

Hall v. Torero's II, Inc.: Drunken Driving, Bar Liability, and the Quest for Safer Roadways*

INTRODUCTION

Tragedy can strike in the blink of an eye. For Michael and Theresa Hall, tragedy struck at approximately 10:40 p.m. on December 3, 1997.¹ That evening the couple was driving on Guess Road in Durham, less than a mile from Torero's, a local Mexican bar and restaurant.² Unbeknownst to them, William Terry, an admitted alcoholic, was driving in the opposite direction.³ Terry had spent the evening at Torero's consuming numerous drinks over the course of the night.⁴ By 10:30 p.m.—some five hours after he first arrived at the bar—patrons and the bartender raised questions among one another about Terry's ability to drive, but when an obviously intoxicated Terry stumbled out of Torero's, keys in hand, no one stood in his way.⁵ Just minutes later, Terry's Jeep swerved across the centerline and collided with the Halls' Toyota Corolla.⁶ Michael died within minutes of the collision; Theresa sustained serious injuries and was pinned in the vehicle until rescue crews arrived.⁷ Authorities later determined that Terry's blood alcohol content at the time he left Torero's would have been 0.20—about two-and-a-half times the legal limit.⁸ For the Hall family, an intoxicated driver had changed their lives in an instant.

When it came time for Theresa Hall to seek redress for her damages, the economics of the tort system required her to look beyond Terry himself.⁹ Like so many tort victims, Hall had to find the

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1. Plaintiffs-Appellants' Brief at 10, *Hall v. Torero's II, Inc.*, 176 N.C. App. 309, 626 S.E.2d 861 (2006) (No. COA05-199).

2. Defendant-Appellant's Brief at 8, *Hall v. Torero's II, Inc.*, 147 N.C. App. 785, 559 S.E.2d 294 (2001) (No. COA00-1446).

3. *Id.* at 10.

4. Plaintiffs-Appellants' Brief, *supra* note 1, at 5–6.

5. *Id.* at 8–10.

6. Record on Appeal at 10–11, *Hall*, 176 N.C. App. 309, 626 S.E.2d 861 (No. COA05-199).

7. Plaintiffs-Appellants' Brief, *supra* note 1, at 6.

8. *Id.* at 11.

9. See PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY: COMPENSATING THE VICTIMS OF DRINKING DRIVERS 9–10 (1992).

deep-pocketed defendant that could satisfy a substantial jury award.¹⁰ For Hall, that deep-pocketed defendant was Torero's, and she filed suit against the restaurant and bar on May 11, 1998.¹¹ The case involved multiple charges of negligence and a lengthy litigation history, but a hung jury¹² and an unfavorable court of appeals decision meant that, by 2004, Hall's only remaining ground for suit was her charge that Torero's was negligent for "failing to take affirmative precautionary measures to prevent . . . Terry from operating a motor vehicle when it knew or reasonably should have known he was intoxicated."¹³ Despite setbacks in the early rounds of litigation, in the spring of 2004, a jury concluded that Torero's was negligent for failing to take affirmative steps to prevent Terry from driving.¹⁴ The jury ordered Torero's to pay Hall \$1,241,600.¹⁵ Yet before Hall had a moment to celebrate, the trial court judge ruled that there was "no legal duty by a commercial provider of alcohol in North Carolina after service of the final drink by the defendant."¹⁶ He issued a judgment notwithstanding the verdict, threw out the jury decision, and decided in favor of Torero's.¹⁷

Hall, of course, appealed, but the North Carolina Court of Appeals sided with the trial judge. The court found that servers of alcohol have no affirmative duty to stop an intoxicated patron from driving.¹⁸ On further appeal to the Supreme Court of North Carolina, the state's highest court split on whether to extend negligence liability to bars that allowed intoxicated patrons to drive. With one justice recused,¹⁹ the other six justices divided equally, three voting to affirm the court of appeals and three voting to reverse.²⁰ As is the court's

10. *See id.* at 10.

11. *Hall v. Torero's II, Inc.*, 176 N.C. App. 309, 311, 626 S.E.2d 861, 863 (2006), *aff'd by an equally divided court*, 363 N.C. 114, 678 S.E.2d 656 (2009).

12. *See id.* at 311, 626 S.E.2d at 864.

13. *Id.* (alteration in original).

14. *See id.* at 312, 626 S.E.2d at 864.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* at 329, 626 S.E.2d at 874.

