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A SOBERING NEW APPROACH TO LIQUOR VENDOR LIABILITY IN FLORIDA

COMMENT BY
LUCINDA BURWELL*

I. INTRODUCTION

Public awareness of the carnage caused by drunk drivers in recent years has been the impetus for state and local governments to implement programs to reduce the problems caused by those who drink and drive. Because many of the fatal trips undertaken by drunk drivers originate at drinking establishments, a primary focus has been on imposing liability on licensees for injuries caused by their inebriated patrons.¹ Such liability, or dram shop liability, exists in a majority of states today by legislative enactment or by developments in the case law.²

In states where dram shop liability does not exist, legislatures are being forced to reexamine the law in light of the frequency of alcohol related accidents and public demand for preventative action. Citizens' groups and governmental bodies alike have endorsed dram shop legislation as an appropriate state response to the drunk driving problem.³ In 1983, the Presidential Commission on Drunk Driving proposed a multifaceted program to reduce society's tolerance toward drunkenness and drunk driving and to build a badly needed "community consensus behind effective countermeasure programs" to prevent drunk driving.⁴ The report included a recommendation that all states enact dram shop laws.⁵ The National Highway Traffic Safety Administration of the Department of Transportation (NHTSA) likewise includes the existence of dram shop liability as one of twenty-one criteria for states seeking incentive grants for drunk driving programs.⁶

Opponents of dram shop liability contend that a bar owner⁷ is in

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¹ W. COZZENS & M. WAGNER, USE OF INTERMEDIARIES IN DWI DETERRENCE, VOL. III REP. No. DOT HS 806 536 (1983).
² For a list of states that impose liability, see infra notes 21-23.
³ Notable groups endorsing dram shop laws include: Remove Intoxicated Drivers (RID), Mothers Against Drunk Drivers (MADD), The Presidential Commission on Drunk Driving, and the National Highway Traffic Safety Administration of the Department of Transportation (NHTSA). J. Mosher, Legal Liabilities of Licensed Alcoholic Beverage Establishments: Recent Developments and Policy Implications 14 (June 1984) (unpublished manuscript).
⁴ PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 5 (1983).
⁵ Id. at 11.
⁶ Uniform Standards for Highway Safety Programs, 23 CFR § 1309.6(h) (1985).
⁷ For purposes of this paper, use of the term “bar owner” or “tavern owner” is not
no position to supervise a patron's actions once the patron leaves the premises, and thus the owner should not be held liable for any injuries which may later occur. Opponents also argue that from a moral standpoint, the responsibility for injuries caused by one who voluntarily becomes intoxicated should rest solely on that individual. Moreover, the imposition of liability on a tavern owner is inherently unfair because it increases the licensee's insurance premiums while minimizing the responsibility of the customer for his own negligent acts. Presently, thirteen states disallow dram shop liability for one or more of these reasons.

Supporters of dram shop liability rejoin that licensees should share in the responsibility of accidents caused by their drunk patrons. Experienced licensees are able to tell when an individual has had too much to drink or is underage, and they are in a position to prevent accidents by refusing to serve those who are likely to harm themselves or others. Proponents of dram shop liability contend that because tavern owners derive a profit from the sale of alcohol, they can purchase liability insurance and spread the cost by increasing prices. Advocates liken dram shop liability to products liability in that the seller should be responsible for the consequences of the use of his product. Additionally, supporters say that the ability of alcohol to impair one's judgment places a duty on the purveyor to exercise some care in preventing the impaired

meant to preclude others who are licensed vendors of liquor.


9. This stems from a traditional view that those who drink excessively are morally reprehensible and that placing part of the blame on a licensee will only encourage the drinker to continue his immoral behavior. See, e.g., Kindt v. Kauffman, 129 Cal. Rptr. 603 (Cal. Ct. App. 1976).


11. States that do not impose liability are: Arkansas, Delaware, Kansas, Maryland, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, South Carolina, Texas, Virginia, and West Virginia. NAT'L ASSOC. OF STATE ALCOHOL & DRUG ABUSE DIRECTORS, ALCOHOL AND DRUG ABUSE REPORT 21-22 (1984).


13. Id. at 1234.

14. As stated in a newspaper editorial:

The argument that the buyer should beware is hollow when the product inherently is capable of impairing the user's judgment. Alcohol is unusual among legal products in that respect. Anyone who drinks is at risk of miscalculating his own capacity on any given occasion; once he has made that error, he cannot judge his own condition. Heavy drinkers and those in the early, undetected stages of alcoholism are especially vulnerable to loss of control.

customer from driving and endangering others' lives.\textsuperscript{15} Thirty-eight states now impose some type of liability on liquor licensees.\textsuperscript{16}

This recent interest in dram shop liability has not been overlooked by Florida lawmakers. During the 1984 Regular Session, dram shop legislation was introduced but did not pass either house.\textsuperscript{17} As a result, a special task force on dram shop responsibility was appointed by the Governor's Highway Safety Commission as an ad hoc advisory body to study the possibility of developing legislation for the 1985 Regular Session of the legislature.

This Comment deals with the "dram shop" legislation proposed during the 1985 Regular Session. Although traditional dram shop legislation did not fare well in the session, one bill directed toward increasing dram shop responsibility received considerable support and suggests future action by the legislature in this area. This Comment provides an overview of current dram shop law, follows the proposed legislation through the session, and concludes with an analysis of the legislature's action in the area of dram shop liability.

