



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 12 | Number 2

Article 6

3-1-1979

California Liquor Liability: *Cole v. Rush* Revived

Alan G. Tippie

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Alan G. Tippie, *California Liquor Liability: Cole v. Rush Revived*, 12 Loy. L.A. L. Rev. 387 (1979).
Available at: <https://digitalcommons.lmu.edu/llr/vol12/iss2/6>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

CALIFORNIA LIQUOR LIABILITY: *COLE v. RUSH* REVIVED?

I. INTRODUCTION

As a major social activity, the consumption of intoxicating beverages provides a livelihood for liquor dispensers nationwide. Recent figures indicate that in California alone there are over twenty-five thousand liquor licenses issued to establishments for consumption on the premises, while a nearly equal number are granted for off-sale distribution.¹ Such an active trade is not, of course, unregulated. In 1935, the legislature enacted the "Alcoholic Beverage Control Act" (ABCA).² Chapter 16 of this Act is comprised of the liquor industry's regulations, which are phrased in language common to criminal statutes. During this decade, however, these regulatory provisions have been used as a basis for the imposition of civil liability. Such an application is only authorized when the court, under common law principles, accepts as controlling the standards set forth in statutory provisions.³ When this occurs in the context of liquor liability, the applicable statutes are generally characterized as "dram shop acts."⁴

Although civil liability based on the a violation of an alcoholic bev-

1. A recent report by the Alcoholic Beverage Commission [Licenses as of June 30, 1978] states that on-sale calendar year licenses are approximately 29,108, and off-sale fiscal year 24,106. A comparison of figures distributed a year earlier [Licenses as of April 1, 1977], showing on-sale as 27,071, and off-sale 23,209, demonstrates the general progression of the industry.

2. CAL. BUS. & PROF. CODE §§ 23000-25763 (West 1964).

3. *Alber v. Owens*, 66 Cal. 2d 790, 798-99, 427 P.2d 781, 787, 59 Cal. Rptr. 117, 123 (1967); *Kindt v. Kaufman*, 57 Cal. App. 3d 845, 866, 129 Cal. Rptr. 603, 617 (1976) (Friedman, acting P.J., dissenting).

4. There is a notion that only statutes which specifically create a civil cause of action are technically "dramshop acts," and that civil liability formulated by case decision, even though primarily based on standards of care as enunciated in regulatory provisions, encompasses a "common law" rule. See generally Keenan, *Liquor Liability in California* 14 SANTA CLARA LAW. 46 (1973). Some early forms of dram shop acts, in fact, did not require that the purveyance of liquor be illegal before liability could attach. J. Lawson, *The Civil Remedy for Injuries Arising from the Sale or Gift of Intoxicating Liquor*, in FREEMAN, THE BOOK OF MONOGRAPHS (1877) from The Central Law Journal (1877); H. BLACK, INTOXICATING LIQUORS 352 (1892). Dram shop acts are generally directed at the operators of drinking saloons where liquors are sold to be drunk on the premises, and at the owners of buildings and premises in which the operators are tenants. J. Appleman, *Civil Liability Under the Illinois Dram Shop Act*, 34 NW. U.L. REV. 30 (1939). The subsequent textual discussion will show

erage control act has existed in various forms since the 1850's in other states,⁵ California has only recently adopted the view that a presumption of negligence arises when a person furnishes liquor in a manner prohibited by statute.⁶ Prior to 1971, this state adhered to the principles enunciated in *Cole v. Rush*,⁷ which held that, absent a statute to the contrary, the sale of intoxicants is not the proximate cause of injuries subsequently received by a purchaser even though the injuries may have resulted from the consumption of alcoholic beverages.⁸ This bar to recovery was abolished by the California Supreme Court in *Vesely v. Sager*,⁹ where a third party was allowed to maintain an action for injuries suffered as a result of the acts of an inebriate.¹⁰ That decision has been followed by a barrage of civil litigation initiated by parties who have sustained injuries caused by another's intoxication and directed against the person who furnished the alcohol for consumption.¹¹ Moreover, the class of individuals permitted to sue has significantly increased. In construing the purpose of the applicable statutes, the California Supreme Court held that the patron who voluntarily consumed the intoxicating beverages was within the class of those meant to be protected.¹²

The ramifications of the *Vesely* decision, however, did not become apparent until several years after it was announced. When the court

that this definition, when applied to modern California jurisprudence, is much too restrictive.

5. In 1853, the Indiana legislature passed a statute similar to the contemporary dram shop acts. Ohio and Pennsylvania followed with the adoption of legislation in 1854, as did New York and Maine in the late 1850's. These enactments apparently were the result of a growing sentiment which favored prohibition. McGough, *Dramshop Acts*, 1967 A.B.A. INS., NEG. AND COMP. L. 448, 449 [hereinafter cited as McGough].

6. See *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (defendant liable upon violation of CAL. BUS. & PROF. CODE § 25602 when violation proximately caused plaintiff's injuries, and occurrence of injury and injured party were within purview of statute).

7. 45 Cal. 2d 345, 289 P.2d 450 (1955).

8. *Id.* at 350, 289 P.2d at 453. See also *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (1944) (no liability on defendant liquor seller when intoxicated patron fell from bar stool and was then dragged on floor by defendants); H. JOYCE, *THE LAW RELATING TO INTOXICATING LIQUORS* § 421 (1910).

9. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

10. The court refrained, however, from deciding the viability of an action by the person served alcoholic beverages in violation of CAL. BUS. & PROF. CODE § 26502. 5 Cal. 3d at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

11. Prior to the *Vesely* decision, a third party could maintain an action at common law against the intoxicated patron for injuries proximately caused by her negligent acts.

12. *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978) (plaintiffs permitted to maintain wrongful death action against bowling alley when young father died of acute alcohol poisoning).

created a common law rule of liability as a means of protecting members of the general public,¹³ one might have expected that only those in the business of dispensing spirituous liquors¹⁴ would need to concern themselves with potential liability. This idea is consistent with the designation of civil liability statutes as "dram shop laws."¹⁵ Nevertheless, at least one California court has chosen to extend liability to non-commercial suppliers of alcohol.¹⁶ In so doing, that court reasoned that the language of the statute was not limited to persons who furnish liquor for profit, and held that it was a "fundamental principle" that a person is liable for injuries proximately caused by his or her failure to exercise reasonable care.¹⁷

In light of the rapid expansion of civil liability, the legislature responded by amending section 25602 of the Business and Professions Code and section 1714 of the Civil Code.¹⁸ The amendments, as en-

13. 5 Cal. 3d at 165, 486 P.2d at 160, 95 Cal. Rptr. at 632 (conclusion that purpose of § 26502 is to protect members of general public from injury to person and damage to property resulting from excessive use of intoxicating liquor compelled by CAL. BUS. & PROF. CODE § 23001, which states that one purpose of the Alcoholic Beverage Control Act is to protect safety of people of the state).

