NOTE

A COMMON LAW CAUSE OF ACTION FOR THE INJURED INEBRIATE?

I. INTRODUCTION

A. *Scope*

This Note focuses upon the issue of whether a person who is injured as a result of his own intoxication has a common law action in negligence against a liquor licensee who unlawfully furnished the injured party intoxicating liquors. The Note will first examine the current law in Iowa and then examine the case law from those jurisdictions which have already addressed this issue. The case law from the various jurisdictions will then be summarized and analyzed to determine whether Iowa, or a state similarly situated, should recognize a cause of action under these circumstances.

The Note will be divided into three major sections. The first section will discuss those jurisdictions which *do not* have dram shop acts.[1] Additionally, the first section will be comprised of two subsections. The first subsection will discuss those jurisdictions which have denied recovery to intoxicated persons.[2] The second subsection will discuss the law in those jurisdictions which have allowed the intoxicated person to recover.[3] The second section will present the case law from those jurisdictions *with* dram shop acts.[4] The last section will analyze the future of Iowa law in light of the law in other jurisdictions. This analysis will focus on whether Iowa should allow an intoxicated person, who is injured as a result of his own intoxication, to recover from the liquor licensee who unlawfully furnished the consumer intoxicating liquors.[5]

Although discussion will necessarily be directed to the liability of a liquor licensee to third parties who are injured as a result of the unlawful sale of intoxicating liquors, the main thrust of this Note is to examine a liquor licensee's liability for injuries to a person who is unlawfully furnished intoxicating liquors. The Note does not, however, address the liability of a social

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1. *See* notes 32-133 *infra.*
2. *See* notes 32-94 *infra.*
3. *See* notes 95-133 *infra.*
4. *See* notes 134-94 *infra.*
5. *See* notes 195-239 *infra.*

host for injuries caused by an intoxicated guest or for injuries to the intoxicated guest.[6]

B. *Background*

At common law a third party who was injured by an intoxicated person was not entitled to recover from the party who unlawfully furnished the intoxicating liquors to the intoxicated person.[7] The common law principle was based on the concept that, as a matter of law, the proximate cause of the injuries sustained by the third person was the consumption of the intoxicating liquor and not the sale.[8] This same principle also barred recovery to the intoxicated person for injuries to himself.[9] Many courts adhered to a related common law principle that it is not a tort to furnish intoxicating liquor to an able-bodied man.[10] In response to the common law principle, many state legislatures have enacted dram shop acts.[11] These acts generally allow a third person, who is injured by an intoxicated person, to recover damages from the liquor licensee under particular circumstances.[12] Additionally,

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6. For a discussion of the liability of a social host, *see* Graham, *Liability of the Social Host For Injuries Caused By the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. REV. 561 (1980); Note, *Social Host Liability For Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L. REV. 95 (1979); 12 CREIGHTON L. REV. 945 (1979); 9 CUMB. L. REV. 613 (1979); 1979 DET. COLL. L. REV. 359; 55 N.D.L. REV. 289 (1979); 10 TEX. TECH. L. REV. 297 (1978); 25 WAYNE L. REV. 975 (1979).

7. *See, e.g.*, Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Robinson v. Bognanno, 213 N.W.2d 530 (Iowa 1973); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958).

8. *See, e.g.*, Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978); Meade v. Freeman, 93 Idaho 389, 462 P.2d 64 (1969); Cowman v. Hansen, 250 Iowa 358, 373, 92 N.W.2d 682, 690 (1958); *Ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951);Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966).

9. *See, e.g.*, Nolan v. Morelli, 154 Conn. 432, ___, 226 A.2d 383, 389 (1967); Robinson v. Bognanno, 213 N.W.2d 530, 532 (Iowa 1973).

10. *See, e.g.*, Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978) (argument that a minor is not an able-bodied man is not persuasive); Farmers Mut. Auto. Ins. Co. v. Gast, 17 Wis. 2d 344, ___, 117 N.W.2d 347, 352 (1962). *But see* Lover v. Sampson, 44 Mich. App. 173, ___, 205 N.W.2d 69, 73 (1972) (a minor is not an able-bodied man).

11. ALA. CODE tit. 6, § 5-71 (1977); CONN. GEN. STAT. ANN. § 30-102 (West 1975); Liquor Control Act § 14, ILL. REV. STAT. ch. 43, § 135 (Supp. 1976); IOWA CODE § 123.92 (1981); ME. REV. STAT. ANN. tit. 17, § 2002 (1965); MICH. COMP. LAWS ANN. § 436.22 (1977-78); MINN. STAT. ANN. § 340.95 (West Supp. 1978); N. Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1973) (often referred to as a blacklist law because the intoxicated person's name must have been on a list published by the state); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969) (this statute is worded differently than most dram shop acts); R.I. GEN. LAWS § 3-11-1 (1976); VT. STAT. ANN. tit. 7, § 501 (1972); WISC. STAT. ANN. § 176.35 (West Supp. 1977); WYO. STAT. ANN. § 12-5-502 (1975).

12. Although most dram shop acts are similar, many do vary as to their requirement in order for an injured party to proceed. Some statutes require a party to be served while visibly intoxicated or to a point of intoxication while other statutes merely require the sale to cause

some state legislatures have enacted acts specifically allowing recovery for injuries to the consumer's family.[13] Although the dram shop acts of the various states differ in their wording and scope, Iowa's dram shop act[14] is representative of the majority of the acts. Iowa's dram shop act makes a liquor licensee liable to third parties for injuries caused by an intoxicated person if the liquor licensee served that person to a point of intoxication, or served that person while he was visibly intoxicated.[15] Although the dram shop acts have abrogated the common law rule in most situations, there are situations which fall outside the dram shop acts.

There are three common situations which fall outside the dram shop acts. The first situation occurs when a third party is injured by an intoxicated minor who was illegally furnished intoxicating liquor, but was not intoxicated when furnished the liquor or was not served to the point of intoxication.[16] The second situation arises when a minor is illegally furnished intoxicating liquor in the same situation as above, and as a result of his intoxication he is injured.[17] A third situation, which is perhaps the most common of the three, occurs when an intoxicated person, who is of legal age, is either served intoxicating liquor while intoxicated or was served to the point of intoxication, and consequently injures himself.[18] Even though the injured intoxicated person cannot recover under a dram shop act, courts have held that under certain circumstances, depending upon the wording of

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the intoxication.

13. GA. CODE ANN. § 105-1205 (1958) (allows parents of a minor to recover); R.I. GEN. LAWS § 3-11-2 (1976) (allows recovery of family or employer if a party furnishes liquor to the habitually intoxicated person if written notice had been given).

14. Iowa Code Section 123.92 provides in pertinent part:

> Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support by any intoxicated person or resulting from the intoxication of any such person, shall have a right of action, severally or jointly, against any licensee or permitee 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. . . .

15. *See* Schubert, *The Iowa Dram Shop Act—Causes of Action and Defenses*, 23 DRAKE L. REV. 16 (1973) (discussion of the requirements and proof problems in order to show that a party was served to a point of intoxication or while intoxicated).

16. *See, e.g.*, Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Trial v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973).

Under the Iowa dram shop act a person must have been served to a point of intoxication or while he is intoxicated. *See* note 14 *supra*.

17. *See, e.g.*, Shepard v. Marsaglia, 31 Ill. App. 379, 176 N.E.2d 473 (1961); Randall v. Village of Excellsior, 258 Minn. 81, 103 N.W.2d 131 (1960).

18. *See, e.g.*, Scholten v. Rhoades, 67 Mich. App. 736, 242 N.W.2d 509 (1976) (parents allowed to recover under dram shop act for injuries caused to minor who was unlawfully sold intoxicating liquor); Vadasy v. Bill Feigel's Tavern, Inc., 88 Misc. 2d 614, 391 N.Y.S.2d 32 (1973) (parents of injured intoxicated minor allowed recovery under dram shop act); Wilkins v. Weresiuk, 64 Misc. 2d 736, 316 N.Y.S.2d 360 (1970) (parents of injured intoxicated minor allowed to recover under dram shop act); Garlinghouse v. Nelson, 72 Misc. 2d 432, 339 N.Y.S.2d 538 (1973) (wife and minor children of decedent allowed to recover under dram shop act).

the statute, a husband, wife, child, parent, guardian or employer[19] may in effect be injured and consequently are allowed to recover from the liquor licensee who unlawfully sold the liquor.[20]

In cases falling outside Iowa's dram shop act the Iowa courts historically denied recovery on the common law rule of proximate cause.[21] The court often stated that the dram shop act provided an exclusive remedy which could not be enlarged except by legislative enactment.[22] In 1977, in *Lewis v. State*,[23] the Iowa Supreme Court was confronted with the situation where the plaintiff's decedents were killed when the car they were driving collided with a car driven by an intoxicated minor.[24] Although the plaintiffs clearly had a cause of action against the minor,[25] they also sought to recover from the state on a common law theory of negligence. The plaintiffs asserted that the state was liable because a state liquor store employee illegally sold intoxicating liquor to the minor who caused the injuries.[26] Since the minor was not intoxicated when he purchased the liquor, the case clearly fell outside the Iowa dram shop act.[27] Consequently, the court held:

> The sale or furnishing of intoxicating liquor in violation of [a statute prohibiting the sale of liquor to minors] may well be the proximate cause of injuries sustained as a result of an individual's tortious conduct and liability may thus be imposed upon the violators in favor of the injured, *innocent third party*. The question of proximate cause under such facts and circumstances would be for the trier of fact.[28]

The court also held that the statute prohibiting liquor sales to a minor "sets a minimum standard of care for conduct generally required of the rea-

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19. *See* note 14 *supra*. These words are found in the Iowa dram shop act.

