

The Dram Shop: Closing Pandora's Box

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I. HISTORICAL BACKGROUND

The "dram shop"¹ has been condemned since the time of Babylon² as an unequalled source of "crime and misery to society."³ The over-indulgence occurring in saloons has long been considered a subject for moral and legal condemnation.⁴ The preamble of the British Statutes of 1552⁵ stated that the "intolerable hurts and troubles to the commonwealth of this realm doth daily grow and increase through such abuses and disorders as are had and used in common ale-houses and . . . tippling-houses."⁶

From early English legislation to the present time, statutes in various forms have been enacted to suppress the evils which the use or abuse of inebriating liquors has wrought.⁷ There has never been any doubt as to the menace the drunk poses for our society. The Presidential Commission on Drunk Driving⁸ states that fifty percent of all fatal accidents are caused by alcohol abuse. In Indiana, during the years 1981 to 1986, "alcohol-related vehicle accidents . . . resulted in 53,429 persons injured and 1,554 deaths."⁹ The impact of these statistics has caused the state judiciaries and legislatures across the country to act in an effort to solve the problems occurring with the abuse of alcohol.

The advent of civil liability and dram shop acts creating liability upon the provider of alcohol is an offspring of this judicial and legislative activity. The imposition of civil liability (as opposed to criminal liability)

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1. *Black's Law Dictionary* defines "dram shop" as "[a] drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon." BLACK'S LAW DICTIONARY 444 (5th ed. 1979).

2. Howie, *Three Hundred Years of the Liquor Problem in Massachusetts*, 18 MASS. L. Q. 79 (1933).

3. *Crowley v. Christensen*, 137 U.S. 86, 91 (1890).

4. 45 AM. JUR. 2D *Intoxicating Liquors* § 1 (1969).

5. *British Statutes at Large*, 1540-52, Ch. 25, p. 391.

6. *Sopher v. State*, 169 Ind. 177, 184, 81 N.E. 913, 915 (1907) (quoting *British Statutes at Large*, 1540-52, Ch. 25, p. 391).

7. *Id.* at 915-16.

8. Presidential Commission on Drunk Driving, Final Report at 1 (1983).

9. *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1220 (Ind. 1988) (citing *Governor's Task Force to Reduce Drunk Driving*, 1987 Progress Report 12).

for furnishing intoxicating liquor to a willing person is a relatively recent development which began during the post civil war temperance movement.¹⁰ Prior to this, it was universally held that "to either sell or give intoxicating liquor to ordinary able-bodied men"¹¹ is not a tort at common law. The reason usually given for this immunity to providers of liquor was that "the drinking of the liquor, not the furnishing of it, was the proximate cause of the injury."¹²

One of the earliest dram shop statutes adopted in this country was in Indiana.¹³ This Act, passed in 1853,¹⁴ led to the enactment of similar acts across the country. These statutes in their various forms were often strictly construed¹⁵ and served as the basis upon which civil liability was imposed upon the provider of intoxicating liquor. Only in more recent times have the courts recognized common law liability exclusive of the theory of liability set forth in dram shop acts or liability premised upon alcoholic beverage control acts.

The leading case of *Rappaport v. Nichols*,¹⁶ a 1959 New Jersey Supreme Court decision, approved the application of ordinary principles of negligence to the act of furnishing alcohol to a person who was

10. The American Society for the Promotion of Temperance was formed in Boston in 1926 followed by the formation of the American Temperance Union in 1936. During the period from 1850 to the mid-1870's the temperance movement stagnated. Prompted by third and fourth generation protestants appalled by the post Civil War immigration of Catholics and Jews from southern and eastern Europe, the Woman's Christian Temperance Movement was founded in 1874 and quickly became a powerful political force. The Guide to American Law, Vol. 10, p. 32.

11. *Elder v. Fisher*, 247 Ind. 598, 604, 217 N.E.2d 847, 851 (1966) (quoting 30 AM. JUR. *Intoxicating Liquors* § 520 (1958)).

12. Annotation, *Common-Law Right of Action for Damage Sustained By Plaintiff in Consequence of Sale or Gift of Intoxicating Liquor or Habit-Forming Drug to Another*, 97 A.L.R.3d 528, 533 (1980). See also 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969).

13. Goldberg, *Dram Shop Update Developments in 1986*, 22 TRIAL, Dec. 1986, at 66. The article, without citation, claims that Indiana, in 1849, was the first state to enact dram shop legislation. However, the author's research only has uncovered passage of the Act of 1853, and the earlier cited 1850 legislation. See *infra* note 14. From this research, it is unclear whether Indiana or Wisconsin first enacted legislation given the 1850 enactment in the State of Wisconsin. Goldberg, *supra*, at 67.

