SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11787
631-234-5588 // www.scba.org

ACADEMY SOCIAL & CLE

SOCIAL HOSTING & DRAM SHOP LAWS

FACULTY

Leonard Badia, Esq.
New York State Courts

William T. Ferris, Esq.
Bracken, Margolin, Besunder, LLP
SCBA President

Michael G. Glass, Esq.
Rappaport, Glass, Levine, & Zullo, LLP

Hon. Caren Loguercio
Suffolk County Family Court

Jennifer A. Mendelsohn, Esq.
Ronkonkoma

Daniel J. Tambasco, Esq.
Russo, Apoznanski & Tambasco

Representatives of Suffolk County Police Department

Social Hosting Lecture
Officer Susan LaVeglia
Community Liaison Officer – Fourth Precinct

Demonstrations
Officer Carl Ruff; Officer James Spadaro; Officer Dave Weinerman

Program Committee
Cheryl Mintz, Esq. – Chair
Leonard Badia, Esq.; William T. Ferris, Esq.; Hon. James Flanagan; Michael Glass, Esq.; Jennifer Mendelsohn, Esq.; Lynn Poster-Zimmerman, Esq.

Friday, September 12, 2014
SCBA Center – Hauppauge, N.Y.

SOCIAL HOSTING & DRAM SHOP LAWS

PROGRAM AGENDA

3:30 p.m.	Sign-In & Socializing
4:00 p.m.	**Introductions; Road-Map of Evening – Cheryl Mintz; William Ferris**
4:10 p.m.	**Police Presentation on Social Hosting – Officer Susan LaVeglia** **Breathalyzer Demonstration** (Volunteer "Drinkers") **Moderator – Leonard Badia**
5:00 p.m	Socializing Break
5:15 p.m.	**Social Hosting: Criminal Defense – William Ferris**
	Family Court Issues & Ramifications – Jennifer A. Mendelsohn and Hon. Caren Loguercio
6:15 p.m.	**Second Police Demonstration** (Volunteer "Drinkers")
6:30 p.m.	**Civil Liability: Dram Shop & Social Hosting (Plaintiff's Perspective) – M. Glass** continued .
7:30 p.m.	**Civil Liability: Dram Shop & Social Hosting (Defense Perspective)** – D. Tambasco
7:45 p.m.	**Third Police Demonstration** (Volunteer "Drinkers")
7:50 p.m.	Socializing

SOCIAL HOSTING & DRAM SHOP LAWS

CONTENTS

DRAM SHOP & SOCIAL HOSTING

– Michael Glass

DRAM SHOP CIVIL LIABILITY
SUFFOLK COUNTY BAR ASSOCIATION
SEPTEMBER 12, 2014

Michael Glass
Rappaport, Glass, Levine and Zullo, LLP

Americans love their alcohol in all its destructive glory. The United States Center for Disease Control reports that 50% of American adults consider themselves regular drinkers. In 2012 alone, there were over 10,000 alcohol-related traffic deaths in the United States. New York has responded by passing legislation targeting alcohol sellers who provide alcohol to visibly intoxicated adults and social hosts who knowingly permit minors to drink. This article reprises civil liability in New York for wrongfully supplying alcohol to the intoxicant and the underage drinker. New York's first Dram Shop Act was enacted in 1873 and the Dram Shop statutes have been amended and supplemented multiple times since then.

STATUTORY BACKDROP

New York is one of 30 states which have enacted Dram Shop Laws which impose civil liability on third parties for aiding and abetting the intoxication of an individual who causes injury by virtue of his or her intoxication. In the common law, there was generally no liability on the tavern owner who plied the intoxicant with liquor. *See, e.g. Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 543 N.Y.S.2d 18 (1989) *aff'd.* 73 N.Y.2d 629, 543 N.Y.S.2d 18 (1989). The drunkard was deemed to be the proximate cause of his own inebriation and the havoc and harm he caused was deemed to be "unforeseeable," at least to the tavern keeper. *See D'Amico v. Christie*, 71 N.Y.2d 76, 524 N.Y.S.2d 1 (1987); *Berkeley v. Arthur Park*, 47 Misc.2d 381, 262 N.Y.S.2d 290 (Sup. Ct. Otsego County 1965).

I. **General Obligations Law Section 11-101 (Unlawful Sale of Alcohol)**

Today, General Obligations Law Section 11-101 provides that a plaintiff injured by an intoxicated tortfeasor has a right of action against the party who sold the alcohol to the intoxicated tortfeasor. The three elements of the claim are:

1. The seller unlawfully **sold** or procured alcohol for the intoxicant; and
2. The seller sold the alcohol to the intoxicant when the intoxicant was **visibly intoxicated**; and
3. There exists a "**reasonable connection**" between the intoxication and the Plaintiff's injury.