19. Justice Mark Martin cited the fact that one of Theresa Hall's attorneys represented his daughter in an unrelated matter occurring after oral argument to the Supreme Court as the ground for his recusal. *See* Chris Baysden, *Supreme Court Justice Embroiled in Conflict of Interest Imbroglia*, TRIANGLE BUS. J. (Raleigh, N.C.), Apr. 24, 2009, <http://triangle.bizjournals.com/triangle/stories/2009/04/27/story8.html>.

20. *Hall v. Torero's II, Inc.*, 363 N.C. 114, 114, 678 S.E.2d 656, 656 (2009).

custom, the court of appeals' decision was affirmed, but it stood without precedential value.²¹

A decade of litigation gave Hall a clear resolution to her case. Torero's would not have to pay her a single penny.²² Yet for North Carolina's bars,²³ the answer was not so clear. Because the court of appeals' decision has no precedential value, commercial alcohol vendors still do not know if they can be held liable for failing to take affirmative steps to stop intoxicated patrons from driving. That lingering question—whether North Carolina should extend tort liability to bars that fail to stop their over-served patrons from driving—is the topic of this Recent Development.

There is no doubt that drunken driving takes a terrible toll throughout North Carolina and the nation. Each year, some 11,773 people die on the nation's highways due to drunk-driving accidents.²⁴ Over four hundred of those victims die in North Carolina.²⁵ Unfortunately, many victims of drunken drivers have little legal recourse. Victims can pursue claims against drunken drivers who cause them harm, and many states have extended liability to social hosts or commercial vendors who provide or sell alcohol to those that they know or should know are intoxicated and plan to drive.²⁶ Still, no

21. *See id*; *see also* *Vogler v. Branch Erections Co.*, 362 N.C. 77, 77, 653 S.E.2d 142, 143 (2007) (explaining that an affirmed decision by an equally divided court has no precedential value); *N.C. Nat'l Bank v. Morgan*, 299 N.C. 541, 543, 263 S.E.2d 576, 578 (1980) (same).

22. *Hall*, 363 N.C. at 114, 678 S.E.2d at 656.

23. Alcohol is served at a seemingly infinite number of locations (bars, restaurants, taverns, ABC stores, pubs, and waterholes, just to name a few). This Recent Development uses "bars" to refer to any establishment where alcohol is sold.

24. NAT'L CTR. FOR STATISTICS & ANALYSIS, NAT'L HIGHWAY TRANSP. SAFETY ADMIN., TRAFFIC SAFETY FACTS: FATALITIES AND FATALITY RATES IN ALCOHOL-IMPAIRED-DRIVING CRASHES BY STATE, 2007–2008, at 3 (2009), <http://www-nrd.nhtsa.dot.gov/Pubs/811250.PDF>.

25. *Id.*

26. *See, e.g.*, *Delta Airlines, Inc. v. Townsend*, 614 S.E.2d 745, 748 (Ga. 2005) (explaining that liability attaches to vendors of alcoholic beverages only when the vendor sells alcohol to a patron who is "in a state of notable intoxication" and who will soon be driving); *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 147–48 (Iowa 2002) (recognizing a cause of action against a liquor establishment that sold alcohol to a patron who was intoxicated and who subsequently caused harm); *Cimino v. Milford Keg, Inc.*, 431 N.E.2d 920, 925–26 (Mass. 1982) (establishing the elements for a liability claim against a commercial alcohol vendor that sold alcohol to a noticeably intoxicated patron). North Carolina's courts have held that commercial vendors who sell alcohol to those that they know or should know are drunk can be held liable for subsequent injuries caused by the drunken patron. *See Hutchens v. Hankins*, 63 N.C. App. 1, 18–19, 303 S.E.2d 584, 595 (1983), *discretionary review denied* 309 N.C. 191, 305 S.E.2d 734 (1983).

state recognizes a cause of action against a bar that allows an obviously intoxicated person to drive.²⁷

Advocates of extending tort liability argue that creating a cause of action for bars that do not take affirmative steps to prevent intoxicated patrons from driving would make the nation's roadways safer. They correctly see the bar doors as the last line of defense for victims of a drunken driving tragedy.²⁸ This Recent Development, however, offers a more effective way to get bar owners to join in the fight against drunken driving. Rather than holding bars liable for the subsequent actions of intoxicated patrons—a proposal that would fail to get bar owners to help in the battle to deter drunken driving—North Carolina should create targeted incentives to entice bars to proactively prevent intoxicated patrons from driving.