20. *See, e.g.*, Evans v. Kennedy, 162 N.W.2d 182 (Iowa 1968) (since the intoxicated person himself can't recover under the statute neither can his estate); Bizzell v. N.E.F.S. Rest. Inc., 27 A.D.2d 554, 275 N.Y.S.2d 858 (1966); Miller v. City of Portland, 288 Or. 271, 604 P.2d 1261 (1980) (action on basis that defendant served minor or that defendant served a person while intoxicated).

21. *See, e.g.*, Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958) (third party was injured by the intoxicated person). The court stated that in furnishing an alcoholic beverage to an intoxicated person, it is foreseeable that he will get hurt, but it is not forseeable that he will injure a third person. *Id.* at 366-67, 92 N.W.2d at 686-87.

22. *E.g.*, Robinson v. Bognanno, 213 N.W.2d 530, 532 (Iowa 1973) (intoxicated person was sold liquor while intoxicated and was injured).

23. 256 N.W.2d 181 (Iowa 1977).

24. *Id.* at 184.

25. There is little doubt that the plaintiff has a negligence action against the intoxicated person who causes the injury. The plaintiffs, however, seek recovery against the liquor licensee in order to find a "deep pocket." A liquor licensee is required to have liability insurance or post a bond. IOWA CODE § 123.92 (1981).

26. Lewis v. State, 256 N.W.2d at 184-85. Under Iowa's dram shop act the person must be served while intoxicated or to a point of intoxication. *See* note 14 *supra*.

27. IOWA CODE § 123.92 (1981).

28. 256 N.W.2d at 191-92 (emphasis supplied).

sonably prudent man under like circumstances for purposes of a common law action of negligence based on the sale or furnishing of intoxicating liquor."[29] The court therefore overruled any prior decisions inconsistent with its conclusion.[30]

Thus, in light of the court's holding in *Lewis*, the issue becomes whether the Iowa court will extend the holding of *Lewis* and allow the intoxicated minor, who was unlawfully served, or the intoxicated person who was unlawfully served intoxicating liquor while intoxicated, to recover from the liquor licensee for their own injuries based upon the violation of a statute prohibiting the sale of intoxicating liquor to a minor or to an intoxicated person.[31]

II. States Without Dram Shop Acts

A. *Recovery Denied*

Several states without dram shop acts continue to recognize the general common law rule that it is the consumption of the intoxicating liquor and not the sale which is the proximate cause of the injury. Consequently, these states do not allow a consumer to recover for his own injuries.[32]

The Arizona Supreme Court has denied a minor the right to recover from the liquor licensee who illegally sold liquor to the minor.[33] The Arizona court denied recovery on the basis that the purpose of a statute prohibiting the sale of liquor to a minor "is to regulate the business rather than to enlarge civil remedies."[34] The court also stated, in this regard, that it is not without significance that the minor was also violating a statute in buying liquor.[35] The court asserted that a child of fifteen is competent to choose whether to drink.[36] The court also noted that by the age of fifteen a child knows that drinking is calculated to produce injuries.[37]

Approximately twenty years later the Arizona Court of Appeals was

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29. *Id.* at 189.

30. *Id.* at 192.

31. Iowa Code § 123.49 (1981) (prohibiting sale to intoxicated person); Iowa Code § 123.47 (1981) (prohibiting sale to a minor).

32. *See, e.g.*, Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977) (as to injured third persons); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969) (as to third persons); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966) (as to injured third persons).

33. *See* Mickey v. Stamatis, 63 Ariz. 293, 162 P.2d 128 (1945). This case was a companion case to *Collier v. Stamatis*, 63 Ariz. 285, 162 P.2d 125 (1945), in which the minor's mother also brought an action. The court's opinion in the minor's case is very brief and the court adopted the principles set forth in the mother's case. For this reason citations are only made to the mother's case.

34. Collier v. Stamatis, 63 Ariz. at _, 162 P.2d at 127. *Contra, see* notes 55, 102, 121, 130, 174 *infra*.

35. *Id.* at _, 162 P.2d at 127.

36. *Id.*

37. *Id.*

presented with a similar issue in *Vallentine v. Azar.*[38] In *Vallentine,* the court denied a minor the right to recover from a liquor licensee who illegally sold liquor to the minor who subsequently became intoxicated and was injured.[39] In denying recovery, the court stated that there should be some remedy other than penal sanctions but that it was up to the supreme court or legislature to change the present law.[40]

Courts in other states have taken a similar attitude as the Arizona Court of Appeals.[41] For example, the Georgia Court of Appeals in *Keaton v. Kroger Co.*[42] denied a third party a right to recover from a liquor licensee who unlawfully sold liquor to a minor. The court in *Keaton* denied recovery on the basis of the common law rule of proximate cause.[43] The Georgia court, however, did state that an injured minor or a previously intoxicated person may have a cause of action against the seller for his or her own injuries, but, the court would not extend this to an injured third party absent any specific statutory synapse.[44]

Although the courts in some states have not addessed the issue of whether the injured intoxicated consumer can recover for his own injuries, many of those courts have denied recovery to third parties injured by an intoxicated consumer.[45] In denying recovery, many of these courts stated that it was up to the legislature to abrogate the common law rule in order to allow recovery.[46] Courts in other states, while stating that it is a legislative

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38. 8 Ariz. App. 247, 445 P.2d 449 (1968) (summary judgment granted).

39. *Id.* at _, 445 P.2d at 450. The injury was caused when the minor jumped three stories into a swimming pool.

40. *Id.* at 451-52 (the Arizona Supreme Court has not addressed this precise issue since *Vallentine v. Azar). See also* note 46 *infra.*

41. *See* Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977).

42. *Id.*

43. *Id.* at _, 237 S.E.2d at 447. "[I]t matters not whether the act of furnishing liquor may be considered as simple negligence or as negligence per se in violation of the criminal statute — it cannot, alone, leap the common law chasm of causation." *Id.*

44. *Id.* at _, 237 S.E.2d at 448. Georgia has not specifically determined whether the intoxicated person who was illegally sold intoxicating liquor could recover for his own injuries. In *Henry Grady Hotel Co. v. Sturgis,* 70 Ga. App. 379, 28 S.E.2d 329 (1943), the court was presented with this issue and although the court denied recovery, on grounds other than the sale not being the proximate cause, it appeared that the court would adhere to the common law rule. *Id.* at _, 28 S.E.2d at 333.

It should also be noted that Georgia Code Annotated section 105-1205 gives a minor's parents a right of action against a person furnishing the minor intoxicating liquor without the parent's permission.

45. *See* notes 8, 33 *supra.*

46. Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965) (a dram shop act may be desired but such a measure should be left to legislative action rather than judicial interpretation); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969) (such a change is up to the legislature and to date the legislature has not expressed an intent to change the law); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976) (the controlling consideration is public policy which the legislature should decide); Marchiondo v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977) (legislature must be aware of the problem and should address the issue).

determination, have denied recovery on the basis that the legislature considered the question and made its intention clear that a third party should not be allowed to recover against the liquor licensee who illegally sold intoxicating liquor to the intoxicated person who caused the injury.[47]

The courts in California have possibly the most developed case law in this area and have on numerous occasions addressed the issue of whether a third party has a right to recover from a liquor licensee who illegally sold intoxicating liquor to the intoxicated person who caused an injury.[48] The California courts have also addressed the issue of whether the injured consumer would also be entitled to recover for his own injuries.[49] One of the leading cases on the right of a third party to recover is *Vesely v. Sager*.[50] In *Vesely*, an injured motorist brought an action against a tavern owner for injuries sustained when the motorist's automobile was struck by an automobile driven by an intoxicated person, who had been served intoxicating liquor in violation of a statute prohibiting liquor sales to visibly intoxicated persons.[51] By allowing the injured party to recover the California court overruled *Cole v. Rush*[52] and held that "the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person."[53] The court went on to hold that the violation of a statute which was enacted to protect a class of persons of which the plaintiff (a third party) is a member, against the type of harm which the plaintiff suffered, raises a presumption of negligence.[54] The court also held that a statute prohibiting the sale of liquor to minors also was "enacted for the purpose of protecting members of the general public against injuries resulting from intoxication."[55]

Subsequent to the holding of *Vesely*, the California courts were

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47. Hamm v. Carson City Nuggett, Inc., 85 Nev. 99, 450 P.2d 358 (1969). The court stated that the statute (since repealed) provided a civil remedy for the illegal sale to a minor but no remedy was provided for the illegal sale to an intoxicated person, thus the legislature has made its intention clear by providing a civil remedy under one section but not the other; consequently, no other remedy is available. *Id.* at ___, 450 P.2d at 360; Griffin v. Sebek, 90 S.D. 692, 245 N.W.2d 481 (1976) (statutory history indicates that the legislature considered the issue and absent an expressed statutory mandate, a remedy does not exist).