II. OVERVIEW OF TRADITIONAL DRAM SHOP LIABILITY

Dram Shop legislation originated in the United States in the mid-1800's during the temperance movement as part of an effort to clarify a social stand against debauchery and public drunkards associated with town saloons.\textsuperscript{18} These civil acts were often promulgated to force tavern owners out of business by making them financially responsible for the support of the habitual drunkard's family.\textsuperscript{19} With the advent of the automobile and the repeal of prohibition, these statutes took on a new significance because many of them could be used to extend liability to bar owners for injuries caused in drunk driving cases.\textsuperscript{20} Today these statutes are strongly

\textsuperscript{15} Mosher, \textit{supra} note 8, at 780.

\textsuperscript{16} See \textit{infra} notes 21-23.

\textsuperscript{17} Fla. CS for HB 189 (1984), which would have imposed liability on any person who knowingly served alcoholic beverages to intoxicated persons, failed to pass the House by a 42-69 vote. \textit{FLA. H.R. JOUR.} 704 (Reg. Sess. 1984). Fla. SB 112 (1984), a similar bill, died in the Senate Comm. on Jud'y-Civ. \textit{FLA. LEGIS., HISTORY OF LEGISLATION, 1984 REGULAR SESSION, HISTORY OF SENATE BILLS} at 37, SB 112.

\textsuperscript{18} Temperance advocates, who believed that alcohol promoted immorality and led to the decay of traditional family values, sought dram shop acts when legislatures refused to take stronger action. These acts were primarily a symbolic gesture of a social stand against alcohol, and they were rarely enforced. Mosher, \textit{supra} note 8, at 773.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.} at 774.
endorsed as a method to deter alcohol-related accidents. In states where legislatures have been slow to act or have enacted laws with restrictive provisions, courts have often taken it upon themselves to provide recovery against vendors of alcoholic beverages through theories based on common law. Currently, twenty-three states have liability statutes. Fourteen states and the District of Columbia have imposed liability through court decisions based on common law, and nine states have both statutory and common law liability.

Numerous dram shop acts exist today, some dating back to the turn of the century. Other more recently enacted dram shop acts address the modern concerns posed by alcohol-related accidents. The acts vary widely from jurisdiction to jurisdiction, but all of them hold vendors liable for some injuries caused when they serve alcohol to a minor, habitual drunkard, or obviously drunk person. The habitual drunkard provisions are vestiges of the earlier acts and have largely fallen into disuse and have been challenged as unconstitutional in some states.


24. Some of the laws passed before the repeal of prohibition are so restrictive that modern suits are effectively precluded. For example, Colorado and Wyoming impose liability for serving a habitual drunkard only after the licensee has been notified in writing not to serve the patron. COLO. REV. STAT. § 13-21-103 (1973); WYO. STAT. § 12-5-502 (1977). In Georgia, a bar owner may be held liable for injuries caused after he serves a minor, but a suit may be brought only by the minor's parents. GA. CODE ANN. § 51-1-18 (1981). Illinois and Connecticut impose low statutory limits so that some suits are discouraged. ILL. ANN. STAT. § 43-135 (Smith-Hurd 1934 & Supp. 1985). CONN. GEN. STAT. ANN. § 30-102 (1975). Other statutes provide for broad recovery. See, e.g., IOWA CODE § 123.92 (1985); UTAH CODE ANN. § 32-11-1 (Supp. 1983).

25. W. COZZENS & M. WAGNER, supra note 1, at 3.

26. See Mosher, supra note 8, at 776.

In modern dram shop actions, licensees are frequently held liable for service to a minor or an obviously intoxicated individual. Dispensing alcohol to minors poses the greatest risk for licensees, because many courts permit recovery even though the minor was not intoxicated at the time of purchase or had purchased alcohol at other bars. Proving that the bar owner should have known that the customer was underage is usually a simple matter in light of strict alcoholic beverage control rules that require licensees to check identification.

Serving alcoholic beverages to one already intoxicated is also hazardous to the owner of a licensed establishment. Even though it is difficult to document the requisite appearance of obvious intoxication, injuries are likely to sympathize with a victim and hold the licensee liable. Commercial vendors are often viewed as "deep pockets," from which financial recovery is readily available whether or not the licensee has educated his employees as to reasonable server practices.

While statutory liability is imposed in most states, common law liability based on negligence principles is employed in some of the jurisdictions without dram shop laws. Under a negligence approach to liability, bar owners have a duty to protect the public from accidents by not serving individuals when it is reasonably foreseeable that the individuals may cause harm to themselves or to others. Courts have determined that serving one underage or inebriated creates a foreseeable risk of harm given the likelihood that the person will drive away from the bar. Service of alcohol to such individuals has been deemed a substantial cause of third party injuries. Common law liability has been imposed where the

30. Some courts have listed steps which may be required of a seller to ascertain whether the conduct of a prospective purchaser manifests the loss of control of actions or emotions that constitute intoxication. See, e.g., Mjos v. Village of Howard Lake, 178 N.W. 2d 862, 867 (Minn. 1970).
31. See Mosher, supra note 3, at 6.
32. Id. at 16-17.
33. See the states listed in supra note 22.
licensee serves a minor or a visibly intoxicated person.\textsuperscript{37}

