

Dram Shop Liability in Indiana: Analysis of *Ashlock v. Norris* and the New Civil Statute

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I. INTRODUCTION

As a result of increasing public awareness and concern with the high incidence of alcohol-related automobile collisions and the horrendous injuries they often produce, there has been a substantial increase in dram shop litigation. Dram shop liability has been imposed nationwide on a variety of defendants. Taverns, restaurants, liquor stores, and commercial and social hosts, including employers, have been held liable for selling, serving, or otherwise providing alcoholic beverages to individuals who they knew or reasonably should have known were intoxicated.¹ Numerous states have adopted some form of dram shop liability. While some state legislatures have enacted dram shop statutes,² courts in other states have extended the common law to include dram shop liability.³

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¹See *Sutter v. Hutchings*, 327 S.E.2d 716 (Ga. 1985) and the twenty-two out-of-state decisions cited therein. See also *Graham, Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLIAMETTE L.J. 561 (1980); Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D.L. REV. 445 (1983); Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013 (1983); Annot., 97 A.L.R.3d 528 (1980).

²See, e.g., ALA. CODE § 6-5-71 (1975); ALASKA STAT. § 04.21.020 (Supp. 1984); COLO. REV. STAT. § 13-21-103 (1974); CONN. GEN. STAT. ANN. § 30-102 (West 1975); FLA. STAT. ANN. § 768.125 (West Supp. 1985); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 123.92 (West Supp. 1985); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1985); MINN. STAT. ANN. § 340.95 (West Supp. 1985); N.Y. GEN. OBLIG. § 11-101 (McKinney 1978 & Supp. 1984-85); N.D. CENT. CODE § 5-01-06 (Supp. 1985); OHIO REV. CODE ANN. § 4399.01 (Page 1982); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969); R.I. GEN. LAWS § 3-11-1 (1976); UTAH CODE ANN. § 32A-14-1 (Supp. 1985); VT. STAT. ANN. tit. 7, § 501 (1972).

Indiana recently adopted a civil dram shop liability statute. See *infra* notes 10-12 and accompanying text.

³See, e.g., *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973) (applying District of Columbia law); *Dodd v. Slater*, 101 Ga. App. 362, 114 S.E.2d 170 (1960); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1967); *Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982); *Davis v. Billy's Con-Teena, Inc.*, 284 Or. 351, 587 P.2d 75 (1978); *Cullan v. O'Neil*, 20 Wash. App. 32, 578 P.2d 890 (1978).

Initially, this Article will discuss the development of dram shop liability in Indiana and will then focus on *Ashlock v. Norris*,⁴ a recent case which extended dram shop liability to a patron in a bar who had gratuitously furnished drinks to another patron. The Article will briefly discuss the new civil dram shop liability statute and will conclude with an analysis of dram shop liability under the Indiana Comparative Fault Act.

II. THE DEVELOPMENT OF DRAM SHOP LIABILITY IN INDIANA

In Indiana, there are two criminal statutes which, through judicial interpretation, have come to provide the basis for civil liability in dram shop cases.⁵ In addition, Indiana courts have held that there is a common law duty that applies in such cases.⁶ Indiana Code section 7.1-5-10-15, which prohibits furnishing alcohol to a person known to be intoxicated, provides in relevant part:

It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated.⁷

Indiana Code section 7.1-5-7-8, which prohibits furnishing alcohol to a minor, provides that:

It is a Class C misdemeanor for a person to sell, barter, exchange, provide or furnish an alcoholic beverage to a minor.⁸

Indiana courts have consistently held that these criminal statutes establish a civil duty and thereby provide the basis for imposing civil liability for personal injuries and damages resulting from conduct in violation of these statutes.⁹

The 1986 Indiana legislature recently approved Senate Bill No. 85 which specifically deals with civil dram shop liability.¹⁰ This new statutory section provides in relevant part:

- (a) As used in this section, "furnish" includes barter, deliver, sell, exchange, provide, or give away.
- (b) A person who furnishes an alcoholic beverage to a

⁴475 N.E.2d 1167 (Ind. Ct. App. 1985).

⁵IND. CODE §§ 7.1-5-10-15 and 7.1-5-7-8 (Supp. 1985). See *infra* text accompanying notes 7-8 for the relevant text of these statutes.

⁶*Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966). See also *infra* text accompanying note 17.

⁷IND. CODE § 7.1-5-10-15 (Supp. 1985).

⁸IND. CODE § 7.1-5-7-8 (Supp. 1985).

⁹See *infra* notes 13-42 and accompanying text.

¹⁰Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

- (1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and
- (2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint.

This act will apply to actions accruing on and after April 1, 1986.¹² However, it does not appear that this new statutory section will have a major effect upon civil dram shop cases. In fact, the section may only codify the common law which had developed to this point.

Nearly twenty years ago, in *Elder v. Fisher*,¹³ the Supreme Court of Indiana held that the violation of the Indiana statute then in effect which prohibited the sale of intoxicating beverages to minors would constitute negligence per se in a personal injury action.¹⁴ In so holding, the court stated that the statute was designed to protect against more than the immediate and obvious effects of alcohol upon minors who consumed it.¹⁵ Because the legislature was concerned with the economic welfare, health, peace, and morals of minors, the court determined that it was probable that the legislature intended the statute to protect the citizens of Indiana from possible harm resulting from the use of intoxicating liquor by minors.¹⁶ In *Elder*, the court further held that, even in the absence of a specific statutory provision, "the general principles of common law negligence should be applied to cases involving intoxicating liquor."¹⁷

In *Brattain v. Herron*,¹⁸ an Indiana appellate court extended civil liability to a private individual who made alcoholic beverages available to a minor in her home.¹⁹ The evidence in this case revealed that the defendant had allowed a boy whom she knew to be a minor to consume alcoholic beverages in her home. The minor had obtained the liquor from the defendant's refrigerator himself. However, the defendant had

¹¹*Id.*

¹²*Id.*

¹³247 Ind. 598, 217 N.E.2d 847 (1966). In *Elder*, the plaintiff brought suit against a retail druggist who had sold alcoholic beverages to a seventeen year old boy. The boy consumed the alcohol and, after becoming intoxicated, was involved in an automobile collision in which the plaintiff was injured.