48. *See* text accompanying notes 50-55 *infra*.

49. *See* notes 57-78 *infra*.

50. 5 Cal.3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

51. *Id.* at 157-58, 486 P.2d at 154, 95 Cal. Rptr. at 626 (defendant tavern owner served intoxicating liquor to the visibly intoxicated operator of the automobile who caused the injury).

52. 45 Cal. 2d 345, 289 P.2d 450 (1955) (proximate cause is the consumption and not the sale—contributory negligence would bar recovery).

53. 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631 (the issue of proximate cause in intoxication cases would now be determined in the same manner as in other cases).

54. *Id.* The court did not indicate whether the intoxicated person is also a member of the class of persons intended to be protected by the statute.

55. *Id.* at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631. The court, however, did not state whether the minor himself is a protected party.

presented with the issue of whether the holding of *Vesely*, which allowed recovery to injured third persons, should be extended to allow recovery to the injured intoxicated consumer himself, who was illegally furnished intoxicating liquors.[56] In *Carlisle v. Kanaywer*[57] the defendant sold intoxicating liquors to the plaintiff's decedent and then failed to render him aid when he became sick.[58] The *Carlisle* court distinguished *Vesely* by stating that *Vesely* dealt only with the rights of innocent third parties injured by the intoxicated person.[59] Additionally, the *Carlisle* court pointed out that the court in *Vesely* specifically stated: " 'We do not decide . . . whether a person who is served alcoholic beverages in violation of the statute may recover for injuries suffered as a result of that violation.' "[60] The *Carlisle* court thereby held that the "contributory negligence of the decedent bars recovery by his heirs."[61] The court further stated that it is understandable that the California Supreme Court refused to determine the drinker's right to recover, in light of the probable consequences of an extension of *Vesely* into an area which is a potentially dangerous field.[62] From this it appears that the court in *Carlisle*[63] was not only denying recovery on the basis of contributory negligence but also on a public policy basis.

In 1975, California abolished the concept of contributory negligence and in its place adopted the principle of comparative negligence.[64] The first case to consider the rights of an intoxicated person to recover under the doctrine of comparative negligence was *Kindt v. Kaufmann*,[65] in which a person who

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56. *See* text accompanying notes 57-72 *infra*.

57. 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972).

58. *Id.* at 590, 101 Cal. Rptr. at 246 (decedent died when he strangled upon inhaling his own vomit).

59. *Id.* at 492, 101 Cal. Rptr. at 248.

60. *Id.* at 591, 101 Cal. Rptr. at 247-48, (quoting Vesely v. Sager, 5 Cal. 3d at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625).

61. Carlisle v. Kanaywer, 24 Cal. App. 3d at 591, 101 Cal. Rptr. at 248. "[I]f the concurrent negligence of the plaintiff is a proximate contributing cause" of the injury, his contributory negligence would bar recovery. *Id.*

62. *Id.* at 592, 101 Cal. Rptr. at 248. *Accord*, Sargent v. Goldberg, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972).

63. 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972).

64. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). Comparative negligence diminishes a negligent plaintiff's recovery in proportion to his own negligence rather than totally barring recovery under the concepts of contributory negligence and assumption of risk. *See* W. Prosser, Law of Torts 433-39 (4th ed. 1971).

65. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976). Although *Kindt* was the first case to actually apply the doctrine of comparative negligence to this situation, the first case which dealt with comparative negligence in this situation was *Venzor v. Santa Barbara Elks Lodge, No. 613*, 56 Cal. App. 3d 209, 128 Cal. Rptr. 353 (1976). The court in *Venzor*, however, stated that the newly adopted doctrine of comparative negligence had limited retroactivity and did not apply to this particular case. Consequently, the court held that the decedent's contributory negligence in becoming intoxicated barred recovery by his hiers. *Id.* at 215, 128 Cal. Rptr. at 357.

was illegally served while intoxicated, was injured in an automobile accident.[66] Relying on the doctrine of comparative negligence, now applicable in California, the court held that a complaint no longer fails to state a cause of action based upon the plaintiff's contributory negligence.[67] The court, however, reaffirmed the public policy behind denying the intoxicated consumer the right to recover for his own injury by stating that "[g]overnmental paternalism protecting people from their own conscious folly fosters individual irresponsibility and is normally to be discouraged. [citation omitted.] To go yet another step and allow monetary recovery to one who knowlingly becomes intoxicated and thereby injures himself is in our view morally indefensible."[68] In this same respect the court stated that "[a] rule of liability here could have no other possible affect upon patrons than to encourage them to excessive consumption at taverns."[69] The court in *Kindt* continued to adhere to the principle, that absent comparative negligence, the consumer's voluntary assumption of the known and conspicuous risk in the consumption of alcohol would bar recovery.[70]

The California courts have, however, allowed an intoxicated person to recover from a liquor licensee for his own injuries if the unlawful sale is so egregious that it constitutes willful misconduct.[71] However, if the defendant's conduct is only negligent then the intoxicated person's contributory negligence bars recovery.[72] The intoxicated person will also be barred from recovery if his actions constitute misconduct.[73]

In 1978, the California legislature abrogated the holding of *Vesely v. Sager*,[74] and other related cases, by amending its code.[75] The amended code now specifically prevents a party, who is injured by an intoxicated con-

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66. Kindt v. Kaufman, 57 Cal. App. 3d at 847, 127 Cal. Rptr. at 604.

67. *Id.* at 851, 129 Cal. Rptr. at 607.

68. *Id.* at 856, 129 Cal. Rptr. at 610.

69. *Id.* at 858, 129 Cal. Rptr. at 611. The court believed that its conclusion was "further confirmed by the negative action of the legislature in refusing to enact proposed legislation which would have brought about an opposite result." *Id.* at 859, 129 Cal. Rptr. 612. This same rationale could arguably be applied to the situation involving minors.

70. *Id.* at 850, 129 Cal. Rptr. at 606. The court did note parenthetically, that it was not concerned with a minor nor with an alcoholic with an irresistible and pathological urge to drink excessively. In such a situation, a person who furnishes such an alcoholic intoxicating liquors, may be guilty of willful misconduct. *Id.* at 853, 129 Cal. Rptr. at 608.

71. Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 396-99, 572 P.2d 1155, 1157-58, 143 Cal. Rptr. 13, 16 (1978) (en banc) (serving a patron on his twenty-first birthday 10 shots of 151 proof rum as well as a vodka collins and two beers within an hour and a half was willful misconduct).

72. *Id.* at 401, 572 P.2d at 1160, 143 Cal. Rptr. at 19. This same concept of willful misconduct has also been recognized by other courts. *See* notes 181-82 *infra*.

73. Sissle v. Stefenoni, 88 Cal. App. 3d 633, 152 Cal. Rptr. 56 (1979). The plaintiff's intentional driving of an automobile while intoxicated in conjunction with his disregard for public safety, is willful misconduct. *Id.* at 636, 152 Cal. Rptr. at 57-58.

74. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

75. CAL. BUS. & PROF. CODE § 25602 (1978).

sumer, from recovering from the person who furnished the liquor to an obviously intoxicated person.[76] The California legislature then codified the common law rule that the proximate cause of any injury is the consumption and not the serving of the intoxicating beverages.[77] The legislature, in conjunction with the above mentioned statute, did enact a law which specifically allows a civil action to be brought against anyone who furnishes liquor to an obviously intoxicated minor.[78] However, the furnishing of the intoxicating liquor to the obviously intoxicated minor must still be the proximate cause of the injury sustained.[79]

Although the California courts have not specifically addressed the issue of whether a minor, who is illegally served intoxicating liquor, can recover for his own injuries, the Montana courts have addressed the issue.[80] In *Deeds v. United States*,[81] the United States District Court held, under the particular facts of the case, that the illegal sale of the liquor to a minor was a proximate cause of the injuries to the plaintiff who was a passenger in the minor's car.[82] Eleven years later the Montana Supreme Court, in *Swartzenberger v. Billings Labor Temple Association*,[83] was presented with the opportunity to expand the holding in *Deeds* to allow an intoxicated person, who was served while intoxicated, to recover for his own injuries when he fell down some stairs.[84] The court distinguished *Deeds* on the basis that *Deeds* dealt with recovery by an injured *third party*.[85] The court also distinguished the California case of *Ewing v. Cloverleaf*[86] on the basis that the defendant's actions in *Ewing* constituted willful misconduct by knowingly serving an inexperienced drinker.[87] The Montana court thereby stated that the "[d]ecedent achieved the state of intoxication voluntarily and disregarded the duty to care for his own safety."[88] In conclusion, the Montana Supreme Court held that the decedent's contributory negligence barred any possible recovery from the defendant.[89] In the same year as *Swartzenberger*, the Montana Supreme Court, in *Folda v. City of Bozeman*,[90] determined the

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76. *Id.*
77. *Id.* § 25602(c).
78. *Id.* § 25602.1.
79. *Id.*
80. *See* text accompanying notes 81-93 *infra.*
81. 306 F. Supp. 348 (D. Mont. 1969) (construing Montana law) (the defendant sold liquor to a minor who became intoxicated and subsequently drove an automobile off the road injuring a passenger). *Id.* at 350.
82. *Id.* at 361.
83. _ Mont. _, 586 P.2d 712 (1978).
84. *Id.* at _, 586 P.2d at 713.
85. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).
86. *Id.*
87. Swartzenberger v. Billings Labor Temple Ass'n, _ Mont. at _, 586 P.2d at 715-16.
88. *Id.* at _, 586 P.2d at 716.
89. *Id.* (summary judgment was granted).
90. 177 Mont. 537, 582 P.2d 767 (1978).

issue of whether the parents of a minor could recover under a wrongful death action against the defendant who illegally served the minor intoxicating liquors.[91] The *Folda* court rejected the argument that the sale of liquor to a minor constitutes negligence per se[92] and held that the decedent's contributory negligence precluded his parents from recovering.[93] The court stated that the proximate cause of the deceased's death was her voluntary intoxication and disregard for her duty to use due care for her own safety.[94]

B. *Recovery Allowed*

The leading case which abrogated the common law rule that it is the consumption of the intoxicating liquor and not the sale which is the proximate cause of resultant injuries is *Rappaport v. Nichols*.[95] In *Rappaport*, the defendant unlawfully sold liquor to a minor who became intoxicated and subsequently was involved in an automobile accident with the decedent's car.[96] The court held that it cannot be said as a matter of law that there was no proximate cause connection "between the defendant's unlawful and negligent conduct and the plaintiff's injuries;" consequently, the court stated that these are factual questions to be answered by the jury.[97] The court in *Rappaport* explicitly held that the purpose of the statute prohibiting the sale of intoxicating liquors to visibly intoxicated persons and minors is intended to benefit the minors and intoxicated persons as well as members of the general public.[98] In regard to the violation of the statute the court held that "if the circumstances are such that the tavern keeper knows or should know that the patron is a minor or is intoxicated, his service to him may

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91. *Id.* at _, 582 P.2d at 769 (the minor, after becoming intoxicated, drowned in a nearby creek).

92. *Id.* at _, 582 P.2d at 771-72.

93. *Id.* at _, 582 P.2d at 772.

94. *Id.* (voluntary intoxication will not excuse the degree of care which a person must take for his or her own safety). *See also* Ramsey v. Anctil, 106 N.H. 375, _, 211 A.2d 900, 902 (1965). "[The statute is] intended merely to establish a standard of ordinary care for the protection of the plaintiff against a risk . . . . " *Id.* at _, 211 A.2d at 902. The court rejected plainfiff's analogy to a firearm statute, in which contributory negligence is no defense for the person who illegally sells a gun to a minor. *Id.* The foundation for the argument based upon the firearm statutes lies within the Restatement (Second) of Torts, section 483 (1966). *See* note 102 *infra*. Additionally, the courts of New Hampshire, while recognizing that a plaintiff may maintain a common law action for injuries received as a result of being served intoxicating liquor while intoxicated, bar recovery based upon the plaintiff's contributory negligence. This same argument has been recognized by several courts. *See* notes 102, 120 *infra*.

95. 31 N.J. 188, 156 A.2d 1 (1959) (decendant's estate instituted a wrongful death action).

96. *Id.* at _, 156 A.2d at 3.

97. *Id.* at _, 156 A.2d at 9.

98. *Id.* at _, 156 A.2d at 8. "The Legislature has in explicit terms prohibited sales to minors as a class because it recognizes their very special susceptibilities and the intensification of the otherwise inherent dangers when persons lacking in maturity and responsibilty partake of alcoholic beverages . . . . " *Id.*

also constitute common law negligence."[99] The court then concluded that the injured third party does have a cause of action against the tavern owner.[100]

The Third Circuit Court of Appeals in *Galvin v. Jennings*,[101] was the first court to determine whether *Rappaport* should be extended to allow the injured intoxicated consumer to recover from the party who illegally sold the intoxicating liquor to him. In *Galvin*, the court held:

> When a statute sets up a standard in some instances the court says that violation of the standard by a defendant resulting in injury to a plaintiff is not to be defended on the basis of the plaintiff's contributory negligence. The theory is that the prohibition in the statute represents a device to protect an incompetent against the consequences of his incompetency.[102]

Thus, with the court in *Rappaport* having determined that the statute was intended to protect minors and intoxicated persons, the court in *Galvin* was able to apply the above principle and hold that the plaintiff's contributory negligence did not bar his recovery.[103]

The New Jersey Supreme Court has also held that a tavern keeper may be held civilly liable to a patron and that a patron's contributory negligence would not bar recovery, because to recognize contributory negligence as a defense would tend to nullify the very aid being offered.[104] The New Jersey court rationalized that it is within the public interest to allow recovery because a tavern owner may protect himself by simply exercising reasonable care.[105] Although the New Jersey courts have not specifically addressed the issue of whether a minor could recover from a liquor licensee for his own injuries if he was not served while intoxicated, it is apparent from the discussion in *Rappaport*[106] and *Soronen v. Olde Milford Inn*,

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99. *Id.* at _, 156 A.2d at 9.

100. *Id.; see also,* Aliulis v. Tunnel Hill Corp., 114 N.J. Super. 205, 275 A.2d 751 (1971) (action by a passenger against a tavern owner who had illegally served the minor driver intoxicating liquor resulting in his intoxication which caused the automobile accident which injured the plaintiff).

101. 289 F.2d 15 (3d Cir. 1961) (the court was applying, and in effect determining, New Jersey law).

102. *Id.* at 19. The court also analogized to the Restatement of Torts section 483 (1934). Currently the Restatement (Second) of Torts section 483 (1965) provides: "If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by the violation of such statute."

103. 289 F.2d at 18-19.

104. Soronson v. Olde Milford Inn, Inc., 46 N.J. Super. 582, _, 218 A.2d 630, 636 (1966).

105. *Id.* at _, 218 A.2d at 637. The court stated, however, that to impose liability absent visible intoxication would result in an undue burden. *Id. See also,* Rappaport v. Nichols, 31 N.J. 188, _, 156 A.2d 1, 10 (1959). The current situation does not involve liquor licensees who do not know or have reason to believe that the patron is a minor or intoxicated when served.

106. *See* note 98 *supra* (statute is intended to benefit minors).

Inc.,[107] that the New Jersey courts would allow a minor to recover.

The New Jersey courts primarily relied upon the Pennsylvania case of *Schelin v. Goldberg*.[108] In *Schelin* the Pennsylvania court held that a statute making it unlawful to sell liquor to a visibly intoxicated person was not only enacted to protect society in general, but also "to protect specifically intoxicated persons 'from their inability to exercise self-protective care.' "[109] The court then applied the principle set forth in the Restatement (Second) of Torts section 483,[110] and held that because the plaintiff was a member of the class which the statute sought to protect, he would not be barred from recovery due to his contributory negligence.[111] In order for a tavern owner to be liable, however, the unlawful sale of liquor must be the proximate cause of the injuries sustained.[112] In *Smith v. Clark*,[113] the defendant sold a minor intoxicating liquor while the minor was intoxicated. Subsequently, the minor was injured when his car left the road resulting in an accident.[114] Although the court found that the defendant had violated two distinct statutes,[115] the court stated that either violation was sufficient to render the defendant civilly liable if either of the two violations were determined to be the proximate cause of the accident.[116] The court in *Smith* did not address the issue of contributory negligence, but in light of *Schelin*[117] it is clear that contributory negligence would not have been a defense. Although Pennsylvania has not recently addressed this issue, two cases subsequent to *Schelin* and *Smith* provide further support for recovery.[118]

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107. 46 N.J. Super. at ___, 218 A.2d at 636. *See* text accompanying note 104 *supra*.

108. 188 Pa. Super. Ct. 341, 146 A.2d 648 (1958).