14. Those in the "business" include both the owners of dram shops and those operating the enterprise of spirituous liquor dispensation. 45 AM. JUR. 2d, *Intoxicating Liquors* §§ 596, 598 (1969).

15. The term "dram shop" is estimated to have originated in the middle 1800's. Its birth was the product of the pre-prohibition era when dramshop described those inns where liquor could be sold in measured quantities of less than a gallon. Other inns were forced to sell quantities sometimes in excess of 30 gallons by command of statutes enacted in the wake of temperance reform. McGough, *supra* note 5, at 448.

16. *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

17. *Id.* at 152, 577 P.2d at 674, 145 Cal. Rptr. at 539. The court further noted that the "commonly known outward manifestations" produced by intoxication are as readily apparent to a social host as they would be in a commercial context. *Id.* at 155, 577 P.2d at 677, 145 Cal. Rptr. at 542. Query whether this conclusion disregards the liberal attitude to "serve yourself," which is quite prevalent in social gatherings. The court's reasoning, based on *People v. Johnson*, 81 Cal. App. 2d Supp. 973, 185 P.2d 105 (1947), fails to recognize the factual disparity centering on the personal contact in a commercial setting where the seller "serves the customer." *Id.* at 975-76, 185 P.2d at 106 (emphasis added).

18. Chapter 929 (Senate Bill No. 1645) of the Statutes of 1978 contains the amendments to BUS. & PROF. CODE § 25602 and CIV. CODE § 1714 which now read as follows:

§ 25602

(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153), *Bernhard v. Harrah's Club* (16 Cal. 3d 313) and *Coulter v. Superior Court* (— Cal. 3d —) be abrogated in favor of prior

acted, essentially abrogate the holdings in *Vesely* and its progeny, and reinstate prior judicial interpretation "so that . . . civil liability to a third party is incurred solely by the intoxicated person."¹⁹ Although the legislature has chosen to specifically prohibit the imposition of civil liability in particular instances,²⁰ the effect of earlier decisions has only been partially annulled²¹ since the expressed legislative intent is that the amended statutes will only operate prospectively.²² Therefore, plaintiffs with a cause of action accruing before the effective date of the amendments will be unaffected.

This comment will examine the development of liquor liability through the cases preceding the amendments and then discuss the impact of these recent enactments.

judicial interpretation finding the consumption of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

§ 1714

(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

(b) *It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313), and Coulter v. Superior Court (— Cal. 3d —) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.*

(c) *No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.*

(Changes or additions are indicated by italics).

19. Legislative Counsel's Digest, Chapter 929 (Senate Bill No. 1645) of the Statutes of 1978. An exception to this proposition is found in newly enacted § 25602.1 of the BUS. & PROF. CODE where an action may be brought against a person licensed pursuant to BUS. & PROF. CODE § 23300 for injury or death proximately caused by "furnishing" alcoholic beverages to an obviously intoxicated minor.

20. CAL. CIV. CODE § 1714(c) (West Supp. 1979), states that the imposition of liability is prohibited in instances where an intoxicated person inflicts injury upon a third person. In addition, the bill specifically prohibits the imposition of liability for injuries or death to the person who consumes alcoholic beverages when served by a social host. See note 18, *supra*.

21. Legislative Counsel Vion Gregory indicated in a letter to Senator Ruben Ayala, the author of Senate Bill No. 1645, that the amended provisions would not affect causes of action which accrue prior to January 1, 1979. L.A. Daily J., Oct. 27, 1978, at 1, col. 4.

22. In failing to give the statute retroactive effect the legislature, as stated by Mr. Gregory, relied upon the notion that a right to sue for damages is a right which vests when the cause of action arises, and one which cannot be retroactively divested by legislative act. L.A. Daily J., Oct. 27, 1978, at 1, col. 4.

II. HISTORY OF DRAM SHOP LAW IN CALIFORNIA

As stated above, California has been slow to extend civil liability to inebriate-related injuries. Statutes enacted in other states as early as 1853 imposed civil responsibility on saloonkeepers for harm resulting from the sale or consumption of alcoholic beverages.²³ Prior to 1971,²⁴ however, California case law, as developed in four major decisions,²⁵ refused to recognize such liability. Mere dicta in the first of these decisions, *Lammers v. Pacific Electric Ry. Co.*,²⁶ culminated in the rule of non-liability espoused in the last, *Cole v. Rush*.²⁷ *Cole* held that an action could not be maintained against a vendor of alcoholic beverages for injuries sustained by an intoxicated patron. The rationale underlying this holding was that the consumption, not the sale, of liquor was the proximate cause of subsequent injury or death.²⁸

23. See note 5 *supra*.

24. The landmark case of *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), abolished a well established rule prohibiting the imposition of civil liability.

25. *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955), *overruled*, *Vesely v. Sager* 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); *Lammers v. Pacific Elec. Ry. Co.*, 186 Cal. 379, 199 P. 532 (1921) *overruled*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

26. 186 Cal. 379, 199 P. 532 (1921), *overruled*, *Vesely v. Sager* 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). In *Lammers*, the plaintiff was ejected from the defendant railroad's train for failing to produce a passenger ticket. The court held the defendant not liable for the injuries sustained by the plaintiff when he was subsequently struck by another train. It reasoned that the injuries were caused by the volitional act of the plaintiff in returning from a place of safety to a position of danger. In rejecting the allegation that the defendant's acts were the proximate cause of the harm the court emphasized:

The only connection between the ejection and the injury would be the fact that if there had been no ejection there would have been no injury. The sale of the whisky to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. 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 a 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.

Id. at 384, 199 P. at 525 (citations omitted).

27. 45 Cal. 2d 345, 289 P.2d 450 (1955). In affirming the judgment of the lower court, the court stated:

(1) that as to a competent person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use; (2) that the competent person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby; and (3) that contributory negligence of the defendant bars recovery by his heirs or next of kin in a wrongful death action. . . ."

Id. at 356, 289 P.2d at 457. It is important to note that the court regarded Mr. Cole as a competent person and therefore denied recovery to the plaintiffs. An allegation that the decedent was an habitual drunkard may have produced a different result.

28. See 45 AM. JUR. 2d *Intoxicating Liquors* § 553. For exceptions to this general rule,

Shortly after the decision in *Cole*, courts in several jurisdictions overturned common law rules which had refused to recognize the sale or gift of alcoholic beverages as a proximate cause of inebriant-related injuries.²⁹ These reevaluations, however, did not spur a universal recognition of a need for the imposition of liability upon saloonkeepers for their negligent acts or for those of their employees.³⁰ Nevertheless, courts in many states did adopt similar rules.³¹ Still other states dealt with the problem legislatively, by passing statutes that imposed civil liability for furnishing intoxicants to a patron who caused injury by reason of his intoxication.³²

A. Vesely v. Sager

In 1971, the California Supreme Court decided *Vesely v. Sager*,³³ a unanimous decision which imposed a duty of care on vendors of alcoholic beverages to their patrons. Though the court took a bold step in

see *Vesely v. Sager*, 5 Cal. 3d 153 n.3, 159, 486 P.2d 151, 155 n.3, 95 Cal. Rptr. 623, 627 n.3 (1971).