14. An Act to Regulate the Retailing of Spirituous Liquors, and for the Suppression of Evils Arising therefrom, ch. 66, 1853 Ind. Acts 87 (approved March 4, 1853). Interestingly, the State of Indiana as early as 1849 enacted legislation to prevent the sale of intoxicating liquors in specifically named counties. An Act more effectually to prevent the retailing of Spirituous Liquors in certain counties therein named, ch. XCII, 1849 Ind. Acts 83 (approved Jan. 16, 1849), amended by ch. CXLIX, 1850 Ind. Acts 119 (approved Jan. 19, 1850).

15. *Couchman v. Prather*, 162 Ind. 250, 252, 70 N.E. 240, 241 (1904).

16. 31 N.J. 188, 156 A.2d 1, 75 A.L.R.2d 821 (1959) *superceded by statute as noted in Renz v. Penn Cent. Corp.*, 87 N.J. 437, 435 A.2d 540 (1981).

visibly intoxicated and that such act was the proximate cause of the plaintiff's injuries. With the *Rappaport* decision came an onslaught of confusing dram shop decisions straining against the common law immunity for furnishing alcohol. Reflecting this confusion, states have held: (a) that the common law provided for liability where no state dram shop act existed;¹⁷ (b) that legislatures preempted or abrogated the common law by enacting statutes;¹⁸ and (c) that despite the existence of dram shop acts or alcohol beverage control acts, the common law principles of negligence applied to the provider of alcohol.¹⁹ Prior to 1986, Indiana fell within the later classification.²⁰

Since *Rappaport*, courts across the country, including Indiana, have forged new ground in expanding dram shop liability to those who furnish or serve alcoholic beverages.²¹ In reaction to this expansion of liability and increased litigation, tavern owners and insurance lobbyists have sought and gained legislation restricting the expansion of alcohol provider liability. In 1986, nineteen states enacted laws, most of which restricted the liability of commercial and social providers.²² As a part of that trend, the Indiana Legislature in 1986 enacted a civil dram shop statute²³ restricting liability to instances where a "person who furnishes an alcoholic beverage" has "actual knowledge" that the consumer was "visibly intoxicated."

II. THE CO-EXISTENCE OF DRAM SHOP ACTIONS BASED ON STATUTE AND COMMON LAW PRINCIPLES IN INDIANA WHICH PRE-DATE THE 1986 DRAM SHOP STATUTE

Prior to the 1988 Indiana Supreme Court decision in *Picadilly, Inc. v. Colvin*,²⁴ the law regarding the coexistence of dram shop common law principles and liability based upon liquor statutes was confusing and

17. *Deeds v. United States*, 306 F. Supp. 348 (D. Mont. 1969).

18. Note, *Ohio Liquor Vendors v. Highway Safety—A Legislative Compromise*, 13 OHIO N.U.L. REV. 475, 478 (1986).

19. *Waynich v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).

20. In 1986, Indiana enacted IND. CODE § 7.1-5-10-15.5 which expressly limits liability to the terms of the statute. In 1988, *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217 (Ind. 1988), recognized liability based on common law principles of negligence even where there were also special statutory provisions on which liability could be based.

21. Beltman, *Dram Shop Liability*, 21 TRIAL, March 1985, at 38.

22. Goldberg, *supra* note 13, at 67. The nineteen states which enacted new statutes or amended existing statutes were: Arizona, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Louisiana, Maine, Michigan, Montana, New Hampshire, New Mexico, Ohio, Rhode Island, Tennessee, Utah, Wisconsin and Wyoming. *Id.* at n.4.

23. IND. CODE § 7.1-5-10-15.5 (1988).

24. 519 N.E.2d 1217 (Ind. 1988).

unclear. In *Picadilly*, the court recognized that common law liability in so called dram shop cases exists notwithstanding the existence of a statute which makes such conduct criminal.²⁵ Indeed, the court held that such statute "designate[s] certain minimal duties but do[es] not thereby relieve persons from otherwise exercising reasonable care."²⁶ This judicial interpretation put to rest the historical legal confusion which existed in Indiana for over one hundred years.

In the 1858 case of *Struble v. Nodwift*,²⁷ one of the earliest dram shop cases found to mention liability arising from the common law, the Indiana Supreme Court held that the complaint which alleged both violation of the liquor law of 1853 and a common law theory of liability did not state a cause of action. The court, considering the common law question, implied that a seller of alcohol may be liable if "he sold it with a knowledge that it was purchased with intent to be applied to [an] improper use."²⁸ Apparently recognizing the implication of its discussion, the court concluded by stating that it did not "mean to intimate any opinion as to whether an action of this character, can or cannot be sustained, at all, upon common-law principles."²⁹ This decision, and many which followed, was reluctant to recognize further that common law principles of negligence applied to providers of alcohol.

