SCHWAB V. MATLEY: THE CONSTITUTIONALITY OF THE LEGISLATIVE ATTEMPT TO LIMIT DRAMSHOP LIABILITY IN ARIZONA

Richard E. Gordon

On October 7, 1978, three underage boys spent the evening drinking beer and tequila at the Good Time Inn, a bar operated by Lee and Rose Raybuck.[1] As the boys "staggered" out of the bar with estimated blood alcohol levels of .23 percent, Mrs. Raybuck was reported to remark that "those boys will be lucky if they make it home alive tonight."[2] In fact, they did not. All three were killed in a single car collision minutes after their departure.[3] The ensuing lawsuit against the tavern fundamentally changed Arizona tort law.

In 1983, the Supreme Court of Arizona recognized dramshop liability as a valid basis for a civil lawsuit.[4] Previously, Arizona common law did not allow a bar patron or a third party to bring an action against a saloon for its role in an alcohol related injury.[5] Similarly, the Arizona legislature had not

---

1. Brannigan v. Raybuck, 136 Ariz. 513, 515, 667 P.2d 213, 215 (1983).

2. *Id.* at 516, 667 P.2d at 216. It is unlawful to operate a motor vehicle in Arizona if a driver's blood alcohol level is .10 percent. ARIZ. REV. STAT. ANN. § 28-692(B) (1989).

3. *Brannigan*, 136 Ariz. at 515, 667 P.2d at 215.

4. Ontiveros v. Borak, 136 Ariz. 500, 513, 667 P.2d 200, 213 (1983) (court reversed and remanded summary judgment granted in favor of tavern that served an intoxicated customer who injured a pedestrian as a result of his drunkenness); *Brannigan*, 136 Ariz. at 521, 667 P.2d at 221 (court reversed and remanded summary judgment granted in favor of tavern that served three intoxicated minors who were killed in a single car collision as a result of their drunkenness).

A dramshop is "a drinking establishment where liquors are sold to be drunk on the premises." BLACK'S LAW DICTIONARY 494 (6th ed. 1990). Dramshop claims are lawsuits brought by those injured by intoxicated persons, against those who furnished the tortfeasor with alcohol. A patron who injures himself as a result of his own intoxication may also bring a claim. *See* Schwab v. Matley, 164 Ariz. 421, 793 P.2d 1088 (1990). Although typical dramshop claims are brought against taverns, liability might extend to others such as liquor stores and social hosts. *See generally* Casenote, *Dram Shop Civil Liability in Arizona*, 1984 ARIZ. ST. L.J. 369, 380-87 (1984) (discussing the development of dramshop liability in Arizona and its possible application to liquor store owners, "conduit suppliers," and social hosts).

5. *See Ontiveros*, 136 Ariz. at 504, 667 P.2d at 204 (abolishing common law rule of non-liability); Thompson v. Bryson, 19 Ariz. App. 134, 505 P.2d 572 (1973); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945).

At times, however, Arizona courts have been willing to find dramshops liable for certain alcohol related injuries. *See* Pratt v. Daley, 55 Ariz. 535, 536-37, 550, 104 P.2d 147, 148-49, 153 (1940) (holding a claim for loss of consortium existed against a vendor who "continuously and repeatedly ... furnished to [the plaintiff's husband] intoxicating liquors."); Pierce v. Lopez, 16 Ariz. App. 54, 57-58, 490 P.2d 1182, 1186 (1971) (holding that a tavern has a duty to protect their invitees); McFarlin v. Hall, 127 Ariz. 220, 224-25, 619 P.2d 729, 733-34 (1980)

acted to make taverns liable for damages when they serve an obviously intoxicated customer who later injures himself or another.[6] The supreme court in *Ontiveros v. Borak*[7] and *Brannigan v. Raybuck*[8] rejected the common law rule and held that taverns are legally accountable for damages when they continue to serve customers who are obviously intoxicated. In 1985 and 1986, the legislature codified the new dramshop rule in chapter 3 under title 4 of the Arizona Revised Statutes.[9]

This Note reviews the development of dramshop liability in Arizona and the motives behind abrogating the former rule of non-liability. The Note examines two recent cases that challenged the constitutionality of the subsequent dramshop legislation. Specifically, it analyzes the Arizona Supreme Court's opinion in *Schwab v. Matley*,[10] which held that a statute prohibiting bar patrons from bringing a dramshop claim violated the Arizona Constitution.[11] The Note also examines *Bruce v. Chas Roberts Air Conditioning, Inc.*,[12] wherein the Arizona Court of Appeals upheld the constitutionality of a statute that immunizes social hosts from dramshop liability.[13] Finally, the soundness of each of these recent dramshop cases is considered in light of the special protections found in the Arizona Constitution.

THE DEVELOPMENT OF DRAMSHOP LIABILITY IN ARIZONA

Under current Arizona law, it is actionable negligence on the part of a tavern to serve liquor to an obviously intoxicated patron, if the patron then injures himself or some third party as a result of the intoxication.[14] This was

---

(holding that a tavern has a duty to protect patrons from the foreseeable injury caused by the violence other patrons).

6. *See Ontiveros*, 136 Ariz. at 511-12, 667 P.2d at 211-12; *Brannigan*, 136 Ariz. at 519, 667 P.2d at 219. The legislature, however, previously established regulations for the alcohol industry. Although these statutes were not enacted to impose dramshop liability, they were ultimately used as a basis for abrogating the rule of non-liability. *See infra* notes 46-53 and accompanying text. *See also Ontiveros*, 136 Ariz. at 509-11, 667 P.2d at 209-11; *Brannigan*, 136 Ariz. at 517, 667 P.2d at 217. *But see Collier*, 63 Ariz. at 289-90, 162 P.2d at 127 (holding that the statutes could not be used as a basis for dramshop liability).

7. 136 Ariz. at 513, 667 P.2d at 213.

8. 136 Ariz. at 521, 667 P.2d at 221.

9. ARIZ. REV. STAT. ANN. §§ 4-301, 4-302, 4-311, 4-312 (1989). *See infra* notes 89-93 and accompanying text.

10. 164 Ariz. 421, 793 P.2d 1088 (1990).

11. ARIZ. REV. STAT. ANN. § 4-312 (1989). The court held that the statute violated article 18, § 5 of the Arizona Constitution. *Schwab*, 164 Ariz. at 425, 793 P.2d at 1092. Section 4-312 disallows a patron who injures himself because of his own intoxication to bring a dramshop claim. The statute also prohibits a lawsuit by a third person who was present when the alcohol was consumed, knew of the patron's inebriation, yet accompanied the patron despite the obvious risks.

12. 166 Ariz. 221, 801 P.2d 456 (Ct. App. 1990), *review denied* (December 18, 1990).

13. ARIZ. REV. STAT. ANN. § 4-301 (1989). The court held that § 4-301 did not violate article 18, § 6 of the Arizona Constitution. *Bruce*, 166 Ariz. at 225, 801 P.2d at 460. The statute limits dramshop liability to "a licensee or an employee of a licensee acting during the employee's working hours or in connection with such employment." *See infra* note 119 for the full text of the statute.

14. ARIZ. REV STAT. ANN. § 4-311 (1989); *Ontiveros*, 136 Ariz. at 513, 667 P.2d at 213; *Brannigan*, 136 Ariz. at 521, 667 P.2d at 221.

not always the case. Prior to 1983, neither Arizona common law[15] nor its statutory law[16] recognized a right to sue a dramshop for this type of injury.

In general, for an injury to be actionable in Arizona, the defendant must owe a duty to the claimant, the defendant must breach that duty, and that breach must be the proximate cause of the injury complained of.[17] Prior to 1983, Arizona courts held that the dramshop claim lacked the necessary elements to bring a tort action. The courts also reasoned that the legislature, not the judiciary, should impose tort liability on dramshops.[18]

In 1979, however, the Arizona Court of Appeals in *Lewis v. Wolf*,[19] found all three elements of the tort claim present and expressly rejected the proposition that the judiciary lacked the authority to impose liability.[20] The *Lewis* court argued that it was indeed the function of the judiciary to change the common law to more closely reflect societal perceptions of what is necessary and fair.[21] The court, however, declined to abrogate the rule of non-liability because it believed that the Arizona Supreme Court was the proper forum to make the needed change.[22]

In *Lewis*, the court not only denounced the rationale of dramshop non-liability as unsound, it also warned that if the legislature did not act to change the law soon, the judiciary would be compelled to do so.[23] Four years later, the Arizona Supreme Court fulfilled this prophecy and nullified the common law rule of dramshop non-liability in *Ontiveros v. Borak*[24] and *Brannigan v. Raybuck*.[25]

---

15. *Ontiveros*, 136. Ariz. at 504, 667 P.2d at 204; *Pierce*, 16 Ariz. App. at 57, 490 P.2d at 1185.

16. *Ontiveros*, 136 Ariz. at 511-12, 667 P.2d at 211-12; *Brannigan*, 136 Ariz. at 519, 667 P.2d at 219; *Pierce*, 16 Ariz. App. at 57, 490 P.2d at 1185. *But see infra* notes 46-53 and accompanying text.

17. Actual damage is also an element. *Ontiveros*, 136 Ariz. at 504, 667 P.2d at 204; *Pierce*, 16 Ariz. App. at 57, 490 P.2d at 1185. *See also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 164-65 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

18. Profitt v. Canez, 118 Ariz. 235, 236, 575 P.2d 1261, 1262 (1977) (held the decision was for the legislature); Vallentine v. Azar, 8 Ariz. App. 247, 249-50, 445 P.2d 449, 451-52 (1968) (held the decision was for the legislature or the Arizona Supreme Court); Lewis v. Wolf, 122 Ariz. 567, 568, 596 P.2d 705, 706 (Ct. App. 1979) (held the Arizona Supreme Court could and should impose dramshop liability if the legislature failed to act).

19. 122 Ariz. 567, 572, 596 P.2d 705, 710.

20. *Id.* at 568, 596 P.2d at 706.

21. *Id.* The court cited some twenty illustrations of common law impositions of dramshop liability. *Id.* at 569-70, 596 P.2d at 707-08.

22. *Id.* at 567, 596 P.2d at 705. The court stated that "[w]ere we the Supreme Court of this state, we would abolish the anachronistic and illogical common law rule and subject the bar owner to liability." *Id.* at 572, 596 P.2d at 710.