¹⁴*Id.* at 603, 217 N.E.2d at 851.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 607, 217 N.E.2d at 853.

¹⁸159 Ind. App. 663, 309 N.E.2d 150 (1974).

¹⁹*Id.* at 674, 309 N.E.2d at 156.

made no objections to the minor's consumption of the alcoholic beverages in her home nor to his taking beer with him when he left. The evidence further revealed that the defendant had known or, in the exercise of reasonable care, should have known, that the minor would be operating his automobile on the highway as soon as he left her home. Shortly after leaving the defendant's home, the minor was involved in a collision in which he caused injuries to the occupants of another vehicle.²⁰

The *Brattain* court cited *Elder* for the proposition that a violation of Indiana's statute prohibiting the sale of alcohol to minors constitutes negligence per se.²¹ The court expanded upon *Elder* in holding that the statute's application is not limited to vendors of liquor.²² The *Brattain* court went on to note that

any person who gives, provides, or furnishes alcoholic beverages to a minor is in violation of the statute. The rationale behind the *Elder* case is that our Legislature has sought to protect the citizens of Indiana from the dangers of minors who would consume alcoholic beverages. Our Supreme Court found that one who sells alcoholic beverages to a minor is liable in a civil action for negligence for injuries resulting from the violation of the statute [citation omitted]. We see no distinction between one who sells alcoholic beverages to a minor and one who gives alcoholic beverages to a minor. The Legislature has provided that either of these actions is a violation of the statute.

Thus, it is our opinion that any person who violates the statute as it pertains to a minor can be liable in a civil action for negligence, since the violation of the statute as it pertains to a minor is negligence *per se*. The Legislature has not seen fit to distinguish between a seller and a social provider of alcoholic beverages to a minor and it is our opinion that no such distinction would be either logical or equitable.²³

In addition, the court in *Brattain* stated that even though the defendant had not served the liquor to the minor, she was still in violation of the statute because she allowed him to obtain the alcoholic beverages from her refrigerator without making any objection.²⁴

The Indiana appellate court further extended dram shop liability in *Parrett v. Lebamoff*.²⁵ The court held that the violation of Indiana Code section 7.1-5-10-15, which provides that it is unlawful to furnish alcohol *to another person known to be intoxicated*, also imposed a duty which

²⁰*Id.* at 665-66, 309 N.E.2d at 152.

²¹*Id.* at 674, 309 N.E.2d at 156.

²²*Id.*

²³*Id.* (emphasis in original).

²⁴*Id.* at 676, 309 N.E.2d at 157-58.

²⁵409 N.E.2d 1344 (Ind. Ct. App. 1980).

would serve as a basis for a civil action for damages.²⁶ In this case, the administratrix of the estate of a deceased driver brought a wrongful death action against the operators of a tavern, claiming that they served her deceased husband intoxicating beverages in violation of the statute and that, after leaving the tavern, her husband was killed in an automobile accident.²⁷ The court held that the intoxicated person himself is within the class of persons intended to be protected by the criminal statute.²⁸ However, the court also pointed out that contributory negligence may constitute a defense to an action based upon a violation of the statute, although not in situations involving willful, wanton, or reckless misconduct on the part of defendant-suppliers.²⁹

In *Elsperman v. Plump*,³⁰ the parents of a son who was killed in an automobile collision brought a wrongful death action against a bar and bartender for serving alcoholic beverages to a driver who subsequently caused the collision. The court in this case noted that "Indiana cases have clearly established the rule that a seller of alcoholic beverages may be held liable for injuries inflicted by an intoxicated person as a result of his intoxication, where such result was reasonably foreseeable and the sale of the intoxicant was in violation of law."³¹ In support of this rule, the court enumerated the following public policy considerations:

We concur with the Supreme Judicial Court of Massachusetts that "the waste of human life due to drunken driving on the highways will not be left outside the scope of the foreseeable risk created by the sale of liquor to an already intoxicated individual." . . . Like the Supreme Court of New Mexico we believe that "[i]n light of the use of automobiles and the increasing frequency of accidents involving drunk drivers, . . . the consequences of serving liquor to an intoxicated person whom the server knows or could have known is driving a car, is reasonably foreseeable."³²

Because it was undisputed that a negligence action could be predicated on the violation of the criminal statute forbidding the furnishing of alcohol to a person known to be intoxicated, and because the *Elsperman* court found that the bartender knew the motorist was driving an automobile,³³ the only issue on appeal was whether there was sufficient evidence to

²⁶*Id.* at 1345.

²⁷*Id.*

²⁸*Id.* at 1346.

²⁹*Id.* However, with the passage of Indiana's Comparative Fault Act, contributory negligence will no longer be an absolute bar to a plaintiff's recovery. IND. CODE §§ 34-4-33-1 to -13 (Supp. 1985). See also *infra* text accompanying notes 114-16.

³⁰446 N.E.2d 1027 (Ind. Ct. App. 1983).

³¹*Id.* at 1030 (citation omitted).

³²*Id.* (citations omitted).

³³*Id.* at 1029.

support the conclusion that the bartender served alcoholic beverages to the motorist knowing that he was intoxicated.³⁴

The *Elsperman* court stated that the evidence in this case included several factors which could be considered in determining whether the motorist was intoxicated and whether the bartender had knowledge of his intoxication and thereafter served him alcohol in violation of the statute. This evidence included the motorist's alcohol consumption before arriving at the bar in question, the motorist's behavior while in the bar (he was loud and boisterous, but not vulgar, and put his arm around another man, telling him that he loved him — which was typical of his behavior while drinking), the fact that the motorist staggered when he walked to the bathroom, the small amount of food he ate at the bar, the amount of alcohol consumed at the bar, the motorist's condition shortly after leaving the bar (which included testimony from the investigating police officers that there was a strong odor of alcohol on the driver, his eyes were bloodshot, his speech was slurred, he had difficulty with motor functions and had a great deal of difficulty removing his driver's license from his wallet, he refused a chemical intoxication test, and, in the opinion of one officer, he was very intoxicated), the fact that someone offered to drive the motorist home, the bartender's admission that he thought the motorist was "a little intoxicated" when he left the bar, the fact that the bartender accompanied the motorist out of the bar and watched him drive away, and the fact that, when the police arrived at the scene, the bartender told a part-time bartender who had observed the motorist in the bar to keep his mouth shut and stay out of it.³⁵ Based upon this evidence, the court in *Elsperman* concluded that the jury could have inferred that the motorist was intoxicated and that the bartender had served him alcoholic beverages knowing that he was intoxicated.³⁶

In *Whisman v. Fawcett*,³⁷ the plaintiff brought suit against an intoxicated driver and the bar where the driver had been drinking immediately prior to the collision. The plaintiff based his allegations of negligence against the bar on the violation of the criminal statute which prohibits furnishing alcohol to an habitual drunkard,³⁸ as well as upon the violation of the criminal statute which prohibits furnishing alcohol to a person known to be intoxicated.³⁹

³⁴*Id.* at 1030-31.