29. At the forefront of cases abrogating the common law rule are *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959); and *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959). For an excellent discussion of these cases and the imposition of civil liability in other jurisdictions, see Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA LAW. 46 (1973).

30. In 12 AM. JUR. *Trials*, *Dram Shop Litigation* § 14 (1966) note is made of the fact that the owner's employees, *i.e.*, the bartenders and waitresses, may be named as party defendants, but the author cautions that the jury may be hesitant to return a large verdict if it believes a salaried employee may have to bear a share of the cost.

31. *See, e.g.*, *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973); *Davis v. Shiappacosse*, Fla., 155 So.2d 365 (Fla. 1963); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Ramsey v. Anttil*, 106 N.H. 375, 211 A.2d 900 (1965); *Swanson v. Ball*, 67 S.D. 161, 290 N.W. 482 (1940).

32. The National Licensed Beverage Association Compendium of State Beverage Alcohol Laws, as of October, 1978, notes the following Dram Shop Acts: ALA. CODE tit. 7, §§ 120, 121 (1958); COLO. REV. STAT. ANN. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1960) (limiting liability to an aggregate sum of \$50,000.00); DEL. CODE ANN. tit. 4, § 711 (1974); GA. CODE ANN. § 105-1205 (Harrison 1958); ILL. ANN. REV. STAT. ch. 43, § 135 (Smith Hurd Supp. 1978) (limiting recovery to \$15,000.00 for injuries and \$20,000.00 for loss of support); IOWA CODE ANN. §§ 123.92, 123.93 (West 1972); ME. REV. STAT. ANN. tit. 17, § 2002 (1964) (provides recovery in exemplary damages); MICH. STAT. ANN. §§ 18.993, 18.993(1) (1957) (intoxicated person must be named as defendant and retained until action is concluded or no right of action against vendor allowed); MINN. STAT. ANN. § 340.95 (West Supp. 1977); N.Y. GEN. OBLIG. LAW art. 11, § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. §§ 4399.01, 4399.02 (Page 1973); OR. REV. STAT. § 30.730 (1976); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1967); R.I. GEN. LAWS ANN. § 3-11-1 (1956); S.D. CODE LAWS § 35-4-78 (1977); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1978); WYO. STAT. ANN. § 12-5-502 (1977) (notification required before vendor liable).

33. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (opinion by Wright, C.J.).

overturning precedent, it limited its ruling to a situation where a commercial licensee is sued by a third party who was injured as a result of the patron's inebriation.³⁴ In *Vesely*, the defendant was the owner and operator of a public tavern located near the top of a mountain. The complaint, upon which a demurrer had been sustained without leave to amend, alleged that the defendant caused a customer to be served large quantities of alcoholic beverages for over seven hours. It further alleged that the defendant knew that his customer was becoming excessively intoxicated, and that the only road leading from the tavern was a "very steep, winding, and narrow mountain road" which the patron would be required to take upon departure. When the intoxicated patron attempted to negotiate the turns on the road he allegedly crossed into the lane of an oncoming vehicle. The vehicles collided and the plaintiff was injured.

As averred, the defendant was charged with a duty of care under section 25602 of the Business and Professions Code.³⁵ A violation of this statute when read in conjunction with section 669 of the Evidence Code was held to raise a presumption of negligence in favor of any person who is a member of the class for whose protection the statute was enacted.³⁶ Since the Supreme Court concluded that the plaintiff was a member of that class, and that the complaint stated facts that would allow a recovery under section 25602,³⁷ it reversed the lower court's contrary ruling.

With deference to the reasoning of cases that had abandoned the common law rule of non-liability, the Chief Justice applied the substantial factor test to find that the defendant's actions may have proximately caused the plaintiff's injuries, since the intervening act of the patron, even if intentional, was reasonably foreseeable.³⁸ Thus, elimi-

34. *Id.* at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

35. Prior to the recent amendment of this statute (*see* note 18 *supra*) § 25602 provided: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

36. Section 669(a) codified a standing presumption within the state by providing that:

The failure of a person to exercise due care is presumed if:

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

37. *See* note 13 and accompanying text.

38. 5 Cal. 3d at 163-64, 486 P.2d at 158, 95 Cal. Rptr. at 630. For a further discussion of this topic, see RESTATEMENT (SECOND) OF TORTS § 449 (1965).

nating the previous roadblock presented by proximate cause, the legal issues were narrowed to one: whether there existed a duty on the defendant's part to maintain a particular standard of conduct. Because this question was answered in the affirmative due to the obligation imposed by section 25602, the plaintiff's burden was relegated to establishing the supporting facts at trial.

III. AFTER *VESELY*

A. *Non-commercial Liability: Third Party Plaintiffs*

Since *Vesely* was limited to the issue of the liability of commercial vendors,³⁹ the question of the non-commercial dispenser's, or social host's, liability remained unanswered. Nonetheless, within a year after the establishment of a civil cause of action under the regulatory provisions of the ABCA came the chance for the Fifth District Court of Appeal, in *Brockett v. Kitchen Boyd Motor Co.*,⁴⁰ to clarify this area. The action was based, however, not on a violation of section 25602 of the Business and Professions Code, but on an alleged violation of section 25658.⁴¹ This latter section contains language similar to the language of 25602, but its provisions prohibit the sale of liquor to minors rather than to habitual drunkards.

In *Brockett*, the court of appeal was again confronted with a case involving a third party action against a defendant employer.⁴² The employer allegedly served his underage employee copious amounts of liquor at a Christmas party, placed him in his automobile and directed him to drive home. The result was an accident in which plaintiffs were injured. Relying on what the court termed the "impeccable logic" of *Vesely*, and concluding that the applicable statute was enacted because "most minors are neither physically nor mentally equipped to handle the consumption of intoxicating liquor," the defendant was held liable for willful disobedience of the law. Although the *Brockett* court felt

39. As stated in note 10, *supra*, the *Vesely* court did not reach the question of liability owed to the consumer for injuries sustained by reason of his intoxication. The court also limited its holding to the liability of the subject defendant—a commercial supplier of alcohol. 5 Cal. 3d at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

40. 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

41. CAL. BUS. & PROF. CODE § 25658(a) (West 1964) provided that "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." Section 25658(a) should now be read in conjunction with the law of Sept. 19, 1978, Cal. Legis. Serv. (ch. 930).

