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Comparative Negligence and Dram Shop Laws: Does *Buckley v. Pirolo* Sound Last Call for Holding New Jersey Liquor Vendors Liable for the Torts of Intoxicated Persons?

At common law, a person injured by an intoxicated individual had no cause of action against an establishment that had furnished the intoxicated individual with alcoholic beverages.[1] In response to this sometimes harsh common law rule, many states have enacted statutes that specifically impose liability on the purveyor of intoxicating beverages in certain situations. These statutes are commonly referred to as "dram shop" statutes.[2]

Unlike these states, New Jersey has not enacted a dram shop statute that imposes civil liability on unlawful sellers of alcoholic beverages. New Jersey does, however, judicially recognize a common law cause of action against a tavern based on the negligent sale of intoxicating liquors.[3]

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1 The reason for this common law rule was that the consumption of liquor, and not the selling of liquor, was considered to be the proximate cause of the alcohol-related injury. This common law principle was exhibited as early as 1793 in Ashley v. Harrison, 1 Peake 149, 3 Rev. Rep. 686 (K.B. 1793), where the court dismissed a libel action because it believed the alleged injury was too remote from the alleged wrongful act. Lord Kenyon stated:

> If this action is to be maintained, I know not to what extent the rule can be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage.

Id.

This common law rule had arisen from the dual assumptions that a person should not be able to relieve himself from responsibility for his acts by becoming intoxicated, and that selling liquor to an able-bodied man should not be a tort because the liquor vending business is legitimate and the purchaser is deemed to be responsible. *See generally* W. Prosser, HANDBOOK ON THE LAW OF TORTS § 32 (4th ed. 1971). *See also* Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969).

2 Dram shop statutes, also known as "civil damage acts," allow a third party, injured by an intoxicated person, to bring a civil action against the person who contributed to the intoxication. Dram shop statutes should be distinguished from liquor control statutes which prohibit the sale of intoxicating liquor to specified individuals, and require either fines or criminal penalties for their violation. For a general discussion of dram shop legislation, see Comment, *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995 (1969). *See also* Comment, Ono v. Applegate: *Common Law Dram Shop Liability*, 3 U. HAW. L. REV. 149 (1981).

Sixteen states have dram shop statutes currently in force: ALA. CODE § 6-5-71 (1975); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); DEL. CODE ANN. tit. 4, § 713 (1974 & Supp. 1980); ILL. ANN. STAT. ch. 43, para. 135-136 (Smith-Hurd Supp. 1980-81); IOWA CODE ANN. § 123.92 (West Supp. 1980-81); LA. REV. STAT. ANN. § 26.683 (West 1975); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS ANN. § 436.22 (West 1978); MINN. STAT. ANN. § 340.95 (West Supp. 1980); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1980-81); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Anderson 1973); R.I. GEN. LAWS § 3-11-1 (1976); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1980-81).

Also, the District of Columbia has a dram shop statute located at D.C. CODE ANN. § 25-121 (Supp. 1986).

3 *See* Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959). *See also infra* note 16 and accompanying text.

With regard to most negligence actions, New Jersey has adopted a comparative negligence approach for apportioning damages.[4] This approach eliminates the complete defense of contributory negligence and apportions damages according to the relative fault of the parties.[5]

Such an approach to damages apparently conflicts with New Jersey's dram shop rule that, at least in principle, imposes strict and absolute liability upon the negligent commercial seller of alcoholic beverages. The Supreme Court of New Jersey recently examined this seeming conflict of New Jersey's Comparative Negligence Act and the state's common law dram shop rule in *Buckley v. Pirolo*.[6] The court's careful reasoning in *Buckley* may have far-reaching implications in New Jersey, and in states that have not addressed this particular issue.

This note will analyze the conflict between a dram shop rule's imposition of strict and total liability and comparative negligence's fault-based apportionment of damages. Part I of this note briefly reviews the development of New Jersey's common law dram shop rule. Part II examines New Jersey's Comparative Negligence Act and determines whether the Act should be applied to all dram shop cases.[7] On a broader level, this section will also examine how several other states have treated the apparent conflict between a comparative negligence approach to the issue of damages and a strict liability approach to the question of liability in dram shop cases. Part III explores the viability of allowing the alternative theory of contributory negligence consisting of an "assumption of the risk" to dilute or to defeat a tavern's culpability in dram shop cases. Finally, Part IV concludes that the public policy considerations supporting a dram shop act and a comparative negligence approach to damages do not necessarily conflict; in fact, with proper balancing by the courts, all of the policy concerns can be effectively addressed in dram shop cases.

I. The Development of Dram Shop Liability

A. *Historical Development*

In order to deter automobile operators from driving while intoxicated and to compensate innocent victims injured by intoxicated individ-

4 N.J. STAT. ANN §§ 2A:15-5.1 to -5.3 (West 1982). *See infra* notes 37-41 and accompanying text.

5 To date, the vast majority of states have adopted some form of comparative negligence. These forms fall primarily into three basic categories: pure, modified and slight-gross. The pure form provides for the apportionment of damages between a negligent defendant and a contributorily negligent plaintiff regardless of the extent to which either party's negligence contributed to the injury. Under the modified approach, however, while damages are apportioned between the parties, contributory negligence continues to be a complete defense where a plaintiff's negligence exceeds that of the defendant. Finally, under the slight-gross form of comparative negligence a plaintiff's contributory negligence will bar his recovery unless his negligence is slight and/or the defendant's negligence was gross in comparison. Easterday, *The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?*, 17 IND. L. REV. 883 (1984).

6 101 N.J. 68, 500 A.2d 703 (1985). *See infra* notes 42-57 and accompanying text.

7 For purposes of this note, a "dram shop case" is a case in which an injured third party brings an action against a liquor vendor that served alcohol to a tortfeasor who was already intoxicated or who was a minor.

uals, the majority of state legislatures have enacted "dram shop acts."[8] These statutes impose liability on commercial vendors who supply alcoholic beverages to minors and to obviously intoxicated persons who injure third parties. Most of these legislatures justify the imposition of statutory liability by declaring that dram shop acts protect people who cannot protect themselves.

