CASE NOTES

DRAM SHOP ACT—In Passing the Dram Shop Act, Iowa Code Section 123.92, the Legislature Preempted the Entire Field of Possible Recoveries Against Commercial Suppliers of Alcoholic Beverages Based upon the Sale or Furnishing of Such Beverages; No Common Law Right to Recover in Negligence Remains to Those Injured as a Result of Such Sale or Furnishing, Even Where the Suit Is Based on an Illegal Action Not Covered by the Dram Shop Act—*Fuhrman v. Total Petroleum, Inc.*, 398 N.W.2d 807 (Iowa 1987).

On March 9, 1981, Diane Moss, a seventeen-year-old girl, bought a quart of beer at a convenience store operated by defendant Total Petroleum,[1] using for identification a poorly altered driver's license which would have been exposed as a forgery by anything more than a cursory examination.[2] In selling the beer to Moss, defendant Total violated a state statute which prohibited the sale of beer or alcoholic beverages to persons under legal age.[3] At the time of the sale, Moss had drunk no alcohol and was sober.[4]

Moss left the store, drove to a nearby park, and drank the beer.[5] She then drove out of the park, intending to go to a friend's house.[6] While en route, she cut across the center line of the street and across several lanes of traffic, and ran into the car in which the plaintiffs were riding, injuring them seriously.[7]

The plaintiffs brought suit against Moss and Total Petroleum, joining the latter on the theory that it had been negligent in selling beer to Moss in violation of statute.[8] (The plaintiffs did not contend that Total had served

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1. Brief for Appellant at 1, Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987) (No. 85-1564).
2. *Id.*
3. Iowa Code § 123.47 (1981).
4. Brief for Appellant at 1, Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987) (No. 85-1564).
5. *Id.* at 2.
6. *Id.*
7. *Id.*
8. *Id.* at 1.

Moss while she was intoxicated, nor that she had been served to the point of intoxication; consequently the action did not come within the provisions of the Dram Shop Act.[9]) The action was settled as to Moss.[10] As to Total, the Iowa District Court for Linn County granted a motion for summary judgment in its favor, and dismissed the plaintiffs' case,[11] on the ground that the plaintiffs' action was precluded by the holding of the Iowa Supreme Court in *Connolly v. Conlan*; the Dram Shop Act, though it addresses only the furnishing of alcohol to intoxicated persons, or the serving of persons to the point of intoxication, is the sole basis of liability as to commercial suppliers of alcohol, leaving no common law action based on violation of any other statute.[12]

On appeal the plaintiffs attacked the decision in *Connolly* as inconsistent with prior case law[13] and unjustified by statute,[14] and maintained that it should be overruled.[15] The Iowa Supreme Court affirmed, holding that the Dram Shop Act, Iowa Code section 123.92, preempts the entire field of possible recoveries against commercial suppliers of alcoholic beverages based upon the sale or furnishing of alcohol and that no common law right of recovery in negligence remains to those injured as a result of such furnishing, even where the injury results from an illegal action not covered by the Act.[16]

At common law a third person, injured by the actions of an intoxicated individual, had no remedy against the person who supplied the liquor which produced the intoxication, because the consumption of alcohol, rather than the provision of alcohol, was considered to be the proximate cause of any injuries which might result.[17]

In the belief that this rule led to unjust results, Iowa (and many other jurisdictions) adopted a statute generally known as the Dram Shop Act, which created a right of action under specified conditions against persons furnishing intoxicating liquor to others whose activities later injured third parties.[18] This right of action existed only under the specified circumstances,

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9. Iowa Code § 123.92 (1981) ("Every . . . person who shall be injured . . . by any intoxicated person or resulting from the intoxication of any such person, shall have a right of action . . . against any licensee or permittee, who shall sell or give any beer or intoxicating liquor to any such person while he or she is intoxicated, or serve any such person to a point where such person is intoxicated, for all damages actually sustained.").

10. Brief for Appellant at 2, Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987) (No. 85-1564).

11. *Id.* at 1.

12. Connolly v. Conlan, 371 N.W.2d 832 (Iowa 1985).

13. Brief for Appellant at 3-7, Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987) (No. 85-1564).

14. *Id.* at 7-8.