The Indiana Supreme Court decided *Krach v. Heilman*³⁰ in 1876. *Krach* involved a claim by Heilman's widow against the party who sold her husband intoxicating liquor. The husband became intoxicated, was placed in the back of a wagon and on the return home was crushed by a salt barrel. The *Krach* court avoided embracing the Indiana Dram Shop Act of 1873³¹ and held that Heilman's death was not proximately

25. *Id.* at 1220. This proposition is supported in a recent annotation. See *Common-Law Right*, *supra* note 12, at 535-36. The specific language of the annotation states: "[i]t was held in the following cases that the plaintiff had stated a cause of action based on common-law negligence apart from any violation of liquor laws . . ." *Id.* at 535. This reasoning, stated in reference to the sale of alcohol, applied equally to the giving of alcohol to another (social host liability). *Id.* at 566. The annotation also includes a discussion of liability for sale or gift of alcohol in violation of statutes or ordinances. *Id.* at 572.

26. 519 N.E.2d at 1220.

27. 11 Ind. 64 (1858), *superseded by statute as noted in Campbell v. Board of Trustees*, 495 N.E.2d 227 (Ind. Ct. App. 1986).

28. *Id.* at 66.

29. *Id.*

30. 53 Ind. 517 (1876).

31. An Act to regulate the sale of intoxicating liquors, to provide against evils resulting from any sale thereof, to furnish remedies for damages suffered by any person in consequence of such sale, prescribing penalties, to repeal all laws contravening the provisions of this act, and declaring an emergency, ch. LIX, 1873 Ind. Acts 151 (approved Feb. 27, 1873) [hereinafter *1873 Act*].

caused by the intoxicated state Krach's consumption of peach brandy had induced.³² The court held that while the "remote cause" may have been his intoxication, the real cause of his death was the injury itself.³³ The widow was denied recovery because she was not "immediately injured by the intoxication of the deceased."³⁴ Interestingly, the court concluded: "[t]he common law does not, on the facts alleged, give the plaintiff any right of action. Her right of action, if . . . any, is based upon statute."³⁵ Arguably, this enunciation implies that a cause of action may have existed independent of statute had Heilman alleged other "facts." Of course, this interpretation, like that of *Struble*, is far from conclusive with regard to the existence of a common law right in dram shop cases.

The 1882 case of *Dunlap v. Wagner*³⁶ did not help to clarify this apparent confusion. Mr. Wagner illegally sold liquor on Sunday to a Mr. Charles Dunlap. The consumption of this liquor caused Dunlap to become intoxicated. Mr. Wagner then placed Mr. Dunlap in a sleigh and headed the horses toward Dunlap's home. The horses ran away and one received injuries which caused its death. Dunlap sued Wagner for the death of his horse. This case, like *Krach*, was based on the Indiana Dram Shop Act of 1873.³⁷ In *Dunlap*, the Indiana Supreme Court made the often quoted observation:

He [defendant] was, therefore, a wrong-doer, and wrong-doers are responsible for injuries proximately resulting from their wrongful acts. A man who, in violation of law makes another helplessly drunk, and then places him in a situation where his drunken condition is likely to bring harm to himself or injuries to others, may well be deemed *guilty of an actionable wrong independently of any statute*.³⁸

Although *Dunlap* may be read to mean that common law principles of negligence are a basis of liability independent of statute, it is likely that the "violation of law" referred to by the court was the illegal Sunday sale of liquor as opposed to non-statutory principles of common law giving way to dram shop liability.

In 1889, citing *Dunlap*, the supreme court held in *Beem v. Chestnut*,³⁹ that Fanny Chestnut did not need to allege that she was free from

32. 53 Ind. at 523.

33. *Id.* at 523-24.

34. *Id.* at 524.

35. *Id.* at 522.

36. 85 Ind. 529 (1882), *superceded by statute as noted in Campbell v. Board of Trustees*, 495 N.E.2d 227 (Ind. Ct. App. 1986).

37. 1873 Act, *supra* note 31.

38. 85 Ind. at 530 (emphasis added).

39. 120 Ind. 390, 22 N.E. 303 (1889).

negligence in her action against Beem, who sold liquor to her intoxicated husband who later "became crazed" and drove her from their home into the "cold" while she was "thinly clad." The court held that the violation of statute amounted to an unlawful invasion of the plaintiff's right and the doctrine of contributory negligence had no application.⁴⁰ However, in considering the defense of contributory negligence, the court pointed out that Mrs. Chestnut had not averred that Beem was negligent and, had she done so, "contributory negligence of the plaintiff may, as is well understood, operate as a defence."⁴¹ It is unlikely that the court envisioned or considered any common law dram shop action. Nevertheless, this court, impliedly embraced the common law without expressing its principles or rejecting them. From the turn of the century until 1966, there are few reported cases based upon the sale or provision of alcohol which would have any relevance to this issue.⁴²