42. The case was first heard under pre-*Vesely* law (*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)), wherein the lower court judgment of dismissal, for failure to state a cause of action, was reversed. *Id.* at 71, 70 Cal. Rptr. at 138.

compelled to impose liability on the employer, it limited its ruling to the imposition of civil responsibility for furnishing liquor to a minor, and expressly refused to come to any conclusion regarding the liability of a social host generally for injuries caused by his intoxicated guests.⁴³ A pivotal factor in the court's decision was its conclusion that the duty under section 25658 was unequivocal, and required no exercise of judgment.⁴⁴

Categorically similar to the facts of *Brockett* is *Bennett v. Letterly*,⁴⁵ where a third party plaintiff brought an action against a defendant-minor alleging a violation of section 25658(a). The defendant was one of several high school students who pooled money together in order to purchase liquor for a gathering of friends at his parents' home. After consuming an entire bottle of whiskey with another friend, one boy attempted to drive. He eventually lost control of the car, striking and injuring the plaintiff. Because the boys poured their own drinks and served themselves, the court held that the plaintiff was not entitled to recover. It concluded that "[t]he word 'furnish' implies some type of affirmative action," and that mere contribution to a fund to purchase liquor was not sufficient to constitute an act of furnishing within the purview of the statute.⁴⁶

Substantial recognition was finally given to a third party action involving a non-commercial defendant in the absence of a "special class" in *Coffman v. Kennedy*.⁴⁷ Although the court concluded that the plaintiff's complaint was insufficient to state a cause of action, it adopted the following rule:

Ordinarily, a host who makes available intoxicating liquors to an adult guest is not liable for injuries to third persons resulting from the guest's intoxication. There might be circumstances in which the host would have a duty to deny his guest further access to alcohol. This would be the case where the host "has reason to know that he is dealing with persons whose

43. 24 Cal. App. 3d at 93-94, 100 Cal. Rptr. at 756.

44. The court apparently, and with good cause, held the employer liable because he unhesitatingly supplied copious amounts of liquor to a minor, a member of a "special class." The court emphasized that its decision hinged on the fact that the employer did "*knowingly make available*" the intoxicants for the minor's consumption. *Id.* at 94, 100 Cal. Rptr. at 756 (emphasis in original). The implication of this statement is that merely providing an opportunity for a minor to consume intoxicating beverages is not sufficient to impose liability; rather, knowledge is required.

45. 74 Cal. App. 3d 901, 141 Cal. Rptr. 682 (1977).

46. *Id.* at 905, 141 Cal. Rptr. at 684. *See* *Calrow v. Appliance Indus., Inc.*, 49 Cal. App. 3d 556, 568-69, 122 Cal. Rptr. 636, 643-44 (1975) (defendant did not "furnish" liquor to another within the purview of § 25602 by mere acquiescence or failure to protest the imbibing of alcohol).

47. 74 Cal. App. 3d 28, 141 Cal. Rptr. 267 (1977).

characteristics make it especially likely that they will do unreasonable things." *Such persons could include those already severely intoxicated, or those whose behavior the host knows to be unusually affected by alcohol. . . .*

We think that each case must be decided on its own facts, and we reject the rule suggested by the defendants that furnishing alcohol to others in a social setting, even if the hosts acts unreasonably, can never give rise to liability for acts of the guest whose intoxication results.⁴⁸

Plaintiff failed to state a cause of action for breach of duty owed to her by the defendant. She did not allege that the defendant negligently and unlawfully furnished intoxicating beverages to an obviously intoxicated person. Nor did she allege that the defendant had knowledge that the intoxicated person was going to be driving on public streets.⁴⁹

There were no such defects, however, in the plaintiff's pleadings in *Coulter v. Superior Court*.⁵⁰ In *Coulter*, the defendants were an owner and operator of an apartment complex and the apartment manager. Plaintiffs alleged that the defendants negligently and carelessly served "extremely large quantities" of liquor to one Williams, that defendants knew or should have known that Williams was becoming "excessively intoxicated," and that defendants knew or should have known that she was "incapable of exercising the same degree of volitional control over her consumption of alcoholic beverages as the average reasonable person."⁵¹ The complaint further alleged that defendants knew that Williams intended to drive after drinking, and that they knew or should have known of the foreseeable risk of harm to third persons.

Plaintiff's cause of action arose when the car in which Mr. Coulter was riding, driven by Williams, collided with roadway abutments after Williams lost control of the car.⁵²

After examining several sections of the ABCA, the *Coulter* court referred to the *Coffman* and *Brockett* decisions to support its conclusion that civil liability may be imposed on a non-commercial supplier of

48. *Id.* at 36, 141 Cal. Rptr. at 272 (italics in original) (footnote omitted) (quoting *Wiener v. Gamma Phi Chap. of Alpha Tau Omega Frat.*, 258 Or. 632, 639-40, 485 P.2d 18, 21-22 (1971) (emphasis added) (footnotes omitted)).

49. 74 Cal. App. 3d at 37, 141 Cal. Rptr. at 272. In its decision, the court directed the trial judge to afford the plaintiff an opportunity to correct the deficiencies in her original complaint. *Id.*

50. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

51. *Id.* at 148, 577 P.2d at 672, 145 Cal. Rptr. at 534. See *Coffman v. Kennedy*, 74 Cal. App. 3d 28, 34 & n.2, 141 Cal. Rptr. 267, 270-71 & n.2 (1977), for reference to the variance in the application of the prior rule of proximate cause when an "able bodied" person was involved, and when a minor or obviously intoxicated individual was furnished liquor.

52. The passenger's wife also joined in the action, claiming as damages loss of consortium and the value of nursing services provided to her husband.

alcohol pursuant to section 25602.⁵³ In dictum, the court further noted that civil liability could also be imposed under general negligence principles.⁵⁴ The court saw no logical basis for confining the application of section 25602 to those who furnish liquor for profit.⁵⁵ Instead, reliance was placed on the principle that a person is liable for the foreseeable consequences proximately caused by his or her failure to exercise reasonable care.⁵⁶ The existence of a duty,⁵⁷ as required by the decision in *Vesely*, was held to be primarily a question of law of which foreseeability is a primary consideration.⁵⁸ Factors other than foreseeability, previously outlined in *Rowland v. Christian*,⁵⁹ were also identified and applied to the particular circumstances alleged in the case to support a rule establishing a duty of care and imposing civil liability upon the defendants.⁶⁰ The *Coulter* majority even incorporated public policy considerations in order to further substantiate its conclusions. It argued that injury or death suffered by reason of the acts of an inebriate are no more easy to accept if it is learned that the driver received his drinks from a hospitable host rather than at a commercial establish-

53. 21 Cal. 3d at 152, 577 P.2d at 672-73, 145 Cal. Rptr. at 537-38.