109. *Id.* at _, 146 A.2d at 652. *See also* Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965). The court in *Majors* rejected the defendant's argument, that the statute was intended to only protect "innocent" intoxication persons, by stating that the "statute was intended to protect persons *when* they are visibly intoxicated regardless of *how* they got that way." *Id.* at _, 205 A.2d at 876.

110. *See* note 102 *supra*.

111. 188 Pa. Super. Ct. at _, 146 A.2d at 652-53.

112. *Id.* at _, 146 A.2d at 652 (by implication). *See* Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, _, 198 A.2d 550, 553 (1964) (proximate cause is a jury question).

113. 411 Pa. 142, 190 A.2d 441 (1963). The court reversed the lower court's holding based upon an erroneous instruction. The case was retried and was again appealed in *Smith v. Evans*, 421 Pa. 247, 219 A.2d 310 (1966). For purposes of this Note, since the applicable law was set forth in *Smith v. Clark*, future references will only be made to that case.

114. 411 Pa. at _, 190 A.2d at 442.

115. One statutory violation was the illegal sale of liquor to a minor, and the second was the illegal sale of liquor to a visibly intoxicated person. *Id.*

116. *Id.* This is an important factor since many courts which have allowed recovery based upon the unlawful sale of liquor to an intoxicated person have not addressed the precise issue of whether the illegal sale to a minor who is not intoxicated, would create civil liability.

117. *See* text accompanying note 108 *supra*.

118. *See* Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965). The defendant, in *Majors*, sold liquor to an intoxicated person who either fell or jumped from a window resulting in his death. The court held violation of the statute was negligence per se. *Id.* at _, 205 A.2d at

The illegal sale of liquor to a minor, who was *not* intoxicated at the time of the sale, was determined to be negligence per se by the Florida court in *Davis v. Shiappacosee.*[119] The court, in determining that the violation of the statute constituted negligence per se, analogized to an ordinance prohibiting the sale of firearms to a minor in which violation of the ordinance had been construed as constituting negligence per se.[120] The court determined that the purpose of the statute was to "preclude the harm that can come to one of immaturity by imbibing in such liquors."[121] The court concluded that based on the facts of the case it was a probable result that the injury would result from the negligent sale[122] and, therefore, the complaint should not have been dismissed.[123] The Florida courts, however, have recognized that even though the violation of the statute constitutes negligence per se,[124] it does not necessarily constitute actionable negligence because the violation of the statute must be the proximate cause of the injury.[125] In this regard the Florida Court of Appeals in *Bryant v. Jax Liquors*[126] held that the illegal sale of liquor to one minor is not, as a matter of law, the proximate cause of the injuries to another minor who consumes the liquors.[127]

In *Vance v. United States,*[128] the United States District Court also recognized that the consumer has a cause of action and held that the statute prohibiting liquor sales to minors and intoxicated persons sets a minimum standard of conduct.[129] The *Vance* court went on to hold that the statutes are intended to protect the innocent third parties and the consumer himself.[130] On the basis of Restatement (Second) of Torts section 483, the court

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875; *see also* Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964) (injury to a third person caused by an intoxicated consumer).

119. 155 So. 2d 365 (Fla. 1963). The court of appeals opinion is published in 145 So. 2d 758 (1962).

120. 155 So. 2d at 367. The case involving violation of the firearm statute was *Tamiami Gun Shop v. Klein,* 109 So. 2d 189 (Fla. App. 1959).

121. 155 So. 2d at 367 (Fla. 1963).

122. *Id.*

123. *Id.* (proximate cause is a jury question).

124. *See* note 120 *supra.*

125. Bryant v. Jax Liquors, 352 So. 2d 542, 544 (Fla. App. 1977). The court stated that "[a] plaintiff must allege: (1) that he is of a class the statute was intended to protect; (2) that he suffered injury of the type the statute was designed to protect; (3) that violation of the statute was the proximate cause of the injury." *Id.*

126. *Id.*

127. *Id.* The court stated that such an occurrence may be possible but not probable. *See also* Rio v. Minton, 291 So. 2d 214 (Fla. App.), *cert. denied,* 297 So. 2d 837 (Fla. 1974) (furnishing an automobile to an intoxicated minor is the proximate cause of the injury, not the unlawful sale of liquor).

128. 355 F. Supp. 756 (D. Alaska 1973).

129. *Id.* at 759. Thus mere compliance with the statute does not relieve a liquor licensee from liability if he was negligent in failing to take additional precautions. *Id.* at 760.

130. *Id.* at 759.

determined that contributory negligence would not be a defense.[131]

Several jurisdictions have abrogated the common law rule of proximate cause and allowed third-parties to recover for their injuries but, have not addressed the issue of whether the consumer can recover for his own injuries.[132] Additionally, it has been held that if an illegal sale to a minor occurs in circumstances which constitute an intentional tort, then the minor's cause of action would not be barred on the basis of contributory negligence.[133]

III. States With Dram Shop Acts

A. *Recovery Denied*

There are currently thirteen states which have some form of a dram shop act.[134] Several of these states have not addressed the issue of whether a third party can recover against the unlawful seller of the intoxicating liquors for injuries caused by the intoxicated person or whether the intoxicated consumer has a cause of action on his own behalf.[135]

New York has the most extensive case law regarding the right of recovery in cases lying outside the scope of a dram shop act.[136] These cases are of particular interest because New York no longer holds, as a matter of law, that the consumption is the proximate cause of resulting injuries.[137] The New York courts have held that a statute prohibiting the sale of liquor to an intoxicated person does not create a cause of action in favor of the person

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131. *Id.* (Alaska had adopted section 483). The court in this respect distinguished the California cases, *see* notes 50-74 *supra*, on the basis that California had not adopted the Restatement (Second) of Torts section 483.

132. *See, e.g.*, Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Wiska v. St. Stanislaus Social Club, Inc., _ Mass. App. Ct. _, 390 N.E.2d 1133 (1979).

133. Nally v. Blandford, 291 S.W.2d 832, 835 (Ky. 1956) (defendant sold liquor to an intoxicated person who defendant knew intended to drink the entire bottle, which resulted in death). The court stated it did not need to determine the issue of contributory negligence since defendant's actions constituted an intentional wrongful act. *Id.* at 835. *See also* Pike v. George, 434 S.W.2d 626 (Ky. 1968)(involving unlawful sale of liquor to a minor who became intoxicated and injured a third party).

134. *See* note 10 *supra*.

135. Alabama has not recently addressed the issue, however, in *King v. Henkie*, 80 Ala. 505 (1886), the court held that the consumers contributory negligence bars recovery for his own injuries. Maine, Rhode Island and Vermont have not addressed the issue.

136. N.Y. Gen. Oblig. Law § 11-101 (McKinney 1978) provides in pertinent part:

> 1. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

Compare id. with Iowa Code § 123.92 (1981); *see* note 14 *supra*.

137. *See, e.g.*, Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965) (involving injuries to third persons).

whose intoxication resulted from the illegal sale.[138] In regard to the illegal sale of liquor to a minor who is subsequently injured, a New York court held in *McNally v. Addis*[139] that the violation of the statute is evidence of negligence, but does not create absolute liability.[140]The court in *McNally*, however, stated that a minor must exercise the care which an ordinary prudent person of his age, capacity and experience would have exercised under the same circumstances.[141] The court went on to hold that in light of the decedent's age of eighteen, his intellectual capacity and experience "he assumed the risk inherent in voluntarily exposing himself to the dangers in the consumption of alcoholic beverages."[142] The court further held that, in any event, the decedent was guilty of contributory negligence as a matter of law which precluded the plaintiff from recovering.[143] Therefore, under the facts of *McNally* no cause of action exists on any basis, as a matter of law.

If the illegal sale of intoxicating liquor is made to a minor, who is not intoxicated at the time of the sale, his parents would not have a cause of action under a dram shop act.[144] If, however, the minor *was* intoxicated at the time of the sale, and subsequently sustained some type of injury, his parents may have a cause of action under a dram shop act.[145]

In *Vadasy v. Bill Feigel's Tavern, Inc.*,[146] the defendant unlawfully sold intoxicating liquor to a minor who was subsequently injured as a result of his intoxication.[147] The court held that the minor's father would have a cause of action based upon the New York dram shop act "if he can prove loss of services of the child."[148] The court, however, prevented the minor from recovering on the basis that the minor would be guilty of contributory negligence as a matter of law.[149]

Oregon has also recognized that in cases lying outside their dram shop

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138. Bizzell v. N.E.F.S. Rest., Inc., 27 App. Div. 2d 554, _, 275 N.Y.S.2d 858, 859 (1966) (plaintiff would only have an action in ordinary negligence). The court's opinion is very brief and contains little helpful analysis.

139. 65 Misc. 2d 204, 317 N.Y.S.2d 157 (1970) (the court's opinion provides a good analysis).