General Obligations Law 11-101 additionally creates a right of action for the unlawful sale of alcohol to persons under the age of 21, as well as the sale of alcohol to an "habitual" drunkard.

GOL 11-101 must be read in conjunction with Alcohol Beverage & Control Law Section 65, which defines an "unlawful sale" of alcohol. ABC Law Section 65 generously defines unlawful selling to include selling, giving away, procuring or delivering any alcoholic beverage to a visibly intoxicated person. Despite this expansive definition, New York decisional law has consistently held that GOL 11-101 is only applicable to commercial sales of alcohol for profit. *See Sherman v. Robinson*, 80 N.Y.2d 483, 591 N.Y.S.2d 974 (1992); *D'Amico v. Christie*, 71 N.Y.2d 76, 524 N.Y.S.2d 1 (1987); *Conigliaro v. Franco*, 122 A.D.2d 15, 504 N.Y.S.2d 186 (2d Dep't 1986); *Gabrielle v. Craft*, 75 A.D.2d 939, 428 N.Y.S.2d 84 (3d Dep't 1980); *Terrigino v. Zaleski*, 144 Misc.2d 474, 544 N.Y.S.2d 283 (Sup. Ct. Monroe Cty 1989).

If the GOL 11-101 requirements are met, the seller of the alcohol is strictly liable to the injured party for the harm caused by the intoxicated person. *See Berkeley v. Arthur Park*, 47 Misc.2d 381, 262 N.Y.S.2d 290 (Sup. Ct. Otsego County 1965); *Anderson v. Comardo*, 107 Misc.2d 821, 436 N.Y.S.2d 669 (Sup. Ct. Livingston County 1981). *See also Bertholf v.*

O'Reilly, 74 N.Y. 509 (1878). Note, however, that the Dram Shop laws are to be narrowly construed, as they are a departure from the common law. *See, e.g., Conigliaro v. Franco,* 122 A.D.2d 15, 504 N.Y.S.2d 186 (2d Dep't 1986); *Gabrielle v. Craft*, 75 A.D.2d 939, 940, 428 N.Y.S.2d 84 (3d Dep't 1980).

I. WHEN IS A SALE A "SALE"

Although GOL 11-101 actions are usually brought against restaurants, tavern owners and convenience stores which directly sell liquor to consumers, the statute makes any formal or informal seller of alcohol responsible irrespective of whether the seller is legally licensed to sell alcohol to the public. *See D'Amico v. Christie*, 71 N.Y.2d 76, 524 N.Y.S.2d 1(1987) (Dram Shop laws not restricted to dram shops or taverns). The myriad circumstances under which alcohol can be supplied for an economic benefit, however, make the precise definition of a "sale" for Dram Shop liability somewhat elusive. For example, is there a "commercial sale" of alcohol in the context of a catered event like a wedding with an open or complimentary bar, where the intoxicant does not directly pay for the alcohol, although the host who arranged for the party does? And, what of employee-sponsored events such as a Christmas parties or outings where the employer pays for the liquor, but no money changes hands between the intoxicated employee and the caterer who dispenses the liquor? What if the liquor is purchased by a spouse or companion, who then supplies it to the intoxicant, so that there is no direct sale to the intoxicant? The case law suggests answers to some of these questions, but the parameters of a sale for Dram Shop purposes are still evolving. A brief tour of some of the relevant case law on "sale" in the setting of a Dram Shop claim follows below.

PRIVATE PARTIES WITH NO ECONOMIC MOTIVE: There is no Section 11-101 liability for true private social events where there is no classic sale and the alcohol is dispensed without any monetary charge or exchange of economic benefit. *See, e.g., Martino v. Stolzman*, 18 N.Y.3d 905, 941 N.Y.S.2d 28 (2012) (No GOL 11-101 claim against social host of New

Year's Eve party where there was no sale of alcohol); *McGlynn v. St. Andrew v. Apostle Church*, 304 A.D.2d 372, 761 N.Y.S.2d 151 (1st Dep't 2003) *lv. to app. den.* 100 N.Y.2d 508, 764 N.Y.S.2d 385 (2003) (claims against parishioners who personally hosted a party at their local church dismissed because alcohol was dispensed free of charge and not "sold" at the party).

