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Joseph A. Hanofee

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CONNECTICUT LAW—DRAM SHOPS: THIRD-PARTY RECOVERY FOR RECKLESS AND WANTON MISCONDUCT—*Kowal v. Hofher*, 42 Conn. L.J. No. 1, 17 (1980).

I. INTRODUCTION

On November 6, 1977 Delbert Goff drove his car across the center lane of a Connecticut highway and collided with a car driven by James Kowal. As a result of the accident Kowal suffered extensive injuries and died. Plaintiff, administrator of Kowal's estate, brought an action against the owners and employees of the Hutch Restaurant, alleging that Goff had been served liquor by defendants while he was intoxicated.¹ The complaint further alleged that Goff left the premises while intoxicated, returned, was served again while intoxicated, left a second time, and caused the collision.

The first count of plaintiff's claim was brought under the Connecticut Dram Shop Act;² the second count was based on common-law negligence; and the third count was based on the common-law tort of gross negligence, which includes the element of reckless and wanton misconduct.³ Before the facts in dispute were litigated,⁴ two legal issues were appealed to the Connecticut Supreme Court. The court's decision in *Kowal v. Hofher*⁵ was limited to a determination of whether the two common-law actions existed under Connecticut law.

Although the court reasserted the rule that actions for ordinary negligence and gross negligence do not exist, it held that a

1. Brief for Appellant at 3, *Kowal v. Hofher*, 42 Conn. L.J. No. 1, at 17 (1980).

2. The statute provides in part:

[i]f any person, by himself or his agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of twenty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of fifty thousand dollars, to be recovered in an action under this section. . . .

CONN. GEN. STAT. § 30-102 (1979).

3. 42 Conn. L.J. No. 1 at 18 n.3. The court in *Kowal* confined its ruling to the allegations of reckless and wanton misconduct.

4. At the time of publication of this note the trial was still pending.

5. 42 Conn. L.J. No. 1, at 17 (1980).

common-law remedy based on reckless and wanton misconduct may be asserted by a third party against a liquor vendor.⁶ *Kowal* reversed the longstanding, common-law rule that no tort action could be brought by an injured third party against a liquor vendor.⁷ Liquor vendors previously were immune from these tort suits because legal causation could not be proved; the customer's consumption of liquor, not the vendor's sale, was treated as the proximate cause of the intoxication.⁸ The *Kowal* court for the first time traced the chain of causation from the third party's injury back to the liquor vendor's sale of alcohol. In recognizing a common-law cause of action the court implicitly reached the conclusion that the Dram Shop Act is not the exclusive remedy when drunk drivers cause accidents.⁹

Kowal may have a far-reaching effect on liquor vendor liability. This note offers third-party claimants some arguments to pursue in seeking a remedy. Further, it will show that *Kowal's* nebulous language invites attorneys to distort facts constituting ordinary negligence to fit *Kowal's* reckless misconduct theory. Finally, this note will show that liability for reckless misconduct creates the potential for conflicting duties on the part of liquor vendors.

II. HISTORY OF COMMON-LAW ACTIONS IN RELATION TO THE DRAM SHOP ACT

During the last twenty-five years the Connecticut Supreme Court has had several occasions to consider the relation between the common law and the Dram Shop Act. In *London and Lancashire Indemnity Co. v. Duryea*¹⁰ the court suggested that the Dram Shop Act was the exclusive remedy available to injured third parties against liquor vendors when it said that defendant's liability came into being only by virtue of the Act.¹¹ Two years later¹² the court declared that the Dram Shop Act created an action unknown to the common law.¹³ In 1967 *Nolan v.*

6. *Id.* at 19.

7. *Nolan v. Morelli*, 154 Conn. 432, 436, 226 A.2d 383, 386 (1967); *Noonan v. Galick*, 19 Conn. Supp. 308, 310, 112 A.2d 892, 894 (1955).

8. *Id.*

9. See note 61 *infra*.

10. 143 Conn. 53, 119 A.2d 325 (1955).

11. *Id.* at 60, 119 A.2d at 328.

12. *Pierce v. Albanese*, 144 Conn. 241, 129 A.2d 606, *appeal dismissed*, 355 U.S. 15 (1957).

13. *Id.* at 249, 129 A.2d at 612. *Pierce* created an evidentiary shortcut. A high level of intoxication at the time of the crash is sufficient to create a reason-

*Morelli*¹⁴ further distinguished the Act from the common law when the court stated that the common law, which completely denied third-party recovery, was overly harsh and that the Dram Shop Act was created to modify it.¹⁵ The court nonetheless repeated the common-law rule by saying that no tort cause of action lay against a liquor vendor.¹⁶ By recognizing that no tort cause of action lay against a liquor vendor, the court appeared to foreclose even an action for reckless and wanton misconduct.