140. *Id.* at _, 317 N.Y.S.2d at 179.

141. *Id.* at _, 317 N.Y.S.2d at 180.

142. *Id.*

143. *Id.*

144. *Id.* at _, 317 N.Y.S.2d at 176.

145. *See* Wilkins v. Weresiuk, 64 Misc. 2d 736, _, 316 N.Y.S.2d 360, 363 (1970).

146. 88 Misc. 2d 614, 391 N.Y.S.2d 32, *aff'd* 55 App. Div. 1011, 391 N.Y.S.2d 999 (1973).

147. 88 Misc. 2d at _, 391 N.Y.S.2d at 33 (it is not clear from the opinion how the minor was injured).

148. 88 Misc. 2d at _, 391 N.Y.S.2d at 35.

149. 88 Misc. 2d at _, 391 N.Y.S.2d at 34 (minor's cause of action was dismissed). *See also* Santoro v. DiMarco, 80 Misc. 2d 296, 363 N.Y.S.2d 694 (1972). The court in *Santoro* held that a minor who was injured as a result of her own intoxication did not have a cause of action against the party who unlawfully sold her the intoxicating liquor. *Id.* at _, 363 N.Y.S.2d at 694-95.

act,[150] a third party who is injured by an intoxicated person, may have a cause of action against the liquor licensee who unlawfully sold the intoxicating liquors.[151] At the same time, however, the Oregon courts deny recovery to the intoxicated consumer on the basis of legislative intent rather than contributory negligence.[152] In this regard the Oregon court stated that it was inappropriate to use a statute, prohibiting the sale of liquor to minors, as a basis of civil liability because it would be inconsistent with legislative policy to allow a cause of action to the violator based upon conduct the legislature has chosen to prohibit and penalize.[153] The court supported its decision by examining Oregon's dram shop act which specifically allows the "wife, husband, parent or child of the intoxicated person or habitual drunkard" to bring an action against the furnisher of the intoxicating liquors.[154] In this context the court stated:

> [W]hen the legislature has considered the liability to the inebriate's immediate family which should result from the giving of alcoholic liquor to him but has refrained from giving him a cause of action, we conclude it is probable it must have considered the matter and rejected any cause of action for him. We, therefore, consider a cause of action for his benefit inappropriate.[155]

The Connecticut courts, in examining these same issues,[156] have in effect combined the New York and Oregon approaches. In other words, the Connecticut courts have denied recovery on the basis of both contributory negligence[157] and legislative intent.[158]

In *Noonan v. Galick*,[159] the Connecticut court continued to adhere to

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150. It should be noted that Oregon repealed its dram shop act, OR. REV. STAT. § 30.730 (1977), in 1979. The dram shop act was still in effect, however, in the cases discussed in notes 151-54 *infra*.

151. *See, e.g.*, Davis v. Billy's Con-Teena, Inc., 284 Or. 351, _, 587 P.2d 75, 78 (1978) (liability based on negligence per se in selling liquor to a minor); Campbell v. Carpenter, 279 Or. 237, _, 566 P.2d 893, 897 (1977) (tavern negligent in serving an intoxicated person); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18, 23 (1971) (recognizing common law duty).

152. *See* text accompanying notes 153-55 *infra*.

153. Miller v. City of Portland, 288 Or. 271, _, 604 P.2d 1261, 1265 (1980). The court was referring to a statute prohibiting a minor from purchasing liquor. The court stated that it would be "inappropriate to create a common law cause of action for physical injury to minors caused by their illegal purchase of alcoholic liquor." *Id.*

154. OR. REV. STAT. § 30.730 (1977) (repealed in 1979).

155. 288 Or. at _, 604 P.2d at 1266. The court also stated that "[i]t would have been the natural thing to include him as a beneficiary of the statute with the rest of his immediate family had the legislature desired to do so." *Id.* n.13.

156. *See* notes 159-68 *infra*.

157. *See* notes 137-49 *supra*.

158. *See* notes 150-55 *supra*.

159. 19 Conn. Supp. 308, 112 A.2d 897 (1955).

the common law rule of proximate cause in denying recovery.[160] The Connecticut court, however, also asserted that even if the sale and not the consumption was the proximate cause of the injuries, the plaintiff would be barred from recovery as a matter of law due to his contributory negligence.[161] The court also stated that had the legislature intended to extend a remedy to the intoxicated person himself, they would have included it in the statute.[162] In light of this determination the court held that to allow such a remedy is within the province of the legislature and not the courts.[163]

Twelve years later the Connecticut court in *Nolan v. Morelli*[164] reiterated this same approach in denying recovery to the intoxicated consumer. The court in *Nolan* held that the consumer would be barred from recovery on the basis of proximate cause.[165] More significantly, however, the court stated that to allow recovery by the intoxicated person would encourage overindulgence, rather than to discourage such overindulgence.[166] Additionally, it would be inconceivable for the legislature to omit the intoxicated person from coverage under the dram shop act, yet accord him a special right of action under another statute.[167]

In the same year as the *Nolan* decision, the Connecticut court also denied recovery against a tavern owner who unlawfully sold liquor to a minor, causing intoxication, and resulting in injuries.[168] Although the Connecticut courts have continued to deny recovery on the somewhat rejected notion of proximate cause, the Connecticut courts do provide a helpful analysis of legislative intent in the drafting of their dram shop act. This analysis will prove helpful to other courts confronted with the same problem.

While the courts of some jurisdictions continue to deny recovery in cases falling outside the bounds of their dram shop acts on the basis of proximate cause,[169] other jurisdictions deny recovery on the basis that since the

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160. *See* note 8 *supra*.

161. Noonan v. Galick, 19 Conn. Supp. at _, 112 A.2d at 894.

162. *Id.* "[I]f one contemplates the vast number of claims which would be urged by drunks if they were entitled to recover for every expense or injury that is the natural concomitant of intoxication" it is easy to see why the legislature did not provide a remedy. *Id.*

163. *Id.*

164. 154 Conn. 432, 226 A.2d 383 (1967).

165. *Id.* at _, 226 A.2d at 389. Note, however, that a proximate cause argument would not bar recovery in many, if not most, jurisdictions. *See* notes 28, 53, 82, 97, 125 *supra* and note 187 *infra*.

166. Nolan v. Morelli, 154 Conn. at _, 226 A.2d at 387.

167. *Id.* at _, 226 A.2d at 390. The court was referring to the statute prohibiting liquor sales to intoxicated persons.

168. Moore v. Bunk, 154 Conn. 644, 228 A.2d 510 (1967). In the case of a sixteen year old minor, he may be presumed to have consumed the liquor voluntarily and his consumption rather than the sale is, under the common law rule, the proximate cause of his injuries. *Id.* at _, 228 A.2d at 512.

169. *See, e.g.*, Stringer v. Calmes, 167 Kan. 278, 205 P.2d 921 (1949) (at the time of the case, Kansas had a dram shop act but it was repealed in 1949); Parsons v. Jow, 480 P.2d 396

legislature has acted, the dram shop act provides the exclusive remedy.[170]

The Wisconsin courts adhere to a principle similar to the rule that the dram shop act provides the exclusive remedy, but Wisconsin has determined that the legislature has preempted the field.[171] For example, in *Farmers Mutual Automobile Insurance Co. v. Gast*,[172] the defendant unlawfully sold liquor to a minor who became intoxicated resulting in an automobile accident in which the passenger was injured.[173] The Wisconsin court held that the statute prohibiting the sale of liquor to minors was intended to protect the safety of third persons as well as the health and morals of minors.[174] Consequently, the general rule would be that the violation of the statute would constitute negligence per se.[175] Notwithstanding the general rule, the court held that the legislature, by enacting the dram shop act, "preempted the field of civil liability resulting from the illegal sale of intoxicating beverages including beer."[176] Therefore, it was determined to be inappropriate to resort to the common law doctrine of negligence per se when the legislature has preempted the field of civil liability.[177] Wisconsin has also denied recovery to injured third parties in cases lying outside its dram shop act,[178] on the

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(Wyo. 1971). Besides denying recovery on the basis of proximate cause the court stated that it was worth mentioning that the law also prohibits a minor from possessing liquor. *Id.* at 398; Fladeland v. Mayer, 102 N.W.2d 121 (N.D. 1960). The *Fladeland* court held that under the circumstances the illegal sale of liquor to one minor is not the proximate cause of injuries caused by another minor. *Id.* at 123-25.

170. *See, e.g.*, Cunningham v. Brown, 22 Ill. 2d 23, 174 N.E.2d 153 (1961) (recovery denied to wife of decedent who killed himself after becoming intoxicated); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (court indicated had Illinois not had a dram shop act an injured third person would have a common law cause of action); Shepard v. Marsaglia, 31 Ill. App. 2d 379, 176 N.E.2d 473 (1961) (dram shop act provides the exclusive remedy in a case in which a minor was injured after becoming intoxicated).