EMPLOYEE SPONSORED EVENTS: Likewise, there is no Dram Shop liability on the employer or employee association which dispenses liquor on a complimentary basis at employee social events. *D'Amico v. Christie*, 71 N.Y.2d 76, 524 N.Y.S.2d 1 (1987) (employee association which provided alcoholic beverages in plastic lined trash cans for members at company picnic was not engaged in a commercial sale of alcohol for Dram Shop purposes where association members hosted and ran the event and funded the purchases of food and beer from monthly dues and ticket sales); *Joly v. Northway Motor Car Corporation*, 132 A.D.2d 790, 517 N.Y.S.2d 595 (3d Dep't 1987) (employer which gratuitously provided beer and wine at Christmas party not responsible for sale of liquor under Dram Shop laws); *Casselberry v. Dominick*, 143 A.D.2d 528 (4th Dep't 1988) *lv. to appeal den.* 73 N.Y.2d 706, 539 N.Y.S.2d 299 (1989) (local union which provided free beer to union members at "sports night" at union hall was not engaged in the sale of alcohol for Dram Shop purposes).

SHIFT DRINKS TO BAR EMPLOYEES: There is also no liability on the tavern or restaurant owner when a bartender or waiter-employee becomes intoxicated from free "shift drinks" supplied as a perquisite of the job. *Custen v. Salty Dog, Inc.*, 170 A.D.2d 572, 566, N.Y.S.2d 348 (2d Dep't 1991) (plaintiff's Dram Shop claims dismissed because there was no "sale" of alcohol when tavern employee who became intoxicated from complimentary shift drinks caused motor vehicle accident); *Carr v. Kaifler*, 195 A.D.2d 584, 601 N.Y.S.2d 8 (2d Dep't 1993) (Dram Shop claim dismissed because there was no "sale" of alcoholic beverages where intoxicated bartender who caused motor vehicle accident testified he did not pay for any of the drinks he consumed); *Stevens v. Spec, Inc.*, 224 A.D.2d 811, 637 N.Y.S.2d 979 (3d Dep't

1996) (Dram Shop Act allegations dismissed for lack of a "sale" where independent contractor sound technician for band at night club became intoxicated after drinking 3 free drinks); *Parker v. Dunn*, 43 Misc.3d 377, 978 N.Y.S.2d 827 (Supreme Court Wayne County 2014) (act of vineyard-employer providing employees a "shift change drink" at the end of each shift was not an economic event causing vineyard to be responsible under the Dram Shop Law).

WEDDING RECEPTIONS/CATERED EVENTS: A number of cases have treated Dram Shop liability claims against caterers in the setting of catered weddings and other catered social events. *See Martinez v. Camardella*, 161 A.D.2d 1107, 558 N.Y.S.2d 211 (3d Dep't 1990) (Dram Shop liability upheld against country club which served alcoholic beverages to intoxicant at wedding reception who then caused motor vehicle accident); *Montgomery v. Orr*, 130 Misc.2d 807, 498 N.Y.S.2d 968 (Sup. Ct. Oneida County 1986) (Summary judgment denied to Veteran's Club which acted as caterer at private graduation party and provided kegs of beer, and charged for same by the number of kegs which were consumed, because those facts constituted prima facie evidence of a sale for Dram Shop purposes); *Haskell v. Chautaqua County Fireman's Fraternity*, 184 A.D.2d 12, 590 N.Y.S.2d 637 (2d Dep't 1992) *lv. to app. dism.*, 81 N.Y.2d 954, 597 N.Y.S.2d 939 (1993) (question of fact as to Dram Shop liability raised where alcohol was sold at concessions at fireman's fundraiser by various fire company concessionaires, but summary judgment granted to fireman's groups that only organized the event because they did not sell alcohol). *But see, Dynarski v U-Crest Fire Dist.*, 112 Misc.2d 344, 447 N.Y.S.2d 86 (Sup. Ct. Erie Cty. 1981) (no Section 11-101 liability for death of 15-year-old from acute alcohol poisoning at firehouse wedding reception because the Dram Shop act does not apply to social occasions). (*NB*: This case pre-dated GOL 11-100 prohibiting service, irrespective of sale, to underage individuals. Today, this case would certainly have survived under the companion statute to GOL 11-101, GOL 11-100, because it involved provision of alcohol to an underage drinker).