Many states that have not enacted dram shop statutes have judicially imposed similar liability on vendors of alcoholic beverages. In these states, the courts have handled dram shop cases using one of three basic theories of liability: (1) negligence per se for violations of beverage control statutes; (2) common law negligence; and (3) pure negligence.

Most state courts have found that violations of beverage control statutes[9] result in negligence per se.[10] In these jurisdictions, if a plaintiff establishes that the defendant violated a beverage control statute, any inquiry into the standard of care of the defendant is foreclosed. Only the amount of civil damages remains at issue.[11]

A few state courts that impose civil liability when a beverage control statute has been violated have developed common law negligence actions.[12] These actions are not based on pure negligence principles; rather, they are premised on the theory that beverage control statutes impose a duty on alcohol vendors to protect third persons from intoxicated persons. These courts reason that when a vendor serves an intoxicated person, it breaches this statutory duty of care, and a cause of action for common law negligence arises.[13]

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8 *See supra* note 2.

9 New Jersey's beverage control statute, Regulation No. 20, Rule 1, Division of Alcoholic Control, New Jersey (1967) states that:

> No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person under the age of twenty-one (21) years or to any person actually or apparently intoxicated, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises. (footnote omitted).

The statutory authority for the regulation is N.J. STAT. ANN. §§ 3361-69 (West Supp. 1971-72). *See* Galvin v. Jennings, 289 F.2d 15, 17 n.7 (3d Cir. 1961) (New Jersey alcohol beverage control (ABC) regulations have the same effect as a statute in establishing the standard of care); Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 590, 218 A.2d 630, 635 (1966) (ABC regulations have the same effect as a statute designed to protect incompetents against consequences of their own incompetency); Cino v. Driscoll, 130 N.J.L. 535, 538-40, 34 A.2d 6, 9 (1943) (the commissioner of the alcoholic beverages commission has the power to promulgate regulations having the force and effect of a statute).

10 *See, e.g.*, Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973) (tavern furnished alcohol to minors in violation of the beverage control statute); Munford, Inc. v. Peterson, 368 So.2d 213 (Miss. 1979) (store furnished alcohol to minors in violation of the beverage control statute).

11 *See generally* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 36 (4th ed. 1971).

12 *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 324-26 (7th Cir. 1959) (common law negligence action existed under a duty imposed by the alcoholic beverage control statute); Rappaport v. Nichols, 31 N.J. 188, 195, 156 A.2d 1, 8 (1959) (vendors served a minor in violation of the beverage control statutes that created a duty to the general public); Lopez v. May, 98 N.M. 625, 651 P.2d 1269 (1982) (tavern owner served an intoxicated patron in violation of the beverage control statutes that created a duty to the general public); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977) (tavern owner who sold intoxicants to an intoxicated woman in violation of a penal statute owed a duty to the traveling public).

13 Courts usually prefer to recognize common law negligence actions rather than strict negligence per se actions because the actions based on the latter theory place presumptions of negligence

Finally, a substantial number of state courts impose liability based solely on the fundamental principles of negligence.[14] These courts recognize that an individual owes a duty to others when his or her act creates a foreseeable and unreasonable risk of harm to third parties. In these jurisdictions, a plaintiff can demonstrate that the alcohol vendor was negligent by showing that when the vendor furnished alcohol to a minor or an intoxicated person it knew that the drinker would then drive on public highways. Such an act is negligent because a reasonable person should know that supplying alcohol to a minor or to an intoxicated person under such circumstances is likely to cause injury to third parties.[15]

New Jersey adheres to the second approach and imposes dram shop liability under the principles of common law negligence. Thus, when a vendor violates the New Jersey beverage control statutes, it breaches its statutory duty of care and can be found negligent if this violation caused damage to an innocent third party.

B. *Development in New Jersey*

In the seminal case, *Rappaport v. Nichols*,[16] New Jersey established its dram shop rule and based the rule on principles of common law negligence. In *Rappaport*, several taverns served alcoholic beverages to an intoxicated minor. After driving away from the last tavern, the minor's car collided with another car. The driver of the other car, Arthur Rappaport, died from injuries received in the collision. Rappaport's widow sued one of the taverns, alleging that the tavern had negligently served alcohol to the minor and, therefore, had proximately caused or contributed to her husband's death.[17]

On appeal, the Supreme Court of New Jersey found that a tavernkeeper who serves alcoholic beverages when he knows or should have known that the patron is intoxicated may be liable for having created an unreasonable risk of harm to third parties.[18] Thus, the tavernkeeper had engaged in negligent conduct upon which a plaintiff could ground a common law claim for damages. The high court further noted that the tavernkeeper may be held liable for the injuries that result in the ordinary course of events from his negligent conduct if his conduct is a "substantial factor" in bringing about those injuries.[19]

In contrast to the situation found in *Rappaport*, the plaintiff-patron's representative in *Soronen v. Olde Milford Inn, Inc.*,[20] sued a tavern for inju-

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on vendors. *See* Easterday, *The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?*, 17 IND. L. REV. 883 (1984).

14 *See, e.g.*, Coulter v. Superior Court, 21 Cal. 3d 144, 153-54, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978).

15 W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 53, n.27 (4th ed. 1971). The third party plaintiff can establish causation if he can show that the accident would not have occurred but for the intoxication.

16 31 N.J. 188, 156 A.2d 1 (1959).

17 *Id.* at 192-93, 156 A.2d at 3-4.

18 *Id.* at 202-03, 156 A.2d at 9.

19 *Id.* at 203, 156 A.2d at 9.