I. TORT LIABILITY LANDSCAPE FOR COMMERCIAL ALCOHOL VENDORS IN NORTH CAROLINA

North Carolina, like other states, establishes two principal causes of action against commercial establishments whose patrons cause automobile accidents.²⁹ First, North Carolina courts recognize that commercial establishments that sell alcohol to a person they know or reasonably should know to be a minor can be liable for subsequent torts committed by the minor under the influence of alcohol.³⁰

27. While this Recent Development will focus on North Carolina, the question is relevant in other states. New Jersey's court of appeals, for example, allowed a victim of a drunken driver to pursue a claim against a bar where the driver had become intoxicated even though the victim did not plead that the bar knew or should have known that the driver was intoxicated. *See* *Bauer v. Nesbitt*, 969 A.2d 1122, 1124 (N.J. 2009). The state's supreme court reversed on the grounds that the court could not find "common-law principles of negligence imposed a duty on the [bar] to monitor the appearance of a person to whom it had not served alcohol." *Id.*

28. *See, e.g.*, FRANK A. SLOAN ET AL., *DRINKERS, DRIVERS, AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY* 111–12 (2000). Several studies have shown that between forty and sixty-three percent of drivers arrested for driving while intoxicated consumed alcohol at a bar before their arrests. *Id.* at 112. One study found that sixty-nine percent of drunken drivers drank at bars, compared with only ten percent who drank at home. *Id.*

29. *See, e.g.*, *Murdock v. Fraternal Order of Eagles*, 779 N.E.2d 964, 967 (Ind. Ct. App. 2002), *transfer denied*, 792 N.E.2d 48 (Ind. 2003) (outlining the statutory requirements for establishing dram shop liability for commercial alcohol vendors); *LaGuire v. Kain*, 487 N.W.2d 389, 392 (Mich. 1992) (noting that Michigan's dram shop act creates liability for alcohol vendors that sell alcohol to minors or "visibly intoxicated persons").

30. *See* *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 202, 505 S.E.2d 131, 135 (1998); *see also* CHARLES E. DAYE & MARK W. MORRIS, *NORTH CAROLINA LAW OF TORTS* § 16.61.4 (2d ed. 1999 & Supp. 2009) (discussing liability of third parties who sell alcohol to minors).

Second, North Carolina allows victims of a drunken driver to sue commercial vendors of alcohol if they can show that the commercial vendors sold alcohol to a person that they knew or reasonably should have known was intoxicated.³¹

While North Carolina has exposed commercial vendors of alcohol to liability in these two ways, a number of victims are still unable to pursue causes of action against deep-pocketed bars. Many drunken drivers are not underage, and it can be difficult for a plaintiff to show that a bar actually *served* alcohol to a person who was intoxicated. In *Hall*, for example, William Terry was not underage and evidence admitted at trial raised questions about whether Torero's actually served him alcohol when he was intoxicated.³² Witnesses at Torero's on the night of the accident recalled thinking that Terry was drunk, but those witnesses agreed that Terry became visibly intoxicated only after he was served his final drink.³³ A receipt admitted at trial showed that Terry was billed for five Budweiser beers over the course of the evening.³⁴ Confronted with this evidence at trial, the jury was unable to find that Torero's had served alcohol to Terry when it knew or reasonably should have known that he was intoxicated.³⁵ In order for plaintiffs like Hall to recover from bars like Torero's, therefore, North Carolina's policy makers or appellate courts would need to recognize a new method of liability. This Recent Development argues that they should not recognize the new method.

II. LIABILITY SHOULD NOT BE EXTENDED

Rudimentary economics teaches that commercial endeavors seek to maximize profits. For bars, the pursuit of that goal generally means selling as much alcohol as possible to as many people as are willing to purchase beverages.³⁶ Commercial alcohol vendors, in other words, have economic incentives that stand in opposition to society's desire

31. See *Hutchens*, 63 N.C. App. at 18–19, 303 S.E.2d at 595.

32. See Defendant-Appellant's Brief, *supra* note 2, at 12–14.

33. *Id.* at 13–14.

34. *Id.* at 13. Evidence excluded from the jury, however, suggests that Terry may have had far more to drink. See Plaintiffs-Appellants' Brief, *supra* note 1, at 10–11. Hall was prepared to introduce evidence from an expert who would have shown that Terry's blood-alcohol content ("BAC") was two-and-a-half times the legal limit. *Id.* According to Hall's expert, a man of Terry's size and weight would have had to have consumed approximately twenty standard drinks to achieve that BAC level. *Id.*

35. *Hall v. Torero's II, Inc.*, 176 N.C. App. 309, 311, 626 S.E.2d 861, 864 (2006), *aff'd by an equally divided court* 363 N.C. 114, 678 S.E.2d 656 (2009).

36. JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA 141 (1989) (noting that the best customers for most bars are "big drinkers" who consume large amounts of alcohol over the course of an evening).

to limit the opportunity for people to drive drunk. Advocates of extending tort liability to bars that allow intoxicated patrons to drive like Theresa Hall argue that the tort system can influence bars to become more responsible by curbing the bar's economic interest in selling alcohol without regard to patrons' subsequent actions.³⁷ A close look at the critiques of tort law as a deterrent, however, reveals that extending tort liability to bars that allow intoxicated patrons to drive would be a particularly ineffective way to deal with the bar's interest in selling alcohol.

One factor affecting tort law's ability to deter behavior is whether actors believe that the risk of being penalized by a tort judgment is greater than the cost of acting more carefully.³⁸ Yet tort law is inherently unpredictable.³⁹ Actors simply cannot know whether they will be held responsible for negligent behavior before they act.⁴⁰ In the context of bars being held liable for allowing intoxicated patrons to drive, the tort system's unpredictability could lead even rational bar owners to discount or ignore the threat of a tort judgment—reducing or negating tort's effectiveness as a deterrent. Indeed, it may even be rational for bar owners to minimize tort's impact. There were some 55,000 DWI-arrests in North Carolina in 2008,⁴¹ but only 423 victims died at the hands of drunken drivers.⁴² Each death, of course, is tragic, but bar owners recognize that simply allowing an intoxicated person to drive does not mean that injury (and a tort judgment) will necessarily follow.

Another reason bar owners might be undeterred by tort law is that not every victim will be able or willing to sue. Some victims—

37. Theresa Hall's brief to the Supreme Court of North Carolina, for example, concluded by pointing out that establishing liability for bartenders who allow drunken patrons to drive could force bartenders to deter drunken patrons from driving. See Plaintiff-Appellants' New Brief at 37–38, *Hall*, 363 N.C. 114, 678 S.E.2d 656 (2009) (No. 187PA06). “[T]hose who negligently create hazards,” she argued, “should have to take reasonable steps to clean them up.” *Id.*

38. See PETER A. BELL & JEFFREY O'CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMA OF TORT LAW* 77 (1997); see also Stephen D. Sugarman, *Doing Away with Personal Injury Law*, in *PERSPECTIVES ON TORT LAW* 143, 151 (Robert L. Rabin ed., 4th ed. 1995) (noting that because some actors discount the threat of being subjected to a tort judgment tort law tends to be an ineffective deterrent).

39. BELL & O'CONNELL, *supra* note 38, at 83. In fact, tort law has sometimes been likened to a “lottery” because some players receive large payouts while others get very little compensation. See CHARLES FRIED & DAVID ROSENBERG, *MAKING TORT LAW* 67 (2003).

40. BELL & O'CONNELL, *supra* note 38, at 83.

41. STATE BUREAU OF INVESTIGATION, N.C. DEP'T OF JUSTICE, *CRIME IN NORTH CAROLINA 2008*, at 6 (2009), available at <http://sbi2.jus.state.nc.us/crp/public/Default.htm>.

42. NAT'L CTR. FOR STATISTICS & ANALYSIS, *supra* note 24, at 3.

especially if their damages are relatively small—are not able to find counsel to represent them and simply will not bring a suit.⁴³ Most tort lawyers work on a contingency basis and can only take cases where the client has sustained sufficient damages to pay for the lawyer’s time.⁴⁴ Other victims simply dislike the court system and are reluctant to file against a negligent actor.⁴⁵ In fact, studies suggest that less than half of victims injured in automobile accidents actually file suit against the negligent actor.⁴⁶ In negligence actions outside of the workplace, meanwhile, fewer than one in five tort victims file suit.⁴⁷ With the likelihood of a tort judgment so remote, a bar owner might well be tempted to sell another drink to a patron, even if it means that the patron will not be safe to drive home alone.

In addition, just because a victim with a meritorious claim elects to bring suit does not guarantee that the bar will have to pay a large judgment. Data suggest that an overwhelming number of cases settle before they reach trial.⁴⁸ In other cases, juries may not award the plaintiff a large sum of money. Faced with a remote (if imposing) threat of a debilitating tort judgment on one hand and the daily costs of limiting alcohol sales on the other, many rational bar owners might take a risk and continue serving alcohol to patrons who may be too impaired to drive safely.