CORPORATE PROMOTIONAL PARTIES: Whether Dram Shop liability attaches to caterers who dispense liquor at "complimentary bars" set up at corporate promotional parties has received little attention or discussion in the case law. Clearly, even if the intoxicant is not paying for the liquor, the caterer has been paid by the corporate host, and the entire event is, essentially, an economic exchange to promote business interests. One lower court case, in an unreported decision, held that the Dram Shop law should not apply in such situations. *See LeConte v. LVMH Moet Hennessy Louis Vuitton, Inc.*, 2009 WL 1568087 (New York Supreme Ct 2009). In *LeConte*, Dram Shop claims were dismissed for lack of a "sale," where the Plaintiff- guest who was present at a promotional party with a complimentary bar, was assaulted by an intoxicated party guest. The Court rejected the Plaintiff's argument that because the event was part of the company's marketing plan, there was a profit motive, and therefore, a "sale" within the meaning of the Dram Shop Act. This decision appears to run counter to, and is inconsistent with, the cases cited above where Dram Shop liability was upheld against caterers who served complimentary liquor at open bars at social events.

COMPANIONS WHO PURCHASE THE LIQUOR FOR THE INTOXICANT: The Dram Shop laws will not impose liability on a seller who sells alcohol to companions of the intoxicant when the companions thereafter, unbeknownst to the seller, supply the liquor to a visibly intoxicated person or underage drinker. See, e.g, *Sherman v. Robinson,* 80 N.Y. 2d 483, 591, N.Y.S. 2d 974 (1992) (convenience store owner who sold liquor to companions of intoxicant had no duty to investigate the potential or possible consumers of the alcohol); *Remillard v. Louis Williams*, 59 A.D.3d 764, 872 N.Y.S.2d 256 (3d Dep't 2009) (Hotel owner was not liable under the Dram Shop Act for injuries to motorist caused by hotel guest at Christmas party where evidence indicated that intoxicant never went to the bar to purchase the alcohol, which was purchased by companions for the intoxicant); *Bregartemer v. Southland*, 257 A.D.2d 554, 683 N.Y.S.2d 286 (2d Dep't 1999) (GOL 11-100 claim dismissed against

convenience store because Plaintiffs were unable to present any evidence of a direct sale of alcohol by the store to the minor who was driving at the time of the accident).

II. ESTABLISHING PROOF OF VISIBLE INTOXICATION

Under GOL 11-100, Plaintiff is not only required to prove there was a commercial sale of alcohol, but that the commercial sale was made to a person "**visibly intoxicated.**" The 1986 amendment to GOL 11-101 inserting the "visibly intoxicated" language was meant to require that the seller have "sufficient notice" of the customer's condition to have an opportunity to stop alcohol service. Therefore, the Courts have repeatedly recognized that it is incumbent upon a Plaintiff who claims Dram Shop violations to offer evidence that the party to whom the liquor was sold acted or appeared to be intoxicated at the time of the sale. *See Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997).

Visible intoxication can be proved by circumstantial evidence and expert testimony. *Adamy v. Ziriakus*, 92 N.Y.2d 396, 681 N.Y.S.2d 463 (1998) (jury verdict for Plaintiff upheld where Dram Shop expert's testimony was buttressed by police officer's testimony of visible intoxication observed at scene of accident shortly after the intoxicant left the restaurant); *Marconi v. Reilly*, 254 A.D.2d 463, 678 N.Y.S.2d 785 (2d Dep't 1998) (experts affidavit, together with eyewitness testimony, was sufficient to raise a triable issue of fact as to whether there was "visible intoxication" at the time the Defendant was served alcohol). It is important to note that the testimony of a toxicologist with regard to the visible effects caused by high blood alcohol content, without other circumstantial evidence or direct testimony in support, will not make out a prima facie case of "visible intoxication." *See Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997) (motorist's submissions were not deficient merely because there was no eyewitness proof that driver had exhibited signs of intoxication, but affidavit of motorist's expert asserting that she must have exhibited symptoms of intoxication in light of blood alcohol level had no probative force); *Sullivan v. Mulinos of Westchester, Inc.*, 73 A.D.3d 1018, 901

N.Y.S.2d 663 (2d Dep't 2010) (although proof of a high blood alcohol content does not, without more, provide a sound basis for drawing inferences about a person's appearance or demeanor, an expert's opinion concerning visible intoxication coupled with supportive deposition testimony was sufficient to defeat defendant's application for summary judgment).

HABITUAL DRUNKS AND MINORS UNDER GOL 11-101

GOL Section 11-101 not only creates a cause of action against those who sell liquor to a visibly intoxicated person, but, when read in conjunction with Section 65 of the ABC Law, provides a cause of action for sales to an "habitual drunkard" or any minor actually or apparently under the age of 21 years. *See* GOL 11-101; ABC Law Section 65; *Matalavage v Sadler*, 77 A.D.2d 39, 432 N.Y.S.2d 103 (2d Dep't 2009). GOL 11-101 requires a **sale** of alcohol. In contradistinction, GOL 11-100 (furnishing alcohol to minors) does not require a sale. In addition, it has been specifically held that GOL 11-101 (the "sale" statute) supports a cause of action against the vendor for injuries resulting from the sale of liquor to an underage person, even when the intoxicated minor is concededly sober at the time of sale. *See Powers v. Niagara Mohawk Power. Corp.*, 129 A.D.2d 37, 516 N.Y.S.2d 811 (3d Dep't 1987). By analogy, therefore, sales of liquor to an habitual drunkard would not require visible intoxication at the time of the sale.