More recently, in *Nelson v. Steffens*,¹⁷ the court reaffirmed its position that third-party, common-law remedies against liquor vendors do not exist in Connecticut. In *Nelson* plaintiffs brought a common-law negligence action alleging that the liquor vendor had violated a state law.¹⁸ In denying the action the court said that plaintiffs had not advanced a compelling reason for abrogation of the common law.¹⁹ When plaintiffs complained that the Dram Shop Act ceiling of recovery was too low, the court responded that, if the damage limitation was too low, it should be increased by legislative enactment rather than by overturning established judicial principles.²⁰

The most significant language in *Nelson* appears in the dissent. Justice Joseph Bogdanski, in a five-page dissenting opinion, urged the court to adopt a common-law cause of action for ordinary negligence. Justice Bogdanski asserted that a jury should decide whether a liquor vendor has breached his common-law duty of ordinary care in serving alcohol to an intoxicated person.²¹ He rea-

able inference that the driver must have been intoxicated when he was served the last drink by the defendant liquor vendor. *Id.* at 259, 129 A.2d at 616.

14. 154 Conn. 432, 226 A.2d 383 (1967). In a footnote, the court reserved judgment on the issue of whether the Dram Shop Act was the exclusive remedy. *Id.* at 439 n.2, 226 A.2d at 387 n.2. In the same footnote, the court expressly acknowledged that a common-law cause of action still might exist. "But if, under any circumstances, any alternative common-law right against a seller, as such, exists, it would, to the extent that it exists, necessarily permit the avoidance, through use of a common-law action, of the provision of the Act restricting the amount of damages recoverable" *Id.*

15. *Id.* at 437, 226 A.2d at 386.

16. *Id.* at 436, 226 A.2d at 386.

17. 170 Conn. 356, 365 A.2d 1174 (1976).

18. The complaint alleged that defendant liquor vendor knowingly had sold liquor to a minor who intended to drive from defendant's establishment. *Id.* at 357-58, 365 A.2d at 1175.

19. *Id.* at 361, 365 A.2d at 1177.

20. *Id.*

21. *Id.* (Bogdanski, J., dissenting).

soned that Connecticut's criminal statute²² measured the duty owed by a liquor vendor to the general public²³ and that violation of the statute constituted negligence per se. Justice Bogdanski satisfied the proximate cause element by theorizing that consumption was not the causative factor but merely a foreseeable intervening cause.²⁴ Justice Bogdanski's dissent later influenced the *Kowal* majority to fashion a common-law theory of recovery for injured third parties.

Most recently, in *Slicer v. Quigley*,²⁵ the Connecticut Supreme Court approved a lower court's jury instruction that no common-law cause of action existed. The court acknowledged that common-law causes of action had been adopted in a substantial number of jurisdictions but nevertheless adhered to *Nelson*.²⁶ In another five-page dissent Justice Bogdanski urged the court to create a common-law remedy.²⁷ A second dissent was reported in the *Slicer* opinion. Associate Justice Ellen Peters also advocated a cause of action for negligence based on violation of a statute.²⁸

Prior to *Kowal* no third-party, common-law cause of action

22. The criminal statute provides:

[a]ny permittee who, by himself, his servant or agent, sells or delivers alcoholic liquor to any minor, or to any intoxicated person, or to any habitual drunkard, knowing him to be such an habitual drunkard, and any person, except the parent or guardian of a minor, who delivers or gives any such liquors to such minor, except on the order of a practicing physician, shall be subject to the penalties of section 30-113.

CONN. GEN. STAT. § 30-86 (1979). Section 30-113 further states: "Penalties. Any person convicted of a violation of any provision of this chapter, for which a specified penalty is not imposed shall, for each offense, be fined not more than one thousand dollars or imprisoned not more than one year, or both." *Id.* (emphasis in original).

23. 170 Conn. at 362, 365 A.2d at 1177.

24. *Id.* at 363-66, 365 A.2d at 1177-79. The dissent directly quotes the RESTATEMENT (SECOND) OF TORTS § 447 (1966):

[t]he fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

170 Conn. at 363-64, 365 A.2d at 1178.

25. 41 Conn. L.J. No. 42 at 1 (1980).

26. *Id.* at 3.

27. *Id.* at 8 (Bogdanski, J., dissenting).

28. *Id.* (Peters, J., dissenting).

against liquor vendors existed in Connecticut. The dissents in *Nelson* and *Slicer*, however, demonstrate that a momentum for change had begun prior to *Kowal*. Although *Kowal* did not recognize an action for ordinary negligence, as urged by the *Slicer* dissents, it did create a common-law action for reckless misconduct. Why the court did not go one step further and create an ordinary negligence action is uncertain. The following analysis offers one possible explanation for the court's reservation. It also exposes some complications that have resulted from the court's distinction between negligent misconduct and reckless misconduct.