54. *Id.* at 151, 577 P.2d at 674, 145 Cal. Rptr. at 538, quoting *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 325, 546 P.2d 719, 726, 128 Cal. Rptr. 215, 222, cert. denied, 429 U.S. 859 (1976), the court stated that "[a]lthough we chose to impose liability on the *Vesely* defendant on the basis of his violating the applicable statute, the clear import of our decision was that there was no bar to civil liability under modern negligence law." 21 Cal. 3d at 152, 577 P.2d at 674, 145 Cal. Rptr. at 538 (emphasis in original). The *Bernhard* court went on to say: "Certainly, we said nothing in *Vesely* indicative of an intention to retain the former rule that an action at common law does not lie." 16 Cal. 3d at 325, 546 P.2d at 726-27, 128 Cal. Rptr. at 222-23.

55. 21 Cal. 3d at 149, 577 P.2d at 672, 145 Cal. Rptr. at 537. *But see* note 17 *supra*.

56. *Id.* at 152, 577 P.2d at 674, 145 Cal. Rptr. at 539. *See also* *Rowland v. Christian*, 69 Cal. 2d 108, 112, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968); CAL. CIV. CODE § 1714 (West 1974).

57. The duty imposed by well established general negligence principles, independent of any statutory provisions, is defined as one owed to the general public to *refuse* to furnish liquor to "an obviously intoxicated person if, under the circumstances, such person thereby constitutes a reasonably foreseeable danger or risk of injury to third persons. . . ." 21 Cal. 3d at 149-50, 577 P.2d at 672, 145 Cal. Rptr. at 537. This definition recognizes and confirms the idea expressed in *Coffman* that each factual situation must be independently examined to determine whether the law will impose such a duty upon the defendant.

58. 21 Cal. 3d at 152, 577 P.2d at 674, 145 Cal. Rptr. at 539 (quoting *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975)).

59. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

60. As stated by the *Rowland* court, the factors include:

the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden of the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *Id.* at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100.

ment. In addition, it assumed that a social host could be protected from the ramifications of its decisions by obtaining insurance coverage.⁶¹

One defense asserted by the defendants in *Coulter* was that the term "obviously intoxicated" contained in section 25602 is "too broad and subjective to serve as a satisfactory measure for the imposition of civil liability."⁶² The court rejected this argument, because the average intoxicated person exhibits "many commonly known *outward* manifestations which are 'plain' and 'easily seen or discovered.'"⁶³ This observation by the court eliminates any distinction between the obligatory perceptions of a bartender and those of a non-commercial social host in discovering the inebriated condition of an individual patron or guest. Such an imposition is not surprising in light of the court's conclusion that a reasonably perceptive host can foresee the danger of ultimate harm caused by excessive intoxication as well as any bartender.⁶⁴

B. *Actions by Vendees*

As the foregoing discussion indicates, the *Vesely* court did not address all issues related to the imposition of civil responsibility with regard to the furnishing of alcoholic beverages. Subsequent decisions were therefore necessary to clarify the extent to which the law would hold a person liable for providing another with inebriants. As a result, the person who had consumed the intoxicating beverages and was subsequently injured because of his intoxication was initially denied recovery. The rationale underlying the failure of the courts to recognize such a cause of action was derived from the belief that the vendee

61. 21 Cal. 3d at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539. Although the court realized that such insurance coverage would doubtless be increasingly costly, it made short shrift of this realization.

62. *Id.* at 155, 577 P.2d at 675, 145 Cal. Rptr. at 540.

63. *Id.*, quoting *People v. Johnson*, 81 Cal. App. 2d Supp. 973, 975-76, 185 P.2d 105, 106 (1947) (emphasis in original).

64. See 21 Cal. 3d at 153, 577 P.2d at 574, 145 Cal. Rptr. at 539. In a concurring opinion Justice Mosk suggested that some degree of difference should be maintained between licensed and social providers of liquor. Arguing that § 25602 prohibits furnishing alcoholic beverages to an *already intoxicated* person, he proposed that the plaintiff in an action involving a social host would be "compelled to prove either (1) that the social host furnished the liquor knowing that it was likely to, and that it did, produce the *original* intoxication, or (2) that the additional liquor served to one already 'obviously intoxicated' *increased* or *prolonged* the existing state of intoxication and to that extent was a proximate cause of the injury." *Id.* at 156, 577 P.2d at 676, 145 Cal. Rptr. at 541 (Mosk, J., concurring) (italics in original). Justice Mosk's suggestion is well taken, but the reason for applying the burden of proof only in cases regarding the liability of a social host is not clear. This author believes that confusion of this point cannot be avoided.

plaintiff was not a member of the general public meant to be protected from the excessive use of intoxicating liquor.⁶⁵ Other cases have held that the inebriate's own concurrent negligence, being a proximate contributing cause of his injuries or death, barred his recovery.⁶⁶ A less popular view, but one that nonetheless negated a right to recovery, was that the vendor and vendee were parties in *pari delicto*.⁶⁷ The criminal fault attributed to the intoxicated patron in this instance is the act of being under the influence of intoxicating liquor in a public place.⁶⁸ When such a relationship exists, and the verisimilar application of this theory does not run afoul of the purpose of the ABCA,⁶⁹ the law generally leaves the parties in the condition in which it finds them, thereby denying the plaintiff compensation for his injuries.

Prior to 1975, regardless of whether a court considered an intoxicated patron to be barred by his contributory negligence, his assumption of the risk,⁷⁰ or otherwise, the viability of the cause of action was equally

65. *See, e.g.*, *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 943, 102 Cal. Rptr. 300, 302 (1972) (vendee suffered fatal injuries while being evicted from restaurant); *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 592, 101 Cal. Rptr. 246, 248 (1972) (patron became ill and choked to death on his own vomit).

66. *See Buckley v. Chadwick*, 45 Cal. 2d 183, 194-201, 288 P.2d 12, 17, *modified*, 289 P.2d 242 (1955) (court examined contributory negligence as a defense to bar recovery in several situations, including contributory negligence of deceased). *Accord*, *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 944, 102 Cal. Rptr. 300, 302 (1972).

67. *See, e.g.*, *Cooper v. National R.R. Passenger Corp.*, 45 Cal. App. 3d 389, 394, 119 Cal. Rptr. 541, 545 (1975) (intoxicated passenger served alcoholic beverages and subsequently sustained injuries when she fell on the floor of the ladies' toilet).

68. CAL. PENAL CODE § 647(f) (West 1970).

69. The legislature has stated its intention that the Alcoholic Beverage Control Act should effect the purposes of "protection of the safety, welfare, health, peace and morals of the people of the State." CAL. BUS. & PROF. CODE § 23001 (West 1964).