20 46 N.J. 582, 218 A.2d 630 (1966).

ries resulting from the patron's own negligence while he was intoxicated. On the day he died, John Soronen began drinking in the early morning at a tavern near his home. Later that same day, Soronen moved to the Olde Milford Inn and continued his drinking. When Soronen attempted to leave his bar stool, he fell and struck his head against a steel column. He died of a fractured skull later that night. His widow brought a wrongful death action against the tavern, and the tavern countered that the plaintiff's decedent had been contributorily negligent.[21]

The Supreme Court of New Jersey adhered to the Restatement position of protecting persons unable to protect themselves and found that the defense of contributory negligence does not apply where the defendants violate a statute enacted "to protect a class of persons from their inability to exercise protective care."[22] The court noted that the tavern's acknowledged duty not to serve intoxicated persons protects the individual as well as the public at large.[23] This duty, according to the court below, "would be rendered meaningless . . . if a tavernkeeper could avoid responsibility by claiming that it was the [plaintiff's] own fault if he drank too much."[24]

In a slightly different context, a New Jersey court has held that contributory negligence is also unavailable as a defense where a third party, injured by an intoxicated bar patron, brings a negligence action against a tavern. In *Aliulis v. Tunnel Hill Corporation*,[25] Alita Aliulis and other minors had been drinking heavily before entering the Tunnel Hill Tavern. In the early hours of the morning, Aliulis left the tavern in a car driven by Cynthia Zulauf, another minor. Aliulis and the two other passengers in the vehicle knew that Zulauf was not fit to drive the car because she was intoxicated. After stopping for gasoline, Zulauf drove only a short distance before colliding with another car. Zulauf was killed and her three passengers were seriously injured. The three passengers brought a suit against the Tunnel Hill Tavern, alleging negligence.

Relying on the *Soronen* case, the Superior Court of New Jersey held that a defendant could not assert contributory negligence as a defense where the plaintiff was effectively forced to ride with the intoxicated driver in order to get home.[26] The court found that because of the rural location of the tavern and the fact that the crash occurred at three a.m., the plaintiff had no real choice but to ride with the intoxicated driver in order to get home. The court stated, however, that it was "not . . . prepared to say that in no case may the contributory negligence of an injured third party defeat his action against a seller of alcoholic beverages

21 46 N.J. at 584, 218 A.2d at 631. Contributory negligence consists of an act or omission amounting to want of ordinary care on the part of the complaining party, which, concurring with defendant's negligence, is a proximate cause of the injury. Traditionally, a finding that the plaintiff was contributorily negligent barred him from any recovery. BLACK'S LAW DICTIONARY 538 (5th ed. 1979).

22 *Soronen*, 46 N.J. at 587, 218 A.2d at 635 (referring to the RESTATEMENT (SECOND) OF TORTS § 483 comment a (1965)).

23 46 N.J. at 589, 218 A.2d at 636.

24 *Soronen*, 84 N.J. Super. 372, 202 A.2d 208 (1964).

25 114 N.J. Super. 205, 275 A.2d 751, *aff'd.*, 59 N.J. 508, 284 A.2d 180 (1971).

26 59 N.J. at 511, 284 A.2d at 182.

to underage or intoxicated persons."[27]

Thus, when New Jersey was still a contributory negligence state, the New Jersey courts refused to apply the defense of contributory negligence to dram shop cases in two situations. One such situation arose when the defendants violated a statute designed to protect a class of persons who could not protect themselves and the plaintiff was a member of that defenseless class. The second situation developed when a plaintiff was unable to get home unless she accepted a ride with an intoxicated driver. The Superior Court of New Jersey did note during this time period, however, that in some circumstances contributory negligence might be a valid defense.

Because New Jersey has adopted the Comparative Negligence Act[28] subsequent to these older decisions, it may now be possible to assert the defense of contributory negligence successfully in a dram shop case. Under the Comparative Negligence Act, a plaintiff's contributory negligence diminishes but does not totally bar his recovery. Considering this new legislative guidepost for determining damages in negligence actions, the New Jersey courts may be more willing to allow this defense.

II. The Doctrine of Comparative Negligence

A. *Historical Development*

Perhaps no rule of the common law has been more widely accepted and criticized than the general rule of contributory negligence.[29] It is generally recognized that contributory negligence with its all-or-nothing approach to recovery has denied justice to more injured persons than any other legal concept.[30]

Because of the harshness of the contributory negligence rule, states began to search for a more equitable approach to apportioning damages. One of the first jurisdictions to do so was Florida in its leading case of *Hoffman v. Jones*.[31] In *Hoffman*, the court reasoned that the initial justification for the contributory negligence rule—to protect the essential growth of industries, particularly transportation—was no longer valid.[32] The court stated that because modern economic and social customs favor the individual and not industry, it was the role of the judiciary to modify this outdated judicially created common law rule.[33]

27 *Aliulis*, 59 N.J. at 511, 284 A.2d at 182.

28 *See infra* notes 37-41 and accompanying text.

29 *See, e.g.*, Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 138 n.1 (1958); Annotation, *The Doctrine of Comparative Negligence and Its Relation to the Doctrine of Contributory Negligence*, 32 A.L.R. 3d 463-88 (1970).

30 Heft & Heft, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A. 933, 936 (1972).

31 280 So. 2d 431 (Fla. 1973).

32 *Id.* at 437.

33 The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved based upon the circumstances applying between them at the time in question. The rule of contributory negligence as a complete bar to recovery was imported into law by judges. Whatever may have been the historical justification of it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to

Today, a majority of jurisdictions have adopted a comparative negligence standard.[34] The doctrine of comparative negligence developed in response to the competing policies of compensating victims of negligence and making individuals responsible for their own safety.[35] The comparative negligence approach accommodates these policies by eliminating the complete defense of contributory negligence and by apportioning damages according to the relative fault of the parties.[36]

B. *The Comparative Negligence Act of New Jersey*

Following the majority trend, New Jersey in 1973 rejected the doctrine of contributory negligence and adopted its Comparative Negligence Act.[37] The Act provides that in any negligence action, contribu-

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remain the test of liability, then the doctrine of comparative negligence, which involves apportionment of the loss among those whose fault contributed to the occurrence, is more consistent with liability based on a fault premise.

Id. at 436.