III. ANALYSIS

In *Kowal* the Connecticut Supreme Court reversed the longstanding judicial rule that the Dram Shop Act is the exclusive source of relief for third parties against liquor vendors. The *Kowal* court simply declared that the legislature did not intend the Dram Shop Act to be the exclusive remedy if causation could be traced back adequately to the liquor vendor.²⁹ Undefined policy considerations were then used to transform the sale into proximate cause.³⁰

The most significant aspect of the case is the distinction it drew between ordinary negligence and the more aggravated form of negligence, reckless and wanton misconduct. The court said that greater consequences attach when conduct is reckless rather than merely negligent.³¹ The court may have feared that foreseeability of an intervening cause, the standard governing liability in ordinary negligence cases,³² would be too easy to prove because any careless act by an intoxicated driver is foreseeable. Unreasonable third-party claims against liquor vendors would have a greater chance of succeeding under an ordinary negligence standard. To avoid imposing excessive liability on liquor vendors, the court held that common-law liability will attach only when a liquor vendor engages in reckless and wanton misconduct, defined as outrageous conduct.³³ When the liquor vendor's conduct is outrageous, nebulous

29. 42 Conn. L.J. No. 1 at 18.

30. *Id.* See note 67 *infra* and accompanying text.

31. 42 Conn. L.J. No. 1 at 18.

32. An intervening cause is one that individuals should reasonably anticipate due to ordinary human experience. A defendant is liable for negligence if he performs some act that results in injury when some foreseeable intervening cause combines with the defendant's act to cause injury. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 44, at 272 (4th ed. 1971).

33. 42 Conn. L.J. No. 1 at 19.

policy considerations satisfy the proximate cause requirement. Thus, under *Kowal*, an ordinary negligence action fails because the consumption, not the sale, is the proximate cause; yet a reckless misconduct action succeeds because policy establishes causation.

Because the *Kowal* court did not explain what types of policy considerations affect causation, the limits of the newly created common-law remedy remain speculative. Until the court defines "reckless and wanton misconduct" and applies it to a set of facts involving a liquor vendor and third-party injury, potential common-law liability will remain uncertain. Since *Kowal* did not describe the type of conduct that will be regarded as reckless and wanton, a definition must be sought in existing case law. In the paragraphs below this note will examine reckless misconduct principles that, until *Kowal*, have been unrelated to liquor vendors.

A. *Reckless Misconduct*

Reckless and wanton misconduct is more aggravated than ordinary negligence.³⁴ The reckless actor is consciously indifferent to the consequences of his action and almost demonstrates a willingness to have disastrous consequences flow from his actions.³⁵ Since such a state of mind usually cannot be proved, an objective standard has been applied. To be liable, the reckless actor needs only to have disregarded "a high degree of danger, either known to him or apparent to a reasonable . . . [person] in his position."³⁶

Reckless misconduct is an aggravated form of negligent conduct that commonly is discussed in automobile guest act cases or in contributory negligence cases. The Connecticut Supreme Court has determined that a defendant may be charged with reckless misconduct when he is in reckless disregard of the rights of others. He must show an indifference to the consequences of his action; momentary thoughtlessness, inadvertence, or erroneous judgment is not sufficient to constitute recklessness.³⁷ For example, in *Upson v. General Baking Co.*³⁸ defendant engaged in reckless misconduct by disregarding a warning.³⁹ Defendant ignored his passenger's

34. W. PROSSER, *supra* note 28, § 34, at 184.

35. *Id.* at 185.

36. *Id.*

37. *Ascher v. H.E. Friedman, Inc.*, 110 Conn. 1, 4, 147 A. 263, 264 (1929).

38. 113 Conn. 787, 156 A. 858 (1931).

39. *Id.* at 788, 156 A. at 859. *See also* *Riordan v. Gouin*, 119 Conn. 235, 236-37, 175 A. 686, 687 (1934); *Anderson v. Collucci*, 116 Conn. 67, 73, 163 A. 610, 612 (1932). *Berman v. Berman*, 110 Conn. 169, 170, 147 A. 568 (1929).

warning about the risk of passing on the left, caused an accident, and was liable for the resulting injuries. In *Grasser v. Fleming*,⁴⁰ cited as support in *Kowal*,⁴¹ decedent's wife warned the bartender that her husband could not control his appetite for liquor. The bartender agreed not to serve decedent but nevertheless sold him an excessive amount of liquor. While walking home, decedent slipped off a narrow bridge and died.⁴² The Michigan Court of Appeals held that the conduct supported an action for wanton misconduct.⁴³

The Connecticut Supreme Court has not defined reckless and wanton misconduct clearly, nor has the court ruled that disregarding a warning is a necessary element of reckless misconduct. Failure to heed a warning, however, recurs in the case law as evidence of recklessness.⁴⁴ In *Ziman v. Whitley*⁴⁵ the court found reckless misconduct even in the absence of an express warning. Evidence that defendant had disregarded an imminent danger by driving his car at an unsafe speed through an intersection apparently convinced the jury⁴⁶ that the actor's conduct had been reckless.⁴⁷ Since there is no specific requirement that an actual warning must be disregarded before liability will be found, perhaps disregard of a constructive warning will suffice to create liability.