Finally, even if a victim was seriously injured by a drunken driver who had spent the evening drinking at a bar, the bar might be judgment proof. Many businesses are undercapitalized, which means that they do not have enough assets to pay a judgment against them.⁴⁹ While it is possible for tort victims to “pierce the corporate veil” and go after a business owner’s personal property, courts are generally reluctant to permit veil piercing unless the business owner has neglected the corporate formalities or perpetuated a fraud.⁵⁰ When a business owner does not face the possibility of satisfying a personal judgment, he has less of an incentive to conform his behavior to

43. BELL & O’CONNELL, *supra* note 38, at 10.

44. *Id.* at 9–10.

45. See Sugarman, *supra* note 38, at 151 (“The injured parties may . . . have an aversion to the idea of litigation.”).

46. BELL & O’CONNELL, *supra* note 38, at 6.

47. *Id.*

48. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 410 (2004) (explaining that while it is not possible to know the number of cases that are resolved before they are filed, some ninety-six percent of cases filed in state courts never go to trial).

49. See CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 240 (2000).

50. *Id.*

acceptable standards.⁵¹ To the extent that North Carolina's bars are undercapitalized or otherwise judgment proof, therefore, imposing tort liability on bars that allow drunken patrons to drive would not be a significant deterrent.

While tort law can be an effective deterrent in situations where actors recognize their potential liability, understand the consequences of their actions, or have private incentives to behave more responsibly, bars that allow intoxicated patrons to drive are not positioned to respond to the impetus of tort law. Individual victims could win awards against specific bar owners, but tort law cannot provide the systemic change needed to make the state's roads safer. What follows in Part III is a proposal to create the incentives to get bar owners to work with policy makers in an effort to combat drunken driving at the last line of defense: the bar doors.

III. SOLUTIONS

Extending tort liability to bars that allow their patrons to drive after a night of drinking would not deter bar owners from allowing drunken patrons to drive. But not creating the particular avenue for relief for tort victims does not mean that North Carolina's drivers should be helpless against the real problem of drunken drivers that leave bars inebriated. Indeed, North Carolina's General Assembly could align the economic interests of bars with the safety interests of the driving public by creating incentives for bars to behave in more responsible ways.

Tax rates can have an important impact on alcohol sales. As such, manipulating taxes based on a bar's level of risk could create incentives for important safety improvements among the state's commercial alcohol vendors. Repeated studies have shown that higher taxes on alcohol reduce the amount of alcohol sold.⁵² Indeed, excise taxes on alcohol have been shown to be one of the most effective ways to deter the use of alcohol in a state.⁵³ Because a bar has an incentive to sell as much alcohol as possible, adjusting a bar's alcohol tax rate—within certain parameters⁵⁴—to its relative

51. See Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201, 225 (1971).

52. See, e.g., SLOAN ET AL., *supra* note 28, at 241 (explaining that less alcohol is sold when its price rises due to taxes).

53. DAVID BRUNORI, STATE TAX POLICY: A POLITICAL PERSPECTIVE 122 (2001).

54. A state, of course, would need to be careful not to lower its tax rates beyond a certain level. Higher alcohol prices reduce the dangers of alcohol. See PHILIP J. COOK, PAYING THE TAB: THE COSTS AND BENEFITS OF ALCOHOL CONTROL 167 (2007).

participation in safety measures to deter drunken patrons from driving could create real incentives for bars to help make the state's roadways safer.

Similarly, licensing fees can influence behavior in industries where licenses are required as a barrier to entry. Since North Carolina requires all commercial vendors of alcohol to obtain a license before selling their wares,⁵⁵ the state could manipulate the license-renewal fee to create incentives for bars to engage in socially responsible behavior. By aggressively monitoring whether a particular bar should pay a higher licensing fee or be denied a license altogether because it engages in risky behavior, North Carolina's policymakers could begin to make the state's roadways safer.