34 Thirty-two states, Puerto Rico, and the Virgin Islands have now enacted comparative negligence statutes:

ARIZ. REV. STAT. ANN. §§ 12-2505 to -2509 (Supp. 1984); ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1983); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1983); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1984); DEL. CODE ANN. tit. 10, § 8132 (Supp. 1984); HAW. REV. STAT. § 663-31 (Supp. 1983); IDAHO CODE §§ 6-801 to -806 (Supp. 1983); IND. CODE §§ 34-4-33-1 to -8 (Supp. 1983), *amended by* Act of Mar. 5, 1984 at IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984); KAN. STAT. ANN §§ 60-2585 to -2586 (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1983-84); MASS. ANN. LAWS ch. 231, § 85 (Law. Co-op. Supp. 1983-84); MINN STAT. § 604.01-02 (Supp. 1984); MISS. CODE ANN. § 11-7-15 (Supp. 1983); MONT. CODE ANN. §§ 27-1-702 to -703 (1981); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41,141 (SUPP. 1981); N.H. REV. STAT. ANN. § 507; 7-a (Supp. 1983); N.J. REV. STAT. §§ 2A:15-5.1 to -5.3 (Supp. 1983-84); N.Y. CIV. PRAC. L. & R. § 1411 (McKinney Supp. 1983-84); N.D. CENT. CODE § 9-10-07 (Supp. 1983); OHIO REV. CODE ANN. § 2315.19 (Anderson Supp. 1982-83); OKLA. STAT. ANN. tit. 23, §§ 13-14 (West Supp. 1982-83); OR. REV. STAT. § 18-470 (1981); PA. STAT. ANN. tit. 42, § 7102 (Purdon Supp. 1983-84); P.R. LAWS ANN. tit. 31, § 5141 (Supp. 1982); R.I. GEN. LAWS § 9-20-4-4.1 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 20-9-2 (Supp. 1983); TEX. [CIV. PRAC. & REM.] CODE ANN. § 33.001 (Vernon 1986); UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1983); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983); V.I. CODE ANN. tit. 5, § 1451 (Supp. 1983); WASH. REV. CODE ANN. §§ 4.22.005-.920 (Supp. 1984-85); WIS. STAT. ANN. § 895-045 (West Supp. 1983-84); WYO. STAT. § 1-1-109 (Supp. 1983).

Ten states have adopted the comparative negligence approach through judicial action. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984); Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979).

The following states have not yet adopted a comparative negligence approach to damages: Alabama, Georgia, Maryland, North Carolina, South Carolina, Tennessee and Virginia.

35 For a general discussion of comparative negligence, see Comment, *Comparative Negligence*, 81 COLUM. L. REV. 1668 (1983).

36 To avoid confusion, it should be noted that comparative negligence statutes merely measure the weight that shall be accorded to a plaintiff's contributory negligence when determining damages instead of deeming such negligence a full bar to recovery.

37 New Jersey's Comparative Negligence Act provides, in relevant part:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West 1982).

In 1982, this act was amended in order to overrule the individual approach to apportioning

tory negligence of the plaintiff shall not act as a complete bar to recovery if such negligence was not greater than the combined negligence of the defendants. Thus, as long as the defendants are more negligent than the plaintiff,[38] the plaintiff may still recover a portion of his damages.

The Act does not explicitly explain how it should be applied to a dram shop case or to any action based on strict liability. The legislative histories of the original act,[39] its amendment[40] and the Governor's Reconsideration and Recommendation Statement[41] also provide no assistance when determining how the Act should affect dram shop actions. Consequently, the courts of New Jersey have had to analyze this issue without legislative direction.

C. *The Interaction of New Jersey's Comparative Negligence Act With the Common Law Dram Shop Rules*

In *Buckley v. Pirolo,*[42] the Supreme Court of New Jersey analyzed for the first time how the state's Comparative Negligence Act interacts with the common law dram shop rule. The court determined that application of the Comparative Negligence Act to dram shop cases does not necessarily conflict with the public policy considerations supporting the dram shop rule. The court believed that this was especially true where the plaintiff in a dram shop case has assumed the risk of his actions.[43]

In *Buckley*, Charles Reidinger and Charles Pirolo drank several bottles of beer and shots of whiskey with their employer at the Forked River House tavern after work. At two p.m., the trio went to a friend's house and drank some more beer. Around four p.m., Pirolo and Reidinger returned to the Forked River House tavern and met several friends. After consuming more alcoholic beverages, the group went for a ride on a plane piloted by Pirolo. During the flight, the plane buzzed over the bar several times at low altitudes.[44]

After this initial flight, the men returned to the bar where Pirolo consumed another two bottles of beer. Pirolo then decided to pilot a second flight with Reidinger and two other friends as passengers. One of the passengers, Roseann Buckley, had not consumed any alcohol that day. On the second flight, the aircraft struck a tower near the tavern and

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damages as used in Van Horn v. William Blanchard Co., 173 N.J. Super 280, 414 A.2d 265, *aff'd*, 88 N.J. 91, 438 A.2d 552 (1980). An "individual approach" allows the plaintiff in a negligence action to recover only from those defendants who were more negligent than plaintiff, even if in the aggregate his negligence was less than the defendants' total percentage. An "aggregate approach" allows the plaintiff in a negligence action to recover damages in any case in which his negligence is less than or equal to the combined negligence of multiple defendants.

38 In other words, if the fact finder determines that the relative fault of the defendant was fifty-one percent or more, the plaintiff may still recover damages.

39 Act of May 24, ch. 146, 1973 N.J. Laws 300.

40 Act of Dec. 6, ch. 191, 1982 N.J. Laws 786.

41 In the Governor's Statement, Governor Kean endorsed the change in the comparative negligence law. He based the endorsement on his belief that the policy of allocating responsibility among all negligent parties in proportion to their relative fault is more fully achieved under the aggregate approach. Senate No. 215-L. 1982, c. 191.

42 101 N.J. 68, 500 A.2d 703 (1985).

43 *Id.* at 78, 500 A.2d at 708.