The 1966 supreme court decision, *Elder v. Fisher*,⁴³ often is cited to support the proposition that "the general principles of common-law negligence should be applied to cases involving intoxicating liquor."⁴⁴ While confirming the existence of dram shop common law in Indiana, the *Elder* court created a challenge to its co-existence with a statute applicable to the factual circumstances, stating: "[i]n the absence of special statutory provision, the general principles of common-law negligence should be applied to cases involving intoxicating liquor."⁴⁵ This language has been interpreted to mean that the common-law provides for an action *only* when a plaintiff's claim does not fall under a "special statutory provision."⁴⁶ In view of the lack of definitive decisions preceding

40. *Id.* at 392, 22 N.E. at 304.

41. *Id.*

42. Most of the reported decisions were based on the Civil Damage (Dram Shop) Acts, exemplified by the following cases: *Mulcahy v. Givens*, 115 Ind. 286, 17 N.E. 598 (1888); *Wall v. State ex rel. Kendall*, 10 Ind. App. 530, 38 N.E. 190 (1894); *Boos v. State ex rel. Sliney*, 11 Ind. App. 257, 39 N.E. 197 (1894); *Homire v. Halfman*, 156 Ind. 470, 60 N.E. 154 (1901); *Nelson v. State*, 32 Ind. App. 88, 69 N.E. 298 (1903); *McCarty v. State ex rel. Boone*, 162 Ind. 218, 70 N.E. 131 (1904); *Couchman v. Prather*, 162 Ind. App. 250, 70 N.E. 240 (1904); *State ex rel. Niece v. Soale*, 36 Ind. App. 73, 74 N.E. 1111 (1905); *Berkemeier v. State*, 44 Ind. App. 1, 88 N.E. 634 (1909); *Greener v. Niehaus*, 44 Ind. App. 674, 89 N.E. 377 (1909); *Banks v. State*, 188 Ind. 353, 123 N.E. 691 (1919).

43. 247 Ind. 598, 217 N.E.2d 847 (1966).

44. *Id.* at 607, 217 N.E.2d at 853.

45. *Id.*

46. *Whisman v. Fawcett*, 470 N.E.2d 73, 80 (Ind. 1984). In *Whisman*, the court held:

Elder did establish for the first time in Indiana that there is a common law action against those unlawfully selling or furnishing intoxicating liquor in favor of third persons subsequently injured by the acts of the purchasers as a result of their intoxicated condition. However, a careful review of the record shows

Elder bearing on the issue of Indiana common-law dram shop liability, one might question the logic of the *Elder* declaration. In fact, the legal underpinnings in *Elder* are questionable. For example, *Elder* cites the Illinois case of *Colligan v. Cousar*⁴⁷ which, *Elder* claims, examined several Indiana decisions and concluded that "there is a commonlaw action in Indiana against those unlawfully selling or furnishing intoxicating liquor"⁴⁸ This is clearly inaccurate. First, the *Colligan* court examined only a single Indiana decision (*Dunlap*) and ultimately ignored it, stating that the language cited was dictum.⁴⁹ *Colligan*, in fact, held: "[C]onsequently it may be said there has been no rule of common law with reference to this particular question set out in any authoritative statements of the Indiana courts."⁵⁰ Further, the *Elder* court incorrectly cited *Krach* in maintaining that no cases had been found which directly held "either that there is or that there is not common law dram shop liability."⁵¹ The court stated that *Krach* includes dictum "to the effect that there is no common-law liability."⁵² To support its argument that prior case law implies "that a common-law action might lie against the seller,"⁵³ the court cited the 1953 Indiana decision of *Burk v. Anderson*.⁵⁴ This also seems inaccurate because the *Burk* discussion centers on the new right of a wife to make a consortium claim (in Indiana only the husband's right previously existed) and the fact that no such consortium loss was incurred due to the immediate death of her spouse. Nowhere in *Burk* is there any language which would imply that a common law action might lie against the seller of alcoholic beverages. Apparently, the only authority correctly relied upon by the *Elder* court was the 1965

the trial court ruled as it did not because it determined a common law action to be nonexistent; rather, it properly concluded that plaintiff's claim fell under specific statutory provisions which serve as a premise for a civil action for damages. Indiana law clearly endorses the proposition that a violation of the liquor laws will result in a civil action. See, e.g., *Elder*, 217 N.E.2d at 851; *Parrett v. Lebamof*, 408 N.E.2d 1344 (Ind. Ct. App. 1980); *Elsperman v. Plump*, 446 N.E.2d 1027 (Ind. Ct. App. 1983). General principles of common law negligence apply only in the absence of a special statutory provision. *Elder*, 217 N.E.2d at 853.