15. *Id.* at 10.

16. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807, 810 (Iowa 1987).

17. *See, e.g.*, Cowman v. Hansen, 250 Iowa 358, 369-72, 92 N.W.2d 682, 688-89 (1958), and cases cited therein.

18. *Id.* at 368, 92 N.W.2d at 687-88.

and the courts of Iowa did not allow recovery in factual situations outside the scope of the statute.[19] Furthermore, as time passed some earlier versions of the Dram Shop Act were subjected to amendments which narrowed the range of factual circumstances under which recovery was possible.[20]

Cowman v. Hansen is typical of the older Iowa decisions denying recovery outside the scope of the Dram Shop Act.[21] In *Cowman* a tavern patron, who had been served beer to the point of intoxication, was later involved in an auto accident in which the plaintiffs' son was fatally injured.[22] The plaintiffs sued the tavern owner under the Dram Shop Act, which gave a right of action to every person injured in consequence of the provision of "intoxicating liquor" to another whose actions later caused injury.[23] The Iowa Supreme Court denied relief, holding that since beer was not "intoxicating liquor" as defined by the Iowa Code,[24] the plaintiffs could not recover under the Dram Shop Act.[25] Nor could they recover on a common law theory of negligence, because it was the voluntary consumption of alcohol, rather than its sale, which proximately caused the injury in question.[26]

Similarly in *Robinson v. Bognanno*, the Iowa Supreme Court held that an intoxicated patron, injured in a fall on the premises of a tavern, had no right to recover against the tavern operator under the Dram Shop Act, because by its terms the Act limited recovery to persons other than the intoxicated individual himself.[27] Nor could he recover under a common law theory of negligence, based on violation of a statute other than the Dram Shop Act, because no right of action against tavern operators existed except in so far as it was specifically created by the Dram Shop Act itself. The remedy was exclusive. Having been created by the legislature, it could not be enlarged except by further legislative action.[28]

In summary, it was an era of strictly-defined liability, in which the

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19. *See, e.g.*, Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Robinson v. Bognanno, 213 N.W.2d 530 (Iowa 1973).

20. *Cf., e.g.*, IOWA CODE § 129.2 (1954) ("Every . . . person who shall be injured . . . by any intoxicated person . . . shall have a right of action . . . against *any person* who shall, by selling or giving to another *contrary to the provisions of this title* any intoxicating liquors, cause the intoxication of such person") and IOWA CODE § 123.92 (1987) ("Any person who is injured . . . by an intoxicated person . . . has a right of action . . . against *any licensee or permittee*, who sold and served any beer, wine, or intoxicating liquor to the intoxicated person *when the licensee or permittee knew or should have known the person was intoxicated, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated*") (emphasis added).

21. Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958).

22. *Id.* at 360, 92 N.W.2d at 683.

23. IOWA CODE § 129.2 (1954).

24. IOWA CODE § 125.2 (1954).

25. Cowman v. Hansen, 250 Iowa at 364, 92 N.W.2d at 685.

26. *Id.* at 373, 92 N.W.2d at 690.

27. Robinson v. Bognanno, 213 N.W.2d 530, 531 (Iowa 1973).

28. *Id.* at 531-32.

courts refused to extend the right of recovery to any person or factual situation not specifically embraced by the statute. And yet those same courts hinted at dissatisfaction with the state of the law, and seemed to suggest that the statute might be ripe for change.[29] Courts and legislatures in other jurisdictions had already demonstrated their belief that the common law rule was no longer an adequate response to the increasing social cost of intoxication[30]—not, as one judge observed, in an age when "horses" had been displaced by "horsepower."[31]

A 1977 case, *Lewis v. State*, put an end to the "strict construction" era of liquor liability in Iowa.[32] In *Lewis* the plaintiffs were injured when their car was struck by a car driven by an intoxicated minor who had bought liquor illegally at a state liquor store.[33] Overruling *Cowman* and related cases, the Iowa Supreme Court held that an Iowa Code provision which made it illegal to furnish liquor to minors[34] set a minimum standard of care for the conduct generally required of the reasonably prudent person, and that the plaintiffs could rely upon violation of that statutory standard as a basis for a common law negligence action against the person furnishing the liquor, or against his employer—at least where his employer was the state.[35] Even more significantly for purposes of the present discussion, the court departed from the common law rule and held that the furnishing of intoxicating liquor to a minor, in violation of law, could be the proximate cause of the injuries sustained as a result of the intoxicated minor's tortious conduct. The question of proximate causation should be answered by the trier of fact, not settled in accordance with an inflexible rule of law.[36] Consequently, liability could be imposed upon the furnisher of alcohol, and upon his employer, in favor of an injured, innocent third party.[37]