44 *Id.* at 71, 500 A.2d at 705.

crashed, killing everyone aboard.[45]

The personal representatives of the three passengers who were killed in the airplane crash brought wrongful death actions against the pilot, the lessor of the aircraft and the tavern. Although the jury found that the passengers in the tavern had been contributorily negligent, the trial court molded its verdict so that the tavern would not benefit from its patrons' negligence.[46]

On appeal, the Superior Court of New Jersey reversed and remanded.[47] The appellate court found that the Comparative Negligence Act could be applied to dram shop cases, but expressly limited its decision to the particular facts of *Buckley*.[48] The court found that the dram shop rule essentially protects intoxicated persons and third persons who, under the circumstances, cannot protect themselves.[49]

The court also distinguished the facts of *Buckley* from those found in the *Aliulis* case. Unlike the situation in *Aliulis*, the court believed that the defense of contributory negligence could be successfully asserted because "the flight was not the sole means of transportation" available to the injured plaintiffs.[50] The court continued: "Indeed, it was not their transportation at all. Their decision to fly with an intoxicated pilot was voluntarily undertaken by persons whose judgments were not proven to have been impaired."[51] Therefore, because under the circumstances the passengers were not forced to accept a ride on the plane, the court refused to apply the dram shop rule and hold the tavern liable for the passengers' injuries. Because the passengers were not intoxicated, they had the capacity and legal duty to protect themselves from the harm that Pirolo might cause in his intoxicated condition.[52]

The Supreme Court of New Jersey agreed with the appellate court's application of the Comparative Negligence Act to a dram shop case.[53] Nonetheless, the high court of New Jersey reversed and remanded the case because the jury had determined the relative fault of the parties in the case without properly considering the issue of contributory negligence.[54]

On the fourth day of the trial, the trial court ruled that the defense of the passengers' negligence would not be available to the tavern even though it was available to the other defendants.[55] Thus, the court fore-

45 *Id.*

46 Even though the jury found Buckley, Reidinger and Elms collectively more negligent than Forked River House, it allowed plaintiffs to recover. This holding was inconsistent with the "aggregate" approach to damages imposed by N.J. STAT. ANN. § 2A: 15-5.1 (West 1982).

47 190 N.J. Super. at 500, 464 A.2d at 1141.

48 *Id.* at 499, 464 A.2d at 1140.

49 *Id.* at 498, 464 A.2d at 1140.

50 *Id.* at 498-99, 464 A.2d 1141.

51 *Id.* at 498, 464 A.2d at 1145. *See also* Petrone v. Margolis, 20 N.J. Super. 180, 89 A.2d 476 (1952) (plaintiff denied recovery because she voluntarily assumed the risk of riding in a motor vehicle operated by a driver who was under the influence of intoxicating liquor).

52 190 N.J. Super. at 498, 464 A.2d at 1140.

53 101 N.J. at 71, 500 A.2d at 704.

54 *Id.* at 74, 500 A.2d at 709 ("The fact remains that when the jury made its determination as to the respective percentages of negligence as between the passengers and the tavern, it did so without the issue having been fully unfolded and thoroughly argued.").

55 *Id.* at 72, 500 A.2d at 705.

closed defendant Forked River House from attempting to persuade the jury that plaintiffs' decedents were negligent. Conversely, plaintiffs also had no chance to focus on the passengers' freedom from negligence with respect to the tavern. The New Jersey Supreme Court found this ruling of the trial court to be a misapplication of the then-existing law.

Therefore, the New Jersey Supreme Court ruled that the cases had to go back to trial on the issue of the passengers' negligence as compared to the tavern's negligence.[56] The court reasoned that the parties should be permitted to present their cases in the context of what the law is—including the tavern's defense of the passengers' negligence—rather than as the trial court misunderstood the law to be.[57]

D. *The Interaction in Other Jurisdictions of Comparative Negligence with Dram Shop Rules*

Other than the decision of the New Jersey Supreme Court in *Buckley v. Pirolo*, case law interpretations of the interaction between comparative negligence and dram shop acts are rare. Only two other jurisdictions have remotely addressed the issue, and both courts have inadequately explained their decisions.

In *Danielson v. Johnson*,[58] the Minnesota Court of Appeals held that the trial court should have allowed the jury to consider plaintiff's negligence when apportioning damages in a dram shop case. In *Danielson*, a passenger in a car driven by an intoxicated individual was injured in an automobile accident. The passenger brought a negligence action against the driver and a dram shop action against the liquor store and the hosts of the party at which the driver had been served alcohol.[59]

During the six months prior to the accident, the driver and the passenger had established a pattern of attending beer drinking parties together. On the night of the accident, the passenger not only purchased six cans of beer for the driver, but also knew that the driver had bought a glass that had entitled him to an unlimited supply of beer at a party they attended. Based on this knowledge and on past experience, the passenger knew that the driver had consumed at least three beers before the fateful ride. Consequently, the court believed the passenger knew or should have known that the driver was intoxicated on the night he was injured.[60]

Based on these facts, the appellate court affirmed a jury finding that placed 12.5 percent of the fault on the passenger. The court did not set forth its rationale for allowing the jury to find the passenger comparatively negligent. The court did not mention Minnesota's Comparative Negligence Act[61] or its interaction with the state's dram shop act. Be-

56 *Id.* at 79, 500 A.2d at 709.
57 *Id.*
58 366 N.W.2d 309 (Minn. App. 1985).
59 *Id.* at 312.
60 *Id.* at 313.
61 MINN. STAT. ANN. §§ 604.01-.02 (West Supp. 1984) provides in relevant part:
Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or in injury to person or property, if the

cause the court discussed in detail the passenger's knowledge of the driver's drunkenness, however, the court presumably believed that the passenger had voluntarily assumed the risk of being injured by the intoxicated patron's conduct. This Minnesota case implicitly recognizes that if a dram shop asserts a defense of assumption of the risk in a dram shop case, a jury may properly consider the comparative fault of the plaintiff and may reduce his recovery accordingly.[62]

Thus, both the Minnesota court in *Danielson* and the New Jersey court in *Buckley* allowed the tavern to assert the defense of comparative negligence because the passengers in both cases had voluntarily assumed the risk of the intoxicated patron's conduct. In both cases, the passengers had observed the intoxicated driver drinking heavily and nevertheless proceeded to accept their last fateful ride.