470 N.E.2d at 80.

47. 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

48. *Elder*, at 607, 217 N.E.2d at 853.

49. *Colligan*, at _____, 187 N.E.2d at 296. The *Colligan* court did cite other Indiana decisions, but in the context of proximate cause rather than common law dram shop liability. See *id.* at _____, 187 N.E.2d at 302.

50. *Id.* at _____, 187 N.E.2d at 296.

51. *Elder*, at 604, 217 N.E.2d at 851.

52. *Id.*

53. *Id.*

54. 232 Ind. 77, 109 N.E.2d 407 (1953).

supplement of *American Jurisprudence* which indicates that recent cases held there are circumstances in dram shop action where injured parties "may have a right of action at common law."⁵⁵

Although dram shop litigation increased, after *Elder*, particularly in the early 1980's, little or no discussion appeared in the published cases bearing on the question of common law dram shop theories and liability. In 1984, the supreme court found in *Whisman v. Fawcett*⁵⁶ that *Elder* did establish "that there is a common law action against those unlawfully selling or furnishing intoxicating liquor in favor of third persons subsequently injured,"⁵⁷ but made no further examination of the elements of such an action. *Whisman*, interpreting *Elder*, further held that no common law cause of action existed where there were special statutory provisions.⁵⁸ Not until 1988, when the elements of dram shop common law were enunciated clearly, did the confusion with regard to the pre-emption of the common law by statutory enactment subside.

III. THE 1988 DECISIONS OF *PICADILLY* AND *GARIUP*

In *Picadilly, Inc. v. Colvin*,⁵⁹ the Indiana Supreme Court clearly confirmed in a well-reasoned decision the existence and elements of common law negligence which may be applied to dram shop actions whether or not liquor statutes were in effect at the time of the occurrence. There are several significant holdings in the *Picadilly* decision.⁶⁰ This

55. *Elder*, at 604, 217 N.E.2d at 851 (quoting 30 AM. JUR., *Intoxicating Liquors*, § 251 (Supp. 1965)). The material quoted in *Elder* is as follows:

[I]t is established that in some circumstances a vendor's sale of liquor may constitute a wilful violation of his duty to one other than the consumer thereof and be the proximate cause of the injury sustained by such third person, so that for such injury the latter may have a right of action at common law against the vendor.

56. 470 N.E.2d 73 (Ind. 1984).

57. *Id.* at 80.

58. *Id.*

59. 519 N.E.2d 1217 (Ind. 1988).

60. For a general discussion of the issues in *Picadilly*, see Harvey, *Rules, Rulings for the Trial Lawyer*, 32 RES GESTAE 14, 15-18 (1988). Additional issues addressed in *Picadilly* and not discussed in the body of this article are punitive damages, the applicable evidentiary standard for punitive damages, and post verdict motions.

In regard to punitive damages the three issues raised by the appellant, *Picadilly*, were:

1. That the award of punitive damages was improper as a matter of law and that the complaint failed to state a proper claim for relief;
2. That the trial court failed to instruct the jury in the appropriate standard for the award of punitive damages; and
3. That the presented evidence failed to show the presence of malice by a clear

Article will consider only the decision as it pertains to the common law ramifications of dram shop liability.

Picadilly is a bar licensed to sell beer, wine and liquor. It is located in a building which formerly housed a department store and covers in excess of 40,000 square feet. The method used in selling alcoholic beverages to the patrons is similar to checkout counters at a supermarket. There are eight lanes for customer use; each lane begins with a cashier where the drinks are ordered and paid for. The drink order is conveyed by computer to a bartender who prepares the drinks. The drinks then are given to a passer who places the completed order upon a counter for the customer to pick up. An intoxicated Picadilly customer driving to her home in Hope, Indiana, at 1:30 A.M., lost her way and entered an interstate highway going in the wrong direction. She collided with

and convincing standard.

Picadilly, Inc. v. Colvin, 519 N.E.2d 1217, 1221 (Ind. 1988). The court quickly disposed of the first two issues and only responded to Picadilly's third allegation.

Characteristic of its entire opinion, the court succinctly rejected Picadilly's final claim of error regarding punitive damages. In writing the majority opinion, Justice Dickson quoted *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986), as holding that malice is not necessarily an element that need be present before the awarding of punitive damages. *Id.* at 1023. From this point, the court retried the issue to focus on the application of a clear and convincing evidentiary standard to the presented evidence. Based on prior Indiana case law, the application of a clear and convincing standard was appropriate. Specifically, the court in *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982), noted:

We find no fault with the end result in these cases, but it becomes apparent, from them, that the advent in punitive damages in contract cases, absent evidence of an attendant full blown tort of a nature which would permit punitive damages in and of itself, has given rise to a need for the adoption of an evidentiary standard not heretofore required, lest the public policy favoring such awards be subverted.

