support, nor has any reported explanation been given since, with the exception of the statement made in Carlisle in reference to the Vesely decision.

The decisions of Majors and Soronen provide a substantial basis for arguing that the California position should be reconsidered. The California Business and Professions Code, section 23001, 144 which sets forth the purposes of the statute in question, and whose predecessor forms the basis of the Hitson ruling, easily lends itself to an interpretation which would permit an intoxicated vendee to be considered a member of the protected class. 145 Not only does the language of the statute indicate that

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140. 46 N.J. 582, 218 A.2d 630 (1966).
141. 31 N.J. 188, 156 A.2d 1 (1959).
144. CAL. BUS. & PROF. CODE § 23001 (West 1964).
145. The rules concerning the proper interpretation of a statute demand that
the broadest, most inclusive class is protected, but it additionally specifies both the values sought to be preserved as well as the anticipated goals. The values stated by the statute include safety, welfare, health, peace and morals. Curbing the evils of unlawful manufacturing and disposing of alcoholic beverages, and promoting temperance in the use and consumption of alcoholic beverages comprise the anticipated statutory goals. It can be clearly argued that by including the word "morals", the legislature intended a broader application for section 25602 of the California Business and Professions Code than that found in case law. Certainly, the safety, welfare, health, and even the peace of innocent third parties are jeopardized by the acts of both the unscrupulous vendor and the imprudent vendee. Physical injury, however, cannot be assumed to bring to the victim a corresponding decline in his moral principles. Thus, because of the inclusion of the term "morals" it can be argued that the liquor vendee whose character may be corrupted, or whose existing corruption may be advanced should also come within the protection of the statute. I would suggest that an interpretation which permits vendees to be members of the protected class is consistent with the promotion of temperance. By subjecting vendors to the added threat of civil suit by an injured vendee, we give liquor purveyors an additional reason to perform their tasks with the necessary caution.

At this point, restrained speculation is in order. Can we not anticipate that a California court will determine that a vendee-plaintiff, who is also a minor, has a cause of action under California Business and Professions Code, section 25658? A contrary finding would be in conflict with the broad social policy that the law seeks to aid and protect minors, while an affirmative ruling would place greater doubt on the Hitson position, since

first the words of the statute themselves be examined, and if this procedure fails to disclose the legislative intent, then the court must seek the social policy behind the statute. 45 Cal. Jur. 2d Statutes §§ 97-112 (1957). For a judicial examination of a liquor liability law see Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966). Here, the Indiana Supreme Court interpreted a statute substantially identical to California Business and Professions Code § 23001. The court determined that a statute stating that it would support the economic welfare, health, peace, and morals was intended to protect against more than the immediate and obvious effects of intoxicating liquor, including, probably, the harm suffered by the vendee.


147. See, e.g., Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), rev'd on rehearing, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972). Clearly, the Brockett court on both occasions was indicating a protective attitude towards minors. Also, the dicta in Lacabanne Properties, Inc. v. Dept. of Alcoholic Beverage Control, 261 Cal. App. 2d 181, 188, 67 Cal. Rptr. 734, 739 (1968) implies that California Business and Professions Code § 25658 was intended for the protection of minors.
both section 25602 and section 25658 are governed by section 23001. The primary reason for the formulation of the position in Hitson, and certainly for its acceptance in Carlisle, is the fear that if the vendee is afforded protection, the protection of other class members is jeopardized. The basis for this reaction is probably the failure to recognize that it is not necessarily inconsistent to allow the vendee's act of consumption to remain a culpable concurrent negligence factor in an innocent third party suit, while at the same time to permit a vendee to escape the responsibility for this same act when he, himself, is the plaintiff. Majors and Soronen did not hold that there was a lack of contributory negligence, but rather found that any such negligence was inapplicable due to the overriding policy of upholding the intent of the liquor statute. Furthermore, the recognition, both expressed and implied, of distinctions between the concepts of negligence and contributory negligence lend theoretical support for the Pennsylvania and New Jersey position. For example, one prominent authority has advocated an external standard of negligence, while calling for an entirely different relaxed subjective standard for contributory negligence. In addition, the Restatement infers that it is not necessarily true that the same conduct will constitute both negligence and contributory negligence.