In another recent dram shop case, the Superior Court of Connecticut refused to hold a motorist injured by an intoxicated patron contributorily negligent. In *Sanders v. Officer's Club of Connecticut*,[63] William Sanders rode in a friend's pick-up truck which towed Sanders' car. The driver of the truck stopped the truck to examine the hitch of the vehicle. While Sanders inspected the back end of the truck, a car driven by an intoxicated motorist collided with the rear of Sanders' car. Sanders' car then slammed into the pickup truck, killing Sanders and severely injuring his friend.[64]

In Sanders' friend's dram shop action against the tavern that had served the intoxicated driver, the Connecticut court held that the tavern could not successfully assert contributory negligence as a defense.[65] The court believed that Sanders' injured friend had not voluntarily assumed the risk because Sanders and his friend had placed emergency lighting devices around both Sanders' car and the pickup truck. A responsible driver, the court reasoned, clearly could have seen the two cars and easily could have avoided them.[66]

As in the *Aliulis* case,[67] the *Sanders* court did not say that assumption of the risk could never be an acceptable defense in a dram shop action. The court stated:

> A defense that a plaintiff seeking recovery upon the ground of negligence assumed the risk of the situation which brought about the injury is in the nature of a plea of confession and avoidance; the defendant may admit his own negligence and the plaintiff's lack of contributory negligence and will claim that he is not liable on this ground. As we have already noted the gravamen of the plaintiff's cause of action is not negligence or wanton misconduct but rather violation of [Con-

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contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering.

62 *Danielson*, 366 N.W.2d at 314.

63 196 Conn. 341, 493 A.2d 184 (1985).

64 *Id.* at 344, 493 A.2d at 187.

65 *Id.* at 348, 493 A.2d at 191.

66 *Id.* at 349, 493 A.2d at 192.

67 *See supra* notes 25-27 and accompanying text.

necticut's dram shop act].[68]

The *Sanders* court's bar of the defense of comparative negligence can be distinguished from the *Buckley* court's allowance of the defense on two grounds. First, the New Jersey Supreme Court has stated that application of the New Jersey dram shop rule "is not the imposition of strict liability upon the tavern keeper. The burden upon the plaintiff to demonstrate negligence and proximate cause remains."[69] In *Buckley*, plaintiffs did not base the cause of action on a statutory violation of a dram shop act as in *Sanders*; rather, they premised the action on common law negligence principles. The *Buckley* court properly allowed the defense of contributory negligence because plaintiffs based the action on negligence and not absolute liability.

Second, the Superior Court of Connecticut in *Sanders* decided that the doctrine of assumption of the risk did not apply because defendant could not prove that plaintiff was aware of the intoxicated condition of the driver that struck him.[70] In contrast, the defendant tavern in *Buckley* presented the jury with facts demonstrating that the passengers in Pirolo's airplane were aware of their pilot's intoxicated state. This awareness characterized their decision to ride on the plane as a voluntary and reasoned choice. Therefore, unlike the unknowing plaintiffs in *Sanders*, the passengers in *Buckley* assumed the risk of their actions and the court permitted the defense of contributory negligence.[71]

III. The Doctrine of Assumption of the Risk: Should It Be a Valid Defense in a Dram Shop Case?

The majority in *Buckley* permitted the defense of contributory negligence because it believed the passengers had assumed the risk of flying in a plane piloted by an intoxicated individual. Consequently, the continued viability of the doctrine of assumption of the risk in light of the acceptance of comparative negligence must be examined.

The jurisdictions that have considered whether the doctrine of assumption of the risk should be retained as a complete defense under a comparative negligence system have reached divergent conclusions. When enacting their respective comparative negligence statutes, some jurisdictions[72] evidently anticipated this problem and expressly merged the doctrines of assumption of the risk and contributory negligence.[73]

68 196 Conn. at 349, 493 A.2d at 192. Like New Jersey, Connecticut has enacted a comparative negligence statute. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1984). Unlike New Jersey, however, Connecticut has adopted a dram shop statute, CONN. GEN. STAT. ANN. § 30-102 (West 1975), rather than a common law negligence dram shop rule. The policy considerations behind either approach are identical.

69 114 N.J. Super. at 210, 275 A.2d at 753.

70 *Sanders*, 196 Conn. at 349, 493 A.2d at 192.

71 Assuming that on remand defendants can show that the passengers on Pirolo's plane were not intoxicated and that they knew of their pilot's drunken condition, the defense of contributory negligence should prove successful.

72 *See, e.g.*, ARK. STAT. ANN. § 27-1763 (1979); N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976) (comparative negligence statutes that have expressly merged the doctrines of assumption of the risk and contributory negligence).

73 The primary reason for merging assumption of the risk with contributory negligence is that it

Other jurisdictions for the most part have reached the same result by judicially merging assumption of the risk with contributory negligence.[74] When assumption of the risk is merged into contributory negligence, it no longer operates as a separate total defense but is recognized as a separate species of contributory negligence. Thus, in jurisdictions that have merged the two concepts, if a plaintiff assumes the risk of his conduct, his award will merely be diminished and not totally barred.

Instead of merging the two defenses, several jurisdictions have statutorily abolished the doctrine of assumption of the risk.[75] In other jurisdictions, the courts have concluded that abolition was necessary to effectuate their state legislature's intent in enacting comparative negligence statutes.[76] Unlike in merger states in which assumption of the risk is still recognized as a viable, though not an absolute defense, states that have abolished the concept no longer recognize it as an independent defense.[77]

Finally, when apportioning fault under their respective comparative negligence statutes, a few jurisdictions have totally rejected the notion of merger or abolition and have retained assumption of the risk as a complete defense.[78] In these jurisdictions, a successful defense of plaintiff's assumption of the risk still totally bars recovery, despite the jurisdictions' adoption of comparative negligence.

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would be inequitable to apportion fault when a plaintiff has been contributorily negligent on the one hand, and yet, on the other hand, to bar recovery when a plaintiff has assumed a known risk. *See* Easterday, *The Indiana Comparative Fault Act: How Does it Compare With Other Jurisdictions?*, 17 IND. L. REV. 883 (1984).