Connecticut case law does not directly embrace the notion of constructive warning, but elements present in the cases are ready to be used in support of a constructive warning principle. It is well established that disregard of an express warning is evidence of recklessness.⁴⁸ *Ziman*, however, did not require an express warning because the clear presence of an imminent danger was tantamount to a warning. Under a broad reading of *Ziman*, therefore,

40. 74 Mich. App. 338, 253 N.W.2d 757 (1977).

41. 42 Conn. L.J. No. 1 at 19.

42. 74 Mich. App. at 340, 253 N.W.2d at 758.

43. *Id.* at 350, 253 N.W.2d at 763.

44. See notes 38 & 39 *supra* and accompanying text.

45. 110 Conn. 108, 147 A. 370 (1929).

46. *Id.* at 110-12, 147 A. at 372. The jury decides whether conduct is reckless and wanton. *Brock v. Waldron*, 127 Conn. 79, 83, 14 A.2d 713, 715 (1940). The jury's decision cannot be set aside "unless its manifest injustice is 'so plain and palpable as to justify the suspicion that the jury or some of its members were influenced by prejudice, corruption or partiality.'" *Coner v. Chittenden*, 116 Conn. 78, 82, 163 A. 472, 473 (1932) (quoting *Roma v. Thames River Specialities Co.*, 90 Conn. 18, 19, 96 A. 169, 169 (1915)). See also *Riordan v. Gouin*, 119 Conn. 235, 237-38, 175 A. 686, 687 (1934).

47. 110 Conn. at 110-12, 147 A. at 372.

48. See notes 39 & 40 *supra* and accompanying text.

disregard of a constructive warning could constitute recklessness. The following discussion of constructive warnings should be read with *Ziman* in mind.

B. *Constructive Warning*

Even if he had not been warned expressly by decedent's wife, defendant bartender in *Grasser* still might have been found liable simply because he knew that decedent was an alcoholic. Mere knowledge that decedent was an alcoholic might have constituted a warning. In *Nally v. Blandford*,⁴⁹ also cited in *Kowal*,⁵⁰ there is no indication that defendant had been warned directly of risk. The Kentucky court simply held that defendant knew or should have known that the sale of a quart of whiskey, which defendant knew decedent was going to consume at once, would cause injury. Plaintiff's husband died from alcohol poisoning. The court used a foreseeability standard⁵¹ to measure defendant's duty. The bartender was charged with knowledge that injury would result because the injury could reasonably have been foreseen. Disregard of the likelihood of injury, in this instance, is equivalent to disregard of an express warning that injury is likely.

When foreseeability of injury operates as a constructive warning, knowledge that a customer later will drive a car could operate as a constructive warning. If a customer demonstrates that he is intoxicated, the bartender should be put on notice that the customer will drive dangerously. Hazardous weather conditions could serve as constructive warning to a bartender that his customers might become dangerous drivers. Knowledge of excessive drinking during "happy hours"⁵² could operate as a constructive warning. Juries might be willing to find liquor vendors liable for this indifferent conduct in light of the pervasive use of the automobile and the high percentage of alcohol-related accidents.⁵³

49. 291 S.W.2d 832 (Ky. 1956).

50. 42 Conn. L.J. No. 1 at 19.

51. 291 S.W.2d at 835.

52. "Happy hours" are designed to lure customers into bars during limited hours when prices are lowered.

53. See GOV'T ACCOUNTING OFFICE REP., THE DRINKING-DRIVER PROBLEM—WHAT CAN BE DONE ABOUT IT? (Feb. 1979). The *Slicer* dissent, 41 Conn. L.J. No. 42 at 6, quotes directly from the GOV'T ACCOUNTING OFFICE REP., *supra*, at iv.: "The Government Accounting Office found that among the major obstacles to successful anti-drinking-driver efforts were: 'Social acceptability and use of alcohol. . . Need for increased judicial support. . . Need for effective methods to identify and penalize those who serve intoxicated individuals.'" 41 Conn. L.J. No. 42 at 6 (emphasis added by court).

In *Kowal*, Goff allegedly was served, left the premises, returned, and was served again. The clear implication that Goff was going to drive a car could have constituted a constructive warning. When defendants served Goff the second time, they disregarded a constructive warning that Goff was a danger to the public.

Kowal, however, indicates that reckless and wanton misconduct is closer to intentional conduct than it is to negligent conduct.⁵⁴ *Kowal* did not address the state of mind of defendant liquor vendor. The courts presumably will draw upon the existing cases that have dealt with the mental state of a reckless defendant. Disregard of imminent danger has been used as a ground to establish recklessness, but its role in the context of liquor sales is purely speculative. The following section examines the conduct and mental state that will warrant a finding of reckless and wanton misconduct.