In recent years, courts in jurisdictions that impose either common law or statutory liability have allowed recovery in cases where it previously has been unavailable to the injured victim.\textsuperscript{38} Many courts have overruled previous decisions which restricted liability.\textsuperscript{39} The courts of some states have expanded liability by broadly interpreting dram shop acts.\textsuperscript{40} Other courts, attempting to avoid harsh results, have used common law principles to extend liability provided under a restrictive statute.\textsuperscript{41} These courts have reasoned that the legislature, in passing a restrictive statute, did not intend to preempt the court's authority to find common law liability.\textsuperscript{42} Finally, some courts have used common law principles to extend liability to noncommercial vendors or party hosts as well as licensees.\textsuperscript{43}

The judiciary's modern inclination to expand liability in an effort to reduce alcohol-related accidents has generated uncertainty in the law as well as some interesting responses on the part of liquor licensees. Many who fear the imposition of liability are paying large settlements out of court.\textsuperscript{44} One explanation for this phenomenon is that insurance companies, by settling claims out of court, seek to limit the possibility that courts will decide to reverse previous decisions or to reinterpret statutory provisions.\textsuperscript{45} At the same time, those involved in the liquor industry have waged publicity campaigns to restore integrity to the industry and change

\begin{footnotesize}
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\item[37.] \textit{Alcohol and Drug Abuse Report, supra} note 11.
\item[38.] For a full discussion of a recent trend toward extending liability, see Mosher, \textit{supra} note 3, at 8-15.
\item[40.] \textit{See, e.g.,} Ross v. Ross, 200 N.W.2d 149 (Minn. 1972) (interpreting dram shop acts to include liability of a social host). This holding was later effectively overruled by the legislature, \textit{see Minn. Stat. Ann.} § 340.95 (West Supp. 1985).
\item[41.] \textit{See, e.g.,} Mason v. Roberts, 294 N.E.2d 884 (Ohio 1973).
\item[42.] 294 N.E.2d 884 at 887.
\item[43.] Traditionally, noncommercial vendors have not been held liable. Several courts have tried to impose liability on social hosts. \textit{See, e.g.,} Kelly v. Gwin nell 476 A.2d 1219 (N.J. 1984).
\item[44.] \textit{See generally} \textit{Alcohol and Drug Abuse Report, supra} note 11.
\item[45.] Mosher, \textit{supra} note 3, at 13.
\end{enumerate}
\end{footnotesize}
public opinion with regard to holding the licensee responsible.\textsuperscript{46}

III. FLORIDA LAW

In 1980, the Florida Legislature passed a restrictive dram shop law which provides:

A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.\textsuperscript{47}

With the passage of this law, Florida became one of the only states to recently pass a restrictive dram shop law.\textsuperscript{48} Florida's limited liability statute is not in keeping with traditional dram shop acts, and some have labeled the legislation "anti-dram shop" because it effectively restricts rather than establishes liability.\textsuperscript{49}

Prior to the passage of the 1980 Act, no statutory liability existed in Florida and the courts supported the common law rule that precluded liability.\textsuperscript{50} In 1963, however, the Florida Supreme Court carved out a single exception in the case of minors who, due to a lack of maturity, could not be held responsible for their negligent acts committed while under the influence of alcohol.\textsuperscript{51} As a

\textsuperscript{46} For example, the National Restaurant Ass'n recently approved a $30 thousand expenditure and formed a task force to define the role that the association should play with regard to drunk driving. The task force recommended donating $7.5 thousand to Students Against Drunk Driving (SADD), discouraging practices which foster overconsumption, and publishing a guest comment in \textit{NRA News} by Candy Lightner of Mothers Against Drunk Drivers (MADD) in order to "reverse the swing of public opinion." Memorandum from Michael Grisanti, Chairman of Task Force on Alcohol Awareness, to the Executive and Finance Committees (Mar. 12, 1984).

\textsuperscript{47} \texttt{FLA. STAT.} § 768.125 (1983).

\textsuperscript{48} California passed a restrictive statute in 1978. The California statute allows a cause of action only if a licensee serves an "obviously intoxicated minor." \textit{See} \texttt{CAL. BUS. & PROF. CODE} § 25602.1 (Deering Supp. 1985).

\textsuperscript{49} The legislative intent that the statute limit the existing liability of liquor vendors is readily apparent from its title which includes the following phrase: "providing that a person selling or furnishing alcoholic beverages to another person is not thereby liable for injury or damage caused by or resulting from the intoxication of such other person." Ch. 80-37, 1980 \texttt{Fla. Laws} 130.

\textsuperscript{50} Barnes v. B.K. Credit Serv., Inc., 461 So. 2d 217, 219 (Fla. 1st DCA 1984).

\textsuperscript{51} \textit{Id.}
result of the decision in *Davis v. Shiappacossee*, civil damages were recoverable against a liquor licensee for the first time in Florida.

The *Davis* case involved a suit against a licensee by the parents of a minor who had purchased alcohol from the defendant and was subsequently killed in an automobile crash. The court found that the tavern owner breached the duty required by section 562.11, Florida Statutes, which was enacted to preclude "harm that can come to one of immaturity by imbibing such liquors." In finding the requisite foreseeability, Justice Thomas stated that "[f]rom their ages it must have been apparent to anyone who bothered to look that [they] were but boys." The fact that they were seated in a "dangerous instrumentality" when the transaction occurred and left the bar under the "drivership of a 16 year-old," should have made it foreseeable and probable that "trouble for someone was in the offing."