In reaching this decision the court was influenced by the conventional negligence theory that an individual is liable if his negligent act is a substantial factor in causing an injury, and that he is not relieved of liability simply by the intervening act of a third person if that intervening act is reasonably foreseeable.[38] Applying this theory to the situation at bar in *Lewis*, the court

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29. *Id.* at 532 (legislature has expressly limited the class of persons to whom the right of recovery is given; it would not be proper for the courts to enlarge the class by interpretation; such an amendment would be within the exclusive province of the legislature).

30. *See, e.g.*, cases collected in Lewis v. State, 256 N.W.2d 181, 190-91 (Iowa 1977).

31. Garcia v. Hargrove, 46 Wis. 2d 724, ____, 176 N.W.2d 566, 572 (1970) (Hallows, C.J., dissenting).

32. Lewis v. State, 256 N.W.2d 181 (Iowa 1977).

33. *Id.* at 184.

34. IOWA CODE § 123.43 (1966) ("no person shall sell, give, or otherwise supply liquor to any . . . person under the age of twenty-one years . . .").

35. Lewis v. State, 256 N.W.2d at 189.

36. *Id.* at 192.

37. *Id.* at 191-92.

38. *Id.* at 190.

stated that where a person furnishes alcohol to a minor, that person should readily foresee the consumption and intoxication which will result, as well as the unreasonable risk of harm both to others and to the minor himself.[39] The court also was influenced by concern that the common law rule, to the effect that consumption rather than sale of alcohol is the proximate cause of any subsequent injury, leads to injustice and hardship.[40]

The *Lewis* decision had significant implications. In abrogating the common law rule as to causation, and enunciating the principle that furnishing of alcohol, rather than consumption of alcohol, might be regarded as the proximate cause of resulting damage, the decision opened the door to new types of negligence suits against suppliers of alcohol.

The elements of a cause of action in negligence are: (1) the existence of a duty to conform to a standard of conduct for the protection of others, (2) violation of that duty by the person to be charged, (3) damage to the person who maintains the suit, and (4) a reasonably close, legally cognizable causal connection between the violation of duty and the damage.[41] Under the old state of the law, however, even a plaintiff who could demonstrate the existence of the first three elements—duty, violation of that duty, and damage—could never maintain a cause of action in negligence against a supplier of alcohol, because the common law rule, and decisions based upon it, made it impossible for him to establish the fourth element—a causal connection between the violation of duty and the damage.[42] *Lewis* removed that disability and made it possible for a plaintiff to maintain a previously barred common law cause of action (*i.e.*, a cause of action not dependent upon the Dram Shop Act) against a supplier of alcohol in a factual situation not covered by that Act, using a statute (such as the prohibition against selling liquor to a minor, which figured in *Lewis*[43]) to establish standards as to the supplier's duty of due care.

The principle put forward in *Lewis* was soon applied in other situations. Thus in *Haafke v. Mitchell*, the plaintiffs' son had been killed in a traffic accident allegedly caused by a drunken driver who was a minor.[44] The plaintiffs brought suit against a tavern and its employees under the Dram Shop Act, asserting that tavern employees had served liquor or beer to the driver while he was intoxicated.[45] The plaintiffs also sued the same defendants in negligence, on the theory that in serving alcohol to the driver they had violated the standard of care established by the statutes prohibiting such sales

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39. *Id.* at 190-91 (quoting extensively from Trail v. Christian, 298 Minn. 101, ____, 213 N.W.2d 618, 622-24 (1973)).

40. *Id.* at 191.

41. W. Prosser & W. Keeton, The Law of Torts, § 30 at 164-65 (5th ed. 1984).

42. *See, e.g.*, Cowman v. Hansen, 250 Iowa at 369-70, 92 N.W.2d at 688.