70. *See Cooper v. National R.R. Passenger Corp.*, 45 Cal. App. 3d 393, 119 Cal. Rptr. 541, 544 (1975). In *Cooper*, the court responded to the plaintiff's claim of negligence and stated:

[E]ven though the server is negligent and in violation of law by continuing to serve alcoholic beverages to an obviously intoxicated drinker, the drinker's cause of action is barred . . . by his voluntary assumption of the known and conspicuous risks incident to the consumption of alcoholic beverages in bars. . . . One of these known and conspicuous risks is the possibility that the bartender will negligently fail to recognize the drinker's obviously intoxicated condition. Thus, when a drinker occupies a stool at a bar, he implicitly acknowledges the possibility that the bartender may negligently continue to serve him alcoholic beverages even though he has become intoxicated and accident-prone as a result of his condition.

Id. at 393-94, 119 Cal. Rptr. at 544 (citations and footnote omitted).

This catch-all argument would prevent recovery by the patron from the vendor unless the drinker could prove a specific and malicious intent to injure him. Courts have since indicated, however, that even intentional acts by the bartender may not invoke liability. *See Rose v. International Bhd. of Elec. Workers*, 58 Cal. App. 3d 276, 279-80, 129 Cal. Rptr. 736, 738 (1976) (attempt to drive a car down a winding road after consuming copious amounts of beer constitutes a type of voluntary assumption of a known and patent risk that is not merely

assailable. In that year, the California Supreme Court rendered the landmark decision of *Li v. Yellow Cab Co.*⁷¹ That sweeping opinion overturned well established principles of negligence and promulgated a preferable system of comparative fault.⁷² Nevertheless, recognition of the vendee's right to maintain an action in negligence for the excessive and careless dispensation of liquor did not occur until approximately three years thereafter.⁷³ In *Kindt v. Kauffman*,⁷⁴ rendered in 1976, the court of appeal specifically addressed the question whether *Li* altered prior law denying a remedy to an injured drunken patron. While conceding that the plaintiff was a member of the general public for whose protection section 25602 was enacted,⁷⁵ the court's rationalization of relevant considerations allowed no recovery.⁷⁶ The thrust of the decision was based on its conclusion that a person normally becomes intoxicated as a result of his own volition and is therefore guilty of willful misconduct.⁷⁷ Since the principles of comparative negligence enunciated in *Li* had not been extended to the area of willful misconduct, and since the *Kindt* court refused to so expand the scope of such doctrine, no civil liability ensued.⁷⁸

Particular note was made in *Kindt* that it did not deal with minors or alcoholics whose special condition makes them extraordinarily susceptible to inebriety, and that such persons may not be guilty of willful misconduct.⁷⁹ Nevertheless, the dissent adamantly argued that the majority's approach to the drunken patron plaintiff, in summarily pronouncing his imbibing of alcohol willful misconduct, constituted a

a variant of contributory negligence, and even in light of *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), bars recovery even in strict liability cases).

71. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

72. The doctrine of comparative negligence adopted in California was designated the so-called "pure" form whereby a plaintiff may recover even if he is found to be more at fault than the defendant. Furthermore, the doctrines of last clear chance and, to a certain extent, assumption of the risk were subsumed under the general process of assessing liability in proportion to fault. *Id.* at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

73. *See* *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

74. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

75. *Id.* at 853, 129 Cal. Rptr. at 608.

76. *Id.* at 859, 129 Cal. Rptr. at 612. The court not only denied the plaintiff a remedy, but it found the scales "tipped heavily" against him. Its conclusion was partially confirmed by the failure of the legislature to enact proposed legislation which would have granted an injured drunken patron a cause of action. *Id.*

77. *Id.* at 852, 129 Cal. Rptr. at 608.

78. *Id.* at 852, 855, 129 Cal. Rptr. at 608-09. *See also* *Venzor v. Santa Barbara Elks Lodge*, 56 Cal. App. 3d 209, 128 Cal. Rptr. 353 (1976), for a discussion of the applicability of the last clear chance doctrine in a situation where a vendor's furnishing of alcohol resulted in the death of its patron.

79. 57 Cal. App. 3d at 853, 129 Cal. Rptr. at 608.

usurpation of the jury function.⁸⁰ It designated the fact of intoxication as only one of several elements to be considered by the fact-finders in determining the existence of willful misconduct.⁸¹

Subsequent to *Kindt*, an anomaly occurred in the area of liquor liability. The sought after vendee remedy was granted in *Ewing v. Clover Leaf Bowl*,⁸² but was obtained under pre-*Li* law.⁸³ In its decision, the *Ewing* majority expressly disapproved of any suggestion in *Kindt* that bartenders owe no duty of care to their patrons.⁸⁴ While granting an intoxicated patron the right to maintain a cause of action, *Ewing* also held, in agreement with the *Kindt* dissent, that the question of the patron's willful misconduct is one of fact, and that intoxication in and of itself does not support a finding that the patron committed willful misconduct as a matter of law.⁸⁵

In *Ewing*, the defendant's employee, a bartender, intentionally served a patron, in addition to a couple of beers and a mixed drink, 10 straight shots of 151 proof rum. All the while, the bartender knew that the patron intended to get drunk to celebrate his twenty-first birthday. In spite of warnings by the bartender and companions with him at the time of the dangers of drinking so much liquor too quickly,⁸⁶ the patron drank to excess and eventually passed out. Friends were required to take him home, where his mother found him dead the next morning. An autopsy revealed that his death was due to acute alcohol poisoning.⁸⁷ A wrongful death action was brought on behalf of the decedent's children against the bartender's employer. The complaint alleged that the bartender had acted both negligently and with willful misconduct in serving so much alcohol to the decedent. The trial court granted

80. *Id.* at 866, 129 Cal. Rptr. at 617 (Friedman, acting P.J., dissenting).

81. *Id.* The dissent supports its argument with decisions which hold that *contributory negligence* does not per se arise from a finding of intoxication. *Id.* at 866-67, 129 Cal. Rptr. at 617.

82. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978) (opinion by Justice Tobriner with Justice Clark dissenting).

83. The *Ewing* complaint was filed on Aug. 10, 1971, three and one-half years prior to the *Li* decision. In the promulgation of a new right therefore, the court was confined to pre-*Li* contributory negligence principles. *Id.* at 395 n.1, 572 P.2d at 1156 n.1, 143 Cal. Rptr. at 15 n.1.

84. *Id.* at 401 n.8, 572 P.2d at 1160 n.8, 143 Cal. Rptr. at 19 n.8.

85. *Id.* at 404 n.10, 572 P.2d at 1162 n.10, 143 Cal. Rptr. at n.10.

86. The young patron consumed a vodka collins, 10 shots of 151 proof rum, and two beer chasers in less than an hour and a half. *Id.* at 394, 572 P.2d at 1156, 143 Cal. Rptr. at 15.