171. *See* text accompanying notes 172-79 *infra*.

172. 17 Wis. 2d 344, 117 N.W.2d 347 (1962).

173. *Id.* at _, 117 N.W.2d at 348-49.

174. *Id.* at _, 117 N.W.2d at 350.

175. *Id.*

176. *Id.* at _, 117 N.W.2d at 351.

177. *Id.* The court also denied recovery on the basis that it is not an actionable wrong to furnish intoxicating liquor to an able-bodied man. *Id.* at _, 117 N.W.2d at 352. In this context the court held that the rule of non-liability is applicable regardless of the purchaser's lack of majority. *Id. Contra*, Lover v. Sampson, 44 Mich. App. 173, _, 205 N.W.2d 69, 73 (1972).

178. In Wisconsin, many cases fall outside its dram shop act which would normally be covered by most dram shop acts. This is due to the fact that in order for a person to be liable under Wisconsin law, the party furnishing the liquor must have been notified or requested in writing not to furnish liquor to the party causing the injuries. *See* WIS. STAT. ANN. § 176.35 (West Supp. 1977). *See, e.g.*, Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979). The *Olsen* court stated that shifting the "blame from the shoulders of the intoxicated driver is contrary to sound public policy." *Id.* at _, 280 N.W.2d at 181; Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970). "The controlling consideration is one of public policy, and public policy dictates that liability should not be extended. *Id.* at _, 176 N.W.2d at 570.

basis of several public policy arguments.[179]

The Michigan courts have also held that the dram shop act provides the exclusive remedy.[180] While still adhering to this general rule, however, the Michigan courts have determined that an exception to the rule arises when the liquor licensee's actions constitute intentional, reckless or grossly negligent conduct.[181] In addition to allowing recovery to the consumer for injuries sustained as a result of the defendant's intentional, reckless or grossly negligent conduct,[182] Michigan has allowed recovery to third parties based upon the violation of a statute prohibiting the sale of liquor to a minor who subsequently injures a third party.[183]

Minnesota is one jurisdiction which could possibly be in a state of flux regarding this issue. The Minnesota courts have denied recovery on the basis that the common law does not provide a remedy to a minor who is sold intoxicationg liquors.[184] Additionally, the Minnesota courts have held, that under these facts no cause of action would arise under their dram shop act.[185] This holding, however, may no longer be valid in light of *Trial v. Christian*.[186] In *Christian*, the court rejected the traditional proximate cause argument and held that a third person injured by an intoxicated person would have an action based upon common law negligence.[187] It is interesting to note that in an earlier case the Minnesota court expressed a willingness to allow the injured consumer to recover for injuries sustained.[188] The court

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179. The court recognized six reasons for cutting off liability:

> (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Olsen v. Copeland, 90 Wis. 2d at ___, 280 N.W.2d at 180 *citing*, Coffey v. City of Milwaukee, 74 Wis. 2d 526, 541, 147 N.W.2d 132, 140 (1976).

180. Manuel v. Weitzman, 386 Mich. 157, _, 191 N.W.2d 474, 477 (1971).

181. Grasser v. Fleming, 74 Mich. App. 338, _, 253 N.W.2d 757, 761 (1977). This basis of recovery is analogous to the theory of willful misconduct recognized by some courts. *See* note 71 *supra*.

182. *Id.*

183. Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973). The violation of a statute prohibiting the sale of liquor to minors constitutes negligence per se when a third-party is injured as a result of the minor's intoxication. *Id.* at _, 213 N.W.2d at 821-22.

184. Calvin v. Smith, 228 Minn. 322, _, 37 N.W.2d 368, 369 (1949).

185. *Id.*

186. 298 Minn. 101, 213 N.W.2d 618 (1973). The defendant sold beer to a minor who became intoxicated and was later involved in an automobile accident in which the plaintiff, a passenger, was injured.

187. *Id.* at _, 213 N.W.2d at 624.

188. Randall v. Village of Excelsior, 258 Minn. 81, 103 N.W.2d 131 (1960) (involving a minor injured as a result of his intoxication).

denied recovery, however, not only on the basis that the common law provides no remedy,[189] but also on the basis that it should be up to the legislature to extend the current Civil Damage Act to broaden its coverage.[190] It is also interesting to note that the court rejected the plaintiff's argument that the Restatement (Second) of Torts section 483[191] would apply.[192] This could possibly be a critical factor if the Minnesota courts were to extend *Christian*[193] to allow a cause of action, under common law, to the injured consumer since contributory negligence would apparently still be available as a defense.

The actions of the California legislature, in abrogating the law as developed by the courts,[194] lends support to the proposition that this is a matter which should be left up to the legislatures of the states. The legislatures can determine whether any civil liability should be allowed on the basis of an illegal sale and if recovery is allowed then the legislatures can decide specifically who should be entitled to recover and who should be held responsible.

IV. Iowa

As earlier set forth, Iowa has a dram shop act.[195] Iowa's act creates a civil action against a liquor licensee who sells liquor to an intoxicated person, or who sells liquor to a person to the point of intoxication if the intoxicated person subsequently injures a third party.[196] In cases falling outside the dram shop act, however, the Iowa courts traditionally denied recovery on the basis that the proximate cause of any resultant injury is the consumption and not the sale.[197]

In 1977 in *Lewis v. State*,[198] the Iowa Supreme Court overruled these earlier cases by determining that the illegal sale of liquor to a minor may be the proximate cause of injuries to an innocent third party.[199] Consequently, the issue facing the Iowa courts today, is whether to extend the holding of *Lewis* and allow the intoxicated consumer to recover for his own injuries from a liquor licensee on the basis of an illegal sale. In *Lewis*, the Iowa Supreme Court determined that the statute prohibiting the sale of liquor to minors or intoxicated persons set a "minimum standard of care for conduct generally required of the reasonably prudent man under like circumstances

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189. *Id.* at _, 103 N.W.2d at 133.
190. *Id.* at _, 103 N.W.2d at 135.
191. *See* note 106 *supra.*
192. 258 Minn. at _, 103 N.W.2d at 135. The court stated the plaintiff cited "no authority either decisional or statutory in this state which might give him the benefit of that rule." *Id.*
193. 298 Minn. 101, 213 N.W.2d 618 (1973).
194. *See* notes 49-72 *supra.*
195. Iowa Code § 123.92 (1981); *see* note 14 *supra.*
196. *Id.*
197. *See* note 20 *supra.*
198. 256 N.W.2d 181 (Iowa 1977).
199. *Id.* at 191-92.

for purposes of a common law action of negligence based on the sale or furnishing of intoxicating liquor."[200] In making this determination, the court relied on the Restatement (Second) of Torts section 286.[201] The court determined that the statute prohibiting the sale of liquor to minors and intoxicated persons was intended to protect "the welfare, health, peace, morals and safety of the people of the state."[202] Applying the requirements of Restatement (Second) of Torts section 286 to the facts of *Lewis*, the Iowa Supreme Court determined that a common law action in negligence may be imposed in favor of an "innocent third party."[203] From this determination it is not entirely clear whether the intoxicated person or minor is intended to be protected under the statute. On the one hand, it can be argued that since the minor or intoxicated person who is served while intoxicated is a member of the general public, they should be allowed to recover for their own injuries. On the other hand, the court specifically held that an "innocent third party" can recover.[204] Thus, it is very possible that the court did not intend to allow the consumer himself to recover because he is not an *innocent third party*. It is also possible that by including the word "innocent," the Iowa Supreme Court was contemplating a situation where the third party who was injured was also an intoxicated person who was involved in the wrong which caused the accident. If the latter interpretation is proper, and a third party who was involved in the wrong committed cannot recover, then recovery should not be allowed to the consumer himself. This rationale would be consistent with the complicity defense which is currently recognized in Iowa.[205] The complicity defense applies in those cases which fall within the requirements of the dram shop act[206] if the third party who is injured by the intoxicated person also participated in the drinking activity resulting in the intoxication. The complicity defense provides that "a party who participates

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200. *Id.* at 189.

201. Restatement (Second) of Torts section 286 (1965) provides:

When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted. The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

202. 256 N.W.2d at 189, (citing IOWA CODE ch. 123 (1966)).

203. *Id.* at 192.

204. *Id.*

205. *See* Berge v. Harris, 170 N.W.2d 621 (Iowa 1969).