43. Iowa Code § 123.43 (1966).

44. Haafke v. Mitchell, 347 N.W.2d 381, 383 (Iowa 1984).

45. *Id.*

to intoxicated persons and to minors.[46]

With respect to the tavern employees, the Iowa Supreme Court in *Haafke* found that they could be held liable at common law for their negligence in furnishing liquor to the driver, and that such negligence could indeed be based on violation of the standards of care established by the statutes in question.[47] The court stated that the Dram Shop Act did not preempt the liability of defendants who, since they did not hold liquor licenses or beer permits, were not subject to its terms, and that this was so even though some aspect of the transaction (in this case, the sale of alcohol to an intoxicated person) might fall within the provisions of the Act.[48] In support of its decision the court pointed out that there was nothing in the Dram Shop Act to suggest that it was intended to be used to cut off common law claims outside its own terms.[49] The whole purpose of such acts, according to the court, was to provide a remedy where the common law did not do so;[50] "it would be strange," said the court, "if the legislature, by stepping in to modify the harshness of the common law [doctrine] . . . should be held to have preempted the field, freezing the development of the common law at that point, and disabling the courts from subsequently changing the doctrine in any other respect."[51] The court also alluded to the first section of the Iowa Liquor Control Act, which states that its provisions are to be liberally construed for the accomplishment of the purpose of protecting "the welfare, health, peace, morals, and safety of the people of the state . . . ."[52] It would not be reasonable, according to the court, to assume that in imposing liability on licensees and permittees under the Dram Shop Act, the legislature intended to shield all other persons against any form of liability for furnishing alcohol, where negligence and proximate cause could be established.[53]

As to the tavern owners, who held a liquor license and thus fell directly within the terms of the Dram Shop Act, the court affirmed, by an equal division, the holding of the district court that if the owners had furnished liquor to an intoxicated person in violation of the Dram Shop Act—in other words, if the factual situation came within the scope of the Act in any respect—then the Act itself provided the exclusive remedy, and the owners had no common law liability based on violation of any other statute.[54] But four justices (of the eight who participated in the decision) added that if the trier of fact found that the Dram Shop Act did not apply—*i.e.*, if the driver

46. *Id.* at 384 (citing IOWA CODE §§ 123.49(1) and 123.47 (1981)).
47. *Id.* at 388.
48. *Id.* at 385-88.
49. *Id.* at 386.
50. *Id.* at 384.
51. *Id.* at 386 (citing Goetzman v. Wichern, 327 N.W.2d 742, 748 (Iowa 1982)).
52. IOWA CODE § 123.1 (1987).
53. Haafke v. Mitchell, 347 N.W.2d at 387 (Iowa 1984).
54. *Id.* at 388.

had not in fact been intoxicated at the time alcohol was sold to him—then a negligent act, such as the sale of alcohol to a minor, would be sufficient to support a common law claim against the owners even though they were licensees.[55] To immunize the licensees from any liability, where the sale is illegal but outside the Dram Shop Act, would be inconsistent with *Lewis* and with the stated public policy of the Liquor Control Act,[56] according to the four justices who joined in this part of the opinion.

Four justices dissented from the above formulation, and would have prohibited any common law cause of action against licensees or permittees, on the theory that by adopting and continually refining the provisions of the Dram Shop Act, the legislature had signified its intention to preempt the entire field.[57] Three of the dissenters maintained that legislative repeal of former Iowa Code section 129.2—which had placed liability upon "any person" furnishing alcohol "contrary to the provisions of this title"[58]—indicated that the legislature had "clearly chosen" to limit dram shop liability to licensees and permittees alone.[59] In a separate opinion Justice Uhlenhopp pointed out that in repealing section 129.2 the legislature had narrowed the liability of licensees and permittees—his point being that in so doing, the legislature had implicitly rejected the possibility of using violations of Iowa Code sections 123.47 and 123.49(1) as bases of liability.[60]

The holding of *Haafke* was soon limited by *Connolly v. Conlan*.[61] The case involved the illegal sale of alcohol by a tavern operator to a minor, where the minor evidently was not intoxicated before the sale[62]—a position which would have resulted in liability under the *Haafke* formulation.[63] In *Connolly* the court rejected that formulation and adopted the reasoning of the *Haafke* dissent, stating that the Dram Shop Act preempts the field of tort liability as to holders of liquor licenses and beer permits, so that no common law cause of action, based upon the violation of any statute other than the Act itself, can be maintained against them.[64] But the decision did not infringe upon the basic principles of *Lewis* with respect to proximate causation and liability for negligence.