C. *Requisite Mental State*

In 1935 the Connecticut Supreme Court determined that an actor may be liable for reckless misconduct if he is able to foresee the possibility of harm. In *Rogers v. Doody*⁵⁵ the court stated that an actor may be found liable for reckless misconduct even if he does not intend to cause harm. The actor will be found liable if he realized or should have realized that his actions created a strong probability that harm might result.⁵⁶ This is the same approach outlined in the *Restatement (Second) of Torts (Restatement)*.⁵⁷ Under this reasoning, conduct will be deemed reckless when the person doing the act is aware of the possibility that harm will result. Using the *Rogers* and the *Restatement* rationale, a bartender may be liable for reckless misconduct even if he expected no harm to result. This argument gains strength from *Ziman*. There the reckless actor was liable for speeding through an intersection. The conduct was deemed reckless because the risk of injury was a strong possibility.

Connecticut case law and the *Restatement* are unclear on the degree to which the actor must anticipate harm. It is firmly estab-

54. 42 Conn. L.J. No. 1 at 19.

55. 119 Conn. 532, 178 A. 51 (1935).

56. *Id.* at 535, 178 A. at 53. This language was taken directly from the RESTATEMENT (SECOND) OF TORTS *supra* note 21, § 500, comment f, at 590. In the RESTATEMENT, *id.* this language is immediately followed by the words: "even though he hopes or even expects that this conduct will prove harmless." *Id.*

57. *Id.* § 500, at 590.

lished in Connecticut case law, however, that the jury decides whether conduct is reckless.⁵⁸ If a jury is left to decide the question, it could assume that bartenders are always reckless when they serve intoxicated customers because an intoxicated driver creates a risk to the public that is imminent and easily foreseeable. The complex issue of causation might render the common law useless to the jury. A jury, therefore, might find liquor vendors liable for reckless and wanton misconduct when they were, at worst, careless or negligent. Liability could be found without intentional or even outrageous conduct.

Expanded liability also may result because reckless misconduct is determined by the use of an objective test.⁵⁹ An objective test will not require the bartender to be indifferent to the safety of travelers; rather, carelessness may suffice.⁶⁰ Only further development of the case law will reveal what consequences bartenders should anticipate.

IV. IMPACT OF *KOWAL*

A. *Ordinary Negligence*

The Connecticut Supreme Court has taken a significant step in creating a common-law cause of action against liquor vendors for reckless and wanton misconduct. Recognition of an ordinary negligence action is the next logical step. As a result of *Kowal*, the argument that the Dram Shop Act was intended to occupy the field is no longer an obstacle to an ordinary negligence action.⁶¹ Further, when the court held that the Dram Shop Act was not the exclusive remedy in its search to find a common-law remedy,⁶² it supported

58. *Brock v. Waldron*, 127 Conn. 79, 83, 14 A.2d 713, 715 (1940).

59. In *Menzie v. Kalmonowitz*, 107 Conn. 197, 139 A. 698 (1928), the court stated, "[i]n the instant case the jury might have found that the defendant, knowing, or bound with knowledge because by a reasonable use of his faculties he should have observed, that the trolley was about to stop. . . ." *Id.* at 200, 139 A. at 699. See also *Rogers v. Doody*, 119 Conn. 532, 555, 178 A. 51, 53 (1935).

60. See note 36 *supra* and accompanying text.

61. 42 Conn. L.J. No. 1 at 18. "There is absolutely no indication, however, that where causation is adequately traced back to the bar keeper . . . the legislature nevertheless, intended the dram shop act to be the injured plaintiff's exclusive remedy." *Id.*

The dissent in *Kowal* countered the majority's position by stating that "[t]he majority of jurisdictions with dram shop acts which have addressed this issue hold that where the act applies, the remedies provided by the legislature are exclusive because the legislature has preempted additional common-law remedies." *Id.* at 20.

62. *Id.* at 18. The court quoted the RESTATEMENT, *supra* note 21, on this point:

the holding by citing *Berkeley v. Park*⁶³ and *Mason v. Roberts*,⁶⁴ which both created causes of action for ordinary negligence in jurisdictions having Dram Shop Acts. In these cases the liquor vendor's duty was measured by a criminal statute that protected the general public.⁶⁵ The *Kowal* court created a common-law cause of action for reckless and wanton misconduct, yet *Berkeley* and *Mason* created actions for ordinary negligence.

The underlying principles of ordinary negligence and reckless and wanton misconduct seemingly overlap because they both use an objective test and both require that harm be foreseeable. Given this similarity, the Connecticut Supreme Court may be moving in a direction similar to that taken in neighboring jurisdictions and soon may recognize ordinary negligence actions. The two dissents in *Slicer*⁶⁶ demonstrate that the Connecticut Supreme Court is not unanimous concerning the status of a common-law ordinary negligence action. The dissenters may yet influence the majority's view.