³⁵*Id.* at 1029-32.

³⁶*Id.* at 1032.

³⁷470 N.E.2d 73 (Ind. 1984).

³⁸IND. CODE § 7.1-5-10-14 (Supp. 1985). This statute provides:

It is unlawful for a permittee to sell, barter, exchange, give, provide, or furnish an alcoholic beverage to a person whom he knows to be a habitual drunkard.

Id.

³⁹IND. CODE § 7.1-5-10-15 (Supp. 1985). See *supra* text accompanying note 7.

The plaintiff conceded that the bar did not sell alcohol directly to the defendant-driver. In fact, the evidence revealed that the bartender refused to serve him directly.⁴⁰ However, the *Whisman* court stated that it is sufficient to show that "the seller knew or had good reason to believe when he sold the liquor that the purchaser intended to furnish it to another person whom the seller knew to be intoxicated."⁴¹ Despite this general statement of the law, the court in this case held that although there was strong evidence that the bartender knew the defendant-driver was intoxicated, the plaintiff failed to produce sufficient evidence to establish that the bartender knew or had reason to know that certain individuals to whom they sold alcohol were going to furnish it to the defendant-driver.⁴²

III. AN ANALYSIS OF *Ashlock v. Norris*

A. *The Extension of Dram Shop Liability to Anyone Furnishing Alcohol to an Adult Known to Be Intoxicated*

A recent Indiana case dealing with dram shop liability is *Ashlock v. Norris*.⁴³ In *Ashlock*, the administratrix of the estate of a deceased pedestrian who was struck and killed by an intoxicated motorist (Morrow) brought a wrongful death action against the motorist's friend (Norris). Norris had furnished Morrow with alcoholic beverages shortly before the fatal collision. The particular facts involved in this case include the following:

The facts favorable to the plaintiff disclose that after work on April 13, 1982, Cindy Morrow went to Butterfield's Restaurant and Lounge in Lafayette. She arrived at the lounge about 3:45 p.m. and ordered a tequila mixed drink. About 5:00 p.m. [defendant] Norris arrived at the lounge. He was previously acquainted with Morrow and joined her at the bar.

At 7:30 p.m. Morrow had consumed two tequila mixed drinks as well as three shots of tequila purchased for her by Norris. At about that time Morrow fell down while attempting to pick up her purse which she dropped. After resting for several moments Morrow was able to regain her feet only with Norris' assistance. He then assisted her in leaving the lounge and helped her into her car. He then spent several minutes in an unsuccessful attempt to persuade Morrow not to drive. She, however, insisted that she had to leave, and she did.

⁴⁰*Whisman*, 470 N.E.2d at 78.

⁴¹*Id.*

⁴²*Id.* at 79.

⁴³475 N.E.2d 1167 (Ind. Ct. App. 1985).

About a mile from the lounge Morrow attempted to pass a car on the right. As she did she struck and killed Anthony Ashlock who was jogging along the shoulder of the road about ten feet from the travelled portion of the highway. Morrow continued to drive down the road, approximately two miles, until she drove into a ditch.⁴⁴

The trial court granted the defendant's motion for summary judgment, and the administratrix of the decedent's estate appealed. The issue on appeal was whether Norris owed any duty to the decedent.⁴⁵ The administratrix argued that Indiana Code section 7.1-5-10-15 created such a duty in providing that "[i]t is unlawful for a *person* to sell, barter, deliver, or *give away* an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated."⁴⁶ The appellate court held that the language of the statute indicated that the legislature probably intended to extend civil liability to family, friends, or acquaintances who furnish "one more drink" to an intoxicated person.⁴⁷ Furthermore, the *Ashlock* court held that sound public policy supported this extension.⁴⁸ Therefore, the court concluded that the administratrix had stated a claim for which relief could be granted.⁴⁹

Ashlock is the first Indiana case to extend civil liability, based upon a violation of Indiana Code section 7.1-5-10-15, to an individual who merely furnished (as opposed to having sold) liquor to an adult. The *Ashlock* court did not appear to have any difficulty expanding the scope of liability, citing *Brattain*, which had extended civil liability based upon furnishing (as opposed to selling) alcoholic beverages to a minor.⁵⁰ The court in *Ashlock* specifically noted that all of the prior Indiana dram shop cases except *Brattain* sought to impose liability upon either an establishment engaged in the business of selling alcohol or the bartender involved in such sale. However, it apparently had no difficulty in concluding that the plain language of Indiana Code section 7.1-5-10-15 applies to *natural persons* who merely *give* alcoholic beverages to another person whom they know to be intoxicated.⁵¹ In other words, the case law

⁴⁴*Id.* at 1168.

⁴⁵*Id.* The administratrix originally filed suit against the corporate owner of the bar, two bartenders, and Norris. However, all the defendants except Norris were previously dismissed with prejudice upon plaintiff's motion. *Id.*

⁴⁶*Id.* (quoting IND. CODE § 7.1-5-10-15 (Supp. 1985)) (emphasis added).

⁴⁷*Id.* at 1169.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.* (citing *Brattain v. Herron*, 159 Ind. App. 663, 309 N.E.2d 150 (1974)). See also *supra* text accompanying notes 18-24.

⁵¹*Id.* at 1169. The court stated:

apparently recognizes no distinction between the duty imposed upon a seller and a gratuitous provider or between a natural person and a business entity.