The most dramatic development in the *Lewis* line of cases came in 1985, with the decision in *Clark v. Mincks*.[65] The plaintiffs were the parents

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55. *Id.*
56. *Id.*
57. *Id.* at 391 (Uhlenhopp, J., concurring in part, dissenting in part); *id.* (Harris, J., dissenting).
58. IOWA CODE § 129.2 (1954) (repealed).
59. Haafke v. Mitchell, 347 N.W.2d at 392 (Iowa 1984) (Harris, J., dissenting).
60. *Id.* at 391 (Uhlenhopp, J., concurring in part, dissenting in part).
61. Connolly v. Conlan, 371 N.W.2d 832 (Iowa 1985).
62. *Id.* at 832-33.
63. *See* Haafke v. Mitchell, 347 N.W.2d at 388 (Iowa 1984).
64. Connolly v. Conlan, 371 N.W.2d at 833 (Iowa 1985).
65. Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985).

of a little girl who was killed when a van, in which she was riding, was involved in a one-vehicle accident.[66] The parents sued the hosts of a cookout at which the driver of the van had been a guest, on the theory that the hosts were liable in negligence for serving beer to their guest though they knew that she was already intoxicated.[67] The Iowa Supreme Court held that a host who gives alcoholic beverages to an adult social guest, knowing that the guest is intoxicated, may be held liable for injuries inflicted on a third party as a result of the negligent driving of the guest, when her negligence is caused by her intoxication.[68] In support of its decision, the court pointed out that the Iowa Code prohibits serving alcohol to *any* intoxicated person, and that it does not excuse a social host from responsibility for violation of its provisions.[69] The court conceded that the adoption of such a rule would interfere with accepted social behavior, in that it would intrude upon and diminish the relaxation and camaraderie of social gatherings. But the court felt that such considerations were outweighed by the importance of providing assurance of compensation to the victims of drunken drivers, and by the likelihood that the rule would tend to deter such driving.[70]

In promulgating this new rule, however, the court evidently carried the principle of *Lewis* farther than society was willing to go. The state legislature responded promptly, adding to section 123.49(1) of the Alcoholic Beverage Control Act—which provides that "A person shall not sell, dispense, or give to an intoxicated person . . . any alcoholic liquor, wine, or beer"—the following paragraphs:

> a. A person other than a person required to hold a license or permit . . . who dispenses or gives an alcoholic beverage, wine, or beer in violation of this subsection, is not civilly liable to an injured person or the estate of a person for injuries inflicted on that person as a result of intoxication by the consumer of the alcoholic beverage, wine or beer.
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> b. The general assembly declares that this subsection shall be interpreted so that the holding of *Clark v. Mincks* . . . is abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, wine, or beer rather than the serving of alcoholic beverages, wine, or beer as the proximate cause of injury inflicted upon another by an intoxicated person.[71]

It was in this context that *Fuhrman v. Total Petroleum* arose and was decided.[72] The factual position was identical to that presented by *Connolly*;

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66. *Id.* at 227.
67. *Id.* at 228.
68. *Id.* at 231.
69. *Id.* (citing IOWA CODE § 123.49(1) (1985)).
70. *Id.* at 230 (citing Kelly v. Gwinnell, 96 N.J. 538, 548-49, 476 A.2d 1219, 1224-25 (1984)).
71. IOWA CODE § 123.49(1)(a,b) (1986).
72. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987).

the plaintiffs, injured in a car accident caused by an intoxicated minor, brought suit against the convenience store which had sold the beer which caused the intoxication, the sale having taken place at a time when the minor was sober.[73] The plaintiffs' theory of recovery was that, though the Dram Shop Act precluded any common law action against licensees based on the sale of alcohol to an intoxicated person, it did not preclude common law actions based upon other acts of negligence; consequently the owner of the convenience store could be liable at common law for the negligent act of selling beer to a minor in violation of statute.[74]