After *Davis*, lower courts were plagued by questions about the extent to which liability should be imposed. It was clear that a cause of action could exist against a vendor who served a minor in violation of statute, but it was not settled as to when harm could reasonably be foreseen. Equally unsettled was whether a third party could sue the licensee for injuries incurred or whether the privilege extended only to the minor himself and to his family. The Florida Supreme Court finally answered this question in the affirmative.

After the 1980 Act became law, some question existed whether a cause of action could be maintained under section 562.11 based on

52. 155 So. 2d 365 (Fla. 1963).
53. Defendant operated the Estuary Bar where orders for alcoholic beverages were received from persons in cars parked on the premises and were filled by delivery to the customers while occupying their cars. *Id.* at 366.
54. FLA. STAT. § 562.11 (1957) (current version at FLA. STAT. § 562.11 (Supp. 1984)).
55. *Davis*, 155 So. 2d at 367.
56. *Id.*
57. See, e.g., *Stanage v. Bilbo*, 382 So. 2d 423 (Fla. 5th DCA 1980) (no liability where companion of minor stumbled while holding a shotgun since harm was not foreseeable); *Rio v. Minton*, 291 So. 2d 214 (Fla. 2d DCA 1974) (no liability where it was not foreseeable that adult accompanying minor would allow him to drive home). But see *McCarthy v. Danny's West, Inc.*, 421 So. 2d 756 (Fla. 4th DCA 1982) (bar owner had no right to assume that adult accompanying minor would not allow him to drive home).
58. See, e.g., *Barber v. Jenson*, 428 So. 2d 770 (Fla. 4th DCA 1983), *quashed*, 450 So. 2d 830 (Fla. 1984) (both holding that no third party action is available); *Migliore v. Crown Liquors of Broward, Inc.*, 425 So. 2d 20 (Fla. 4th DCA 1982), *quashed*, 448 So. 2d 978 (Fla. 1984). But see *Prevatt v. McClennan*, 201 So. 2d 780 (Fla. 2d DCA 1967).
59. *Migliore*, 448 So. 2d at 978.
common law theory, notwithstanding the fact that a cause of action could not be maintained under section 768.125. This issue arose in a case in which appellants claimed that appellee sold liquor to a minor in violation of section 562.11, but appellants failed to allege that the sale was made "willfully" as required by section 768.125.60 On review, the Florida Supreme Court held that section 768.125 did not create a cause of action for third parties, rather it constituted a limitation on the existing liability by requiring that the sale be made willfully.61 Thus, section 768.125 presently controls civil damage claims in Florida, and liability cannot be extended beyond the terms of the statute by employing common law principles, as can be done in some states.

IV. PROBLEMS WITH EXISTING LAW AND RECOMMENDATIONS OF THE TASK FORCE

Section 768.125 has not significantly altered the law in Florida. Consequently, it has not been a catalyst in curbing alcohol related traffic accidents. Although the statute has withstood an attack on its constitutionality,62 it has been heavily criticized,63 and at least one commentator has strongly urged its repeal.64

One problem with the statute is that it creates liability for service to one who is "habitually addicted" to alcohol. This provision stems from the largely outdated "habitual drunkard" class defined in the older statutes.65 Since 1943, it has been a crime in Florida to serve a habitual drunkard after the bar owner received written notice from a relative of the alcoholic.66 However, courts have refused to find civil liability under a common law theory where the notice

60. Armstrong, 439 So. 2d 1009 (Fla. 2d DCA 1983), aff'd, 451 So. 2d 480 (Fla. 1984).
61. Armstrong, 451 So. 2d at 480.
62. In Barnes v. B.K. Credit Serv. Inc., 461 So. 2d 217 (Fla. 1st DCA 1984), the statute was attacked as unreasonable, arbitrary, and capricious, and in violation of due process because it places a different standard of care on tavern owners in their sale of alcohol to minors as compared to adults. The court found that the statutory provisions were reasonably related to the legitimate state purpose of safeguarding minors because of their inexperience with both drinking and driving.
63. As one judge stated: "In an era when even more severe legislation is being enacted to cut down on the evil of drunk driving, it is amazing that Section 768.125, Florida Statutes (Supp. 1980) was ever adopted." MacArthur v. Travelers Ins. Co., 400 So. 2d 20, 20 (Fla. 4th DCA 1981) (Letts, J., concurring).
65. See supra notes 26-27.
66. Ch. 22633, 1945 Fla. Laws 184 (current version at Fla. Stat. § 562.50 (1983)).
requirement in the criminal statute is not met. 77 Section 786.125 provides no indication whether there is a notice requirement as in the criminal statute nor does it form any standard for determining who is an alcoholic if notice is not necessary. Because courts have not addressed this issue, the lack of any standard will inevitably lead to inconsistency in the case law.

Another problem arises from the requirement that the sale to a minor be "willful." The term denotes a knowing or intentional act, 68 yet courts have not so interpreted it. One lower court conceded that a "willful" sale to a minor requires knowledge that the recipient is underage but found that knowledge may be established by circumstantial as opposed to direct evidence. 69 Thus, if the appearance of the minor is such that the vendor should have known that he was underage, knowledge may be inferred. 70 The term willful has no place in the law if the bar owner is to be held to the standard of what a "reasonable man" should have known.