The enactment of the new civil dram shop statute confirms the court's holding in *Ashlock* that a "sale" of alcohol is not a necessary prerequisite for dram shop liability. The statute specifically provides that furnishing an alcoholic beverage to an intoxicated person is sufficient to impose civil liability and defines "furnish" as including bartering, delivering, selling, exchanging, providing, or giving away.⁵²

B. *The Knowledge Requirement*

After determining that a civil duty existed under the facts of this case, the *Ashlock* court considered whether there was a genuine issue of material fact as to Norris' knowledge of Morrow's intoxication at the time he bought her last drink. By its terms, Indiana Code section 7.1-5-10-15 prohibits the selling, bartering, delivering, or giving away of an alcoholic beverage by one person to another who is intoxicated if the former *knows* of the latter's intoxication.⁵³ The new civil dram shop statute is also worded in terms of a person furnishing an alcoholic beverage to another whom he knows to be visibly intoxicated.⁵⁴ These statutory sections would appear to establish a subjective standard based upon the provider's actual knowledge.

Indiana courts in dram shop cases have repeatedly applied an objective standard of knowledge; however, none of these applications concerned knowledge of intoxication. In *Elder v. Fisher*,⁵⁵ the court held that a complaint alleging that the defendant druggist sold alcoholic beverages to an individual who he *knew or, in the exercise of ordinary care, should have known* was a minor was sufficient to state a cause of action.⁵⁶ In *Brattain v. Herron*,⁵⁷ the evidence revealed that the defendant knew that the person to whom she furnished alcoholic beverages was a minor and that *she knew, or by the exercise of reasonable*

Indeed the legislature has specifically defined "person" to include any "natural" person (I.C. 7.1-1-3-31) and has made the statutory proscription applicable to a person, rather than to a "permittee."

Id.

The *Ashlock* court, however, rejected the argument that Norris was negligent in helping the intoxicated motorist to her vehicle and then allowing her to drive. The court held that, absent some special relationship between Norris and the intoxicated motorist, Norris had no duty to the public to control Morrow's use of her automobile. *Id.* at 1171.

⁵²Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

⁵³IND. CODE § 7.1-5-10-15 (Supp. 1985). See *supra* text accompanying note 7 for the relevant text of this statute.

⁵⁴Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

⁵⁵247 Ind. 598, 217 N.E.2d 847 (1966).

⁵⁶*Id.* at 601, 607, 217 N.E.2d at 848, 853 (1966).

⁵⁷159 Ind. App. 663, 309 N.E.2d 150 (1974).

care, should have known that he would be operating his automobile on the highway as soon as he left her home.⁵⁸ In *Whisman v. Fawcett*,⁵⁹ the court upheld the decision of the trial court to the effect that evidence was insufficient to show that the defendant's bartenders *knew, or had reason to know*, when they sold the alcohol that the purchasers would give it to the intoxicated driver.⁶⁰

Although Indiana Code section 7.1-5-10-15 is worded in terms of providing alcohol to a person *known* to be intoxicated,⁶¹ and the court in *Ashlock* stated the issue in terms of whether Norris *knew* that the driver was intoxicated at the time he provided her with her last drink,⁶² the factual analysis upon which the court based its decision suggests that perhaps this is not a strictly subjective standard. In considering this issue, the *Ashlock* court stated:

It would be proper to prove by circumstantial evidence that Norris knew Morrow was intoxicated before he last provided her a drink. As the Court pointed out in *Elsperman*, . . . there are many factors which can be considered in determining whether a person was intoxicated to another person's knowledge, including what and how much the person was known to have consumed, the time involved, the person's behavior at the time, and the person's condition shortly after leaving.⁶³

The court also pointed out that, although Norris denied that the driver appeared intoxicated, he was with her for two and one-half to three hours, during which time she consumed five drinks, each containing one ounce of tequila.⁶⁴ The court specifically noted that there was no expert testimony submitted to establish the probable effect of consuming that amount of alcohol in that time period upon either Morrow specifically or upon the average individual with her physical makeup.⁶⁵ This suggests that the court might have found such evidence relevant and of some probative value. The court also pointed out that within thirty minutes after receiving her last drink, the driver was so intoxicated that she could not maintain her balance or walk without assistance.⁶⁶ The court stated that the evidence outlined above, *standing alone*, would probably be sufficient to grant judgment on the evidence in favor of the defendant.⁶⁷

⁵⁸*Id.* at 666, 309 N.E.2d at 152.

⁵⁹470 N.E.2d 73 (Ind. 1984).

⁶⁰*Id.* at 79.

⁶¹*See supra* text accompanying note 7.

⁶²*Ashlock*, 475 N.E.2d at 1170.

⁶³*Id.* (citing *Elsperman v. Plump*, 446 N.E.2d 1027, 1031 (Ind. Ct. App. 1983)).

⁶⁴*Id.* at 1170-71.

⁶⁵*Id.* at 1171.

⁶⁶*Id.*

⁶⁷*Id.*

The court further stated that "only speculation based upon the circumstances supports the determination that Norris was aware Morrow was intoxicated when he last provided her a drink."⁶⁸ However, because this case arose in the context of a motion for summary judgment, the court concluded that there was a genuine issue of material fact which had to be resolved in favor of the nonmovant.⁶⁹

Additional evidence in the case indicated that Norris saw the driver drop and spill her purse while in the bar. She lost her balance, fell, and was unable to rise without assistance.⁷⁰ Norris stated that the driver "appeared to be out of control" within one-half hour after receiving her last drink.⁷¹ While he accompanied her to her car, he attempted to dissuade her from driving.⁷² It is unclear whether, without Norris' apparent admissions concerning his knowledge of the driver's condition (his statement that the driver appeared out of control and his attempt to prevent her from driving), the appellate court would have decided that the evidence was sufficient to avoid summary judgment.