In a five-to-four decision, a majority of the Iowa Supreme Court rejected the plaintiffs' theory, stating that the case was controlled by *Connolly*, that the plaintiffs could prevail only if *Connolly* were to be overruled, and that the court was not inclined to take that step.[75] The majority gave three reasons for its holding:

1. *Connolly* had been correctly decided, and the reasoning which had prevailed in that case should also prevail in the present one.[76] In passing the Dram Shop Act the legislature had deliberately limited the liability of licensees and permittees to certain specifically described factual situations.[77] This legislative act preempted the field of tort liability, based on the furnishing of alcohol, as to licensees and permittees.[78] Since Moss, the minor who caused the plaintiffs' injuries, had not been served alcohol while intoxicated, and had not been served to the point of intoxication, the factual situation presented by the case fell outside the bounds of liability established by the legislature.[79] Consequently the plaintiffs could not recover.[80]

2. In amending section 123.49(1) so as to abrogate the holding in *Clark v. Mincks*, the legislature had indicated its disapproval of common law tort theories which would extend liability beyond the boundaries established by the Dram Shop Act.[81] The legislature had specifically directed the courts to revert to the "prior judicial interpretation" which placed tort liability on the person who consumed the alcohol rather than on the person who furnished it.[82] Violations of statutes other than the Dram Shop Act itself could not be used to impose liability.[83]

3. The importance of stability in precedents made it undesirable to

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73. *Id.* at 809; *cf.* Connolly v. Conlan, 371 N.W.2d 832, 832-33 (Iowa 1985).

74. Brief for Appellant at 7, Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987) (No. 85-1564).

75. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d at 809 (Iowa 1987).

76. *Id.*

77. Connolly v. Conlan, 371 N.W.2d at 833 (Iowa 1985).

78. *Id.*

79. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d at 809 (Iowa 1987).

80. *Id.*

81. *Id.* at 809-10.

82. *Id.* at 810.

83. *Id.*

overrule so recent a case as *Connolly*.[84]

The dissent, written by Justice Schultz, objected to what appeared to be logical inconsistencies in the law as expounded by the majority. In the attempt to protect the public from the misuse of alcohol, the legislature had provided criminal penalties for the furnishing of alcohol to intoxicated persons and to persons who were served to the point of intoxication, and also for the sale of alcohol to minors.[85] The Dram Shop Act provided a civil remedy to those injured by violation of the second; such individuals had no statutory remedy.[86] But the mischief which resulted from the two types of violation was essentially the same, and it was not reasonable to believe that in giving the public the benefit of a remedy in the first instance, the legislature had intended to *deny* a remedy in the second.[87] Such a conclusion should not be reached without a clear legislative requirement.[88]

Justice Schultz also discussed the incongruity of an interpretation of the law which would allow recovery, based on an illegal action not covered by the Dram Shop Act, against the employee of a tavern keeper[89] but not against the tavern keeper himself, though the employee might be acting under the tavern keeper's orders, and though it would be the tavern keeper, rather than the employee, who would profit from the illegal sale.[90] It was "ironic" that licensees and permittees—who stood to gain the most from such violations of statute as illegal sales of alcohol to minors—should be given the benefit of a defense not available to anybody else, and shielded from liability by judicial interpretation.[91] There was a "predicament" inherent in the fact that common law liability could flow from some instances of illegal furnishing of alcohol, as exemplified by *Lewis v. State* and the cases which followed and developed the *Lewis* rule concerning proximate causation; while in other instances, where licensees and permittees were involved, liability would be cut off.[92] In this situation it was the court's responsibility to create and apply common law principles to those problems not directly addressed by the legislature in the Dram Shop Act.[93]

As a matter of policy, one might propose still other objections to the position taken by the majority. For instance, one might wonder whether the

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84. *Id.*

85. *Id.* at 813 (Schultz, J., dissenting) (referring to IOWA CODE §§ 123.92 and 123.47 (1986)).

86. *Id.* (Schultz, J., dissenting).