23. The court noted a warning made by the Supreme Court of New Mexico that "if the legislature failed to act in the matter, it would." *Id.* at 571, 596 P.2d at 709 (citing Marchiondo v. Roper, 90 N.M. 367, 369, 563 P.2d 1160, 1162 (1977), *overruled*, Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982)).

24. 136 Ariz. 500, 667 P.2d 200. The case was never relitigated. After the imposition of dramshop liability, the case settled for an undisclosed amount. Telephone interview with Stuart Reilley, plaintiff's attorney (March 7, 1991).

25. 136 Ariz. 513, 667 P.2d 213. Despite the success in the Arizona Supreme Court, the plaintiff was unable to prove that the defendant served the boys while they were obviously

The *Ontiveros*[26] and the *Brannigan*[27] opinions addressed the traditional justifications used to defend the rule of dramshop non-liability. In each case, the supreme court considered and then rejected the theory that the dramshop did not owe a duty of care to the injured claimants.[28] Similarly, in both actions the court challenged the widely accepted principle that the dramshop claim lacks legal causation.[29] Finally, in each case the court responded to the objection that the problem is one that should be addressed by the legislature, rather than the judiciary.[30]

Lack of Duty as a Rationale for Denying the Validity of the Dramshop Claim

One rationale used to renounce dramshop liability is that the dramshop does not owe a duty of care to third persons injured by an intoxicated customer.[31] Duty is the concept that recognizes the "legal obligation" of an individual to conform to a particular "standard of conduct" for the advantage of another.[32] The search for duty is often conducted in cases where the central issue concerns the relationship between the defendant and the plaintiff and whether that relationship requires the defendant to act with the plaintiff's interest in mind.[33] In essence, taverns argue that they have no duty to monitor their customers' drinking because their relationship to those injured by their customers is too attenuated.[34]

In *Ontiveros*, the Arizona Supreme Court held for the first time that providers of alcohol have a duty to protect others from injury caused by their patrons regardless of where the injury occurs.[35] The court concluded that the dramshop duty is derived from both common and statutory law.[36]

The *Ontiveros* court had some difficulty in finding that a dramshop duty existed as a matter of common law because Arizona's accepted rule was that of

---

intoxicated. After three days of deliberation the jury returned a defense verdict. Telephone interview with Alan Goldman, plaintiff's attorney (March 1, 1991).

26. 136 Ariz. 500, 667 P.2d 200.

27. 136 Ariz. 513, 667 P.2d 213.

28. *Ontiveros*, 136 Ariz. at 508-11, 667 P.2d at 208-11; *Brannigan*, 136 Ariz. at 515-16, 667 P.2d at 215-16.

29. *Ontiveros*, 136 Ariz. at 505-08, 667 P.2d at 205-08; *Brannigan*, 136 Ariz. at 519, 667 P.2d at 219.

30. *Ontiveros*, 136 Ariz. at 511-12, 667 P.2d at 211-12; *Brannigan*, 136 Ariz. at 519, 667 P.2d at 219.

31. *Ontiveros*, 136 Ariz. at 508, 667 P.2d at 208.

32. PROSSER AND KEETON, *supra* note 17, at 356 ("duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff ... to conform to the legal standard of reasonable conduct in light of the apparent risk."). *See also Ontiveros*, 136 Ariz. at 508, 667 P.2d at 208.

33. PROSSER AND KEETON, *supra* note 17, at 274.

34. *Ontiveros*, 136 Ariz. at 508, 667 P.2d at 208.

35. *Id.* at 511, 667 P.2d at 211. The *Brannigan* court held that a dramshop not only has a duty to protect third parties from their patrons' intoxicated conduct, but also has a duty to protect patrons from injuring themselves as a result of their overindulgence. *Brannigan*, 136 Ariz. at 515-16, 667 P.2d at 216-17. *Cf. supra* note 5 for examples of tavern liability for customer created injuries.

36. *Ontiveros*, 136 Ariz. at 511, 667 P.2d at 211. The court held that there "is an obligation imposed upon tavern owners for the benefit of those who may be injured by the tavern owners' patrons ... [w]e find that duty both as a matter of common law and of statute." *Id.*

non-liability.[37] The majority[38] noted, however, that Arizona common law does recognize a general duty to take affirmative steps to control or limit a danger caused by others.[39] The court believed that this common law principle translated to dramshop cases and concluded that this duty exists even though Arizona had not previously applied the principle in this context.[40]

The court further observed that in some exceptional cases, dramshops were found liable for injuries caused by their intoxicated patrons.[41] The existence of such case law demonstrated that a dramshop duty was not foreign to Arizona common law.[42] The court made clear, however, that a dramshop's duty is broader than what was previously recognized.[43] The tavern's duty of care is not limited to the protection of patrons, but instead extends to the general public.[44] Despite some hedging, the *Ontiveros* court ultimately concluded that a dramshop duty is supported by Arizona common law.[45]

Additionally, the *Ontiveros* court found that a dramshop's duty is based on statutory law.[46] The court relied on section 4-244 of the Arizona Revised Statutes to support its finding that a dramshop has a statutory duty to act cautiously when serving alcohol to its customers.[47] Section 4-244 establishes regulations for the provider of alcohol which include a minimum drinking age for its patrons.[48]

---

37. *Ontiveros*, 136 Ariz. at 504, 667 P.2d at 204.

38. All five justices joined in the opinion with Chief Justice Holohan specially concurring only to note that his holding rests solely on statutory law. *Id.* at 513, 667 P.2d at 213 (Holohan, C.J., concurring). *See also Brannigan*, 136 Ariz. at 521, 667 P.2d at 221 (Holohan, C.J., concurring).

39. The court held that "a duty to take affirmative measures to control or avoid increasing the danger from the conduct of others" is an accepted principle at common law. *Ontiveros*, 136 Ariz. at 508-09, 667 P.2d P.2d at 208-09 (citing RESTATEMENT (SECOND) OF TORTS § 315; Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977)). The court noted that liability is imposed on a party who provides a dangerous instrument (such as an automobile) to an incompetent person who causes injury to another with the instrument. *Ontiveros*, 136 Ariz. at 509, 667 P.2d at 209.

40. *Ontiveros*, 136 Ariz. at 509, 667 P.2d at 209.

41. *Id.* at 508, 667 P.2d at 208. *See supra* note 5 for examples of tavern liability for customer-created injuries.

42. 136 Ariz. at 508, 667 P.2d at 208.

43. *Id.* The court held that the duty extends beyond that recognized in *McFarlin*, 127 Ariz. 220, 619 P.2d 729, where the court held that the tavern had a duty to protect patrons from other violent patrons.

44. *Ontiveros*, 136 Ariz. at 511, 667 P.2d at 211.

45. *Id.* at 509, 667 P.2d at 209. The court stated, "[e]ven if the existence of a tavern owner's duty to act with care when furnishing liquor to patrons could not be found by application of common law principle and authority, its existence could be postulated upon the affirmative requirements of statute." The court, however, later declared that the duty existed "as a matter of common law and of statute." *Id.* at 511, 667 P.2d at 211.

46. *Id.* at 511, 667 P.2d at 211.

47. *Id.* at 509, 667 P.2d at 209. The *Ontiveros* court held that ARIZ. REV. STAT. ANN. § 4-244(14) (1989), which imposes criminal sanctions if a licensee furnishes alcohol to a customer who is already intoxicated, supported this proposition. *See also Brannigan*, 136 Ariz. at 517, 667 P.2d at 217, where the court held that ARIZ. REV. STAT. ANN. § 4-244(9) (1989), which establishes a minimum legal drinking age, and ARIZ. REV. STAT. ANN. § 4-241(A) (1989), which mandates the tavern verify a patron's age with identification, "constitute legislative recognition of the foreseeable danger to both the patron and third parties."

48. ARIZ. REV. STAT. ANN. § 4-244(9).

Section 4-244, moreover, imposes criminal sanctions for serving liquor to an intoxicated customer.[49] Although the statute is primarily regulatory and was not enacted to provide a remedy for dramshop claimants,[50] the court rejected the notion that the statute could not be used to support dramshop liability.[51] The *Ontiveros* court concluded that even though the statute was silent regarding civil liability, the statute's purpose, to protect the public from alcohol related injuries, implicitly imposed a duty of care on tavern owners.[52] The court expressly held that the dramshop's duty to stop serving intoxicated customers is based on statutory as well as common law.[53]

Elaborating upon its decision in *Ontiveros*, the Arizona Supreme Court concluded in *Brannigan*[54] that a breach of the duty owed by a dramshop is negligence per se.[55] The negligence per se theory grants a conclusive presumption of negligence if the plaintiff can show that the defendant breached a statute designed for the plaintiff's protection.[56]

Negligence per se is not a doctrine without exceptions, however. The *Brannigan* court noted that a defendant might be relieved of liability under certain circumstances, and provided illustrations when a jury may find the negligent conduct of a tavern excusable.[57] For example, a tavern might be excused for serving an intoxicated patron if it can establish that the patron's conduct was such that a reasonable person could not tell the patron was intoxicated.[58] Additionally, if a minor was served, but appeared to be of the legal drinking age and produced proper identification, liability might also be avoided.[59]

---

49. *Id.* § 4-244(14). The violation of the statute is a class 1 misdemeanor. *Id.* § 4-246(B) (1989). *See also Ontiveros*, 136 Ariz. at 509, 667 P.2d at 209.

50. *See Collier*, 63 Ariz. at 289-90, 162 P.2d at 127. *See also* Coolidge & Murphey, *Sale of Intoxicating Liquor as Proximate Cause of Inebriate's Tort*, 3 ARIZ. L. REV. 98, 101-02 (1961).

51. *Ontiveros*, 136 Ariz. at 510, 667 P.2d at 210.

52. *Id.* The court held that "we believe ... that '[a] duty of care and the attendant standard of conduct may be found in a statute silent on the issue of civil liability.'" *Id.* (quoting Nazareno v. Urie, 638 P.2d 671, 675 (Alaska 1981), *overruled*, Kavorkian v. Tommy's Elbow Room Inc., 711 P.2d 521 (Alaska 1985)).