87. The blood sample taken at the autopsy indicated that the level of alcohol was .47 percent. Generally, a person becomes comatose at a .30-.40 percent alcohol level, while death due to paralysis of the brain centers is occasioned by a level of .42 percent. *Id.* at 398, 572 P.2d at 1158, 143 Cal. Rptr. at 17.

defendant's motion for nonsuit because it found: 1) that the decedent's conduct amounted to contributory negligence as a matter of law, and 2) that the bartender did not commit willful misconduct. On appeal, the California Supreme Court reversed the judgment.

The court recognized two chief defenses to the plaintiffs' claims: 1) proof of the patron's contributory negligence when the bartender's conduct amounted to no more than negligence,⁸⁸ or proof of willful misconduct of the patron, and 2) establishment of the patron's assumption of the risks accompanying voluntary intoxication as a matter of law. With regard to the first affirmative defense, it had been held that the existence of negligence or willful misconduct is a question for the jury. The court therefore viewed the evidence in a light most favorable to the plaintiffs⁸⁹ in order to determine whether a jury could reasonably find that the decedent's conduct amounted to no more than mere negligence, and whether the evidence of the bartender's conduct was reasonably susceptible of a finding of willful misconduct.⁹⁰ If the decedent's conduct could only be reasonably construed as willful misconduct, a commission of either negligence or willful misconduct by the bartender would be irrelevant, and the plaintiffs' cause of action would be barred. In the final analysis, however, the court held that the findings most favorable to the plaintiffs could be drawn.

With respect to the second affirmative defense, *i.e.*, assumption of risk, the defendant argued that the patron had assumed the risks accompanying the act of voluntary intoxication⁹¹ and the plaintiffs were therefore barred from recovery as a matter of law. The specific danger

88. *See supra* note 83.

89. The standard applied by the court when reviewing a nonsuit order is that which produces the most favorable conclusion in support of plaintiffs' case. 20 Cal. 3d at 402, 572 P.2d at 1161, 143 Cal. Rptr. at 19.

90. This particular characterization of the actors' conduct is the only one that would support a finding for the plaintiffs. As stated by the court:

If a jury could reasonably find only that the bartender was negligent and that Ewing was also negligent, Ewing's contributory negligence would of course bar plaintiffs' recovery and justify the trial court's nonsuit. If, however, a jury could find that Lamont's conduct amounted to willful misconduct, while Ewing's conduct was merely negligence plaintiffs could recover, and the trial court's nonsuit would be erroneous. Finally, if the jury could reasonably conclude only that Lamont's conduct and Ewing's conduct constituted similarly willful misconduct, plaintiffs would again be barred.

Id. at 401, 572 P.2d at 1160-61, 143 Cal. Rptr. at 19 (citation omitted).

91. "To warrant the application of the doctrine (of assumption of risk) the evidence must show that the victim appreciated the specific danger involved. He does not assume any risk he does not know or appreciate. . . . Stated another way, before the doctrine is applicable, the victim must have not only general knowledge of a danger, but must have knowledge of the particular danger, that is, knowledge of the magnitude of the risk involved." *Id.* at 406, 572 P.2d at 1163-64, 143 Cal. Rptr. at 22.

involved in that case was identified by the court as the risk of acute alcohol poisoning. After considering the relative naivete and inexperience of the patron, the majority held that the plaintiffs' evidence had not conclusively established that the specific risk was one which the patron appreciated, and therefore could not have been assumed. As a result, the theory of assumption of the risk could not justify the trial court's nonsuit, and the plaintiffs' claims were not barred.⁹²

Shortly after the *Ewing* decision, the court of appeal decided *Paula v. Gagnon*,⁹³ another wrongful death action, wherein the defenses of the patron's willful misconduct and his assumption of the risk were again asserted. Although *Ewing* was cited for the proposition that determinations of willful misconduct are questions for the jury, the court recognized a significant distinction between the facts of that case and those of the case at hand.⁹⁴ The issue in *Ewing* was whether the act of voluntary intoxication constituted willful misconduct as a matter of law, whereas the *Gagnon* court was confronted with the question whether *driving* while intoxicated amounted to willful misconduct so as to bar recovery by the decedent's heirs. Refusing to depart from the principles espoused in *Ewing*, the court concluded that the complaint did not reveal willful misconduct as a matter of law, and that the issue should be decided by the jury.⁹⁵

The assumption of risk defense asserted in *Gagnon* was disposed of by assessing the effect of *Li* on the doctrine. Since assumption of risk as a variant of negligence is merged into the system of comparative fault,⁹⁶ the doctrine is only applicable to bar recovery where the patron's conduct "amounts to a release of the defendant's obligation of reasonable conduct."⁹⁷ The *Gagnon* court interpreted *Li* as dictating application of the doctrine only in the "clearest instances" of release of duty. It then concluded that "[a] customer's conduct in requesting and consuming drinks from a bartender beyond the point of intoxication does not meet this standard."⁹⁸ In the particular facts of this case,

92. *Id.* at 406-07, 572 P.2d at 1164, 143 Cal. Rptr. at 22-23. This holding encompassed a conclusion that the courts in *Cooper* and *Rose*, *supra* note 70, "incorrectly characterized the rules which define whether or not a plaintiff assumed a risk." *Id.* Therefore, *Cooper* and *Rose* were not controlling here.

93. 81 Cal. App. 3d 680, 146 Cal. Rptr. 702 (1978).

94. *Id.* at 684, 146 Cal. Rptr. at 704.

95. *Id.* at 684-85, 146 Cal. Rptr. at 705. This conclusion by the court made it unnecessary to determine whether a finding that the patron was guilty of willful misconduct would bar recovery by the plaintiffs. *Id.* But see *id.* at 686, 146 Cal. Rptr. at 705 (*dicta*).

96. See *supra* note 72.

97. 81 Cal. App. 3d at 685, 146 Cal. Rptr. at 705.

98. *Id.*

therefore, the doctrine of assumption of risk was insufficient to bar plaintiffs' recovery as a matter of law.

The preceding discussion illuminates the proliferation of civil liability initiated by *Vesely v. Sager*. Absent a decision holding a non-commercial supplier of alcohol liable to an intoxicated consumer for injury or death proximately caused by intoxicants provided by the host, *Vesely* and its progeny have encompassed the four major plaintiff-defendant combinations in the area of liquor liability. Although we would have expected to see judicially-created vendee actions against non-commercial suppliers of alcohol, recent legislative amendments may operate to block such judicial action.⁹⁹

IV. RECENT LEGISLATIVE CHANGES

In response to the need to clarify legislative intent with regard to specific provisions of the ABCA, the legislature has recently enacted new statutes and has amended several existing provisions.¹⁰⁰ This action appears to have been possibly motivated by a principle in the *Ewing* dissent that a line must be located between liability and non-liability.¹⁰¹ The stated purpose of the legislation was to abrogate the holdings in cases such as *Vesely v. Sager*, *Bernhard v. Harrah's Club*, and *Coulter v. Superior Court*, and to reinstate prior judicial interpretation of the amended sections.¹⁰² It is not unquestionably clear, however, that prior judicial interpretation, represented by the decision in *Cole v. Rush*,¹⁰³ has been fully reinstated. The common law preceding *Vesely* barred *all* actions against a purveyor of liquor for injury or death occasioned by the acts of an inebriate, whether the purveyor was

99. See note 104 *infra*. In as much as the legislature intends prospective application only, the courts may yet complete their combination of party variables. See notes 21 & 22 *supra*.