A. *The Feasibility of Altering Taxes and Licensing Fees to Adjust Bar Behavior*

Before discussing changes to the state's taxing or licensing powers, it is important to note that such changes would be popular and possible. Although four out of five Americans oppose holding bars liable under tort law for subsequent accidents caused by drunken patrons,⁵⁶ the voting public across the United States tends to support taxes on alcohol.⁵⁷ Most excise taxes on alcohol are ultimately passed on to consumers of alcohol in the form of higher prices,⁵⁸ but the general public recognizes that excise taxes serve a social good by reducing the number of drinkers on state highways.⁵⁹ And since North Carolina already taxes alcohol sales,⁶⁰ creating incentives for bars to engage in socially responsible behavior would simply be a question of adjusting tax rates—or creating deductions—for bars that conform to certain expectations.

North Carolina also already uses its licensing power to determine what establishments can sell alcohol. Indeed, any business that wants to sell alcohol in North Carolina must obtain a license annually.⁶¹ Using licenses to influence the behavior of bars in North Carolina, therefore, would simply be a measure of calibrating the requirements

Reducing the tax rate on alcohol too far, therefore, could mean that any additional safety measures by bars could result in a net gain in danger on the state's roadways. *See id.*

55. N.C. GEN. STAT. §§ 18B-304, 105-113.69 to -113.70 (2009).

56. SLOAN ET AL., *supra* note 28, at 238.

57. BRUNORI, *supra* note 53, at 122.

58. *See* DAVID G. DAVIES, UNITED STATES TAXES AND TAX POLICY 241 (1986).

59. *See* BRUNORI, *supra* note 53, at 122.

60. *See* §§ 105-113.77 to -113.80 (2009) (establishing licensing and excise taxes on the licensing of commercial alcohol vendors and the sale of alcohol).

61. *See* § 105-113.70.

for obtaining and keeping a license to certain social goals. The infrastructure—the taxing and licensing system—is already in place. The only issue would be making the infrastructure create incentives for bars to take certain safety measures.

B. Proposed Safety Measures

Ideas for improving safety in bars abound. Scholars, entrepreneurs, and bartenders themselves have all contributed ideas that would help make it less likely for drunken patrons to drive after a night at a bar. The following ideas are meant as a point of departure—the beginning of a conversation about how tax incentives could be used to get bars to participate in the admirable goal of making the state's highways safer.

One proposal, for example, would be for the General Assembly to provide significant tax breaks for bars that installed safety devices in their establishments. Bars in some states, for example, have begun to install breathalyzer machines by their doors that warn patrons when it would be unsafe for them to drive.⁶² According to bartenders, the breathalyzer machines can give patrons valuable information and prevent them from driving drunk.⁶³ Giving tax breaks to bars in North Carolina that installed similar machines could influence intoxicated patrons to not get behind the wheel of a car.

As a somewhat cheaper alternative for bars, North Carolina could also provide incentives for bars that place breathalyzer software in their establishments. Like breathalyzer machines, breathalyzer software computes a person's blood alcohol content based off the number of drinks a patron has consumed, her height, and her weight.⁶⁴ While such software does not guarantee that a person can drive safely,⁶⁵ providing customers with information about how the

62. See GERALD D. ROBIN, WAGING THE BATTLE AGAINST DRUNK DRIVING: ISSUES, COUNTERMEASURES, AND EFFECTIVENESS 102 (1991); see also Advanced Safety Devices, Coin / Bill Operated Commercial Breathalyzer Machine, <http://www.safety-devices.com/alcscan-al3500-coin-bar-breathalyzer.htm> (last visited May 4, 2010) (providing an example of one such breathalyzer machine); Advanced Safety Devices, AlcoMate Core Breathalyzer, <http://www.safety-devices.com/alcomate-core-breathalyzer-al6000.htm> (last visited May 4, 2010) (demonstrating a cheaper, more portable machine).

63. See Samantha Ptashkin, *Rockford Bar Owner Hopes to Save Lives with Breathalyzer*, WREX NEWS, Jan. 21, 2010, <http://www.wrex.com/global/story.asp?s=11861615>.

64. See Shirley Min, *N.C. State Students Develop "Over the Limit" iPhone App*, MYNC.COM, Mar. 22, 2010, <http://wake.mync.com/site/wake/news/story/49660/nc-state-students-develop-over-the-limit-iphone-app/>.

65. See *id.*

alcohol in their bodies might impair their driving could deter many from driving drunk.