53. *Id.* at 511, 667 P.2d at 211.

54. 136 Ariz. at 515, 667 P.2d at 215.

55. *Brannigan*, 136 Ariz. at 517-18, 667 P.2d at 217-18.

56. PROSSER AND KEETON, *supra* note 17, at 229-30. The fact that the defendant is negligent per se, however, does not relieve the plaintiff of the obligation to demonstrate that the negligence (breach of the statute) was the cause of the injury. *Id. See also Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205, where the court noted that "[t]here are some dramshop cases where it would be possible to say as a matter of law that the defendant's acts did not contribute to the result, and there are other cases ... where cause-in-fact remains a question for the jury."

57. *Brannigan*, 136 Ariz. at 517-18, 667 P.2d at 217-18. *See also* PROSSER AND KEETON, *supra* note 17, at 227-29.

58. *Brannigan*, 136 Ariz. at 518, 667 P.2d at 218.

59. *Id.* The court also pointed out that the defenses of contributory negligence and assumption of the risk might still be available to a dramshop. *Id. See also* PROSSER AND KEETON, *supra* note 17, at 230; Casenote, *supra* note 4, at 388-90. This issue was addressed in Del E. Webb Corp. v. Superior Court, 151 Ariz. 164, 726 P.2d 580 (1986), where the Arizona Supreme Court held that these defenses were available in dramshop cases. For a full discussion see Note, *Undermining the Arizona Constitution: Recent Developments in Dramshop Liability*, 20 ARIZ. ST. L.J. 263, 269 (1988) (discusses the *Del E. Webb* case and the constitutionality of ARIZ. REV. STAT. ANN § 4-312 (1989)).

Clearly, after *Ontiveros*[60] and *Brannigan*,[61] a dramshop has a duty to monitor its patrons' drinking and to discontinue serving its visibly intoxicated customers.[62] This duty is based on Arizona common law and is also derived from section 4-244 of the Arizona Revised Statutes.[63] Furthermore, because the duty is independently based on statutory law, a breach of this duty is negligence per se.[64]

The Lack of Causation as a Rationale for Denying the Validity of the Dramshop Claim

Probably the most formidable argument for rejecting dramshop liability rests on the theory that the dramshop claim lacks legal causation.[65] Legal causation is present where the defendant's act can be identified as the true origin of the injury[66] and is closely enough related so that it would be fair to hold the defendant accountable.[67]

In *Ontiveros*, the supreme court rejected the widely accepted principle that the legal cause of a dramshop injury is the alcohol's consumption, not its sale.[68] The court also rejected the alternative argument that while the sale of liquor is indeed a part of the causation chain, the chain is broken by the superseding act[69] of voluntary consumption, thus relieving the dramshop of liability.[70]

---

60. 136 Ariz. 500, 667 P.2d 200.

61. 136 Ariz. 513, 667 P.2d 213.

62. *See* Casenote, *supra* note 4, at 380-81 (discussing the parameters of tavern owner liability and the extent to which a tavern owner may need to police the drinking of his customers). *See also* Carrillo v. El Mirage Roadhouse, Inc., 164 Ariz. 364, 369, 793 P.2d 121, 126 (Ct. App. 1990) (holding that a dramshop must monitor its patrons' drinking, and liability may be imposed where "a licensee has actual or constructive knowledge that an intoxicated person will ultimately receive and consume the alcohol.").

63. *Ontiveros*, 136 Ariz. at 511, 667 P.2d at 211.

64. *Brannigan*, 136 Ariz. at 517-18, 667 P.2d at 217-18.

65. *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. To have the required legal causation the plaintiff must show both that the defendant's conduct actually caused the plaintiff's harm (cause in fact) and there was "a reasonably close causal connection between the conduct and the resulting injury" (proximate cause). PROSSER AND KEETON, *supra* note 17, at 165, 272-73.

66. "Cause in fact is the particular cause which produces an event and without which the event would not have occurred." BLACK'S LAW DICTIONARY, *supra* note 4, at 221; PROSSER AND KEETON, *supra* note 17, at 265.

67. "Proximate cause is the limit which the courts place upon [an] actor's responsibility for the consequences of [his] conduct." PROSSER AND KEETON, *supra* note 17, at 264 ("Often ... the legal limitation on the scope of liability is associated with policy — with our more or less inadequately expressed ideas of what justice demands, of what is administratively possible and convenient.").

68. *Ontiveros*, 136 Ariz. at 507-08, 667 P.2d at 207-08.

69. *Id.* This doctrine ("intervening cause") rests on the theory that, although a defendant's conduct can be identified as the original cause of an injury, the defendant should not be held responsible because the injury was "brought about later by a cause of independent origin for which the defendant was not responsible." PROSSER AND KEETON, *supra* note 17, at 301; *Ontiveros*, 136 Ariz. at 505-06, 667 P.2d at 205-06. The superseding act relieves a defendant of liability even though initially the defendant had substantially contributed to the original conduct that led to injury. 136 Ariz. at 505-06, 667 P.2d at 205-06.

70. *Ontiveros*, 136 Ariz. at 506, 667 P.2d at 206. *See also Collier*, 63 Ariz. at 290, 162 P.2d at 127 ("[this] principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking.").

The Arizona Supreme Court declared that a tavern could be held accountable for its role in an alcohol-related injury even though its conduct was not the major cause of that injury.[71] The court concluded that cause in fact is present whenever it is found that the injury would not have occurred but for the defendant's conduct, even when that conduct contributed very little to the plaintiff's injuries.[72]

The court also rejected the argument that self-induced intoxication is a superseding act which relieves the dramshop of liability.[73] According to the court, superseding conduct relieves the defendant of liability only if the intervening event is "unforeseeable and extraordinary."[74] The superseding conduct does not relieve the original actor of liability where the original conduct increases the risk of a superseding act.[75] Clearly, a patron who consumes alcohol provided by the tavern does not fall within this exception. The tavern's conduct of supplying alcohol to a patron who is already intoxicated surely increases the risk that the patron will consume it. Therefore, the patron's voluntary consumption and intoxication will not excuse the tavern's liability.

Most importantly, the court held that in the case of dramshop liability, legal causation will no longer be considered conclusively absent, and its presence is a question of fact for the jury.[76] The court declared that "common sense, common experience and authority all combine to produce the irrefutable conclusion that furnishing alcohol, consumption of alcohol, and subsequent driving of a vehicle which is then involved in an accident are all foreseeable, ordinary links in the chain of causation leading from sale to the injury."[77]

Judicial Restraint as a Rationale for Denying the Validity of the Dramshop Claim

The *Ontiveros* court further held that the judiciary is empowered to abrogate the rule of non-liability.[78] The court rejected the reasoning that the legislature's failed attempts to enact dramshop legislation showed their intention not to impose liability.[79] The court noted that the legislature may have in fact believed that it was the judiciary's, and not the legislature's, responsibility to

---

71. *Ontiveros*, 136 Ariz. at 503, 667 P.2d at 203. In *Ontiveros*, the defendant, Reuben Flores, drank an estimated 30 beers during the course of an afternoon and evening. Most of the alcohol was consumed at a bar owned by the defendant. While attempting to drive home with an estimated .33 blood-alcohol level, Mr. Flores struck and seriously injured a pedestrian. *Id.* at 503, 667 P.2d at 203.

72. *Id.* The court also noted that multiple actors may be simultaneously liable for an injury. *Id.*

73. *Id.* at 506, 667 P.2d at 206.

74. The court held that superseding conduct will relieve a tavern owner of liability when the "conduct was unforeseeable to one in [the defendant's] position and whether the court can say with the benefit of hindsight that the occurrence of the harm through the conduct of the intervening actor was both unforeseeable and extraordinary." *Id.* The court somewhat facetiously added that "[t]he only thing extraordinary [about the facts of *Ontiveros*] is that this patron ... was able to walk to his car." *Id.*

75. *Id.*

76. *Id.* at 507-08, 667 P.2d at 207-08.

77. *Id.* at 507, 667 P.2d at 207.

78. *Id.* at 504, 667 P.2d at 204.

79. *Id.* at 512, 667 P.2d at 212.

abrogate the common law rule.[80] The *Brannigan* court denied the accusation that it was engaging in judicial activism.[81] Instead, the court asserted that it was appropriately responding to the changing needs of society.[82]

The *Ontiveros*[83] and the *Brannigan*[84] rulings brought an end to the common law immunity that tavern owners enjoyed for so long.[85] Like the court in *Lewis*,[86] the *Ontiveros* court believed that the judiciary was empowered to abrogate the rule of non-liability.[87] Consequently, in dramshop litigation, legal causation is no longer an insurmountable obstacle and is determined on a case by case basis. The imposition of dramshop liability does not require a return to the days of prohibition, but a tavern does have a duty to its patrons and others to stop serving a customer who is obviously intoxicated. Arizona courts finally recognize what seems so obvious to so many: because injury is foreseeable when a tavern continues to serve alcohol to an intoxicated customer, accountability is justified.[88]

THE LEGISLATIVE RESPONSE TO THE JUDICIAL IMPOSITION OF DRAMSHOP LIABILITY

The Arizona legislature attempted to limit the scope of dramshop liability by enacting chapter 3 to title 4 of the Arizona Revised Statues.[89] Chapter 3 expressly recognizes and codifies dramshop liability[90] but substantially limits the rule's utility by excluding social hosts,[91] disallowing certain patron claims,[92] and mandating specific notice requirements.[93] The constitutionality of some of this legislation was challenged in *Schwab v. Matley*[94] and *Bruce v. Chas Roberts Air Conditioning, Inc.*.[95]

---

80. The court stated "[t]he legislature may well believe that when a judge-made common law rule has become obsolescent, anachronistic and unjust, the responsibility for change is ours, not theirs." *Id.*

81. The court rejected that it overstepped its role and had engaged in "judicial legislation," asserting that the holding was "merely the response of the common law to changed social conditions." *Brannigan*, 136 Ariz. at 519, 667 P.2d at 219.

82. *Id.*

83. 136 Ariz. 500, 667 P.2d 200.

84. 136 Ariz. 513, 667 P.2d 213.

85. The *Ontiveros* court expressly refused to classify the common law rule as an "immunity." Instead, the court believed that the rule was one of non-liability based primarily on the lack of legal causation. *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205.