74 *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 805, 824-25, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872-73 (1975); Blackburn v. Dorta, 348 So. 2d 287, 293 (Fla. 1977). Merging assumption of the risk into contributory negligence was accomplished by including the doctrine of assumption of the risk within the definition of the abandoned approach of contributory negligence.

Assumption of the risk can be separated into two general categories: express and implied. Express assumption of the risk occurs when a plaintiff expressly agrees by contract or otherwise to accept a risk of harm arising from the defendant's negligent or reckless conduct. RESTATEMENT (SECOND) OF TORTS § 496B (1965). Implied assumption of the risk occurs when a plaintiff does not expressly agree to assume a risk of harm, but he fully understands the risk of harm and voluntarily chooses to enter or remain within the area of that risk. RESTATEMENT (SECOND) OF TORTS § 496C (1965).

> As noted in RESTATEMENT (SECOND) OF TORTS Explanatory Notes § 496A comment c(4) (1965):
> The same conduct on the part of the plaintiff may then amount to both assumption of the risk and contributory negligence and may subject him to both defenses. His conduct in accepting the risk may be unreasonable and thus negligent because the damage is all out of proportion to the interest he is seeking to advance as where he consents to ride with a drunkard driver in an unlighted car on a dark night, or dashes into a burning building to save his hat.

75 CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1981); MASS. GEN. LAWS ANN. ch. 231 § 85 (West Supp. 1979); UTAH CODE ANN. §§ 78-27-37 to -43 (1977).

76 *See, e.g.*, Wilson v. Gordon, 354 A.2d 398 (Me. 1976); Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974); Brittain v. Booth, 601 P.2d 532 (Wyo. 1979).

77 *See* Kopischke v. First Continental Corp., 187 Mont. 471, 507, 610 P.2d 668, 687 (1980) ("We will follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute.").

78 *See, e.g.*, Yankey v. Battle, 122 Ga. App. 275, 176 S.E.2d 714 (1970); Blum v. Brichacek, 191 Neb. 457, 215 N.W.2d 888 (1974); Bartlett v. Gregg, 77 S.D. 406, 92 N.W.2d 654 (1958). The argument supporting retention of the separate defense of assumption of the risk is that such a defense is not based on fault but on knowledge and consent. Consequently, apportioning damages purely on the basis of fault is not appropriate. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.3 (1974). *See also* Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977).

New Jersey has judicially merged the defense of assumption of the risk and contributory negligence.[79] In an ordinary negligence action, plaintiff's assumption of the risk is subsumed under the general category of contributory negligence. In a strict liability tort action, however, New Jersey courts recognize a species of assumption of the risk as a defense.[80] According to the Supreme Court of New Jersey, the defense of contributory negligence in a strict liability case will be recognized only when the plaintiff has voluntarily and unreasonably proceeded to encounter a known risk, i.e., the plaintiff has impliedly assumed the risk of its conduct.[81] Following this reasoning, courts can apply the Comparative Negligence Act to strict liability actions in those narrowly defined cases in which the plaintiff's conduct may be found to constitute contributory negligence.[82] Therefore, in tort actions in New Jersey, a defense of contributory negligence based on assumption of the risk will not totally bar recovery but will simply reduce the amount of a plaintiff's recovery.

In *Buckley*, the court referred to contributory negligence only in the context of assumption of the risk. In limited circumstances such as those in *Buckley*, in which the defendant asserts assumption of the risk as a partial defense to a common law dram shop negligence action, the court should allow the defense. In such a situation, the plaintiff is only denied the protection of the dram shop statute because he fully understood the risk involved and still chose to assume the risk. Further, assumption of the risk is not a complete bar to a plaintiff's recovery, but merely a form of contributory negligence to be used in apportioning fault.

IV. The Allowance of the Defense of Contributory Negligence in Dram Shop Cases: Policy Considerations

In the *Buckley* decision, public policy concerns justified allowing an assumption of the risk defense to New Jersey's dram shop rule because the rule is based on principles of common law negligence. In contrast, public policy concerns do not warrant allowing contributory negligence as a defense where defendant does not aver that plaintiff voluntarily assumed the risk of injury.

Regardless of how statutes impose liability on alcohol vendors in dram shop cases, the policy behind imposing liability is the same.[83] A state-conferred privilege, and not a guaranteed right, allows liquor licensees to operate their businesses. State liquor control regulations make it illegal for these licensees to serve minors and visibly intoxicated persons. Such regulations are designed to protect the general public as well as minors and intoxicated persons. However, when the protected class un-

79 *See* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978), *rev'd on other grounds*, 81 N.J. 150, 406 A.2d 140 (1979).

80 Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

81 *Id.*

82 *Id.*

83 For a general discussion of the public policy considerations underlying dram shop statutes and provisions, see Comment, *Liability of Commercial Vendors, Employers and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013 (1983).

derstands the risk of harm that they are being shielded from and yet still chooses to encounter this risk, they should not be held totally blameless.

State legislatures and courts believe it is more equitable to impose the cost of alcohol-related accidents on those profiting from the sale of alcoholic beverages rather than on those innocent third parties who were injured in the accidents. The legislatures and courts justify their position by noting that commercial vendors of alcoholic beverages: (1) can purchase extensive liability insurance to bear such losses; (2) can most equitably spread the cost of insurance by increasing the prices of alcoholic beverages; (3) have expertise in judging whether a person or a minor is intoxicated; and (4) can most directly control its patrons' consumption of alcoholic beverages.[84]

While this "deep pocket" analysis has been accepted and applied in many situations other than those involving dram shop liability, it cannot always be justified. Simply because commercial vendors can capably guard against injuries to innocent persons by intoxicated individuals does not mean that courts and legislatures should automatically thrust such liability on them. The courts and legislatures should note that if a member of the protected class chooses not to accept the protection afforded him, he must accept the possible disastrous consequences of such a decision. Although courts should not completely abolish recovery, under these circumstances courts should diminish recovery to some degree.