Finally, the most widely criticized aspect of the law is that, unlike most dram shop legislation, it does not provide a cause of action for damages resulting from serving an obviously intoxicated person. Accordingly, in many cases where the intoxicated individual is judgment proof, the victim will go uncompensated even though the licensee may have acted irresponsibly in serving the intoxicated patron. Although some state courts have established a cause of action through the common law, 71 Florida courts have faithfully clung to the old common law and the statute, refusing to create a cause of action. 72

In 1984, the Governor's Highway Safety Council appointed a special Task Force on Dram Shop Responsibility. 73 This group was charged with examining all information pertinent to the alcoholic beverage industry's potential role in reducing drunk driving and

67. Roberts v. Roman, 457 So. 2d 578 (Fla. 2d DCA 1984).
68. "The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." Black's Law Dictionary 1434 (5th ed. 1979).
69. Willis v. Strickland, 436 So. 2d 1011, 1012 (Fla. 5th DCA 1983).
70. Id. (whether the vendor should have known from his appearance that the customer was a minor is, of course, a question of fact for the jury).
71. See the states listed in supra note 22.
72. See Barnes, 461 So. 2d at 218-19.
73. Gov.'s Highway Safety Council, Task Force on Dram Shop Responsibility, Final Report (Mar. 1985). Mr. Leonard R. Mellon, Executive Director of the Department of Highway Safety & Motor Vehicles served as chairman of the Task Force. Fourteen other members were chosen to represent the alcoholic beverage, entertainment, and hospital industries, concerned citizens, and government. Id. at 4.
developing specific recommendations. Although its final report included suggestions in the administrative, educational, and legislative areas as part of a comprehensive approach against drunk driving, the primary purpose of the Task Force was to review the issue of dram shop legislation in Florida.

Aware of the problems with Florida's current statute as well as those associated with traditional dram shop legislation in other states, the Task Force recommended that the law must, to protect the public interest:

1. Define its purpose and the classes to be protected by it;
2. Identify illegal, reckless, negligent, or irresponsible services as the proximate cause of injury to a third person and the primary focus of concern of the statute;
3. Hold that responsible establishment actions are a defense to lawsuits;
4. Provide for recourse by an establishment for frivolous lawsuits.

It was additionally suggested that "any properly written statute must provide a [clearer] standard by which to judge server and establishment practices than simply 'service to obviously intoxicated customers.'"

Although the Task Force offered advice in drafting traditional dram shop legislation, it recommended that if prevention of driving under the influence is the primary concern, then a different strategy should be chosen. The Task Force recognized that although an injured third party should have some recourse against irresponsible serving practices, "responsible establishments acting in a reasonable manner must not become easy 'deep pockets' through litigation allowed by common law or statute." As an al-

74. Id. at 3.
75. The final report set forth twenty recommendations including suggestions that governmental agencies continue to educate the community and industry on issues involving responsible alcoholic beverage use and distribution, that the Department of Education expand efforts to educate secondary school students concerning alcohol and drug abuse, that all persons issued a Florida driver's license for the first time meet required alcohol abuse education standards, and that the state require mandatory incarceration for all DUI offenses. Id. at ii-vii.
76. Id. at 21.
77. Id.
78. Id. at 24.
79. Id. at 23.
80. Id. at 24.
81. Id. at 23.
ternative to traditional dram shop legislation, the Task Force offered the following suggestions to the legislature: (1) that a law be passed making it a crime to serve alcoholic beverages to an obviously intoxicated person;\(^82\) (2) that a law be enacted which would allow the Division of Alcoholic Beverages and Tobacco to take firm action against those who serve obviously intoxicated persons in violation of the law; (3) that the Crimes Compensation Fund be expanded to include payments to victims of DUI offenses and their families;\(^83\) and (4) that fines of DUI offenders and administrative fines from retail licensees be placed into this fund.\(^84\)

V. LEGISLATIVE HISTORY

The 1985 Regular Session saw five bills introduced which would have amended Florida's dram shop act.\(^85\) While the bills differed in the scope of liability imposed, three bills would have extended liability to bar owners for injury or damage resulting from furnishing alcoholic beverages to a "visibly intoxicated" person.\(^86\) Senate Bill 159 and its companion, House Bill 75, would have reworded Section 768.125 Florida Statutes to provide:

Any person who willfully and unlawfully sells, gives, or furnishes, or otherwise provides alcoholic beverages to a person who, through reasonable procedures, should have been known to be not of lawful drinking age or who knowingly serves a person habitually addicted to the excessive use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.\(^87\)

Although a staff analysis of House Bill 75 called this a "restate-

\(^{82}\) Id. at 24. Under present law, it is a crime to serve a minor, Fla. Stat. § 768.125 (1983), or, with notice, a habitual drunkard, Fla. Stat. § 562.50 (1983), but it is not against the law to serve one who is visibly intoxicated.

\(^{83}\) For a discussion of the current law on the Crimes Compensation Fund, see infra note 100.

\(^{84}\) Final Report, supra note 73, at 24-26.


\(^{86}\) Fla. HB 75 (1985); Fla. HB 95 (1985); Fla. SB 159 (1985).

ment” of the current law regarding sale to minors and habitual offenders, it was reworded in a way that could have been interpreted as extending liability to all persons, not just bar owners.