The court determined that the causation element could be satisfied by "policy considerations."⁶⁷ Additionally, the court reserved the freedom to shape policy considerations by using a "moral approach to causation."⁶⁸ The Connecticut Supreme Court's policy concerning ordinary negligence liability for liquor vendors, therefore, might be influenced by an argument based on moral considerations because "a moral approach to causation introduces into the formula the perceived nature of the actor's conduct which produced the injury. Responsibility for greater consequences may

"[t]he fact that the actor's misconduct is in reckless disregard of another's safety rather than merely negligent is a matter to be taken into account in determining whether a jury may reasonably find that the actor's conduct bears a sufficient causal relation to another's harm to make the actor liable therefor." *Id.* at 501(2), at 591; *cf. id.* § 435B, at 455.

63. 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965).

64. 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

65. This was Justice Bogdanski's approach in *Slicer v. Quigley*, 41 Conn. L.J. No. 42 at 6. *See* notes 21 & 28 *supra* and accompanying text.

66. *See* notes 27 & 28 *supra* and accompanying text.

67. 42 Conn. L.J. No. 1 at 18. At common law, the consumption, but not the sale, was the proximate cause of injury. Policy considerations, according to the *Kowal* court, can make the sale the proximate cause: "[i]n sum whatever the formulation of the rule, policy considerations generally underlie the doctrine of proximate cause." *Id.*

68. *Id.* at 18. "A moral approach to causation introduces into the formula the perceived nature of the actor's conduct which produced the injury. Responsibility for greater consequences may be considered justified in the case of intentional or reckless conduct than for mere negligence." *Id.*

be considered justified in the case of intentional or reckless conduct than for mere negligence."⁶⁹ The *Slicer* dissents confirm that two justices will be willing to listen to arguments based on moral principles favoring an ordinary negligence action.

In several states the defense of lack of causation, the common-law defense to an ordinary negligence action, has deteriorated. Jurisdictions that have created ordinary negligence actions have recognized that the law must keep pace with the changes that have taken place in society. Liability is recognized as a flexible concept that evolves with social values. Many jurisdictions, therefore, have broadened the concept of causation to ease the plaintiff's burden of proof.

The New York Court of Appeals asserted in *Berkeley* that, while danger to the general public from transportation was not imminent in the horse and buggy era, it is imminent today because the mode of travel has changed.⁷⁰ The court quoted Judge Cardozo:

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be *imminent* does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.⁷¹

The *Berkeley* court changed the concept of causation because the increased use of the automobile made the drunk driver's threat to the public easily foreseeable. Thus, the court fashioned a foreseeability standard as the measure of the duty owed by liquor vendors to the public because the risk of selling alcohol to an already intoxicated person who drives an automobile is easily foreseeable to the reasonable person.⁷²

The Supreme Court of New Jersey in *Rappaport v. Nichols*⁷³ held that policy considerations and the balancing of conflicting interests are factors in shaping the common-law principles of negligence and proximate cause.⁷⁴ Disregard of a foreseeable risk of harm was held to constitute negligence. Further, the court decided

69. *Id.*

70. 47 Misc. 2d at 383-84, 262 N.Y.S.2d at 293.

71. 47 Misc. 2d at 384, 262 N.Y.S.2d at 293. (quoting *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 391, 111 N.E. 1050 (1916) (Cardozo, J.)).

72. *Id.* at 383, 262 N.Y.S.2d at 293.

73. 31 N.J. 188, 156 A.2d 1 (1959).

74. *Id.* at 197, 156 A.2d at 10.

that negligence might be found when a defendant disregards unreasonable risk resulting from the predictable action of another.⁷⁵ In *Rappaport* the intoxicated minor drove carelessly and caused an accident which resulted in the death of plaintiff's decedent, Rappaport. The liquor vendor who had served the minor was liable to Rappaport's administratrix.

In *Adamian v. Three Sons, Inc.*,⁷⁶ a Massachusetts criminal statute measured the duty owed by a liquor vendor to the general public. Violation of the statute was evidence of negligence.⁷⁷ The liquor vendor, who catered to the driving public,⁷⁸ allegedly served an intoxicated customer. In devising a remedy for the innocent victims of an ensuing automobile accident, the Massachusetts Supreme Judicial Court said: "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."⁷⁹

Twenty-four jurisdictions have adopted ordinary negligence actions and have held that the sale of liquor can cause injury to third parties.⁸⁰ The modern view is toward expansion of negligence liability in the area of dram shops.⁸¹ Most of the jurisdictions that have created tort actions have founded liability on ordinary negligence standards,⁸² and they consider violation of an applicable statute to be evidence of negligence. If the Connecticut Supreme Court is determined to resist any further changes in the area of liquor vendor liability despite the changes occurring in other jurisdictions,⁸³ proponents might try the following approach to establish liability.