This deviation from the "deep pocket" theory should only be applied when the member of the protected class is capable of making an informed choice. Incompetents, who are legally incapable of making informed choices, should continue to receive the statutory protections of dram shop rules. These protections are designed to guard incompetents from the possible consequences of their incompetency, regardless of whether they voluntarily encounter a known risk. Statutory prohibitions against child labor, the sale of firearms to minors, and hazardous workplaces[85] would be rendered meaningless if defendants were allowed to assert contributory negligence as a defense. The primary purpose of such statutes is to ensure that the protected class will have recourse against those who exploit and expose them to unnecessary risks. *Buckley*'s limited erosion of the strict liability protection afforded to protected persons in dram shop cases will not defeat this primary purpose. Only those members of the protected class who are capable of rejecting the protection afforded them will, through diminished recovery, be held responsible for their decisions.

84 *Id.* at 1015. *See also* Comment, *Comparative Negligence*, 81 COLUM. L. REV. 1668 (1983).

85 The RESTATEMENT (SECOND) OF TORTS § 483 (1965) discusses these statutes in the following manner:

> There are exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves.

One example of these exceptional statutes, according to the Restatement, is a "Dram Shop Act (prohibiting the sale of intoxicating beverages to a visibly intoxicated patron)." *Id. See also* Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965).

Because most comparative negligence statutes apply to *any* negligence action,[86] state legislatures and courts could theoretically extend the coverage of comparative negligence statutes to dram shop actions and to other actions traditionally viewed as "exceptional." Other exceptional actions involve matters such as child labor, the purchase of firearms, and worker's compensation.

Following such reasoning, most jurisdictions have recently applied comparative negligence principles to strict products liability actions.[87] These states have also allowed the defense of contributory negligence in cases commonly involving strict liability such as dog bite cases[88] and worker's compensation cases.[89] Like the Supreme Court of New Jersey in *Buckley v. Pirolo*, however, most of these state courts have applied comparative negligence principles only where the plaintiff voluntarily and unreasonably proceeded to encounter a known risk.

New Jersey courts have followed this trend and have applied comparative negligence principles to products liability cases.[90] The New Jersey courts have specifically held that, although the Comparative Negligence Act may apply to strict liability cases, the Act will only apply when the plaintiff unreasonably and voluntarily exposes himself to a known risk.[91] Thus, since courts have traditionally viewed both dram shop and products liability cases as strict liability cases, tavern owners should also be able to assert comparative negligence as a defense when the plaintiff assumed the risk of the intoxicant's conduct.

A conditional application of a comparative negligence statute to dram shop cases does not undermine the purposes of the statute or the dram shop act or rule. Comparative negligence statutes accommodate

86 N.J. STAT. ANN. § 2A:15-5.1 (West 1982) states that the comparative negligence act is applicable "in any action . . . to recover damages for negligence."

87 For case law interpretations, see Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (applying the law of the Virgin Islands); McPhail v. Municipality of Culebra, 598 F.2d 603 (1st Cir. 1979) (applying Puerto Rican law); Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1976) (applying Mississippi law); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D.C. Idaho 1976) (applying Idaho Law); Austin v. Raybestos Manhatten, Inc., [1983-84 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9924 (Jan. 17, 1984); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1983); Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983); Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977); Reid v. Spadone Mach. Co., 119 N.H. 457, 404 A.2d 1094 (1979); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984); Wilson v. B.F. Goodrich, 292 Or. 626, 642 P.2d 644 (1982); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

For statutory interpretations, see ARK. STAT. ANN. §§ 27-163 to -1765 (1979); COLO. REV. STAT. § 13-21-406 (Supp. 1982); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MICH. COMP. LAWS ANN. § 600.2949 (West Supp. 1982); N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976); WASH. REV. CODE §§ 4.22.005-.015 (Supp. 1983-84).

88 *See, e.g.*, Arbegast v. Board of Educ., 65 N.Y.2d 161, 490 N.Y.S.2d 751, 480 N.E.2d 365 (1985); Allgeyer v. Lincoln, 125 N.H. 503, 484 A.2d 1079 (1984).

89 *See, e.g.*, Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1985).

90 *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Goodman v. Stalfort, Inc., 411 F. Supp. 889 (D.N.J. 1976) *aff'd in part, rev'd in part and remanded*, 564 F.2d 89 (3d Cir. 1977).

91 *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

the competing policies of compensating victims of negligence and of making individuals responsible for their own safety. Dram shop acts protect a class of people who supposedly cannot protect themselves. However, if a person has the capacity to protect himself from the foreseeable harm that an intoxicated person may cause, a comparative negligence statute should not protect someone who in reality does not require statutory protection.[92]

V. Conclusion

In *Buckley v. Pirolo*, the Supreme Court of New Jersey properly applied that state's Comparative Negligence Act to a dram shop case. The court allowed the defendant tavern owners to assert a contributory negligence defense of voluntary assumption of the risk. This application diminished, but did not bar, the plaintiff's recovery. The court's actions did not defeat the purpose of either the Comparative Negligence Act or of the dram shop rule because the tavern was only allowed to assert the defense against individuals who were capable of protecting themselves.

Other states that have adopted dram shop acts should not view the *Buckley* decision as an erosion of the strict liability rationale underlying those acts. Strict and absolute liability is only breached in situations where the plaintiff has voluntarily encountered a known risk.

Further, state courts can reconcile the legislative intent behind comparative negligence statutes with the public policy underlying dram shop rules. When in conflict, the policy underlying dram shop rules should prevail because of the state's overriding purpose of making it easier for plaintiffs to recover damages in negligence actions.

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92 The Buckley court summarized this position in the following manner:

> If a person has the capacity to protect himself from potential harm [that] an intoxicated patron may foreseeably cause, then he must act as a reasonable, prudent person. The polestar is the capacity of the person seeking to recover damages to engage in self-protective measures. Where the patron has such capacity, we see no conflict between our comparative negligence law and the important public policy considerations underlying our dram shop rule.

101 N.J. at 77, 500 A.2d at 708.