Although it may not be necessary under *Ashlock* for the defendant to admit that he knew the person to whom he supplied the alcohol was intoxicated in order for the plaintiff to sustain his burden of proof, the court left unclear whether constructive knowledge would be sufficient. The *Ashlock* court did not specifically discuss whether the person provided with the alcohol must be *visibly* intoxicated or whether the provider may draw upon his experiences in life to realize or predict the probable effect of a certain amount of alcohol. The court also did not discuss the relevance of the provider's familiarity with the intoxicated person's tolerance to alcohol or his familiarity with the intoxicated person's driving ability after drinking. That is, if the provider knew that the recipient was of a certain height and weight and had had X number of drinks within X period of time, could the provider avoid liability if the recipient was not manifesting any outward signs of intoxication at the time the last drink was provided? Or, would the courts impose a common sense standard and impute to the provider knowledge of the effects of that amount of alcohol on the recipient? In light of the *Ashlock* court's reference to expert testimony on this issue,³⁷ the decision suggests that it might have been proper to impute such knowledge to the provider.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* at 1170.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 1171. The court stated, "[N]othing was placed before the court on the motion for summary judgment to establish the probable effect of that much alcoholic beverage in that time span on either Morrow or an average person of her physical makeup." *Id.* See also *supra* text accompanying note 65.

To date, the Indiana dram shop cases have neither addressed the method of proving actual intoxication nor defined explicitly the term "intoxicated." However, based upon the conduct of the recipients in *Elsperman*⁷⁴ and *Ashlock*,⁷⁵ the decisions suggested that no particular blood alcohol level was required, and that intoxication could have been implied from the drinker's actions. The question remained under these decisions, however, whether, absent action that implied intoxication, expert testimony could be introduced concerning the effect of a certain amount of alcohol upon a person of a certain physical makeup.

The new civil dram shop statute appears to provide answers to some of these questions but leaves others unanswered. Although the statute does not provide that evidence of an individual's intoxication under Indiana Code section 9-11-1-7⁷⁶ (establishing that .10% or more by weight of alcohol in one's blood is prima facie evidence of intoxication) is conclusive evidence of intoxication in a civil action,⁷⁷ it would still appear that such evidence would be admissible for the jury to consider in reaching its verdict.

Additionally, no Indiana dram shop case to date has specifically held that constructive knowledge of intoxication was sufficient to impose liability. Generally, however, under Indiana law where knowledge is a required element in a tort action, constructive knowledge satisfies this requirement without a showing of actual knowledge.⁷⁸ Consequently, prior to the enactment of the new civil dram shop statute, it was not unreasonable to expect that courts might have been willing to impose liability (if they had not already done so) upon those who provided alcohol to persons who they knew, *or in the exercise of reasonable care should have known*, were intoxicated.

The new statute provides that a person must have had actual knowledge that the individual to whom he furnished alcohol was visibly intoxicated.⁷⁹ The implication of this language would appear to be that constructive knowledge of intoxication will not support a cause of action based upon the civil dram shop statute. However, as before, it seems improbable that a defendant will have to admit that he knew the individual was visibly intoxicated when he furnished him a drink. Certainly, the same type of circumstantial evidence used in *Ashlock* and other dram shop cases will continue to constitute probative evidence from which a jury may infer that the defendant had actual knowledge of the individual's state of intoxication. Even though a court will be unable to give a jury instruc-

⁷⁴*Elsperman*, 446 N.E.2d at 1032. See also *supra* text accompanying notes 35-36.

⁷⁵*Ashlock*, 475 N.E.2d at 1170-71. See also *supra* text accompanying notes 64-72.

⁷⁶IND. CODE § 9-11-1-7 (Supp. 1985).

⁷⁷Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5). A previous version of the bill expressly stated that such evidence would not be conclusive.

⁷⁸See, e.g., *Great Atlantic & Pacific Tea Co. v. Custin*, 214 Ind. 54, 15 N.E.2d 538 (1938).

⁷⁹Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

tion worded in terms of "knew or should have known," as a practical matter, one can reasonably assume that given compelling evidence of the individual's intoxication, a jury will conclude that the person to whom the alcoholic beverage was furnished was visibly intoxicated and that the defendant actually knew it.

C. *Possible Extensions of Ashlock v. Norris*

Neither the Indiana cases to date nor the new civil dram shop statute provides any basis for limiting the application of dram shop liability to a particular environment or setting. Other jurisdictions have imposed dram shop liability in the context of weddings, picnics, office parties, cocktail parties, and fraternity and sorority parties.⁸⁰ Therefore, it is reasonable to expect that Indiana will impose dram shop liability in similar situations.

Although all dram shop cases that have arisen in Indiana have involved automobile collisions caused by drunk drivers, these cases do not provide any obvious basis for limiting dram shop liability to that factual context. Because other jurisdictions have held the provider of alcoholic beverages to an intoxicated person liable for injuries and damages that result from fights, gunshot or knife wounds, and thrown objects,⁸¹ it is likely that Indiana will follow in that direction.

IV. DRAM SHOP LIABILITY BASED UPON FURNISHING ALCOHOLIC BEVERAGES TO A MINOR

With the enactment of the new civil dram shop statute, the legislature has made clear its intent to impose civil liability upon persons who

⁸⁰Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981) (plaintiff stated cause of action against employer-host of office Christmas party for injuries caused by employee-guest); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973) (plaintiff stated cause of action against sponsors of wedding reception for injuries caused by minor-guest); Wiener v. Gamma Phi Chap. of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18 (1981) (plaintiff stated cause of action against fraternity for injuries caused by minor attending fraternity party); Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295 (1984) (plaintiff stated cause of action against hosts of company Christmas party for injuries caused by company-employee who was a guest at the party).

⁸¹Clendening v. Shipton, 149 Cal. App. 3d 191, 196 Cal. Rptr. 654 (1983) (plaintiff stated cause of action against social host for injuries caused by guest who broke neck of another guest); Allen v. Babrab, Inc., 438 So. 2d 356 (Fla. 1983) (tavern owner held liable for injuries caused by patron who threw glass at fellow patron in tavern's parking lot, blinding her); Kiriluk v. Cohn, 16 Ill. App. 2d 385, 148 N.E.2d 607 (1958) (tavern owner held liable for death of patron when patron's wife shot him after he returned from tavern so intoxicated that he chased her around kitchen and threatened her); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 245 N.E.2d 420 (1969) (tavern owner held liable for injuries caused by patron who shot another); Ollison v. Weinberg Racing Ass'n, Inc., 69 Or. App. 653, 688 P.2d 847 (1984) (plaintiff stated cause of action against race track for injuries caused by intoxicated race patron who fired gun causing stampede).

supply alcoholic beverages to an individual who is visibly intoxicated.⁸² Therefore, it will no longer be necessary to look to the criminal statute to establish a duty upon which dram shop liability may be imposed in such cases.