75. *Id.* at 194, 156 A.2d at 8.

76. 353 Mass. 498, 233 N.E.2d 18 (1968).

77. Negligence per se based on a statutory violation operates in Connecticut. See *Panaroni v. Johnson*, 158 Conn. 92, 256 A.2d 246 (1969). In *Panaroni*, a landlord was liable to his tenant for injuries sustained by the tenant when he fell down an unsafe exterior stairway. The applicable statute required the landlord to keep exterior stairways in safe repair.

78. 353 Mass. at 499, 233 N.E.2d at 19. Defendant's tavern was on a public road and had a large parking lot.

79. *Id.* at 501, 233 N.E.2d at 20.

80. Brief for Appellant at 6, *Kowal v. Hoffer*, 42 Conn. L.J. No. 1 at 17.

81. *Id.* at 5.

82. See note 83 *infra*.

83. *Trail v. Christian*, 213 N.W.2d 618 (Minn. 1973); *Veseley v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). See also *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973); *Kerby v. Flamingo Club, Inc.*, 35 Colo. App. 127, 532 P.2d 975 (1975); *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964); *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (1965). But see *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965).

B. *A Matter of Semantics*

Summary judgment against the plaintiff is guaranteed when his complaint alleges ordinary negligence on the part of a liquor vendor. A complaint using reckless misconduct principles, however, probably will survive summary judgment. Calling conduct reckless will get the case to a jury.

Under an ordinary negligence standard⁸⁴ the sale of liquor is the proximate cause of third-party injury when two elements are present: An intoxicated vendee consumes liquor and his negligent conduct is a foreseeable intervening cause.⁸⁵ Under a reckless misconduct standard the vendee's potential for injurious conduct would have to be sufficiently apparent to the bartender to constitute a warning.⁸⁶ In both ordinary negligence and reckless misconduct cases the conduct of the liquor vendor and of the customer is the same, only the language used to describe it is different. An ordinary negligence complaint would fail because proximate cause could not be established, but a reckless misconduct complaint would succeed because proximate cause would be established by public policy.

The Connecticut Supreme Court's newly created reckless and wanton misconduct cause of action probably will expand. The court may decide to adopt the reasoning of neighboring jurisdictions and create an ordinary negligence action. If it does not, actions constituting ordinary negligence could be manipulated to conform to the requirements of reckless and wanton misconduct. Notwithstanding these two possibilities, expanded liability could emerge if the existing reckless misconduct action adopts disregard of imminent danger as the equivalent of a constructive warning. Regardless of which form the expansion takes, liquor vendors will face conflicting duties.

V. POTENTIAL FOR CONFLICTING DUTIES

In *Merhi v. Becker*⁸⁷ plaintiff attended an outdoor picnic sponsored by defendant, a local union. Becker, a union member, was involved in two fights, one described as a brawl, but he was not asked to leave.⁸⁸ A half hour after the brawl Becker drove his car

84. See notes 71-79 *supra* and accompanying text.

85. W. PROSSER, *supra* note 28, § 44, at 272.

86. See notes 45-47 *supra* and accompanying text.

87. 164 Conn. 516, 518, 325 A.2d 270, 272 (1973).

88. *Id.* at 518, 325 A.2d at 272.

into the picnic area and injured plaintiff, who had paid the one dollar admission price.

The court characterized plaintiff, a paying guest, as an invitee.⁸⁹ Defendant, as "possessor of the premises . . . , had the duty of exercising reasonable care and control to protect its invitees from dangers which might reasonably be anticipated to arise from the conditions of the premises or the activities taking place there."⁹⁰ Defendant was found liable for failure to perform its duty to control its "beer drinking guests."⁹¹

Had defendant invitee in *Merhi* left the picnic and driven on the public highway, the duty of the local union to control its liquor-drinking guest would have ceased. As a result of *Kowal*, defendant local union would have to be proved reckless in its conduct to be liable to an injured highway plaintiff but only negligent in its conduct to be liable to an invitee.⁹² The highway plaintiff, however, seems to be as foreseeable a victim as an invitee plaintiff.

In *Merhi* the test of proximate cause was whether the harm which occurred was of the same general nature as the foreseeable risk created by defendant's negligence.⁹³ The duty arose in defendant local union because it should reasonably have anticipated that dangers to invitees would arise from the amount of alcohol consumed at the picnic.⁹⁴ The liquor-drinking invitees, however, are just as dangerous to highway travelers. Certainly, the possibility that an intoxicated picnicker will cause an accident while driving on a public road is just as foreseeable as the possibility that he will deliberately strike a fellow picnicker with his car. According to current Connecticut law, defendant local union, or any liquor vendor,⁹⁵ could successfully defend a negligence suit brought by an

89. *Id.* at 519, 325 A.2d at 272.