86. 122 Ariz. 567, 596 P.2d 705.

87. *Ontiveros*, 136 Ariz. at 504, 667 P.2d at 204.

88. *Id.* at 509, 667 P.2d at 209.

89. The legislature at first attempted to enact a number of procedural hurdles for the dramshop claimant. *See* Casenote, *supra* note 4, at 390-92. This original attempt was defeated in the House Commerce Committee. *Id.* at 390 & n.163. The legislature eventually enacted ARIZ. REV. STAT. ANN. §§ 4-301, 4-302, 4-311, 4-312 (1989).

90. ARIZ. REV. STAT. ANN. § 4-311.

91. *Id.* § 4-301.

92. *Id.* § 4-312 (held unconstitutional by *Schwab*, 164 Ariz. 421, 793 P.2d 1088). *See infra* notes 109-17 and accompanying text for a discussion of the statute.

93. ARIZ. REV. STAT. ANN. § 4-302.

94. 164 Ariz. 421, 793 P.2d 1088.

95. 166 Ariz. 221, 801 P.2d 456.

Schwab v. Matley: *The Constitutionality of Section 4-312*

The Supreme Court of Arizona struck down section 4-312 of the Arizona Revised Statutes in *Schwab v. Matley*.[96] The suit arose from an altercation between the plaintiff and another patron outside of a bar owned by the defendant.[97] The plaintiff brought suit under the *Ontiveros* rule claiming that the defendant, Therese Matley, was negligent in furnishing alcohol to the plaintiff and his assailant despite their obvious intoxication.[98]

While the case was pending, the legislature enacted section 4-312.[99] The new law allowed only innocent third persons to bring an action against a tavern.[100] Matley asserted that the statute relieved her of any liability and moved for dismissal.[101] The case reached the state supreme court based upon an unrelated procedural issue.[102]

The supreme court never reached the procedural issue.[103] Instead, it exclusively addressed the constitutionality of section 4-312.[104] The court found that the statute invoked the "contributory negligence"[105] and "assumption of

---

96. 164 Ariz. 421, 793 P.2d 1088.

97. *Id.* at 422, 793 P.2d at 1089.

98. *Id.* The plaintiff, Schwab, also claimed that Matley was negligent for allowing the two to remain on the premises in their impaired condition. *Id.*

99. *Id. See* ARIZ. REV. STAT. ANN. § 4-312 (1989). Section 4-312 prohibits a claim by a patron who intoxicates himself and is injured as a result. Section 4-312 also bars dramshop claims by a customer who accompanied an intoxicated patron, and is injured despite his knowledge that the patron was drunk. This doctrine is commonly referred to as the doctrine of "complicity" or the "noninnocent party doctrine." The noninnocent party and complicity doctrine as a bar to dramshop claims is recognized in other jurisdictions. *See* Casenote, *Dramshop Act — Noninnocent Party Doctrine*, 67 U. Det. L. Rev. 345 (1990) (discusses how comparative negligence affects dramshop liability in other jurisdictions and specifically addresses Craig v. Larson, 432 Mich. 346, 439 N.W.2d. 899 (1989) (holding that the adotion of comparative negligence did not preclude the use of the noninnocent party doctrine and the doctrine could be used even where the claimant is a minor)).

100. ARIZ. REV. STAT. ANN. § 4-312.

101. *Schwab*, 162 Ariz. at 47, 780 P.2d at 1388.

102. *Id.* Schwab argued that the use of the new law would be an impermissible retroactive application of the statute. The trial court granted Matley's motion to dismiss holding that the statute's application was not retroactive because Schwab filed his lawsuit over one month after the statute's effective date. On appeal, the Arizona Court of Appeals also rejected Schwab's argument and affirmed the trial court's dismissal. However, upon reconsideration of the statute's effective date, the court of appeals reversed and remanded the case holding that the statute's use would indeed be an illegal retroactive application of the new law. *Id.* Matley appealed to the Arizona Supreme Court on the retroactivity issue. *Schwab*, 164 Ariz. at 422, 793 P.2d at 1089.

103. *Schwab*, 164 Ariz. at 422 n.2, 793 P.2d at 1089 n.2. See the concurring opinion by Justice Robert Corcoran that criticized the court for addressing the constitutional argument when it could have disposed of the case by addressing only the procedural issue. *Id.* at 425, 793 P.2d at 1092 (Corcoran, J., concurring).

104. *Id.* at 422 n.2, 793 P.2d at 1089 n.2. Schwab, in his cross-petition, argued that the new statute violated article 18, § 6 and article 2, § 31 of the Arizona Constitution. The court believed, however, that other constitutional principles were better suited to challenge the statute than those raised by Schwab. Specifically, the court considered article 18, § 5 to be the controlling provision in examining the constitutionality of the statute and ordered supplemental briefing accordingly. *Schwab*, 164 Ariz. at 422, 793 P.2d at 1089.

105. *See infra* notes 146-58 and accompanying text. Contributory negligence addresses the issue of whether the plaintiff in a lawsuit was also negligent, and if so, whether that negligence was a concurrent cause of the injury complained of and therefore should affect recovery. PROSSER AND KEETON, *supra* note 17, at 451-58.

risk"[106] defenses, which are constitutionally required to be questions of fact for the jury to decide.[107] Article 18, section 5 of the Arizona Constitution requires that a jury determine whether the plaintiff is partially responsible for his or her own injury, and therefore, not entitled to recover.[108]

Section 4-312 forbids the dramshop plaintiff, who consumes too much alcohol and injures himself as a result, to sue the tavern which provided the liquor.[109] The statute also prohibits a lawsuit by a party who knowingly accompanies an intoxicated patron, despite the knowledge of the patron's menacing condition.[110] In essence, section 4-312 prohibits those dramshop claims where the plaintiff's conduct clearly supports a finding of contributory negligence or assumption of the risk. The new law, therefore, deprives these dramshop plaintiffs of their constitutional right to have a jury independently assess the presence of contributory negligence or assumption of the risk.[111]

The defendant in *Schwab* argued that section 4-312 merely eliminates a "duty" on the part of the tavern owner.[112] The court rejected this analysis and held that there is no real difference between section 4-312 and the doctrine of contributory negligence because in both cases the tavern's exoneration hinges on the existence of culpable conduct by the plaintiff.[113] The *Schwab* court found Matley's argument to be equally unpersuasive when examined under an assumption of the risk analysis.[114] In fact, the court noted that the assumption of the risk doctrine itself rests upon the idea that a defendant is somehow relieved of a legal duty to act on the plaintiff's behalf.[115] Consequently, the court concluded that section 4-312, even as Matley described it, is a compulsory

---

106. *See infra* notes 146-58 and accompanying text. The assumption of the risk doctrine rests on the notion that a defendant is relieved of liability by securing express or implied consent from the plaintiff that relieves the defendant of a duty to act on the plaintiff's behalf. *Schwab*, 164 Ariz. at 424, 793 P.2d at 1091. *See also infra* note 115; PROSSER AND KEETON, *supra* note 17, at 480-81.

107. ARIZ. CONST. art. 18, § 5: "The defense of contributory negligence or assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

108. *Id.*

109. ARIZ. REV. STAT. ANN. § 4-312.

110. *Id.*

111. The court held that § 4-312 was "in effect a preemptory instruction to the judge that the case must be dismissed if the facts establish the defense of contributory negligence...." *Schwab*, 164 Ariz. at 424, 793 P.2d at 1091. Although the court, in fact, was addressing only contributory negligence, its rationale equally applies to the assumption of the risk defense. The court later noted "[a]ny lawyer defending the tavernkeeper and wishing to plead that the action must fail because the plaintiff consumed too much alcohol or remained in the zone of danger of one who had done so, would plead the defense under the rubric of contributory negligence or assumption of the risk." *Id.*

112. *Id.*

113. The court noted that like contributory negligence, "the statute clearly deals with the antecedent conduct of the person injured, providing that the one who causes the injury, 'shall not be liable.'" *Id.*

114. *Id.*

115. The court held, "The very basis of the [assumption of the risk] doctrine was that the plaintiff had expressly or impliedly consented to the defendant's negligent conduct, the legal result being that the defendant is simply relieved of the duty which would otherwise exist." *Id.* (citing PROSSER AND KEETON, *supra* note 17, at 481).

application of the assumption of the risk or contributory negligence defense.[116] Because the Arizona Constitution requires that these defenses in all cases be assessed by a jury, the *Schwab* court struck down section 4-312 as unconstitutional.[117]

Bruce v. Chas Roberts Air Conditioning: *The Constitutionality of Section 4-301*

Unlike section 4-312,[118] section 4-301,[119] which immunizes the social host from dramshop liability, withstood recent constitutional scrutiny by the Arizona Court of Appeals in *Bruce v. Chas Roberts Air Conditioning, Inc.*.[120] In *Bruce*, a Chas Roberts employee, Michael Duarte, became intoxicated at a party held on the business's property.[121] While driving home, he collided with a vehicle driven by the plaintiffs, Claudia and Norman Bruce.[122] The plaintiffs, who were seriously injured, claimed that Chas Roberts was liable under various theories of negligence.[123] The court found that the plaintiffs were actually asserting a dramshop claim and held that section 4-301's social host exclusion immunized Chas Roberts from liability.[124]

---

116. *Id.*

117. *Id.* at 425, 793 P.2d at 1092.

118. ARIZ. REV. STAT. ANN. § 4-312.

119. *Id.* § 4-301:

> A person other than a licensee or an employee of a licensee acting during the employee's working hours or in connection with such employment is not liable in damages to any person who is injured, or to the survivors of any person killed, or for damage to property, which is alleged to have been caused in whole or in part by reason of the furnishing or serving of spirituous liquor to a person of the legal drinking age.

120. 166 Ariz. 221, 801 P.2d 456.

121. *Id.* at 223, 801 P.2d at 458.

122. *Id.* Claudia Bruce was rendered comatose from the accident. Appellant's Petition for Review at 6, *Bruce*, 166 Ariz. 221, 801 P.2d 456 (No. 1 CA-CV88-261) (July 29, 1990).