Id. at 360. The application of the greater standard of clear and convincing evidence is not limited to contract actions as suggested by the quoted language. *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137 (Ind. 1988).

Even though the lower court applied the appropriate standard, the Indiana Supreme Court's decision contained very little application of current law to facts. The analysis suggests a failure to stringently adhere to the application of the clear and convincing standard. Perhaps the punitive damages decision in *Picadilly* can best be understood in light of the hostility generated by drunk driving. Such a decision might have been predicted based on the court's language in *Armstrong*. The court noted:

For, just as we agree that it is better to acquit a person guilty of crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one *whose error was one that society can tolerate* and who has already compensated the victim of his error.

Armstrong, 442 N.E.2d at 362 (emphasis added).

Colvin. Two separate blood tests were taken after 6:00 A.M. which showed the customer's blood alcohol content to be .114 and .1205.⁶¹ Colvin filed suit against the customer and Picadilly and then settled with the customer prior to trial. The trial resulted in a verdict for Colvin. The appellate court reversed the trial court, and, following *Whisman*, held that there was no common law cause of action for dram shop liability in a situation where the plaintiff sought recovery based upon special statutory provisions.⁶²

On appeal, the Indiana Supreme Court analogized dram shop liability to motor vehicle driving statutes, observing that, "[r]ather than preempting the common law, such statutes designate certain minimal duties but do not thereby relieve persons from otherwise exercising reasonable care."⁶³ Based upon this reasoning, the court held that *Whisman* misinterpreted *Elder* to the extent that it held "that general principles of common law negligence 'apply only in the absence of a special statutory provision.'"⁶⁴ The court went on to state that the correct interpretation of *Elder* is that it recognized "the common law liability *notwithstanding* the existence of such statute."⁶⁵

It should be noted that the statute referred to in *Picadilly* was a criminal statute⁶⁶ and not a dram shop act creating a civil right of action in the person injured. The *Picadilly* court, expounding on the rationale for the application of common law principles in dram shop cases, held:

Under the common law of this State, persons engaged in the business of furnishing alcoholic beverages are not granted special exemption or privilege. They are under the same duty to exercise ordinary and reasonable care in the conduct of their operations as those involved in businesses which are not alcohol related. Such ordinary and reasonable care must be exercised for the safety of others whose injuries should reasonably have been foreseen or anticipated. The foreseeable risk of harm is indisputable.⁶⁷

61. 519 N.E.2d at 1219.

62. *Picadilly, Inc. v. Colvin*, 503 N.E.2d 421, 423 (Ind. Ct. App. 1987), *vacated*, 519 N.E.2d 1217 (Ind. 1988).

63. 519 N.E.2d at 1220.

64. *Id.* (quoting *Whisman v. Tawcett*, 470 N.E.2d 73, 80 (Ind. 1984)).

65. 519 N.E.2d at 1220 (emphasis added).

66. IND. CODE § 7.1-5-10-15(a) (1988). Section 15(a) provides: "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." *Id.*

67. 519 N.E.2d at 1220.

The impact of *Picadilly* immediately became apparent with the supreme court's same day decision of *Gariup Construction Co. v. Foster*.⁶⁸ In *Gariup*, an employee of Gariup Construction Company became intoxicated at a 1982 Christmas party thrown by his employer. The employee left the party to pick up his wife from work, drove the wrong direction on a highway and collided with and seriously injured the plaintiff, Andrew Foster. Foster recovered the maximum from the employee's liability insurance policy and then proceeded against the employer. A jury awarded Foster a judgment of \$150,000.00, but the court of appeals reversed, basing its decision on the *Whisman* interpretation of *Elder*.

The Indiana Supreme Court, extending common law liability to the employer-provider, relied upon and quoted in detail the Restatement of Torts.⁶⁹ The *Gariup* discussion, therefore, is more definitive of the

68. 519 N.E.2d 1224 (Ind. 1988).

69. The following *Restatement* sections were quoted by the Indiana Supreme Court in *Gariup*:

Sec. 302 Risk of Direct or Indirect Harm

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either

- (a) the continuous operation of a force started or continued by the act or omission, or
- (b) the foreseeable action of another, a third person, an animal, or a force of nature.

Restatement (Second) of Torts § 302 (1965).

Sec. 302A Risk of Negligence or Recklessness of Others

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

Restatement (Second) of Torts § 302A (1965).

Sec. 308 Permitting Improper Persons to Use Things or Engage in Activities

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) of Torts § 308 (1965).