House Bill 95 differed slightly from Senate Bill 159 and House Bill 75 in that it did not impose the reasonable man standard with regard to determination of the individual's lawful age. In addition, House Bill 95 omitted the requirement of “excessive” use in regard to the habitually addicted. The bill was referred to the House Judiciary and Appropriations Committees but was never taken up by either committee. House Bill 75 received a favorable report by the House Subcommittee on Consumer, Family and Probate but was never considered by a full committee. Senate Bill 159 was never considered by a committee.

Senate Bill 20 would not have imposed liability on bar owners or private persons for serving a visibly intoxicated person. It would have made private party hosts, as well as bar owners, liable for “willfully and unlawfully” furnishing alcoholic beverages to minors or for “knowingly” serving one who is habitually addicted to alcohol. This bill was discussed at a presession meeting of the Judiciary-Civil Committee, but was temporarily postponed pending a report from the Task Force and was not taken up again by the committee.

House Bill 46 would have increased the liability of persons who “unlawfully” sell or furnish alcoholic beverages to a minor by deleting the requirement that the sale or furnishing be “willful.” The bill was substantially amended by the House Judiciary Committee to incorporate recommendations of the Task Force and, as amended, excluded any provision for increasing civil liability.

89. Fla. HB 95 (1985); Fla. SB 159 (1985); Fla. H.B. 75 (1985).
91. Id. at 10.
VI. Senate Bill 1225

While traditional dram shop legislation was not well received by the 1985 legislature, a bill incorporating recommendations of the Task Force was passed by the Senate.\(^7\) Although the bill would not have affected existing law regarding civil liability of bar owners or private persons, it did address the issue of bar owners' responsibility and proposed some far-reaching changes in the current law.

Senate Bill 1225 would have imposed an additional fine of fifty dollars on persons convicted of, pleading guilty or nolo contendere to a charge of driving under the influence or driving while intoxicated.\(^8\) A portion of the fine would have been deposited in a Drunk Drivers' Victims' Compensation Trust Fund created by the bill.\(^9\) A victim of a drunk driver or the relative of a victim who died as a result of an automobile accident involving a drunk driver could have received compensation from the fund for unreimbursed expenses incurred as a result of the accident.\(^10\)

The bill as originally proposed would have deposited eighty percent of the fine in the Victims' Compensation Fund.\(^11\) However, this was amended to fifty percent by the Judiciary-Criminal Committee.\(^12\) Although the original bill set up responsibilities for the Department of Business Regulations, it made no provision for funds to provide these services. The bill was amended so as to provide for the expenses which would be encountered in carrying out the services created by the bill.\(^13\) The remaining portion of the funds created by the additional DUI and DWI fines would have gone to a Drunk Driving Information Trust Fund, also created by the bill.\(^14\) One third of the monies in the Drunk Driving Information Trust Fund would have been appropriated to the Department of Education to inform the public of DWI and DUI laws and the enforcement policies of those laws.\(^15\) The Department would have also provided drunk driving educational programs in the public

\(^8\) Fl. SB 1225, sec. 1 (1985) (proposed Fl. Stat. § 316.1937 (1)).
\(^9\) Id. (proposed Fl. Stat. § 316.1937(2)).
\(^10\) Id. The 1985 Florida Legislature passed SB 106 which expanded the class of victims covered under the Florida Crimes Compensation Act to include victims of drunk driving accidents. Ch. 85-326, 1985 Fl. Laws.
\(^11\) Fl. SB 1225, sec. 1 (1985) (proposed Fl. Stat. § 316.1937(1)).
\(^12\) Fl. CS for SB 1225 sec. 1 (1985),(proposed Fl. Stat § 316.1937(3)).
\(^13\) Id.; Fl. S. Comm. on Judy-Civ., tape recording of proceedings (Apr. 29, 1985) (on file with committee) [hereinafter cited as Apr. 1985 Jud'y-Crim. Tape].
\(^14\) Fl. CS for SB 1225, sec. 1 (1985) (proposed Fl. Stat § 316.1937(1)).
\(^15\) Id. (proposed Fl. Stat. § 316.1937(3)).
schools, published informational pamphlets, and provided for print, billboard and broadcast advertising in an effort to deter driving under the influence of alcohol.¹⁰⁶

Two-thirds of the monies in the Drunk Driving Information Trust Fund would have been appropriated to the Department of Business Regulation.¹⁰⁷ The Committee Substitute for Senate Bill 1225 provided that at least eighty per cent of this amount would have been used to enforce beverage laws prohibiting the unlawful sale of alcoholic beverages.¹⁰⁸

The remaining monies in the Drunk Driving Information Trust Fund allocated to the Department of Business Regulation would have been used to help establish responsible vendor programs.¹⁰⁹ This provision would have required a vendor, prior to approval of licensure, to submit an acceptable plan to the Division of Alcoholic Beverages requiring the applicant's current and future employees to participate in an educational program. As clarified in the committee substitute to the bill, such programs would have included prevention of sales to underage persons and obviously intoxicated persons, and prevention of trafficking of drugs and narcotics.¹¹⁰ The Division would have assisted vendors by providing information regarding the establishment of such programs, promotion of designated driver plans, and coordination of taxi services or other services to assure that an intoxicated person has a means of transportation other than his own vehicle.