123. The Bruces first argued that the doctrine of *respondeat superior* applied and that Chas Roberts was vicariously responsible for Duarte's conduct. *Bruce*, 166 Ariz. at 226, 801 P.2d at 461; Appellant's Opening Brief at 14-16, *Bruce*, 166 Ariz. 221, 801 P.2d 456 (No. 1 CV 87-21134) (July 1, 1988).

The Bruces also asserted the special relationship between the employer and employee places a duty on the employer to control his employees to prevent foreseeable injury to third persons. They argued that the *Restatement (Second) of Torts* § 317 supported this contention and Chas Roberts was under a duty to prevent Duarte from leaving its premises intoxicated. *Bruce*, 166 Ariz. at 227, 801 P.2d at 462; Appellant's Opening Brief at 8-10, *Bruce*, 166 Ariz. 221, 801 P.2d 456.

The Bruces also argued that Chas Roberts was negligent independent of whether the *Restatement (Second) of Torts* § 317 applied. They asserted that Arizona law "recognizes [the] duty of an actor to take affirmative measures to control another to prevent harm to an innocent bystander under certain circumstances." Appellant's Opening Brief at 12-14, *Bruce*, 166 Ariz. 221, 801 P.2d 456. They argued that *Ontiveros*, 136 Ariz. 500, 508-09, 667 P.2d 200, 208-09, and the *Restatement (Second) of Torts* § 315 support that Chas Roberts had a duty to take affirmative steps to prevent the injury. *Id.*

The court ruled that ARIZ. REV. STAT. § 4-301 controlled and foreclosed all liability. *Bruce*, 166 Ariz. at 224, 801 P.2d at 461. Nevertheless, the court did address each of the Bruces' arguments in lengthy dictum and believed, even without § 4-301, there could be no liability. *Id.* at 225-29, 801 P.2d at 460-64.

124. *Id.* at 224, 801 P.2d at 459. In response to the statutory defense, the Bruces first argued the statute did not shield Chas Roberts' conduct because the company is not a social host. Second, the plaintiffs asserted that even if the statute was applicable it should be struck down because it violated article 18, § 6 of the Arizona Constitution. *Id.*

The *Bruce* court held that the legislature intended that the statute's protection be very broad.[125] The court determined that the term "persons," which is defined to include a "company, corporation, partnership, or association," was satisfactory proof of legislative intention to include employers within the statute's protection.[126] The court further found that section 4-301 protected Chas Roberts' conduct because Duarte, and not the company, furnished the alcohol.[127] The *Bruce* court held that because the legislature intended to immunize a host who serves liquor, it would surely provide the same protection for the less egregious act of merely allowing the consumption to occur.[128]

The court of appeals also rejected the contention that section 4-301 violated article 18, section 6[129] of the Arizona Constitution.[130] Article 18, section 6 prevents the legislature from enacting laws that abrogate or limit a claimant's common law right to recover for personal injury.[131] This provision, however, protects only those interests recognized by the common law at the time Arizona adopted its constitution.[132] Because Arizona did not recognize dramshop liability until 1983, the court concluded that article 18, section 6 did not restrict the legislative action.[133]

CONSTITUTIONAL ANALYSIS OF DRAMSHOP LEGISLATION: *SCHWAB V. MATLEY* AND *BRUCE V. CHAS ROBERTS AIR CONDITIONING*

The Arizona Constitution has several provisions that protect a claimant's right to access the courts for redress of a personal injury.[134] A majority of

---

125. *Id.*

126. *Id.* at 224-25, 801 P.2d at 459-60. The court referred to ARIZ. REV. STAT. ANN. § 4-101(22) (1989), which set out the definitions for the legislation and held that the section heading which reads "Social Hosts" did not affect the court's interpretation. *Id.*

127. The record revealed that Duarte purchased his own beer and drank it both on and off the premises throughout the afternoon. *Bruce*, 166 Ariz. at 223, 801 P.2d at 458.

128. The court held:

> The present case is less remarkable than that contemplated by the legislature in A.R.S. § 4-301. Here, Roberts did not furnish or serve beer to Duarte. If the statute forecloses liability for "a person" when they furnish or serve alcohol, certainly there cannot be liability for Roberts who only observed his employees but did not furnish, serve, or provide beer in any way.

Id. at 225, 801 P.2d at 460.

129. ARIZ. CONST. art. 18, § 6. *See infra* note 173 for the full text of the provision.

130. *Bruce*, 166 Ariz. at 225, 801 P.2d at 460.

131. ARIZ. CONST. art. 18, § 6.

132. *See infra* notes 172-88 and accompanying text.

133. *Bruce*, 166 Ariz. at 225, 801 P.2d at 460. The court relied on Boswell v. Phoenix Newspapers, Inc., 152 Ariz. 9, 930 P.2d 186 (1986) (held that art. 18, § 6 protects the right to recover general damages for actual injury in a defamation suit), and Schoenrock v. Cigna Health Plan of Arizona, 148 Ariz. 548, 715 P.2d 1236 (Ct. App. 1985) (held that art. 18, § 6 does not protect a wrongful death claim because it is "purely statutory"), and concluded that "[a]rticle 18, § 6 applies only to rights recognized by common law at the time the Arizona Constitution was adopted." *Bruce*, 166 Ariz. at 225, 801 P.2d at 460..

134. *See generally* Kenyon v. Hammer, 142 Ariz. 69, 79-83, 688 P.2d 961, 971-75 (1984); Comment, *The Right to Recover Damages: Tort Reform and the Arizona Constitution*, 20 ARIZ. ST. L.J. 227 (1988). These provisions include: ARIZ. CONST. art. 2, § 13 (disallows the enactment of laws that grant privilege and immunities unequally among citizens or

state constitutions contain similar provisions.[135] In Arizona these provisions are considered a powerful recognition of constitutional rights allowing the judiciary to strike down laws that circumscribe their spirit.[136] Because recent dramshop legislation conspicuously attempts to limit a claimant's right to recover for personal injury, it clearly implicates these protective provisions. Specifically, article 18, section 5[137] and article 18, section 6[138] significantly restrict the legislature's ability to enact laws which impede a claimant's right to a judicial remedy for tortious injury. It is not surprising, therefore, that the supreme court closely scrutinized section 4-312 in *Schwab v. Matley*.[139] What is disturbing, however, is that the supreme court chose not to review *Bruce v. Chas Roberts*[140] and limit section 4-301[141] accordingly.

Article 18, Section 5 as a Protection of Dramshop Liability

The *Schwab*[142] court correctly concluded that section 4-312 violates article 18, section 5 of the Arizona Constitution. The statute unconstitutionally applies the defense of contributory negligence or assumption of the risk as a matter of law.[143] Although there are conflicting interpretations regarding the scope of article 18, section 5, section 4-312 contravenes even the most narrow interpretation.[144] Furthermore, the statute clearly deviates from previous legislative direction.[145] To understand *Schwab*, it is necessary to look at the background of article 18, section 5.

---

corporations); ARIZ. CONST. art. 2, § 31 (disallows the enactment of laws that limit the amount of damages that may be recovered for death or injury); ARIZ. CONST. art. 18, § 3 (disallows employers to require contracts that waive employees' rights to recover claims for personal injury or death caused by employer negligence); ARIZ. CONST. art. 18, § 4 (eliminated the fellow servant doctrine which allowed an employer to escape liability for an employee's injury by placing culpability on coworkers); ARIZ. CONST. art. 18, § 5 (leaves the defenses of contributory negligence and assumption of the risk in all cases a question of fact for the jury); ARIZ. CONST. art. 18, § 6 (disallows the legislature from abrogating an injured party's right to recover damages or from placing a statutory limitation on the recovery); ARIZ. CONST. art. 18, § 7 (mandates that legislation be created that imposes liability on employers in hazardous operations for injury or death which results from a condition of the occupation); ARIZ. CONST. art. 18, § 8 (mandates the creation of a workman's compensation law to ensure that an employee can recover certain losses from his employer). *See also* Comment, *supra* at 228 n.10.

135. *Boswell*, 152 Ariz. at 13, 730 P.2d at 190 (citing Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202 (1964)). Thirty-seven states have constitutionalized a claimant's right to have a judicial remedy for "'every wrong and for every injury to person, property, or reputation.'" *Id.* at 13 n.5, 730 P.2d at 190 n.5 (quoting Note, 49 IOWA L. REV. at 1202).

136. *Kenyon*, 142 Ariz. at 79, 688 P.2d at 971; *Boswell*, 152 Ariz. at 12, 730 P.2d at 189. In fact, the *Kenyon* court held that the "right to bring and pursue [an] action is a 'fundamental right' guaranteed by Article 18, § 6 of the constitution [as well as other provisions]." *Kenyon*, 142 Ariz. at 83, 688 P.2d at 975.

137. ARIZ. CONST. art. 18, § 5. *See supra* note 107 for the full text of the section.

138. ARIZ. CONST. art. 18, § 6. *See infra* note 173 for the full text of the section.

139. 164 Ariz. 421, 793 P.2d 1088.

140. 166 Ariz. 221, 801 P.2d 456.

141. ARIZ. REV. STAT. ANN. § 4-301.

142. 164 Ariz. at 425, 793 P.2d at 1092.

143. *Id.*

144. *See infra* notes 146-65 and accompanying text.

145. *See infra* notes 166-68 and accompanying text.

Under Arizona common law, contributory negligence is a complete defense to a personal injury claim.[146] Consequently, if a defendant showed that a plaintiff's own negligence contributed to his injury in any way, the law prohibited the plaintiff from recovering any damages.[147] Assumption of the risk similarly bars all recovery where the plaintiff expressly or impliedly consented to the conduct which caused the injury.[148] Prior to the adoption of the Arizona Constitution and article 18, section 5, a court could direct a defense verdict if the facts conclusively showed the plaintiff was contributorily negligent or had assumed the risk.[149] In fact, only in those cases where there remained a question of fact as to the existence of these defenses did the jury have any role in the disposition of the matter.[150]

The drafters of the Arizona Constitution believed that these "draconian" defenses, which bar all recovery when imposed, should never be applied by the court as a matter of law.[151] Article 18, section 5 reflects this belief and requires the jury to assess the applicability of these defenses in all cases.[152] Therefore, when a defendant pleads contributory negligence or assumption of the risk as an affirmative defense, the jury is charged with two responsibilities. First, the jury must assess the facts and determine whether the plaintiff's conduct supports the application of either defense.[153] Second, if the jury finds that either defense is supported by the facts, they next decide *how* the defense should

---

146. *Schwab*, 164 Ariz. at 423, 793 P.2d at 1090.