Sec. 317 Duty of Master to Control Conduct of Servant

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them,

- (a) the servant
 - (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
 - (ii) is using a chattel of the master, and
- (b) the master

elements of common law dram shop liability than the analysis appearing in *Picadilly*.⁷⁰

Both *Picadilly* and *Gariup* arose from occurrences which pre-dated the 1986 Dram Shop Act.⁷¹ This statute, which has been said to be merely a codification of existing law,⁷² sharply restricts the liability of providers of alcohol for injuries inflicted by the people they serve.

IV. THE 1986 DRAM SHOP ACT

The provisions of the 1986 Dram Shop Act explicitly preempt the objective standards of the common law stated in *Picadilly* and *Gariup*. The 1986 Act provides:

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

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965).

Sec. 318 Duty of Possessor of Land or Chattels to Control Conduct of Licensee

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person so as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

- (a) knows or has reason to know that he has the ability to control the third person, and
- (b) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 318 (1965).

70. Furthermore, *Gariup* noted that liability was not predicated upon a social host/guest relationship but rather on the duty of an employer who is hosting a party, which status the court felt carries with it "a significantly greater influence and control." 519 N.E.2d at 1229.

71. The incident upon which *Gariup* is based occurred on December 17, 1982. The incident discussed in *Picadilly* occurred on June 27, 1981.

72. Todd & Yosha, *Dram Shop Liability in Indiana: Analysis of Ashlock v. Norris and the New Civil Statute*, 19 IND. L. REV. 417, 419 (1986).

- (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.⁷³

Clearly, the statute precludes civil liability unless it is shown that the provider had actual knowledge of intoxication. Consequently, the "see no evil" defenses relied upon by the defendants in *Picadilly* and *Gariup* probably would have prevailed had the events in these cases occurred subsequent to the Dram Shop Act.⁷⁴

With certainty, dram shop defendants in cases arising after April 1, 1986, will be filing motions for summary judgment with supporting affidavits stating that they had no actual knowledge that the person served was visibly intoxicated. At first blush, it would seem impossible to successfully prosecute a claim unless the defendant admitted such guilty knowledge. This, however, may not be the case. In *Ashlock v. Norris*,⁷⁵ which pre-dated the 1986 Dram Shop Act, the court of appeals considered the defendant's knowledge as to the intoxication of the person served. In *Ashlock*, the defendant merely purchased drinks at a bar for an acquaintance who later, while intoxicated, struck and killed Anthony Ashlock who was jogging on the shoulder of the road.⁷⁶ Summary judgment was granted to the defendant.

The court of appeals reviewed the evidence, including the defendant Norris' "see no evil" deposition, answers to interrogatories and an affidavit in support of his position that the acquaintance for whom he purchased drinks did not appear to him to be intoxicated at the time.⁷⁷ Plaintiff Ashlock offered no rebuttal affidavit in the summary proceeding. The appellate court reversed the trial court, stating with regard to defendant's knowledge of the intoxication of the acquaintance that there was "some evidence" opposing Norris' declaration that the acquaintance did not appear intoxicated.⁷⁸

It is the impression of this writer that the court in *Ashlock* did not apply principles of constructive notice or an objective standard (knew or should have known) in determining that there was sufficient evidence from which "an inference might be drawn opposing Norris' declaration that [the acquaintance] did not appear intoxicated."⁷⁹ Concerning Norris' state of mind or knowledge, the court noted:

73. IND. CODE § 7.1-5-10-15.5 (1988) (emphasis added).

74. Seeger, *The Liability of Purveyors of Alcoholic Beverages in Indiana, Auto Accidents—Non-driver Liability*, 1986 INDIANA CONTINUING LEGAL EDUCATION FORUM II-18-19.

75. 475 N.E.2d 1167 (Ind. Ct. App. 1985).

76. *Id.* at 1168.

77. *Id.* at 1170.

78. *Id.*

79. *Id.* at 1170. This conclusion directly contradicts the analysis of the *Ashlock*

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.⁸⁰

This language may be interpreted to mean that "see no evil" defenses may be overcome with circumstantial proof of the defendant's "knowledge." In other words, the subjective defense that "I had no actual knowledge of the person's intoxication" may well be overcome by the evidence afforded by the surrounding circumstances. Such a method of proof of a state of mind is different from proving knowledge by objective standards, *i.e.*, the reasonably prudent person who knew or should have known under like or similar circumstances. Proof of subjective knowledge is not unknown in Indiana law. Indiana criminal law decisions are replete with discussions of the use of circumstantial evidence to prove actual knowledge or state of mind.⁸¹

V. CONCLUSION

Nowhere in tort law has the deterrent effect of civil liability been more apparent than in the area of dram shop litigation. There is little doubt that these decisions have forced the providers of alcohol to control the sale and provision of alcohol. It is well known that recent Indiana decisions brought an end to happy hour cocktail time, and barroom drinking contests and created more care and concern in the barroom on the part of the waiters and bartenders about the inebriation and condition of their customers. It is hoped that the 1986 Dram Shop Act will not represent a step back in time, particularly with judicial and public recognition and concern over the growing number of alcohol-related injuries and deaths. There is little doubt that, unless the judiciary interprets the 1986 Dram Shop Act in a manner that allows victims of negligent alcohol providers to prove the provider's knowledge circum-

decision and its knowledge requisite in *Todd & Yosha*, *supra* note 72, at 425. *Todd & Yosha* primarily rely on the language of IND. CODE § 7.1-5-10-15 as requiring subjective knowledge of intoxication by the provider of alcohol.