Once it has been established that a contributory negligence situation may be treated differently from a negligence situation, one may consider the question of whether compulsive intoxication can be legally accepted as a form of insanity. If compulsive intoxication may be held analogous to insanity, it must then be determined whether this fact renders a compulsive drinker immune from the defense of contributory negligence. The Carlisle court specifically recognized the difficulties inherent in the attempt to define and diagnose what constitutes a "compulsive

149. Id. § 25658.
150. Id. § 23001.
151. To the extent that a compulsive drinker might be considered a person of unsound mind, a court could not absolve him from liability to third parties, since to do so would contravene the provisions of Cal. Civ. Code § 41 (West 1954) which provides: "A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him ...." This, of course, does not per se affect the drunken driver's ability to recover from the vendor for his own injuries.
152. If the injured vendee can be considered a member of the protected class under California Business and Professions Code § 25602 the following discussion is academic.
154. Restatement (Second) of Torts § 464, comment f at 508 (1965).
The United States Supreme Court considered the issue in the criminal law context in *Powell v. Texas,* and concluded that the present state of medical and psychiatric definitions were insufficient to permit an effective legal use of the "compulsive drinker" concept. It should be remembered, however, that definitions of standards applicable to conduct are considerably more strict in criminal law than in civil suits. Nevertheless, a simple and well received definition and diagnosis of the compulsive drinker must first be established by the medical community before the courts can attempt to analogize the condition of the compulsive drinker to that of the person held to be legally insane.

If such a position is reached, it may be possible under the present California law to permit such a person to recover as a vendee-plaintiff. Although it appears to be established that insanity is not a defense to either intentional torts or negligence, it might serve to render inapplicable the defense of contributory negligence. An inference supporting this view may be drawn from the Restatement. This authority expressly approves the general rule stating that insanity is no defense to negligence, but refrains from extending this rule to contributory negligence.

*DeMartini v. Alexander Sanitarium, Inc.* is the only California case which considers this issue. Here the court cited with approval the trial judge's instruction that if the plaintiff "was in such mental condition that he was likely to harm himself or was not capable of realizing the consequences of his acts or of caring for his own safety," he was incapable of contributory negligence as a matter of law. In permitting such a matter to be submitted to the jury at all, the court impliedly categorized a determination of plaintiff's mental competency as a question of fact relevant to the presence of contributory negligence. Thus, it appears that if compulsive intoxication could be considered a form

157. With respect to insane persons and negligence, the Restatement states:

> Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.

RESTATEMENT (SECOND) OF TORTS § 283B (1965). Compare this statement to that found in a caveat to section 464 concerning insane persons and contributory negligence.

The Institute expresses no opinion as to whether insane persons are or are not required to conform for their own protection to the standard of conduct which society demands for sane persons.

159. *Id.* at 448, 13 Cal. Rptr. at 567.
of insanity for legal purposes, it could operate to defeat the defense of contributory negligence in California.\textsuperscript{160}

**CONCLUSION**

*Vesely*, hopefully, represents the beginning of a substantial expansion of present California liquor vendor law. As our society continues to become increasingly motorized, and as social drinking continues to be the acceptable norm of behavior, the combination of drinking and driving will continue to subject both drunken drivers and innocent third parties to potential injuries and fatalities.

Social policy and fundamental tort doctrine demand an expansion of existing liquor vendor law to afford protection to intoxicated vendees as well as to innocent third parties sustaining injuries as a result of the vendees’ intoxication.

Further development should be consistent with several guidelines. First, a social host should be equally responsible with the commercial vendor for the acts of his intoxicated vendee. An intoxicated guest is no less menacing than an equally intoxicated patron. Furthermore, the foreseeability of danger remains the same in both situations.

Second, an injured vendee should be considered to be within the ambit of statutory protection pursuant to applicable statutes. The policy of upholding the intended purposes of these statutes should take precedence over the vendor’s right to escape liability by establishing that the plaintiff was contributorily negligent. Acceptance of this rule would avoid both the necessity of determining whether an intoxicated individual was capable of contributory negligence as well as potential confusion regarding the status of an intoxicated defendant, a problem which might result from a holding in favor of the vendee. A relatively simple solution,

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160. For a suggestion that an intoxicated vendee’s contributory negligence could be rebutted by a last clear chance analysis, see *Galvin v. Jennings*, 289 F.2d 15 (3d Cir. 1961). Whether such an approach is possible in California is an open question. The first of the three elements of the doctrine as applied in this state requires the plaintiff to be in a position of danger from which he cannot escape by the exercise of ordinary care . . . not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger . . .

*Brandelius v. City and County of San Francisco*, 47 Cal. 2d 729, 740, 306 P.2d 432, 440-41 (1957). Thus, the applicability of the doctrine might be made to depend on the proximity of the plaintiff’s injury to the defendant’s awareness of it. It is doubtful that plaintiff’s inebriation alone would be sufficient to qualify as “a position of danger.” However, in aggravated circumstances in which, for example, a defendant puts an inebriated plaintiff behind the wheel of an auto, there seems to be no sound reason to avoid application of the doctrine.
therefore, is provided for the most common victim of the liquor vendor, the vendee, who was occasionally granted protection under the early common law.

Lastly, the existing statutes should continue to represent the proper standard of care. By doing so, all liquor purveyors, including commercial vendors and social hosts, would be subject to the identical standard of care and would be protected against arbitrarily imposed and unreasonable duties.
STUDENT COMMENTS AND NOTES
ON CURRENT TRENDS
IN CRIMINAL LAW

The justice of a society isn't measured by how it treats its best men, but by how it treats its worst.

anonymous