The Division would have considered any responsible vendor program established by a licensee in order to mitigate a violation of the beverage laws.¹¹¹ Further, the bill provided that insurers, in determining premiums for liability insurance, would make allowance for any risk reduction resulting from the implementation of a responsible vendor program.¹¹² Originally, the submission of an approved educational program prior to licensure applied only to bar and tavern licensees.¹¹³ However, after spokesmen for the Division of Alcoholic Beverages noted that convenience stores and service stations were the source of many problems regarding sales to mi-

¹⁰⁶. Id.
¹⁰⁷. Id.
¹⁰⁸. Id.
¹⁰⁹. Fla. CS for SB 1225, sec. 3 (1985) (proposed FLA. STAT. § 562.51(1)).
¹¹⁰. Id.
¹¹¹. Id. (proposed FLA. STAT. § 562.51(2)).
¹¹². Id. (proposed FLA. STAT. § 562.51(3)).
nors, this provision was changed to include all licensees.114

Perhaps the most fundamental change Senate Bill 1225 would have made in the current law is that it prohibited service of alcoholic beverages to obviously intoxicated persons. Although the bill as originally introduced prohibited the dispensation of alcoholic beverages "to any person who is obviously intoxicated,"115 the bill was amended in the Senate Judiciary-Criminal Committee to prohibit dispensing "on licensed premises."116 The Task Force did not intend for the bill to cover all persons who serve obviously intoxicated patrons. Rather, only those who dispense such beverages in a sales context or for compensation would have been affected by the bill.117 The amendment was added to clarify that intent.118 The bill further provided a definition of "obviously intoxicated person." "A person is obviously intoxicated . . . if the person's behavior makes it apparent that the person is under the influence of alcohol or other substances to the extent that he does not have normal use of his mental or physical faculties and poses a clear danger to himself or others."119

Violation of the prohibition against serving obviously intoxicated persons would have been a first degree misdemeanor, punishable as provided in sections 775.082, 775.083, or 775.084.120 An additional administrative fine of up to $5 thousand could have been imposed for each violation.121

Senate Bill 1225 as originally proposed would have given the Division of Alcoholic Beverages the right to suspend a license without a hearing if probable cause existed to believe that the licensee regularly, systematically, or flagrantly served alcohol to minors or to obviously intoxicated persons.122 However, opposition to the provision and questions regarding its constitutionality led to its being stricken by the Committee on Judiciary-Criminal.123

Committee Substitute for Senate Bill 1225, as offered by the Judiciary-Criminal Committee, passed that committee and the Sen-

114. Fla. SB 1225 sec. 3 (1985), (proposed Fla. Stat. § 562.51(1)).
115. Fla. SB 1225 sec. 3 (1985), (proposed Fla. Stat. § 562.15(1)).
117. Id.
118. Fla. CS for SB 1225, sec. 2, (1985) (proposed Fla. Stat. § 562.115(1)).
119. Id.
120. Id. (proposed Fla. Stat. § 562.115(2)).
121. Id. (proposed Fla. Stat. § 562.115(3)).
After an amendment clarifying that the bill did not impose civil liability on licensees, the bill also passed the Commerce and Appropriations Committees. The full Senate passed the bill by a 32-0 vote and it was sent to the House Committee on Appropriations. However, the Senate passage of the bill occurred on May 29, with only two days remaining in the session. Primarily due to a lack of time, the bill died in the House Appropriations Committee.

Approximately 60,000 persons are convicted of or plead guilty or nolo contendere to DUI or DWI charges each year in Florida.

The additional fifty dollar fine imposed by Senate Bill 1225 would have created an approximate annual revenue of $3 million, half of which would have been used to compensate victims of drunk drivers through the Victims' Compensation Fund. Of the remaining $1.5 million, approximately $500 thousand would have been appropriated to the Department of Education for advertising and public education as provided by the bill.

Approximately $1 million per year would have been appropriated to the Department of Business Regulation to enforce the laws regarding unlawful sales and to supervise the employee responsibility programs set up by the vendors. The Department estimated that the enforcement provisions of the bill would have required an additional twenty-seven investigators, one for each of the twenty-one district offices throughout the state plus a second additional agent for the more populous areas such as Tampa, Miami, Orlando, Fort Lauderdale, and Jacksonville. The total estimated cost of the additional personnel was $800 thousand. An additional $200 thousand would have been necessary for the enforcement provisions.
departmental monitoring of vendors' employees' responsibility programs.136

The primary responsibility and expense for setting up the programs would have fallen on the state's 35,000 alcoholic beverage vendors. Because the industry has a high employee turnover rate, the educational programs would have to be run on a continuing basis.137 The Department's role in the vendor programs would have been a supervisory one, explaining the law and enforcement policies to vendors and providing technical expertise in setting up the programs.138

VII. ANALYSIS

Although there are many supporters nationwide of dram shop legislation as an appropriate deterrent for drunk driving, the failure of the legislature to adopt a dram shop act this year reveals that Florida is not ready or willing to adopt as state policy the civil liability of liquor licensees. Of the five bills pertaining to traditional dram shop liability, none were seriously considered by a committee.139

On the other hand, Committee Substitute for Senate Bill 1225 passed the Senate, and the groundwork has been laid for its passage by the full legislature next year. Although there are some drawbacks to the bill, it is a step forward in a state where a strong liquor lobby has defeated almost all liability legislation in recent years.