147. *Id. See also* PROSSER AND KEETON, *supra* note 17, at 451-53. Even if the defendant was far more culpable than the plaintiff, the doctrine still barred all recovery. *Id.* at 456.

148. *Id.* at 480-81. *See also Schwab*, 164 Ariz. at 424, 793 P.2d at 1091.

149. *Schwab*, 164 Ariz. at 423-24, 793 P.2d at 1090-91. The supreme court interpreted article 18, § 5 for the first time in Inspiration Copper Co. v. Conwell, 21 Ariz. 480, 190 P. 88 (1920). *See generally* Note, *supra* note 59, at 266-69 (discussing the impact that article 18, § 5 had on the contributory negligence defense in Arizona and the courts' interpretation of the article). Despite a verdict contrary to the evidence supporting an assumption of the risk defense, the *Conwell* court held that article 18, § 5 commanded that the jury's assessment be binding. *Conwell*, 21 Ariz. at 486-88, 190 P. at 90-91. In 1962, the supreme court, in *Layton v. Rocha*, held that in light of article 18, § 5, a trial court could not require the jury to apply the defense even where the jury found its applicability irrefutably present. 90 Ariz. 369, 370-71, 368 P.2d 444, 444-45 (1962). *See also* Comment, *Comparative Negligence in Arizona*, 1979 ARIZ. ST. L.J. 581 (1979) (discusses the merits of adopting comparative negligence in Arizona).

150. *Schwab*, 164 Ariz. at 423-24, 793 P.2d at 1090-91 (citing Heimke v. Munoz, 106 Ariz. at 29-30, 470 P.2d at 110-11 (1970)). A great deal of article 18, § 5 litigation surrounded jury instructions on the defenses of assumption of the risk and contributory negligence. *See, e.g., Heimke*, 106 Ariz. 26, 470 P.2d 107; Davis v. Waters, 103 Ariz. 87, 436 P.2d 906 (1968); Schmidt v. Gibbons, 101 Ariz. 222, 418 P.2d 378 (1966); Holtz v. Holder, 101 Ariz. 247, 418 P.2d 584 (1966); Trojanovich v. Marshall, 95 Ariz. 145, 388 P.2d 149 (1963); Deering v. Carter, 92 Ariz. 329, 376 P.2d 857 (1962); *Layton*, 90 Ariz. 369, 368 P.2d 444; Zancanaro v. Hooper, 79 Ariz. 207, 286 P.2d 205 (1955); Kauffroath v. Wilbur, 66 Ariz. 152, 185 P.2d 522 (1947); Campbell v. English, 56 Ariz. 549, 110 P.2d 219 (1941); Dennis v. Stuckey, 37 Ariz. 510, 295 P. 971 (1931); Wiser v. Copeland, 23 Ariz. 325, 203 P. 565 (1922); Davis v. Boggs, 22 Ariz. 497, 199 P. 116 (1921); *Inspiration Consol. Copper Co.*, 21 Ariz. 480, 190 P. 88.

151. Hall v. A.N.R. Freight System, Inc., 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986).

152. ARIZ. CONST. art. 18, § 5. *See supra* note 107 for the full text of the section.

153. *See* Comment, *supra* note 149, at 582. *See also Kenyon*, 142 Ariz. at 81, 688 P.2d at 973.

affect the recovery.[154] Ideally, when the facts show that the plaintiff contributed to his injury or assumed the risk of injury, the jury should find for the defendant and award no damages.

However, article 18, section 5 does not allow a court to instruct a jury that it must apply one of these defenses and bar recovery even where the defense is conclusively supported by the facts.[155] To be constitutionally correct, a court can only instruct that the plaintiff "should" not recover if the facts support contributory negligence or assumption of the risk.[156] Thus, it is possible for a jury to find that the plaintiff was contributorily negligent or had assumed the risk but award damages anyway.[157] Arguably, article 18, section 5 implicitly permits a jury to apportion damages based on fault similar to the comparative negligence system.[158]

Scholars have criticized the court's interpretation of article 18, section 5 as overly broad.[159] In *Layton v. Rocha*,[160] Justice Jennings, in a strong dissent, argued that the jury's constitutionally protected role is limited to factually determining the applicability of these defenses.[161] He argued that article 18, section 5 mandates that the jury determine the existence of contributory negligence or assumption of the risk, but does not allow the defenses to be disregarded once they are found to apply.[162] Use of the defenses, therefore, is not subject to the jury's free will, and article 18, section 5 does not endorse a "de facto comparative negligence" law.[163] Consequently, when a jury finds that a plaintiff has contributed to his own injury or has assumed the risk, they must correctly apply the law and bar recovery.

---

154. *See* Comment, *supra* note 149, at 582. *See also Kenyon*, 142 Ariz. at 81, 688 P.2d at 973.

155. *Layton*, 90 Ariz. at 371, 368 P.2d at 445.

156. *Id.*

157. *Del Webb Corp.*, 151 Ariz at 169, 726 P.2d at 585 (declaring that article 18, § 5 and its interpretation had transformed contributory negligence into a "form of de facto comparative negligence."). *See also Heimke*, 106 Ariz. at 28-29, 470 P.2d at 109-10. The *Heimke* court stated:

> [The jury's role] *includes not alone the right to determine the facts, but to apply or not apply, as the jury sees fit, the law of contributory negligence as defense....* Clearly and unmistakably, the defense of contributory negligence does not defeat a plaintiff's recovery unless the jury says it shall.

Id. (emphasis in original).

158. *Hall*, 149 Ariz. at 136, 717 P.2d at 440 (citing Zadro v. Snyder, 11 Ariz. App. 363, 367 n.1, 464 P.2d 809, 813 n.1 (1970) (held that a jury could reduce a plaintiff's damage award consistent with article 18, § 5)). *See also* Note, *supra* note 59, at 272-77 (author argues that the courts have misinterpreted article 18, § 5); *Del Webb Corp.*, 151 Ariz. at 169, 726 P.2d at 585.

159. *Hall*, 149 Ariz. at 136, 717 P.2d at 440; *Layton*, 90 Ariz. at 373, 368 P.2d at 446 (Jennings, J., dissenting). *See also* Note, *supra* note 59, at 272-77.

160. 90 Ariz. 369, 368 P.2d 444.

161. The dissent declared that article 18, § 5 "does not give the jury the power to arbitrarily set forth the legal consequences of contributory negligence." *Id.* at 374, 368 P.2d at 447 (Jennings, J., dissenting).

162. *Id.* at 375, 368 P.2d at 447.

163. The "de facto" language is used in *Hall*, 149 Ariz. at 136, 717 P.2d at 440; *Del Webb Corp.*, 151 Ariz at 169, 726 P.2d at 585. *See also* Note, *supra* note 59, at 273.

The supreme court recognized in *Schwab* that section 4-312 violates even the most narrow interpretation of article 18, section 5.[164] Section 4-312 completely deprives the jury of its constitutionally protected function to assess the facts and determine whether the defenses of contributory negligence or assumption of the risk apply at all. Concededly, a claimant who drinks excessively and injures himself as a result is vulnerable to the contributory negligence and assumption of the risk defenses. Likewise, a plaintiff who knowingly accompanies an obviously intoxicated patron is also susceptible to these defenses. Nevertheless, article 18, section 5 demands that a jury, not the legislature make that determination.[165] Accordingly, the supreme court properly held that section 4-312 violates the Arizona Constitution.

Section 4-312 is also inconsistent with prior legislative policy. Specifically, the Arizona legislature implicitly endorsed a broad interpretation of article 18, section 5 by enacting the Uniform Contribution Among Tortfeasors Act.[166] The legislature, by adopting comparative negligence as the rule in Arizona, formally allows the jury to apportion damages based on the claimant's relative degree of fault. This legislative act sanctions an enlarged jury responsibility. As a result of the Act, the jury is charged with assessing whether the plaintiff's conduct supports a contributory negligence or an assumption of the risk defense, as well as determining the effect that their finding will have on the plaintiff's award.[167] Even though section 4-312 violates the Arizona Constitution by completely depriving the jury of the contributory negligence or assumption of the risk decision, it also inexplicably deviates from this former legislative direction.[168] Consequently, the supreme court's

---

164. *Schwab*, 164 Ariz. at 425, 793 P.2d at 1092. Arguably, Justice Jennings would disapprove of section 4-312 because the statute completely deprives the jury of their constitutionally protected function. He noted that although article 18, § 5 "does not give the jury the power to arbitrarily set forth the consequences of contributory negligence," it "guarantees litigants the right to have the jury determine the existence or nonexistence of contributory negligence." *Layton*, 90 Ariz. at 374, 368 P.2d at 447.

165. The *Schwab* court stated that "[c]ertainly if such issues must always be left to the jury so litigants will be protected from actions of the judiciary, the constitutional provisions must also apply to legislative enactments requiring such dismissal, or the protection provided by the constitution would be meaningless." 164 Ariz. at 425, 793 P.2d at 1092.

166. ARIZ. REV. STAT. ANN. §§ 12-2501 to -2509 (Supp. 1991). This Act, which was effective as of August 1984, formally implements a comparative negligence system in Arizona. Under this system each tortfeasor is responsible to compensate an injured claimant in direct proportion to their relative degree of fault. *See* Comment, *supra* note 134, at 234-40. For a discussion on the consistency of the Act with article 18, § 5, see *Hall*, 149 Ariz. at 133-37, 717 P.2d at 437-41.

167. *Hall*, 149 Ariz. at 136-37, 717 P.2d at 440-41.

168. The rationale for this deviation may be as simple as an oversight. Article 18, § 5 rarely has been used in any manner other than to challenge jury instructions. In fact, Schwab's counsel never asserted that § 4-312 violated article 18, § 5 until the supreme court requested supplemental briefing on the issue. *Schwab*, 164 Ariz. at 422, 793 P.2d at 1089. *See also* Note, *supra* note 59, at 277-83 (asserts that section 4-312 is both bad policy and violates article 18, § 6, but does not argue that it violates article 18, § 5).