North Carolina could also allow bars to write-off expenses for these and other responsible actions. Some alcohol distributors that are concerned about drunken driving, for example, offer free taxi rides to intoxicated bar patrons through the Alert Cab program.⁶⁶ While that solution is obviously more viable in larger cities with more taxi services, the state could allow bars willing to pay for (or share the cost of) cab services for patrons too drunk to drive to write off their expenses on their tax returns. The state could also reward bars that give discounts to patrons who come to a bar with a designated driver.⁶⁷ Designated driver programs are viewed favorably by the American drinking public and can be an effective way to keep intoxicated individuals from driving.⁶⁸ And since only twelve percent of Americans who drink in groups report using designated drivers,⁶⁹ there is room for significant safety increases if North Carolina could create incentives for bars to reward patrons who utilize designated drivers.

Tax incentives, unlike tort law, could provide positive reinforcement for bar owners who make efforts to protect the driving public. Bars that take proactive steps toward reducing the chances that a patron drives drunk could be rewarded with lower tax rates on alcohol.⁷⁰ Because lower excise taxes can influence the amount of alcohol sold,⁷¹ responsible bars would be rewarded with more

66. See ROBIN, *supra* note 62, at 18 (showing an advertisement for the Alert Cab program). The Alert Cab program, which is paid for by commercial alcohol distributors, offers free or reduced-fare rides to drunken individuals in selected cities. See, e.g., Grey Eagle Distributors, Alert Cab, <http://www.abwholesaler.com/greyeagle/Custom/AlertCab> (last visited May 4, 2010). Some distributors fund the Alert Cab program year-round, *see id.*, while others fund the program during holidays or other special occasions when consumers are more likely to drink. See El Paso County Sheriff's Office, Sheriff's News, http://www.epcounty.com/CS/blogs/sheriff_news/archive/2009/12/26/press-conference-announcing-holiday-alert-cab-program-tomorrow-11-25.aspx (last visited May 4, 2010).

67. Some bars already offer discounts to patrons who bring designated drivers. See H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES* 126–27 (1992). Bars already have an economic incentive to support designated drivers because it allows them to sell more alcohol to patrons who know that they have a ride home. *Id.* at 126.

68. *Id.*

69. *Id.*

70. Bars can have an appreciable impact on the frequency of drunken driving. See SLOAN ET AL., *supra* note 28, at 113. In one Australian study, investigators discovered that patrons leaving bars deemed to be “high risk” based on the number of car accidents caused by patrons at that bar in the past had higher blood-alcohol levels than patrons leaving “low risk” bars. *Id.*

71. *Id.* at 241.

business and lower taxes, and, most importantly, more patrons would be drinking at a safer bar. For the same reasons, bars that do not take proactive steps to create safe drinking environments would likely earn less money due to the resulting penalties.⁷²

For establishments not tempted by tax breaks, North Carolina's licensing power could ensure that alcohol vendors comply with at least some standards. The state, for example, could require commercial alcohol vendors to make their employees undergo staff training to ensure that bartenders are better able to tell when a patron might be at risk of driving drunk.⁷³ Studies have shown that server education courses, when properly implemented, can reduce the number of intoxicated patrons by significant numbers.⁷⁴ Staff members could receive instruction about how to tell if a patron is inebriated, how to confront a person who appears to be drunk, and how to sell alcohol in a way that does not encourage intoxication.⁷⁵

As noted above, these proposed solutions are meant as a starting point for a discussion about measures that can be taken inside bars to make it less likely that a patron will leave a drinking establishment and get behind the wheel of a car. The bar doors are, in a real sense, the last line of defense for the victims of drunken drivers on North Carolina's roadways.⁷⁶ By using the state's taxing and licensing power to influence bar behavior with creative solutions, the state's roadways could become safer for all.

C. Drawbacks and Responses

Like any solution, of course, a tax incentive program is not flawless. Implementing a taxing or a licensing system for commercial alcohol vendors that is tied to the bar's particular activities would lead to higher administrative costs. Government tax collectors would have to ensure that bars that report taking certain safety measures like installing a breathalyzer or giving patrons free (or reduced fare) taxi rides have actually done so. Still, the state already provides, or has provided at some point in the past, incentives for numerous

72. Higher prices for alcohol do, indeed, reduce the dangers caused by alcohol. See COOK, *supra* note 54, at 167.

73. See ROBIN, *supra* note 62, at 102 (outlining the characteristics of one such server-training course).

74. *Id.* at 104 (reporting that one bar cut the number of intoxicated patrons by forty-five percent after its employees underwent a server training course).

75. See Graeme Willersdorf, *Selling and Serving Beverage Alcohol*, in WORKING TOGETHER TO REDUCE HARMFUL DRINKING 115, 134-36 (Marcus Grant & Mark Levertson eds., 2010).