90. *Id.* at 520, 325 A.2d at 272. The court does not discuss whether the duty to control includes the duty to control the amount the invitee can consume.

91. *Id.*

92. W. PROSSER, *supra* note 28, § 61, at 392-93.

93. 164 Conn. at 521, 325 A.2d at 273. Defendant local union argued that because defendant invitee's conduct was intentional it should have operated as an independent supervening cause. The court rejected the argument stating, "[T]he fact that the [defendant] neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." *Id.* at 521, 325 A.2d at 273. The court concluded that failure to police a large, liquor-drinking crowd could result in boisterous and angry occurrences which might result in injury to bystanders. *Id.* at 519, 325 A.2d at 273.

94. *Id.* at 519-20, 325 A.2d at 272.

95. A liquor vendor would have the same status as possessor of the premises that the local union had in the *Merhi* case. W. PROSSER, *supra* note 28, § 57, at 351.

injured highway traveler. If an objective foreseeability test⁹⁶ becomes the standard for reckless misconduct actions, however, liability may be premised on a constructive warning, and the liquor vendor could be faced with a dilemma. If the liquor vendor cannot control the actions of an intoxicated invitee, he has a duty to expel the invitee⁹⁷ in spite of potential liability for reckless and wanton misconduct. If the expelled customer causes third-party injury on the highway, the liquor vendor could be liable for reckless and wanton misconduct. The constructive warning will be present if the harm was imminent, as required by *Ziman* and *Nally*, and disregard of the warning will be evidence of recklessness.

Measuring the duty owed by liquor vendors to the general public is difficult in Connecticut because the common law has not kept pace with the changes in society. Increased use of the automobile and a marked rise in alcohol consumption have rendered the common law surrounding dram shops inappropriate. In *Kowal* the Connecticut Supreme Court attempted to address the problem, but the court seems to have raised more questions than it has answered.

VI. CONCLUSION

In *Kowal*, plaintiff's son was killed by Delbert Goff, a drunk driver. Plaintiff sued the liquor vendor, who allegedly had continued to serve Goff even though Goff was intoxicated. The suit was brought in three counts, the first under the Connecticut Dram Shop Act. The trial judge struck the second and third counts because he believed that ordinary negligence and reckless misconduct were precluded by the statutory remedy. On appeal, the Connecticut Supreme Court ruled that a cause of action for reckless and wanton misconduct should have been recognized although the ordinary negligence action did not exist. In the face of contradictory precedent, the court for the first time recognized a common-law cause of action by third parties against liquor vendors.

Historically, ordinary negligence actions were disallowed because causation could not be proved. The consumption of alcohol, rather than the sale, was considered to be the proximate cause of injury. This approach insulated liquor vendors from liability. In order to provide injured third parties with a remedy, as well as to preserve a defense for liquor vendors in negligence suits, the

96. See notes 49-51 *supra* and accompanying text.

97. 164 Conn. at 520, 325 A.2d at 272.

Connecticut Supreme Court decided in *Kowal* that public policy will satisfy the causation element only when the conduct of liquor vendors is reckless and wanton. The court, however, appears to be ready to expand the common-law liability of liquor vendors even further to include ordinary negligence liability.

Connecticut liquor vendors already may face expanded liability since negligence complaints could easily be disguised as reckless misconduct actions. Plaintiffs' attorneys undoubtedly will attempt to get their cases to the jury by calling conduct reckless and wanton rather than negligent. The defense of lack of causation would then be unavailable to the liquor vendor because policy considerations satisfy the proximate cause requirement in the reckless and wanton misconduct action.

The *Kowal* court did not define "reckless and wanton misconduct." In prior cases not involving liquor vendors, however, the court applied an objective standard to test for reckless and wanton misconduct. *Ziman*,⁹⁸ a Connecticut case, and *Nally*,⁹⁹ a Kentucky case cited in *Kowal*, indicate that an objective foreseeability standard will emerge as the measure of the liquor vendor's duty to the general public.

Disregard of an express warning is evidence of reckless and wanton misconduct. If a bartender is warned that a customer cannot control his drinking, a disregard of that warning will expose him to liability under *Kowal*. The presence of a foreseeable danger putting the defendant on constructive notice also might become a ground for liability. Once a foreseeable danger becomes apparent, the reckless actor would be charged with knowledge of that danger just as he would be after receiving an actual warning.

Even if the new tort action does not expand to embrace ordinary negligence actions, the duties presented by *Kowal* and *Merhi*¹⁰⁰ appear to be incongruous. These two cases place liquor vendors in a dilemma: the liquor vendor must satisfy his duty to protect business invitees from intoxicated customers at the expense of the motoring public. A reevaluation of the Connecticut law addressing the duties of liquor vendors is inevitable.

Joseph A. Hanofee

98. See note 45 *supra* and accompanying text.

99. See note 49 *supra* and accompanying text.

100. See notes 87-91 *supra* and accompanying text.