The legislature, however, failed to mention furnishing alcoholic beverages to minors in the new civil statute. Arguments can be made in support of two opposite conclusions which may be drawn from this omission. First, one can argue that Indiana Code section 7.1-5-7-8, which makes it a misdemeanor to sell, barter, exchange, provide, or furnish an alcoholic beverage to a minor whether or not he is visibly intoxicated, can still be used as the basis for a civil dram shop case because the civil statute does not specifically provide otherwise. On the other hand, an argument can be made that because the legislature did not include minors within the scope of the statute, furnishing alcoholic beverages to them if they are not visibly intoxicated should no longer be the basis for dram shop liability.

The legislative history of the new civil statute would appear to lend some support to both arguments. One proposed amendment to Senate Bill No. 85 would have required that a person be "proven by clear and convincing evidence to have furnished an alcoholic beverage to *a person under age twenty-one (21)*" or to a person known to be intoxicated.⁸³ Another proposed amendment provided that in order to impose civil dram shop liability, a person or establishment must be shown to have "knowingly, willfully, and intentionally furnished the alcoholic beverage to one who was obviously intoxicated or *known to be a minor.*"⁸⁴ A third proposed amendment read in pertinent part:

A person who furnishes an alcoholic beverage is not liable for civil damages caused by the intoxication of the person to whom the alcoholic beverage was furnished, unless the person furnishing the alcoholic beverage has been convicted of an offense under IC 7.1-5-7-7 [which prohibits furnishing alcohol to minors] or IC 7.1-5-10-15⁸⁵

All of these proposed amendments included specific references to minors. However, they were all rejected, and the civil statute as enacted makes no mention of minors. As a result, an argument may be made that unless a minor is also visibly intoxicated at the time the alcoholic beverage is provided, no civil liability exists. However, eliminating liability

⁸²Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

⁸³Proposed amendment to Senate Bill No. 85 by Senator Vobach (emphasis added) (available in the *Indiana Law Review Office*).

⁸⁴Proposed amendment to Senate Bill No. 85 by Senator V.R. Miller (emphasis added) (available in the *Indiana Law Review Office*).

⁸⁵Proposed amendment to Senate Bill No. 85 by Senator Mills (available in the *Indiana Law Review Office*).

for those providing alcohol to minors would be a dramatic change from prior case law⁸⁶ and contrary to the strong public interest in discouraging the use of alcohol by minors. Therefore, absent a clear legislative mandate, it seems unlikely that courts will interpret the new civil statute as eliminating a cause of action based upon furnishing alcohol to a minor even though he is not visibly intoxicated.

V. DRAM SHOP LIABILITY UNDER INDIANA'S COMPARATIVE FAULT ACT

The impact of the *Ashlock* decision and the new civil liability statute cannot be properly analyzed without considering how Indiana's comparative fault statute⁸⁷ will affect dram shop liability. A brief analysis of the pertinent parts of the Act and their anticipated effect upon dram shop cases follows.

Simply stated, the Indiana Comparative Fault Act provides that, in an action based upon "fault," a claimant's contributory negligence is no longer an absolute bar to his recovery.⁸⁸ Rather, his compensatory damage award will be reduced in proportion to his fault unless his contributory fault is greater than the combined fault of the other tortfeasors who proximately contributed to the claimant's damages.⁸⁹ For example, in a two-party situation, if the plaintiff is fifty percent at fault, the plaintiff will still recover fifty percent of his damages, but if the plaintiff is fifty-one percent at fault, he will not recover because his negligence is greater than that of the defendant.

A. The "Nonparty" Or "Empty Chair" Defense

One of the more controversial sections of the Indiana Comparative Fault Act is the nonparty or "empty chair" defense provision.⁹⁰ This

⁸⁶*Elder*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Brattain*, 159 Ind. App. 663, 309 N.E.2d 150 (1974). This conclusion would also follow from the well known principle that statutes in derogation of the common law are to be strictly construed. *See, e.g., Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); *Manners v. State*, 210 Ind. 648, 5 N.E.2d 300 (1937).

⁸⁷IND. CODE §§ 34-3-33-1 to -13 (Supp. 1985).

⁸⁸IND. CODE § 34-4-33-3 (Supp. 1985). This section provides:

In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter.

Id.

⁸⁹IND. CODE §§ 34-4-33-4 and -5 (Supp. 1985).

⁹⁰IND. CODE § 34-4-33-10 (Supp. 1985). Subsection (a) provides:

In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.

Id.

provision allows a defendant to raise as an affirmative defense the negligent conduct of a nonsued tortfeasor.⁹¹ The jury then, in assessing fault, must determine the percentage of fault attributable to the nonparty.⁹² Consequently, the plaintiff's recovery against a single named party-defendant can be diminished not only by the percentage of his own fault, but also by the percentage of fault allocated to any nonparties.

At this time there is some confusion as to who can be a nonparty under the Indiana Comparative Fault Act. In the section pertaining to forms of verdicts and disclosure requirements, the Act provides in relevant part:

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict . . . shall require a disclosure of the *name of the nonparty* and the percentage of fault charged to the nonparty.⁹³

This section has been interpreted to mean that a defendant must specifically designate the name of a nonparty before the jury can allocate any fault to that nonparty.⁹⁴ A counterargument, however, can be made that if the legislature had intended that interpretation, it would have included a requirement that the defendant specifically name any nonparties when raising a nonparty defense. However, nowhere in the section providing for nonparty defenses is a defendant required to provide the name of the nonparty.⁹⁵

The courts' future interpretation of the statutory language relating to named tortfeasors could have significant implications in dram shop litigation. For example, suppose a drunk driver collides with and severely injures an individual who is totally free from fault. Suppose further that the drunk driver was so intoxicated that he was unable to remember the name of the tavern where he had become intoxicated prior to the collision. However, he was able to remember that he had been drinking at a tavern. If the defendant-drunk driver is not required to provide the name of the tavern before the jury could allocate any fault to the tavern, then the defendant would be allowed to point his finger at the nonparty-tavern in an attempt to reduce his percentage of fault. If, on the other hand, the defendant-drunk driver is required to provide the exact identity of the tavern and is unable to do so, then the defendant-drunk driver would be prevented from arguing that he is anything less than one hundred per cent at fault. The latter alternative would be more

⁹¹*Id.*

⁹²IND. CODE § 34-4-33-6 (Supp. 1985).