One criticism of the bill is that it appears to increase the injured victims' chances of recovery through the Victims' Compensation Fund, but the funds actually provided are insufficient. The public should not be deceived into thinking that Senate Bill 1225 would have provided any real compensation for those injured. In many instances, $1.5 million would not cover the damages incurred in a single personal injury or wrongful death case,140 let alone the dam-

136. Id.
137. Id.
138. Id.
139. See supra note 87 and accompanying text. SB 20 was discussed by the Senate Comm. on Jud'y-Civ. but was temporarily postponed and never taken up again. Fla. Legis., History of Legislation, 1985 Regular Session, History of Senate Bills at 3, SB 20.
140. The Alcohol and Drug Abuse Report provides examples of the tremendous amount of damages claimed by those who institute dram shop suits. For example, a Colorado case involving a defendant lounge's employee who allegedly continued to serve a visibly intoxicated patron who later injured plaintiff in an auto accident was settled for $9,999,999.99. A California case involving a plaintiff who suffered severe and permanent brain trauma was
ages incurred in the many alcohol-related accidents in Florida each year.\textsuperscript{141} It is not surprising that the liquor industry would support Senate Bill 1225 since passage of the bill would reinforce the state's current policy precluding civil liability.

Whereas Senate Bill 1225 may not be sufficient with regard to its provision for compensation to injured victims, traditional dram shop legislation as a vehicle for recovery has disadvantages as well. Under traditional civil liability, time consuming, expensive litigation is the only means of recovery. Many times the evidence to maintain a dram shop suit is lacking. Moreover, those who have valid claims are discouraged from filing suit because of the uncertainty of an award and high attorney's fees.\textsuperscript{142} Additionally, civil liability does not provide compensation to those injured by one who served himself or who was served by a social host, thus many victims may not recover.\textsuperscript{143} Clearly, there are problems with compensating innocent parties under both approaches.

The strength of the bill is its focus on prevention. Senate Bill 1225 is more likely to prevent DUI than traditional dram shop liability for three reasons. First, the standard of "visibly intoxicated" persons is vague and inconsistently applied.\textsuperscript{144} Because servers cannot be certain as to what standard they will be held, they cannot take effective preventative action. Further, juries are unsympathetic toward vendors since they generally identify more with the victims. Conversely, under Senate Bill 1225, "obviously intoxicated" is defined and vendors are required to submit an educational program before licensure which will instruct employees as to their responsibilities and the standards which they must meet.

Secondly, traditional dram shop laws do not provide any defense for the responsible establishment that takes precautions against improper service to customers. Thus, there is no incentive to instigate any preventative procedures, because even the most careful licensee can be held liable for a single employee's misjudgment. Alternatively, Committee Substitute for Senate Bill 1225 allows the division to consider preventative practices in mitigation of penal-

\textsuperscript{141} In 1984, 16\% of the 237,511 accidents on Florida highways were alcohol related. Drunk drivers were involved in 47\% of the 2,856 deaths in automobile accidents. Dep't of Highway Safety & Motor Vehicles, Florida Traffic Accident Facts (1984), at 1.

\textsuperscript{142} W. COZZENS & M. WAGNER, supra note 1, at 7-8.

\textsuperscript{143} Mosher, supra note 3, at 17.

\textsuperscript{144} COLMAN, DRAM SHOP LAWS; A PREVENTION TOOL; PREVENTION RESEARCH GROUP at 5.
ties for violation of the beverage laws.

Finally, insurance companies tend to settle dram shop suits and make up the expenditure by raising premiums.\footnote{W. COZZENS & M. WAGNER, supra note 1, at 6.} Vendors generally rely upon insurance protection in the event that they are held liable. Accordingly, they have no reason to establish responsible server practices.\footnote{Id.} In an effort to remedy any disincentive due to the availability of insurance, Committee Substitute for Senate Bill 1225 would have provided that insurance companies base their premiums on preventative policies.\footnote{CS for SB 1225, sec. 3 (1985) (proposed Fla. Stat. § 562.51(3)).} Therefore, licensees would have had a financial impetus to enact such programs.

If Senate Bill 1225 is passed next year, the legislature should consider amending section 768.125 so that the two statutes can work together to deal with drunk driving accidents. The outdated "habitual drunkard" section of the statute should be repealed because it fails to provide a practical standard servers can use in implementing preventative action. The term "willful" with regard to sales to minors should likewise be deleted, and emphasis should instead be placed on what the server should have known through reasonable server practices. Finally, the statute should provide a defense for licensees with responsible service programs as further encouragement to establish such programs. Additionally, Senate Bill 1225 should be amended to provide that monies collected for unlawful sales be placed in the Victims' Compensation Fund so that more funds will be available for compensation.

Senate Bill 1225 evinces a positive movement by the legislature to prevent deaths on our highways by reducing the likelihood that drunk drivers will be on the road. Although the bill would not effectively increase the compensation awarded to injured parties, it would decrease the possibility that such injuries would occur by encouraging liquor vendors to take preventative measures. Moreover, the bill reinforces the idea that everyone, not just those who sell alcohol, must take responsibility for the problems caused by the use of alcohol in our society. Senate Bill 1225 offers a comprehensive approach to prevent the tragedies caused by drunk driving. If this bill is passed next year, Florida will have adopted a refreshing alternative to traditional dram shop legislation.