80. *Ashlock*, 475 N.E.2d at 1170 (emphasis added) (citation omitted).

81. Knowledge or intent may be proven from the facts and circumstances presented in each particular case. *Williams v. State*, 271 Ind. 656, 395 N.E.2d 239 (1979); *Boney v. State*, 498 N.E.2d 67 (Ind. Ct. App. 1986); *Schroer v. State*, 159 Ind. App. 522, 307 N.E.2d 587 (1974).

stantially, such conduct will go unpunished and the victims uncompensated. Without the availability of such proof, it would be the rare victim who would recover and then only in instances where the provider admits his knowledge as to the visible intoxication of the person furnished alcohol.

It is, indeed, ironic that the effect of the statute could be to insulate negligent providers from liability in light of the 1988 Indiana Supreme Court statement that "under the common law of this State, persons engaged in the business of furnishing alcoholic beverages *are not granted special exemption or privilege.*"⁸² If, in fact, the effect of this statute is to give special exemption to providers of alcohol, the Indiana Legislature should give heed to the rationale of recent Indiana decisions allowing judgments against persons negligently furnishing alcohol and either repeal or amend the statute. Should the legislature consider amending the statute, it is suggested that the statute be amended to hold those who furnish liquor to the same standard the law usually has required, *i.e.*, the reasonable person standard.⁸³ Under such a standard, one who

82. *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1220 (Ind. 1988) (emphasis added).

83. The Ohio State Legislature in 1986 enacted Ohio Revised Code Section 4399.18. The key language of the statute allows a cause of action for damage away from a vendor's premises or parking lot if a "permit holder or his employee knowingly sold an intoxicating beverage . . ." OHIO REV. CODE ANN. § 4399.18(A) (Anderson Supp. 1987) The statute clearly requires actual knowledge of a served customer's intoxication by a liquor vendor or his employee before liability can be imposed upon a tavern owner by a third party injured by a drunk driver.

For an interesting discussion of the Ohio statute, see Comment, *Ohio Liquor Vendors v. Highway Safety—A Legislative Compromise*, 13 OHIO N.U.L. REV. 475 (1986). The author of this article argues that a subjective standard of actual knowledge results in negligence principles no longer being applicable in liquor vendor liability cases. *Id.* at 488-87. In essence, a tavern owner's liability has been narrowed for incidents that occur within his premises or in his parking lot.

In response to this narrowed liability, the author of this Ohio article prepared an amended statute. The pertinent part of the proposed statute provides:

1. A husband, wife, child, parent guardian, employer, or other person injured in person, property, or means of support by an intoxicated person . . . shall have a right of action, against any person selling intoxicating liquors which contributes in whole or in part to the intoxication of such person.

(a) The liquor vendor shall be held to a reasonable man standard Thus, where the liquor vendor knew or should have known . . . he shall be held liable, subject to the exceptions enumerated in subsection 2 of this statute, to the injured third party for damages.

. . . .

(c) Vendor liability shall attach only where the negligent operation of the patron's vehicle was a direct and proximate result of his or her intoxication.

. . . .

2. Pursuant to subsection (1)(a) of this statute, liability will not be imposed

furnishes alcohol would be liable if that person knew or should have known in the exercise of reasonable care that the person served was intoxicated.⁸⁴

. . . if the vendor can prove by a preponderance of the evidence that:

. . . .

(b) That the intoxicated individual was served only a reasonable amount of alcohol while in the liquor vendor's establishment, and that the individual exhibited no visible and/or audible signs of intoxication.

Id. at 492-93. This proposed statute creates a compromise between liquor vendors, and their insurance carriers, and highway and traffic safety. Under the statute, a vendor is subject to a reasonable person standard. However, the statute also provides for exceptions to this liability when due care by a vendor could not have prevented the inflicted harm.

84. The equity of this approach is virtually guaranteed by the way in which fault is allocated under Indiana's Comparative Fault Act. IND. CODE § 34-4-33-1 to -14 (1988). The primary wrongdoer, the intoxicated person, routinely will bear the greater percentage of allocated fault, thus limiting the provider's exposure. This is true, of course, only so long as joint and several liability is not found to exist within Indiana's comparative fault scheme. *See generally*, Todd & Yosha, *supra* note 72.