⁹³*Id.* (emphasis added).

⁹⁴Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 920 (1984).

⁹⁵IND. CODE § 34-4-33-10 (Supp. 1985).

favorable to the plaintiff because named defendants could not escape complete liability without providing the exact identity of a nonparty. If future courts decide that a defendant must specifically identify a nonparty before any fault could be assessed to him, a defendant-drunk driver would not be allowed to describe a nonparty tavern as "the tavern where I was drinking prior to the collision." The defendant-drunk driver, instead, would have to present evidence of the proper name of the tavern.

B. Joint and Several Liability in Dram Shop Cases Under the Comparative Fault Act

An equally controversial feature of the Indiana Comparative Fault Act is its apparent abolition of joint and several liability.⁹⁶ Although nowhere does the Act expressly state that joint and several liability has been abrogated either partially or completely, the jury instructions relating to multiple defendants⁹⁷ could be interpreted as abolishing this common law doctrine.⁹⁸ The instructions require the jury to enter a verdict against each defendant by multiplying each defendant's percentage of fault by the total amount of damages.⁹⁹ Contrary to the common law principles of joint and several liability, this could mean that a defendant may no longer be responsible for all the plaintiff's damages, but only those caused by his fault.¹⁰⁰

However, arguments have been made that the Indiana Comparative Fault Act retains the concept of joint and several liability.¹⁰¹ These arguments are in part based on the fact that the Act contains no substantive provision abolishing joint and several liability.¹⁰² The only indication that joint and several liability has been abolished is found in the jury instructions which require allocation of fault to the claimant, each defendant, and any nonparties.¹⁰³ If one assumes that the purpose of the jury instructions is to assist juries in performing their computations, as opposed to affecting the Act substantively, one might argue successfully

⁹⁶Joint and several liability has been defined as follows in Indiana:

Where an injury is caused by the concurrent negligence of two parties, the injured person may recover from either or both, and neither can successfully interpose as a defense the fact that the concurrent negligence of the other contributed to the injury.

Indian Refining Co. v. Summerland, 92 Ind. App. 429, 432, 173 N.E. 269, 270 (1930).

⁹⁷IND. CODE § 34-3-33-5(b) (Supp. 1985).

⁹⁸Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 703-05 (1984).

⁹⁹IND. CODE § 34-3-33-5(b)(4) (Supp. 1985).

¹⁰⁰Wilkins, *supra* note 98, at 703-05.

¹⁰¹*Id.* at 705-17.

¹⁰²*Id.* at 705-08.

¹⁰³IND. CODE § 34-4-33-5(b) (Supp. 1985). See also Wilkins, *supra* note 98, at 707.

that a strict construction of the Act does not abolish joint and several liability.¹⁰⁴

If the Act has indeed abolished joint and several liability, plaintiffs who are totally free from fault will unfortunately be penalized the most. Before the enactment of the comparative fault statute, a plaintiff free from contributory negligence was allowed to recover the full amount of his damages against any one defendant regardless of that defendant's proportional fault.¹⁰⁵ For example, in a typical dram shop situation, the plaintiff generally brings suit against the defendant-drunk driver and the defendant-tavern. Often the defendant-drunk driver has little or no insurance. The tavern is more likely to have insurance sufficient to cover the plaintiff's damages. Therefore, under the common law doctrine of joint and several liability, the innocent plaintiff could recover his entire judgment against the tavern and would be fully compensated despite the fact that the defendant-drunk driver had little or no insurance. If joint and several liability has, however, been abolished under the Act, the plaintiff in this situation would be fully compensated only if the defendant-tavern was found to be one-hundred percent at fault. In other words, if the jury finds the defendant-drunk driver eighty percent at fault and the defendant-tavern twenty percent at fault, the plaintiff will only receive twenty percent of his total damages.

A consideration of public policy, including an analysis of who is better able to bear losses, whether it be innocent plaintiffs or businesses and insurance companies, leads to the conclusion that the retention of joint and several liability is the better policy. Future courts will be confronted with competing arguments for the abolition or retention of joint and several liability. In weighing policy considerations, courts should be mindful that forcing totally innocent plaintiffs to bear losses caused by someone else's fault does not benefit society as a whole and has never been the purpose of tort law.¹⁰⁶

C. Settlement of Dram Shop Cases Under the Comparative Fault Act

In dram shop cases involving multiple defendants, the Indiana Comparative Fault Act will affect the decision regarding whether a settlement should be made with one or more defendants prior to trial. The tortfeasor with whom the plaintiff reaches a settlement before trial will most often be a nonparty to whom the jury must assess fault.¹⁰⁷ The goal of

¹⁰⁴Wilkins, *supra* note 98, at 707-08.

¹⁰⁵See *supra* note 96 and accompanying text.

¹⁰⁶W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS ch. 1, § 4 (5th ed. 1984). See also Pardieck, *The Impact of Comparative Fault in Indiana*, 17 IND. L. REV. 925, 936-38 (1984).

¹⁰⁷Eilbacher, *supra* note 94, at 908-09.

nonsettling defendants at trial will be to maximize the percentage of negligence attributed to settling tortfeasors.¹⁰⁸ On the other hand, the goal of the plaintiff at trial will be to persuade the jury that the settling tortfeasor's degree of fault was minimal.¹⁰⁹

There may be instances in which the drunk driver carries little or no automobile liability insurance. Therefore, it may be advisable in such cases to settle with the drunk driver and proceed to trial against the tavern, tavern owner, bartender, or friend who supplied the drunk driver with alcohol. Because a drunk driver is often the most culpable defendant in dram shop cases and would not generally make a sympathetic nonparty, plaintiff's counsel will be placed in the difficult position of "defending" the drunk driver in an attempt to reduce the percentage of fault which the jury attributes to him.