The legislature may have merely been looking for a way to appease the liquor or restaurant industry and reduce the costs in protecting against liability. *See* Casenote, *supra* note 4, at 390-92. *See also* Van Warner, *Political High Noon in the New West*, 24 NATION'S RESTAURANT NEWS NEWSPAPER, §§ 6, 8 (August 20, 1990). *Cf.* Casenote, *supra* note 99.

ruling accords with the Arizona Constitution and is consistent with the statutory imposition of comparative negligence as the rule in Arizona.

Article 18, Section 6 as a Protection of Dramshop Liability

The court of appeals in *Bruce*[169] mistakenly held that section 4-301, the social host immunity statute,[170] barred the Bruces' action against Chas Roberts. The court rejected that the Bruces' claim could be asserted in a manner other than a dramshop action. Although the court correctly ruled that the social host statute does not violate the Arizona Constitution,[171] the breadth of the *Bruce* holding contravenes article 18, section 6[172] by summarily prohibiting all other claims for recovery, even those unrelated to dramshop liability.

Article 18, section 6 of the Arizona Constitution expressly prohibits the legislature from enacting laws that limit an injured party's right to recover damages from the tortfeasor.[173] The provision also prevents the legislature from capping the amount of damages that an injured party may receive.[174] Article 18, section 6 protects from legislative limitation those common law actions which existed in 1912, the time Arizona adopted its constitution.[175] In recent years, however, there has been substantial controversy regarding what claims article 18, section 6 protects.[176] Because the common law by its nature is "evolving,"[177] there is no authoritative determination of what actions were recognized as of 1912. The controversy lies in the claim's classification as one that existed at common law, therefore deserving protection, or one that is so different from any right recognized before Arizona adopted its constitution that the legislature may limit or abrogate the claim within the bounds of article 18, section 6.

The Arizona Supreme Court examined the scope of article 18, section 6 in *Boswell v. Phoenix Newspapers, Inc.*.[178] In *Boswell*, the plaintiffs challenged the constitutionality of a statute that prohibited the recovery of general damages in defamation suits when the defendant adequately publishes a retraction.[179] The defendant argued that article 18, section 6 did not protect the

---

169. 166 Ariz. 221, 801 P.2d 456.
170. ARIZ. REV. STAT. ANN. § 4-301.
171. ARIZ. CONST. art. 18, § 6. *See infra* note 173 for the full text of the section.
172. *Id.*
173. ARIZ. CONST. art. 18, § 6: "The right of action to recover damages for injuries shall never be abrogated, and the amount shall not be subject to any statutory limitation."
174. *Id.*
175. *Kenyon*, 142 Ariz. at 82, 688 P.2d at 974; *Boswell*, 152 Ariz. at 17, 730 P.2d at 194; Bryant v. Continental Conveyor & Equip. Co., 156 Ariz. 193, 195, 751 P.2d 509, 511 (1988).
176. *See Boswell*, 152 Ariz. 9, 730 P.2d 186; *Bryant*, 156 Ariz. at 197, 751 P.2d at 513 (Feldman, J., dissenting); Comment, *supra* note 134, at 229-34; Note, *Gambling on Death in Arizona—The Right of Dependents to Recover for Wrongful Death After a Personal Injury Recovery by the Decedent*, 30 ARIZ. L. REV. 909, 918-23 (1988) (discusses a dependent's right to recover for wrongful death after a recovery by the decedent in light of article 18, § 6 and the recognition that the right to recover for personal injury is a fundamental right in Arizona).
177. *Boswell*, 152 Ariz. at 17-18, 730 P.2d at 194-95.
178. 152 Ariz. 9, 730 P.2d 186.
179. *Id.* at 11-12, 730 P.2d at 188-89. *See* ARIZ. REV. STAT. ANN. §§ 12-653.02, 12-653.03 (1982). In *Boswell*, the plaintiffs sought recovery for defamation against the Phoenix Gazette for printing a story that mistakenly reported their arrest and conviction for second degree

plaintiffs' defamation claim because Arizona common law only allowed recovery for torts involving the "*negligent* infliction of *bodily* injury."[180] The court rejected the defendant's interpretation and found that the defamation statute violated article 18, section 6.[181] Consequently, the plaintiffs were permitted to recover general damages caused by the defamation.[182]

The *Boswell* majority favored an expansive interpretation of article 18, section 6.[183] The majority ruled that the constitution broadly protects a claimant's right to seek a judicial remedy for injury.[184] The court held article 18, section 6 shields an action from legislative infringement if the 1912 common law recognized the right to recover for the general type of injury claimed.[185] The existence of specific theories and doctrines are not relevant in the constitutional analysis.[186] The *Boswell* majority explained that article 18, section 6 not only protects the common law claim as it existed in 1912, it also accommodates the "evolution of common law actions" and protects a claim even if it does not precisely mirror its 1912 ancestor.[187]

---

burglary. In fact, the plaintiffs were security guards who helped apprehend the thieves. *Boswell*, 152 Ariz. at 10, 730 P.2d at 187.

180. *Id.* at 12, 730 P.2d at 189 (emphasis in original).

181. *Id.* at 19, 730 P.2d at 196. Although the court recognized a more narrow interpretation of article 18, § 6 favored by the dissent in *Mendez*, 19 Ariz. 151, 166 P. 278, and accepted in Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 242 P. 658 (1926), it believed that the rationale did not apply in this case. *Boswell*, 152 Ariz. at 13-14, 730 P.2d at 190-91. The *Boswell* court held that the narrower holdings simply stood for the proposition that article 18, § 6 did not protect claims "created by the legislature" previously unrecognized at common law. *Id.* at 14, 730 P.2d at 191.

182. *Boswell*, 152 Ariz. at 19, 730 P.2d at 196. The plaintiffs were permitted to recover "general damages for *actual* injury" to their reputation and for emotional distress. *Id.* (emphasis in original).

183. *Id.* at 13, 730 P.2d at 190. The court believed it "inappropriate ... to restrict the guarantee by adding words of limitation 'contrary to the plain language used.'" *Id.* (citing Kilpatrick v. Superior Court, 105 Ariz. 413, 419-20, 466 P.2d 18, 24-25 (1970)).

184. The court noted:

> Section 6 does not speak of negligence actions, but of the "right of action to recover damages." It mentions no particular type of damage, but speaks instead to the broad "right ... to recover damages for injuries." Article 18, § 6 contains no restrictive adjectives or phrases.

Id. at 13, 730 P.2d at 190 (footnote omitted).

185. *Id.* at 17-18, 730 P.2d at 194-95.

186. *Id.*

187. *Id.* The court held that article 18, § 6 shields the *Boswell* plaintiffs' right to recover for emotional distress even though this type of recovery was not recognized in a defamation action until 1922, well after the adoption of the Arizona Constitution. The court stated:

> Although Article 18, § 6 preserves common law rights, our common law is not frozen as of 1912. The constitutional protection extends to wrongs recognized at common law, but it is not limited to those elements and concepts of particular actions which were defined in our pre-statehood law. Article 18, § 6 protects the *right of people to seek "remedy by due course of law"* for injury to their "lands, goods, person, or reputation." The law must allow for the evolution of common-law actions to reflect today's needs and knowledge. Any other rule would allow those "long dead" to dictate solutions to problems of which they could not have been aware.

Id. (citations omitted) (emphasis in original).

In 1988, the supreme court retreated from the *Boswell* interpretation of article 18, section 6 in *Bryant v. Continental Conveyor & Equipment Co.*.[188] The *Bryant* court held that a statute of repose which barred certain product liability claims did not violate article 18, section 6.[189] The majority believed that because the modern doctrine of strict products liability did not exist at the time of the constitution's adoption, the claim was not protected by the provision.[190]

Justice Feldman, the author of the *Boswell* opinion, dissented in *Bryant*.[191] He reiterated his belief that the article did not protect specific "doctrines, theories or causes of actions."[192] Instead he asserted that the article's reach was much broader and protected the "*right of action* to recover damages for injuries."[193] He noted that both the right to recover for injury caused by defective products and the concept of strict liability existed at the time the constitution was adopted.[194] Consequently, according to the dissent, the *Bryant* claim was protected by article 18, section 6 even though the two concepts did not meld into the contemporary products liability claim until after the adoption of the Arizona Constitution.[195]

At first glance, the constitutional flaw of the *Bruce*[196] holding is not apparent. The court of appeals correctly held that because dramshop liability did not exist when the state adopted the constitution, the social host statute does not violate article 18, section 6.[197] It seems clear that article 18, section 6 does not protect a dramshop claim from legislative limitation even under the liberal

---

188. 156 Ariz. 193, 751 P.2d 509.

189. *Id.* at 195, 751 P.2d at 511. The statute barred all product liability claims brought more than twelve years after the product was first sold unless the claim was based upon negligence or breach of express warranty provided by the manufacturer or the seller. ARIZ. REV. STAT. ANN. § 12-551 (1982).

190. *Bryant*, 156 Ariz. at 195, 751 P.2d at 511. The court held "that the statute of repose, A.R.S. § 12-551, is not an abrogation of a substantive right of action protected by art. 18, § 6 because the tort of strict products liability did not exist at the time the constitutional provision was adopted." *Id.*

The court also found that the statute did not violate Arizona's equal protection clause, nor did it violate Arizona's due process clause. *Id.* at 195-97, 751 P.2d at 511-13.

191. *Id.* at 197, 751 P.2d at 513 (Feldman, J., dissenting). Chief Justice Gordon concurred in the dissent. Justice Feldman believed that the statute not only violated article 18, § 6, but also believed that the majority applied the wrong standard of review in the equal protection assessment and misapplied the rational basis test. *Id.*

192. Consistent with his reasoning in *Boswell*, Justice Feldman opined that the fact that the doctrine of strict products liability was not recognized until after the adoption of the article was not relevant under an article 18, § 6 analysis. *Id.* Somewhat sarcastically he stated that it was true that "the 'doctrine' of strict liability for injuries caused by a product was first recognized by this court in the 1960's ... [t]hat historical fact is interesting, but totally irrelevant." *Id.* at 198, 751 P.2d at 514.

193. *Id.* (emphasis in original).