87. *Id.* (Schultz, J., dissenting).

88. *Id.* (Schultz, J., dissenting).

89. *See* Haafke v. Mitchell, 347 N.W.2d at 388 (Iowa 1984).

90. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d at 812-13 (Iowa 1987) (Schultz, J., dissenting).

91. *Id.* (Schultz, J., dissenting).

92. *Id.* at 812 (Schultz, J., dissenting).

93. *Id.* at 813 (Schultz, J., dissenting).

public interest in the stability of precedents, cited by the majority,[94] is really so great as to outweigh the public interest in providing a financially responsible defendant, where innocent victims are injured by negligent consumers of alcohol and there is a reasonably close causal connection between the actions of the defendant and the injury. Again, one might suggest that where legislation is reasonably susceptible of differing interpretations, it might be best to choose that interpretation which will cause civil liability to follow upon criminal violation, so that the two bodies of law will work together to accomplish the social objectives for which both have been created. Such an interpretation would be consistent with the declaration of policy contained in the Dram Shop Act itself: "This chapter . . . shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose."[95] Indeed, the majority itself seems less than satisfied with its own decision, and the opinion contains a pointed hint that the law, as found by the majority, is ripe for change.[96]

Nevertheless there appears to be an additional consideration, not mentioned by the dissent and scarcely touched upon by the majority, which may mandate the result reached by the court.

It is ordinarily said that liability for negligence depends upon the presence of four elements: a duty of due care, breach of that duty, damage, and a sufficient causal connection between the breach of duty and the damage (referred to as "proximate cause").[97] Since *Lewis*, Iowa courts have been willing to accept the proposition that negligent furnishing of alcohol may satisfy the fourth of these elements; that is, that negligent furnishing may be the proximate cause of injury which results from the actions of the consumer of alcohol.[98] However, in abrogating the holding of *Clark v. Mincks*, the Iowa legislature stated that the consumption of alcohol, rather than the furnishing of alcohol, is to be considered the proximate cause of any subsequent injury.[99] The legislature did not indicate whether this principle is to be applied narrowly—operating only in the situation from which it arose, to cut off the liability of a social host to those injured by an intoxicated

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94. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d at 810 (Iowa 1987).

95. Iowa Code § 123.1 (1987).

96. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d at 809 ("The question is not whether we privately agree with the legislative parameters of the dramshop act. The question rather is whether the legislature did in fact set them."); *see also* Connolly v. Conlan, 371 N.W.2d at 833 (Iowa 1985) ("Social policies might support the expanded liabilities suggested by the plaintiffs. But the legislature was not persuaded by them, and we are bound to adhere to the limitations of the legislative plan.").

97. W. Prosser & W. Keeton, The Law of Torts, § 30 at 164-65 (5th ed. 1984).

98. *See* Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984).

99. Iowa Code § 123.49(1)(b) (1987).

guest—or more broadly. If the principle is to be applied broadly, then it appears that no common law cause of action, based upon the negligent furnishing of alcohol, can ever exist in Iowa, because as a matter of law the element of proximate causation can never be established.

If this is the case, then a number of consequences follow. *Lewis* and its progeny[100] are no longer good law; after ten years of development and refinement the principle of *Lewis* no longer has vitality. The only remaining tort based upon the furnishing of alcohol is the statutory tort created by the legislature in the Dram Shop Act, which is limited to a narrow and specifically defined range of situations. The law has returned to where it was in 1958, under the rule of *Cowman v. Hansen*.[101] The case of *Fuhrman v. Total Petroleum* is correctly decided, and only further legislative action can change the legal position.

One might legitimately wonder whether the above suggestion is correct. The 1986 amendment does not specify its intended scope, and it is not clear that the legislature meant to make a comprehensive change in the liquor law. But it seems unlikely that the legislature intended that the phrase "proximate cause" should mean one thing in the context of the liability of a social host, and something else in other contexts within the same statute. This fact suggests that the 1986 amendment, which contains the most recent and specific pronouncement on the subject, is intended to have general application. In any event, *Fuhrman* shows how the statute is likely to be construed in the future, and it could certainly be argued that the amendment requires this construction. There remains the question whether this is a socially desirable approach to the problems which the Iowa Liquor Control Act is intended to address—and particularly to the problems which frequently follow upon the sale of alcohol by a commercial supplier to a sober minor.