D. Causation in Dram Shop Cases Under the Comparative Fault Act

Indiana's Comparative Fault Act has retained the requirements of both cause in fact and proximate cause in negligence actions.¹¹⁰ As the court in *Elder v. Fisher*¹¹¹ pointed out, proximate cause is often a crucial issue in dram shop cases.¹¹² The *Elder* court stated:

The crucial issue in all of the cases involving liability of a seller of alcoholic beverages seems to be the matter of proximate cause. Many of the cases constantly cited have arbitrarily held that the selling of the intoxicating liquor is too remote in time to be a proximate cause of resulting injuries.

However, it is well settled that for a negligent act or omission to be a proximate cause of injury, the injury need be only a natural and probable result thereof; and the consequence be one which in the light of circumstances should reasonably have been foreseen or anticipated.¹¹³

In future dram shop cases under comparative fault, defendant-suppliers of alcohol will attempt, as in the past, to avoid liability by arguing that providing the alcoholic beverage is too remote to be a proximate cause of the resulting injury. Thus, a defendant-supplier will allege that

¹⁰⁸*Id.* at 909.

¹⁰⁹*Id.*

¹¹⁰IND. CODE § 34-4-33-1(b) (Supp. 1985). This subsection provides:

In an action brought under this chapter, legal requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault.

Id. See also Pardieck, *supra* note 106, at 931-32.

¹¹¹247 Ind. 598, 217 N.E.2d 847 (1966).

¹¹²*Id.* at 605, 217 N.E.2d at 852. Indeed, the new civil statute expressly provides that the intoxication must have been a proximate cause of the injury. Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

¹¹³*Id.*

the defendant-drunk driver's culpable conduct is an intervening or superseding cause, thereby relieving him from liability. However, in view of increasing public awareness of the dangers associated with drinking and driving, plaintiffs should be able to convince a jury that suppliers of alcohol could reasonably foresee that providing alcoholic beverages to an already intoxicated person or to a minor could result in injurious consequences. Furthermore, it seems that juries would be more reluctant to classify a defendant-supplier's conduct as a "remote" cause or a defendant-drunk driver's conduct as an "intervening" or "superseding" cause under a system in which more equitable results can be obtained by the apportionment of fault and damages.

*E. Incurred Risk and Unreasonable Assumption of Risk
in Dram Shop Cases Under the Comparative Fault Act*

The Indiana Comparative Fault Act specifically includes "unreasonable assumption of risk not constituting an enforceable express consent" and "incurred risk" in its definition of fault.¹¹⁴ Because assumption of risk and incurred risk are to be treated as comparative "fault," such conduct on the part of a plaintiff will no longer totally bar his recovery. Rather, the fact that the plaintiff knows, understands, and appreciates any risks, and the fact that he voluntarily encounters them will be considered by the jury in apportioning fault.

In cases such as *Parrett v. Lebamoff*,¹¹⁵ where the intoxicated individual makes a claim for personal injuries against the individual or entity that provided him with alcohol, contributory negligence and incurred risk will no longer totally bar his claim. Such a claimant would thus be able to recover for his own injuries arising from an alcohol-related automobile accident. Because an intoxicated individual may be able to recover a portion of his damages despite some negligence or incurred risk on his own part, cases such as *Parrett* may now have more appeal to plaintiffs' lawyers than they did prior to the enactment of the comparative fault statute. The Indiana statute provides that a plaintiff who is fifty percent at fault can still recover fifty percent of his damages.¹¹⁶ It would appear that a plaintiff's lawyer could successfully argue that in a case where someone provided an already visibly intoxicated plaintiff with more alcohol or provided a minor-plaintiff with alcohol, that this plaintiff was not more than fifty percent at fault. Conversely, in these types of cases, defense counsel will emphasize that plaintiff's own contributory negligence or incurred risk was the sole proximate cause of the collision or at least exceeded fifty percent, thereby relieving the defendant from liability.

¹¹⁴IND. CODE § 34-4-33-2(a) (Supp. 1985).

¹¹⁵408 N.E.2d 1344 (Ind. Ct. App. 1980). See also *supra* text accompanying notes 25-29.

¹¹⁶IND. CODE § 34-4-3-4 (1985). See also *supra* text accompanying notes 88-89.

VI. CONCLUSION

*Ashlock v. Norris*¹¹⁷ and the newly enacted civil dram shop statute illustrate the current trend extending dram shop liability beyond the tavern, tavern owner, or bartender. *Ashlock* extends dram shop liability to a patron in a bar who provides an already intoxicated fellow patron with alcohol. The new civil statute, enacted after the *Ashlock* decision, does not limit the class of persons to whom dram shop liability may be applied. In fact, it specifically states that it applies to anyone who barter, delivers, sells, exchanges, provides, or gives away an alcoholic beverage to one who is known to be visibly intoxicated. Therefore, it appears that civil liability will be imposed upon *anyone* who supplies alcoholic beverages, whether in exchange for payment or gratuitously, to an already visibly intoxicated individual if that individual later causes harm to others.

The court in *Ashlock* did not resolve the issue whether the provider must have actual knowledge of an individual's intoxication or whether constructive knowledge will be sufficient to impose dram shop liability. In response to increasing public outcry to the carnage caused by drunk drivers, it was not unreasonable to expect that Indiana courts would have concluded that constructive knowledge would support a cause of action. However, the enactment of the new civil dram shop statute has eliminated the likelihood that a court will instruct the jury on constructive knowledge. Nevertheless, juries will still be able to draw inferences from circumstantial evidence to conclude the defendant actually knew the individual was intoxicated.

Indiana's Comparative Fault Act will certainly have an impact on dram shop liability. However, many questions remain unanswered about the Act. At this time, it is unknown who may be a nonparty and whether joint and several liability has been abolished. Consequently, the extent of the impact of the comparative fault statute on dram shop liability will be left in the hands of future courts. It is hoped, however, that these courts will interpret the Act to protect plaintiffs fully who have been injured by negligent suppliers of alcohol.

¹¹⁷475 N.E.2d 1167 (Ind. Ct. App. 1985).