76. See *supra* note 28 and accompanying text.

businesses, including new and expanding businesses,⁷⁷ recycling facilities,⁷⁸ and businesses engaged in research and development,⁷⁹ which suggests that the administrative costs of providing such incentives do not outweigh the benefits that they can bring. In addition, North Carolina's alcohol tax could be adjusted to cover heightened administrative costs as needed.

Another shortcoming of this system is that licensing fees and licensing polices as they exist right now might be too low to influence behavior. The permit fee for selling malt beverages in many retail establishments including restaurants, hotels, and country clubs, for example, is \$400.⁸⁰ The corresponding tax on such a license can be as low as \$15 per year.⁸¹ Evidence from other states, meanwhile, suggests that enforcement of licensing standards can be quite low. In one survey of twenty-seven states, applicants were rejected for licenses just four percent of the time.⁸² The same study revealed that only 1.5 percent of current licensees had their permits to sell alcohol revoked each year.⁸³ Obviously, North Carolina would need to raise its licensing fees and—if North Carolina is like other states—become more aggressive at policing its policies for any adjustments in its licensing fees to have an impact on bars.

D. Advantages over Imposing Tort Liability

Still, using tax incentives to influence bar behavior is ultimately a more effective way than extending tort liability to combat the problem of bars allowing drunken patrons to drive. As noted above, the remote possibility of tort liability allows negligent actors to discount the chances that they will be subject to a tort judgment.⁸⁴ Using tax incentives to encourage bars to become more responsible, on the other hand, is proactive. Tax incentives reward safe bars and raise the costs for unsafe bars, which can influence behavior before a tragic accident occurs.

77. See N.C. GEN. STAT. §§ 105-129.2 to -129.13 (2009). These tax incentives for new and expanding businesses were repealed by a sunset provision applicable to the entire article on January 1, 2007. See § 105-129.2A.

78. See §§ 105-129.25 to -129.27.

79. See §§ 105-129.50 to -129.55.

80. See N.C. Alcoholic Beverage Control Comm'n, Kinds of Retail Permits, http://www.ncabc.com/permits/retail_kinds.aspx (last visited May 4, 2010).

81. See § 105-113.77(a).

82. COOK, *supra* note 54, at 160.

83. *Id.*

84. See *supra* Part II.

In addition, tax incentives do not present the “moral hazards” that tort liability can create. When tort liability is imposed, actors that take out insurance coverage are free to engage in more risky behavior because they know that the insurance company will bear the cost of any tort judgment.⁸⁵ In the drunken driving context, bars with insurance coverage might be willing to engage in more risk-taking behavior simply because they know that the insurance company will bear the consequences of their actions. Under the system proposed by this Recent Development, in contrast, bar owners only see rewards—lower taxes and reduced licensing fees—if they engage in more responsible behavior.

While recognizing that no system can be perfect, this Recent Development has outlined many of the drawbacks that would be inherent in extending tort liability to commercial vendors of alcohol that allowed drunken patrons to drive. As an alternative, this Recent Development has proposed using tax and licensing fees to encourage bars to behave in more responsible ways. By proactively bolstering the defenses against drunk driving inside the state’s bars—rather than waiting to fight the dangerous battle on the state’s roadways—North Carolina’s policy makers can work to save even more lives.

CONCLUSION

Despite years of law enforcement and legal crackdowns on drunken driving, intoxicated drivers continue to plague roadways across the country. Michael Hall was just one of the over four hundred individuals who died in North Carolina in each of the last few years because of drunken driving.⁸⁶ In recognition of the harm that drunken driving can cause, tort law has expanded beyond its common law limitations and now allows victims of drunken drivers to pursue claims against commercial hosts who serve alcohol to minor and obviously intoxicated patrons. This Recent Development argues that North Carolina’s tort law should not be extended to encompass bars that allow drunken patrons to drive. Concerns about tort law’s incoherence as a moral system and inability to bring about public policy goals are heightened in the context of bar liability for intoxicated driving. Rather than imposing tort liability on bar owners, the state should use its alcohol tax and licensing system to create incentives for bars to engage in more responsible practices when

85. MARK C. RAHDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM 48 (1995).

86. NAT’L CTR. FOR STATISTICS & ANALYSIS, *supra* note 24, at 3.

serving alcohol to patrons that may drive. With the correct incentives, bar owners could put their energies toward making alcohol consumption in North Carolina safer for bar patrons and drivers alike.

FITZ E. BARRINGER