It is common knowledge that the social cost of alcohol misuse is very high.[102] Under the present state of Iowa law, it appears that this cost must be borne by drinkers themselves, to the extent that they are financially responsible and can assume the burden of paying for injuries which they inflict upon others and upon themselves; by commercial suppliers of alcohol, in certain narrowly defined situations covered by the Dram Shop Act; and by third party victims, to the extent that the only recourse the law allows

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100. *E.g.*, Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984).

101. Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958).

102. In the years 1972 through 1982, the number of people killed in car accidents involving alcohol averaged 25,000 per year. In 1980, over 650,000 people were injured in alcohol-related accidents. *Hearing on S. 671, S. 672, S. 2158 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 65 (1982) (cited in State v. Justice Court, 663 P.2d 992, 999 (Ariz. 1983)). By comparison with a person who is sober, a person whose blood contains .15 percent alcohol is about twenty-five times more likely to be involved in a fatal automobile accident for which he is responsible. DRINKING: ALCOHOL IN AMERICAN SOCIETY, 122 (J. Ewing & B. Rose, eds., 1978).

them is against a defendant who happens not to be financially responsible. Given the limitations upon liability which result from the 1986 amendment to section 123.49,[103] one suspects that all too often the cost of injury will be allowed to lie where it falls, on an innocent third party. And, in fact, this is precisely the effect of the *Fuhrman* decision.

The dissent in *Fuhrman*, written by Justice Schultz, points out the inconsistency and injustice of this position.[104] The existence of statutes establishing criminal penalties for the sale of alcohol to minors[105] and for the furnishing of alcohol to intoxicated persons and to persons to the point that they become intoxicated[106] shows that the legislature recognizes these to be particularly dangerous actions, from which society requires protection. It is both unreasonable, and a potential source of injustice to the injured, to maintain that recovery ought to be allowed for violation of one statute, but not for violation of the other, where the harm to be anticipated from violations of the two statutes is essentially the same.[107]

It seems clear that the law could be improved. Yet in view of the position taken by the court in *Fuhrman*—to the effect that the legislature has preempted the field of torts based upon the sale or furnishing of alcohol[108]—it seems equally clear that the legislature alone can bring about the improvement.

A number of considerations support the suggestion that the legislature should revise the present law to extend liability to licensees and permittees who furnish alcohol to minors in violation of statute:

1. Such an extension of liability would increase the likelihood that an injured, innocent victim would have recourse against a financially responsible defendant.

2. It would place a larger proportion of the cost of alcohol misuse on those who profit from it. It does not seem unfair to impose this cost on commercial suppliers of alcohol, particularly when the alternative may be to leave the entire cost of alcohol-related injuries to be borne by victims who may be wholly free of fault.

3. To the extent that sellers of alcohol, and their employees, are aware of and act in response to a rule of law which expands their potential liability, such a rule will tend to discourage irresponsible sales and will thus support the stated purposes of the Iowa Liquor Control Act: to protect the welfare, health, and safety of the people in the state.[109]

4. The suggested rule would bring the civil and criminal branches of the

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103. Iowa Code § 123.49(1)(b) (1987).
104. *See supra* notes 85-93 and accompanying text.
105. Iowa Code § 123.47 (1987).
106. *Id.* at § 123.49 (1987).
107. *See supra* notes 85-88 and accompanying text.
108. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807, 809 (Iowa 1987).
109. Iowa Code § 123.1 (1987).

law into harmony, and allow them to work together to advance the social purposes for which both were created.

In summary, the present state of the law in Iowa, as it relates to the civil liability of commercial suppliers for illegal provision of alcohol to minors, allows and may indeed mandate[110] an interpretation which leads to inconsistent and arguably unjust results in cases such as *Fuhrman*. However, it seems certain that any improvement in the law must be made by the legislature rather than the courts.[111] In view of the fact that the situation presented by *Fuhrman* is not at all uncommon, it would seem to be desirable for the legislature to take prompt action.

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110. *See supra* notes 97-101 and accompanying text.
111. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807, 809 (Iowa 1987).