100. See notes 18 & 19 *supra*.

101. Justice Clark, quoting a passage from *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1971), emphasized that: "[e]very injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.' . . . '[N]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere. In delineating the extent of a tortfeasors responsibility for damages under the general rule of tort liability . . . , the courts must locate the line between liability and nonliability at some point, a decision which is essentially political.'" 20 Cal. 3d at 412, 572 P.2d at 1167, 143 Cal. Rptr. at 26 (emphasis added by dissent).

102. See CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1979); CAL. CIVIL CODE § 1714(b) (West Supp. 1979).

103. In *Cole v. Rush*, *supra* note 7, the court held that: "it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use. . . ." *Id.* at 356, 289 P.2d at 457. Cf. CAL. BUS. & PROF. CODE § 25602(c); CAL. CIV. CODE § 1714(b).

a saloonkeeper or a social host, and whether the plaintiff was a third party or the inebriate, either suing on his own behalf or, in case of death, by his heirs. The current legislation, on the other hand, appears to allow an action for injury to the consumer if brought against a supplier of liquor other than a social host.¹⁰⁴ The omission of *Paula v. Gagnon* and *Ewing v. Cloverleaf Bowl* as cases specifically abrogated by the amendments to section 25602 and section 1714 seems to confirm this deviation from prior common law.¹⁰⁵

In addition to the apparent distinction made between social hosts and all others in amended section 25602, an actual distinction is present in newly enacted section 25602.1¹⁰⁶ Existing law prohibits all persons from furnishing alcoholic beverages to any person under the age of 21.¹⁰⁷ Section 25602.1, however, authorizes actions only against persons licensed pursuant to section 23300.¹⁰⁸ An action brought pursuant to section 25602.1, however, requires more than merely showing that intoxicants were furnished to a minor. In addition to the usual require-

104. Although subsection (b) to amended § 25602 clearly states "[n]o person" shall be liable to "any injured person," the import of the language is not free from ambiguity. Subsection (c) appears to alleviate any confusion that the section applies to all actions, whether brought by a third party or on behalf of the consumer, by providing that "the consumption of alcoholic beverages rather than the serving of alcoholic beverages [is] the proximate cause of injuries inflicted upon another by an intoxicated person." CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1979) (emphasis added). The implication of this language supports the view that the legislature only intended to limit vendor liability for injuries inflicted upon one other than the intoxicated person, *i.e.*, third parties. Consider also the language in the Legislative Counsel's Digest which states that Senate Bill No. 1645 was enacted to "specifically prohibit the imposition of civil liability in such instance" where civil liability is imposed "upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a *third party*." Legislative Counsel's Digest, 1978 Cal. Legis. Serv. (ch. 929) (emphasis added).

Further support for this proposition can be found in § 1714(c), *supra* note 18, by its specific provision that no "social host" shall be legally accountable for injury or death to either the consumer or third parties injured as a result of the consumption of intoxicating beverages furnished by the host, while no such total immunity is granted to any other party within any of the new provisions. Query whether this special treatment accorded social hosts might lead to conflicting constructions of the term, and whether all non-commercial suppliers of alcohol should be included under the rubric of a social host and therefore obtain statutory protection.

105. Inasmuch as *Ewing v. Cloverleaf Bowl* 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978), was decided prior to *Coulter v. Superior Court* 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), January 6, 1978 and April 26, 1978 respectively, the legislature should have been fully apprised of the decision at the time that it amended § 25602 and § 1714. *Paula v. Gagnon* 81 Cal. App. 3d 680, 146 Cal. Rptr. 702 (1978), on the other hand, was decided thereafter on June 7, 1978, but a full three months prior to the date the changes were approved on September 19, 1978.

106. CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1979).

107. CAL. BUS. & PROF. CODE § 25658(a) (West 1964).

108. CAL. BUS. & PROF. CODE § 23300 (West 1964).

ment of proving that the furnishing of alcohol proximately caused the injury or death, the plaintiff needs to establish that the minor was obviously intoxicated at the time he was furnished the intoxicating beverage.¹⁰⁹ As presently phrased, section 25602.1 is available to both third parties and minors as a basis for a civil suit.

V. CONCLUSION

A major function of the regulatory provisions of the ABCA is the deterrence of conduct likely to result in injury to the public. Sections 25602 and 25658, in particular, attempt to deter conduct involving the excessive and potentially harmful use of intoxicating beverages. The deterrent factor, however, is not always accompanied by a correlative right to compensation — the result of recent legislation in the instant case. Protection from injury caused by a violation of section 25602 once included compensation to the victim. The recent amendments to the ABCA have circumvented that protection so that an injured third person is only afforded, by reason of the statute, the preventative protection effected by fear of the penalties to which a violator of the statute may be subjected.

Inasmuch as the legislature has abrogated judicial decisions affording an injured party the right to monetary relief it has rendered a legislative judgment that granting such relief runs counter to a public policy favoring immunity. This determination, however, is presently subject to scrutiny by the Joint Legislative Committee on Tort Liability. No sooner than the date the recent amendments took effect, the committee's report¹¹⁰ recommended the repeal of dram shop immunity statutes. One consideration for this recommendation centers on "the extreme cost to society of life and limb"¹¹¹ caused by the act of furnishing alcoholic beverages in violation of the statutes. In defense of opponents of the measure, the report also suggests that a presumption that the patron assumed the risks of voluntary intoxication should arise by reason of his conduct in becoming intoxicated.

As a decade of judicial decisions, recent legislation and legislative recommendations indicate, the area of liquor liability in California is far from being settled. In all of the political action taken regarding this

109. CAL. BUS. & PROF. CODE § 25602.1, *supra* note 106. See *Coulter v. Superior Court*, 21 Cal. 3d 144, 155, 577 P.2d 669, 675, 145 Cal. Rptr. 534, 540 (1978) for a discussion of the term "obviously intoxicated."

110. Selected provisions of the report and important aspects of some recommendations are reported in the L.A. Daily J., Jan. 17, 1979, at 1, col. 4.

111. *Id.* at 17, col. 4.

area, there seems to be a common understanding that the general public needs protection from the abuse in furnishing intoxicating beverages. Differences arise in the extent to which this protection should be afforded. Nonetheless, if the California Legislature intends to adequately protect the general public from the prohibited use of alcohol, it should grant an injured party both preventative and compensatory protection.

Alan G. Tippie