194. *Id.*

195. *Id.* at 197-98, 751 P.2d at 514-15 (Feldman, J., dissenting). The dissent stated that "[a]ll that has happened since 1912 is the logical extension of *Rylands v. Fletcher*'s strict liability theory to the right to bring a product liability action." *Id.* at 198, 751 P.2d at 515.

196. 166 Ariz. 221, 801 P.2d 456.

197. *Id.* at 225, 801 P.2d at 460.

interpretation favored by the majority in *Boswell*[198] and the dissent in *Bryant*.[199]

Although dramshop liability is based on common law principles, the *Ontiveros* court acknowledged that non-liability was Arizona's accepted rule until 1983.[200] Furthermore, because social host non-liability is still the rule in Arizona, section 4-301 simply codifies the common law as it has existed since 1912.[201] Consequently, the 1912 common law principles that underlie Arizona dramshop and social host liability are not readily recognizable.[202] Even under the broadest interpretations[203] of article 18, section 6, the court would likely require a more substantial tie with the 1912 common law to hold that dramshop or social host liability is constitutionally protected from legislative limitation.

Despite the constitutionality of the social host statute,[204] the *Bruce* holding itself violates article 18, section 6. Both the *Boswell*[205] opinion and the less generous *Bryant*[206] opinion found that the provision shields a claim as it existed at the time Arizona adopted its constitution. The *Bruce* court believed that Chas Roberts' conduct, the acquiescence of social drinking on business property, fell within the social host statute and held that there could be no liability.[207] Concededly, the Bruces' complaint alleged liability based on conduct that could give rise to a dramshop claim.[208] The Bruces, however, also

---

198. 152 Ariz. 9, 730 P.2d 186.
199. 156 Ariz. at 197, 751 P.2d at 513 (Feldman, J., dissenting).
200. *Ontiveros*, 136 Ariz. 500, 667 P.2d 200.
201. The *Ontiveros* court expressly declined to rule on the question of social host liability. *Id.* at 511, 667 P.2d at 211. Arguably, the broad language in *Boswell* would support the assertion that article 18, § 6 prohibits the legislature from "freezing" the common law as of 1912. *Boswell*, 152 Ariz. at 17-18, 730 P.2d at 194-95. *See also* Note, *supra* note 176, at 920-21 (author interprets *Boswell* to bestow article 18, § 6 protection to claims "[i]f today's common law consists of the right to bring [the action]...."). However, in the case of dramshop and social host liability the 1912 common law principles that support liability (and must exist in order for there to be article 18, § 6 protection) are not readily recognizable. In fact, the *Ontiveros* court hedged on its analysis by holding "[e]ven if ... a duty could not be found by application of common law principle and authority, its existence could be postulated upon the affirmative requirements of statute." *Ontiveros*, 136 Ariz. at 509, 667 P.2d at 201. Furthermore, Chief Justice Holohan refused to hold that the dramshop's duty was based on common law principles. *Id.* at 513, 667 P.2d at 213 (Holohan, C.J., concurring) ("any discussion of common law duty is irrelevant."); *Brannigan*, 136 Ariz. at 521, 667 P.2d at 221 (Holohan, C.J., concurring) ("The discussion of common law duty found in the majority opinion is, for me, interesting but irrelevant."). *Cf. Bruce*, 166 Ariz. at 225 n.3, 801 P.2d at 460 n.3.
202. "The conventional view at common law" was that of dramshop non-liability. PROSSER AND KEETON, *supra* note 17, at 58 (Supp. 1988). Although the acceptance of dramshop liability has greatly expanded, social host liability continues to be the exception even in those states that have adopted dramshop liability. *Id.*
203. *See, e.g.*, *Boswell*, 152 Ariz. at 13, 730 P.2d at 190; *Bryant*, 156 Ariz. at 197, 751 P.2d at 513 (Feldman, J., dissenting).
204. ARIZ. REV. STAT. ANN. § 4-301.
205. 152 Ariz. 9, 730 P.2d 186.
206. 156 Ariz. 193, 751 P.2d 509.
207. *Bruce*, 166 Ariz. at 224, 801 P.2d at 459.
208. The Bruces likely understood the consequences of alleging dramshop/social host liability and therefore correctly chose to assert other theories of negligence. *Respondeat superior*, one of several claims asserted by the Bruces, could not be disposed of by means of section 4-301 without violating article 18, § 6. This theory of recovery was available to the

alleged liability based on principles unrelated to dramshop liability.[209] Article 18, section 6 prevents the legislature or the court from foreclosing other protected claims even though there are alternative bases of liability that are not constitutionally protected.[210] The legislature may not enact laws that place restrictions on a claimant's right to collect damages for personal injury without leaving the claimant a reasonable opportunity to pursue a judicial remedy.[211] The court of appeals summarily ruled that section 4-301 foreclosed all the Bruces' claims because the defendant's disputed conduct would concurrently support social host liability. In doing so, the court unconstitutionally extinguished the Bruces' other viable claims.[212] Article 18, section 6 expressly forbids the enactment of laws which achieve this end.

1912 claimant and therefore protected by the provision. PROSSER AND KEETON, *supra* note 17, at 499-501. *See also* Fletcher v. Baltimore & Potomac R.R., 168 U.S. 135 (1887) (cited in Appellant's Petition for Review at 13, *Bruce*, 166 Ariz. 221, 801 P.2d 456). *See also* Judge Kleinschmidt's dissent where he argues that the record supports an inference that the alcohol's consumption was in furtherance of Chas Roberts' business and a trier of fact could find Chas Roberts vicariously liable under respondeat superior principles. *Bruce*, 166 Ariz. at 229-30 & n.6, 801 P.2d at 464-65 & n.6.

209. *See supra* note 123 and accompanying text.

210. The fact that the *Bruce* court addressed the Bruces' arguments does not mitigate the court's broad interpretation of § 4-301 which unequivocally held that this statute controlled to preclude all liability. *See Bruce*, 166 Ariz. at 225-29, 801 P.2d at 460-64. The court held that "[a]lthough A.R.S. § 4-301 is dispositive, we feel it is appropriate to meet Bruce's remaining issues, the resolution of which also foreclose Roberts' liability." *Id.* at 225, 801 P.2d at 460.

211. *Boswell*, 152 Ariz. at 18, 730 P.2d at 195.

212. An example should help explain the flaw in the *Bruce* holding. Suppose a host ("Host") has a party and invites several close friends to her home to celebrate. Host's home is located in a highly concentrated urban neighborhood. At the party, Host offers only alcoholic refreshments. Additionally she gives her guests free reign of her home to celebrate wherever they want. Next, assume a guest ("Guest") wanders into Host's garage and finds a large collection of explosives. Guest, intoxicated by the alcohol, ignites the explosives ultimately destroying Host's garage and causing injury to Host's guests and neighbors. Host will surely face a strict liability claim based on her conduct, notwithstanding § 4-301 and her status as a social host who provided alcohol. *See* PROSSER AND KEETON, *supra* note 17, at 545-54; Correa v. Curbey, 124 Ariz. 480, 605 P.2d 458 (Ct. App. 1979). Article 18, § 6 forbids an interpretation of section 4-301 that would foreclose a strict liability claim solely because the conduct also supports a claim based on dramshop and social host liability.

The Bruces made a similar argument to the court. They maintained that the legislative intention was not to bar liability in the employer-employee setting because that relationship was sufficiently different from the social host-guest scenario. Appellant's Opening Brief at 17, *Bruce*, 166 Ariz. 221, 801 P.2d 456. The Bruces maintained that Kechonen v. Robles, 146 Ariz. 268, 705 P.2d 945 (1985), a factually similar case, supported their position. In *Kechonen*, the court refused to hold the employer liable under dramshop principles but stated the employer may have alternatively incurred liability due to his status as the owner of the property. *Id.* at 272 n.3, 705 P.2d at 949 n.3 ("For purposes of this opinion we have assumed but not decided that there could have been some liability on the part of Neil's as the owner of the premises...."). The Bruces argued that this note stood for the broader proposition that liability outside of the dramshop context remained unaffected even though the employer could not be held liable because of his status as a social host. Appellant's Opening Brief at 16, *Bruce*, 166 Ariz. 221, 801 P.2d 456. The court denied that the *Kechonen* remark left open the possibility that the employer could be liable. *Bruce*, 166 Ariz. at 224, 810 P.2d at 459. Instead, the court of appeals held that the footnote merely meant that the employer, because he owned the premises, was considered to be a host for purposes of the holding. *Id.*

CONCLUSION

The Arizona Supreme Court has broadly interpreted the scope of dramshop liability since its adoption in 1983.[213] This liberal interpretation accords with the special provisions found in the Arizona Constitution that protect a claimant's right to a judicial remedy in cases of tortious injury.[214] The *Schwab* case is an example of the court's willingness to protect the integrity of the new rule in light of these protections. The court correctly recognized that section 4-312 is a legislative directive to apply the affirmative defenses of contributory negligence or assumption of the risk and bar claims brought by a tavern patron or his culpable companion. Article 18, section 5 reserves the role of assessing and imposing these affirmative defenses in all cases to the jury. Consequently, the supreme court rightly struck down the statute.

In contrast, section 4-301, which immunizes the social host from dramshop liability, does not facially violate the Arizona Constitution. The court of appeals correctly concluded that social host liability is not protected by article 18, section 6 because it has only a tenuous link with principles recognized by Arizona common law.[215] The *Bruce* court, however, interpreted the statute to foreclose all liability if the statute is found to apply. This is true even if a claim concurrently supports other constitutionally protected bases of liability unrelated to dramshop principles. This interpretation violates article 18, section 6 which prohibits invalidating common law claims, through legislation or judicial interpretation, without leaving alternative judicial remedies.[216] The supreme court, however, has declined to review the *Bruce* holding despite its breadth. As a result, section 4-301 remains far more powerful than constitutionally permissible.

---

213. *Schwab*, 164 Ariz. at 425, 793 P.2d at 1092 (held patron's claim against tavern protected by article 18, § 5). *Cf. Carrillo*, 164 Ariz. at 370, 793 P.2d at 127 (court of appeals held that a dramshop must monitor its patrons' drinking because the tavern may be liable for "indirectly" serving a patron who is obviously intoxicated).

214. *See supra* note 134.

215. *See supra* notes 201 & 202.

216. *Boswell*, 152 Ariz. at 18, 730 P.2d at 195.