206. To fall within the requirements of Iowa's dram shop act the person must be served while he is visibly intoxicated or to a point of intoxication and must injure someone other than himself. *See* IOWA CODE § 123.92 (1981).

in the drinking activities during which the injuring party becomes intoxicated cannot recover under the dramshop act for injuries sustanied as a result of such intoxication."[207] It has been said that the rationale behind the defense of complicity is that "one cannot profit from his own wrong"[208] and that to allow recovery "would enhance instead of suppress the mischief . . . ."[209]

If it is determined, however, that the statute is intended to protect the consumer from his own incompetency,[210] then based upon Iowa's use of Restatement (Second) of Torts section 286, the consumer would clearly be entitled to bring an action in negligence based upon a violation of the statute.[211] If the consumer is entitled to base an action in negligence upon violation of the statute, the question becomes whether the doctrines of contributory negligence or assumption of risk bar his recovery.[212] While several jurisdictions hold that contributory negligence is an absolute bar to recovery,[213] other jurisdictions hold that contributory negligence is not a defense.[214] In those jurisdictions which deny the defense of contributory negligence the courts principally rely upon Restatement (Second) of Torts section 483.[215] Iowa, however, has not adopted section 483 and there is nothing to indicate that it will. Consequently, it appears that Iowa would allow the defense of contributory negligence or assumption of risk. In this context it should also be noted that in Iowa a "person who intentionally or negligently becomes intoxicated is held to the same standard of care as if he were sober."[216] It should also be noted that the only jurisdictions which hold that contributory negligence is not a defense do not have dram shop acts.[217] It is also interesting to note that New York, a jurisdiction with a dram shop act and well developed case law, allows recovery to an injured third party, but at the same time denies recovery to the injured consumer on the basis of his contributory negligence.[218]

Many jurisdictions deny recovery to either the injured consumer or to an injured third person on the basis that it is up to the legislature to extend such liability.[219] One argument relating to Iowa is that, since the court in

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207. 170 N.W.2d at 625.

208. Osinger v. Christian, 43 Ill. App. 2d 480, _, 193 N.E.2d 872, 875 (1963).

209. *Id.*

210. This is the approach taken by many courts. *See* notes 98, 102 *supra.*

211. *See, e.g.,* IOWA CODE § 123.47 (1981) (sale to a minor).

212. The doctrine of contributory negligence and assumption of risk are well established in Iowa. *See, e.g.,* King v. Barrett, 185 N.W.2d 210 (Iowa 1973).

213. *See* notes 57-73, 142-49, 181-94 *supra.*

214. *See* notes 102-31 *supra.*

215. *See* notes 102, 132 *supra.*

216. *Yost v. Miner,* 163 N.W.2d 557, 561 (Iowa 1968).

217. *See* notes 102-31 *supra.*

218. *See* notes 137-49 *supra.*

219. *See* notes 40, 46, 154, 163, 176, 190 *supra.*

Lewis v. State[220] went beyond Iowa's dram shop act to allow innocent third parties to recover, this is not necessarily a legislative matter and the court will be willing to further extend liability. An examination of Iowa's dram shop act and the holding of *Lewis*, however, reveals that the court is acting consistent with the legislature's intent. Iowa's dram shop act specifically lists those persons who are entitled to recover under the act, which only includes third parties.[221] In a similar manner, the holding in *Lewis* extends liability to innocent third parties injured by an intoxicated person.[222] Thus, while *Lewis* went beyond the Iowa dram shop act the holding of *Lewis* is consistent with the legislature's intent, in that recovery is being limited to third parties. Examined in this light, *Lewis* is only altering the circumstances under which a third party can recover rather than altering the legislative intent at to what parties should be allowed to recover.[223] If the court were to allow an intoxicated consumer to recover for his own injuries this would appear to be in direct contravention of legislative intent.[224] Because the statute spcifically lists those parties who will be allowed to recover, it would appear that a strong argument can be made that the legislature considered the issue and chose not to allow the consumer to recover for his own injuries.[225] This argument is somewhat reinforced by the actions of the California legislature.

California is one of the leading jurisdictions in allowing third parties to recover for injuries caused by intoxicated persons,[226] but this may be due to the fact that the California legislature abrogated the holdings of their case law.[227] Additionally, where it appeared that the California courts would deny an intoxicated minor the right to recover on the basis of contributory negligence,[228] the legislature stepped in and specifically gave the minor a cause of action for his own injuries if the minor was obviously intoxicated when he purchased the liquor.[229] Although the rationale for passing these

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220. 256 N.W.2d 181 (Iowa 1977).

221. Iowa's dram shop act specifically lists those persons who are entitled to recover: "Every husband, wife, child, parent, guardian, employer or other person who shall be injured . . . by any intoxicated person or resulting from the intoxication of any intoxicated person. . . . " IOWA CODE § 123.92 (1977).

222. 256 N.W.2d at 19.

223. In order for a liquor licensee to be liable under Iowa's dram shop act he must have served the injuring party to a point of intoxication or served the party while he was intoxicated. IOWA CODE § 123.92 (1981). The court, however, is extending potential liability to a liquor licensee in those instances where he unlawfully furnishes intoxicating liquor to a minor who subsequently becomes intoxicated and injures an innocent third party.

224. The apparent legislative intent is to limit recovery to third persons. This same concept has been adopted by other courts. *See* notes 155, 167 *supra*.

225. *See* notes 47, 155, 162 *supra*.

226. *See* notes 50-55 *supra*.

227. *See* CAL. BUS. & PROF. CODE § 25602 (West 1978).

228. *See* notes 61-68 *supra*.

229. *See* CAL. BUS. & PROF. CODE § 25602. (West 1978).

statutes has been questioned,[230] the California legislature's action does give credence to the argument that this matter should be left up to the legislature. A logical extention of this argument would be that if the legislature has addressed the issue of civil liability regarding the sale of liquor by enacting a dram shop act, then the courts should exercise restraint in extending liability beyond the purview of such an act.

There are several public policy arguments which can be made to deny the intoxicated consumer recovery for his own injuries. The argument most often made is that a person who knowingly becomes intoxicated, who acts in total disregard for his own safety, voluntarily assumes the risk of any resultant consequences and consequently should not be entitled to recover.[231] Another argument which is often made is that to expand liability under these circumstances would create a situation which would have such a potential for the imposition of liability that this matter should be left up to the legislature.[232] A third argument which has been recognized is that to allow recovery would encourage overindulgence.[233] A final basis for denying recovery is that a person should not be able to profit from his own wrong.[234] In a case totally unrelated to the sale of liquor, but somewhat analogous, the Iowa Supreme Court has recently denied a patient a cause of action in tort against her psychiatrist on the basis that he negligently failed to prevent her from murdering her husband.[235] The court ultimately denied recovery and held

> 'that a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws . . . . '[236]

By applying this same rationale to the situation where liquor is illegally sold to a minor who is subsequently injured, it would appear that the minor would not have a cause of action because he would have to base his cause of action on his own wrong.[237] If a court would find this argument persuasive, then the minor's parents would also have no cause of action because allowing such a cause of action would be contrary to the same public policy

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230. Cory v. Shierloh, _ Cal. 3d _, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).
231. *See* notes 70, 88, 142 *supra*.
232. *See* notes 40, 46, 165 *supra*.
233. *See* notes 68, 69 *supra*.
234. *See* notes 35, 68, 153 *supra*.
235. Cole v. Taylor, 301 N.W.2d 766 (Iowa 1981).
236. *Id.* at 768.
237. Although the Iowa Code does not specifically make it illegal for a minor to purchase alcoholic liquor or beer, the Code does prohibit a person under legal age from having liquor or beer in his possession or control. *See* IOWA CODE § 123.47 (1981). The apparent purpose behind prohibiting possession or control rather purchasing is to make the prohibition broader.

grounds.[238]

V. Conclusion

After examining the rationales set forth by other jurisdictions and in light of the current state of Iowa law, it appears that the person who is unlawfully sold intoxicating liquors and who is subsequently injured, should not be entitled to recover from a liquor licensee on the basis of the unlawful sale. This final determination is reinforced by several factors. In examining other jurisdictions with dram shop acts similar to Iowa's, absent willful or intentional misconduct,[239] no jurisdiction has allowed the intoxicated person to recover for his own injuries.[240] While several jurisdictions without dram shop acts have allowed recovery on the basis of negligence per se and held that contributory negligence is not a defense,[241] those jurisdictions had adopted Restatement (Second) of Torts section 483 which has not been adopted in Iowa. In those jurisdictions which do not have dram shop acts and have adopted section 483, a very persuasive argument can be made that the legislature has not chosen to act and that the statute was intended to protect minors and intoxicated people from their own actions. Consequently, on the basis of section 483, contributory negligence is not a defense and would not bar recovery. In jurisdictions with dram shop acts, since the legislature has chosen to act in this volital area, it would appear that such jurisdictions, including Iowa, should not absent willful misconduct, allow the intoxicated consumer to recover for his own injuries from the liquor licensee who unlawfully furnished the intoxicating liquor. If a cause of action should be recognized, then it should be created by legislative enactment.

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238. *See* Cole v. Taylor, 301 N.W.2d at 766.
239. *See* note 181 *supra*.
240. *See* notes 102-104, 108-11, 119-25, 128-31 *supra* and accompanying text.
241. *Accord*, notes 46, 47, 154, 163, 180 *supra*.