III. PROVING CAUSATION IN DRAM SHOP CASES

After establishing a SALE, and proving the intoxicant was VISIBLY INTOXICATED, the Dram Shop plaintiff must establish a causal connection between the intoxication and the injury. In order to show that the damages suffered by the Plaintiff arose out of the intoxication of a person to whom alcohol was illegally sold, however, there need be only some "reasonable or practical connection" between the sale of alcohol and the resulting injuries. Proximate cause, as must be established in conventional negligence cases, is not required. *See, e.g., McNeill v Rugby Joe's, Inc.*, 298 A.D.2d 369, 751 N.Y.S.2d 241 (2d Dep't 2002); *Catania v. 124 In-To-Go, Corp.*,

287 A.D.2d 476, 731 N.Y.S.2d 207 (2d Dep't 2001) *lv. to appeal dism.* 97 N.Y.2d 699, 739 N.Y.S.2d 99 (2002).

SOCIAL HOST LAWS: FURNISHING ALCOHOL TO A MINOR

In 1983, the New York legislature enacted GOL 11-100 as a sister statute to GOL 11-101. GOL 11-100 imposes civil liability upon any person who unlawfully "furnishes" or "assists in procuring" alcoholic beverages to a person under the age of 21. GOL 11-100; (see L 1983, Chapter 641, effective October 23, 1983.) Significantly, GOL 11-101 does not require a sale of liquor, thereby opening the door to liability for social hosts who cause or permit underage drinking on their watch at social occasions where no money changes hands. *See McCauley v. Carmel Lanes, Inc.*, 178 A.D.2d 835, 577 N.Y.S.2d 546 (3d Dep't 1991).

The elements of the claim are straightforward. The statutes speaks in terms of "furnishing" or "assisting in procuring" the alcohol for the minor. "Assisting in procuring" has been interpreted to include using one's own money, or even contributing money with others to the purchase of alcohol for the minor. *See Bregartemer v. Southland*, 257 A.D.2d 554, 683 N.Y.S.2d 286 (2d Dep't 1999). No liability attaches, however, if the adult is a mere passive participant at a party where minors happen to be drinking. In addition, the Defendant must know, or have reasonable cause to believe, the persons receiving the alcohol are under the age of 21. *See Sherman v. Robinson* 80 N.Y.2d 483, 591, N.Y.S.2d 974 (1992) (A convenience store operated by defendant which sells alcoholic beverages may not be held liable under General Obligations Law §§11-100 or 11-101 for personal injuries resulting from an indirect sale of alcohol to a minor). If the defendant is reasonably unaware of the alcoholic consumption by the minor, or did not authorize its consumption on his premises, no liability will attach. *See Lane v Barker*, 241 A.D.2d 739, 660 N.Y.S.2d 194 (3d Dep't 1997) (GOL 11-100 claims dismissed where the parents whose minor held a party with underage drinking did not procure or furnish the alcohol that was consumed at the party, nor did they provide funds for that purpose);

Guercia v Carter, 274 A.D.2d 553, 712 N.Y.S.2d 143 (2d Dep't 2000) (summary judgment to parents granted where they neither knew of underage drinking on their premises when daughter hosted party, nor furnished alcohol to any minors); *Lombart v. Chambery*, 19 A.D.3d 1110, 797 N.Y.S.2d 216 (4th Dep't 2005) (GOL 11-100 claim dismissed where Defendant was a passive participant who merely knew of the underage drinking, but did nothing to encourage it); *McGlynn v. St. Andrew v. Apostle Church*, 304 A.D.2d 372, 761 N.Y.S.2d 151 (1st Dep't 2003) *lv. to appeal den.* 100 N.Y.2d 508, 764 N.Y.S.2d 385 (2003) (party at Church hosted by parishioner where underage drinking occurred; Church not responsible under 11-100 because it did not play an indispensable role in making the alcohol available to underage persons; claims against adults at the party dismissed because they were "passive participants," who merely knew of the underage drinking and did nothing to encourage it; claims against Defendant who procured and furnished the beer, however, survived summary judgment); *Fantuzzo v Attridge*, 291 A.D.2d 871, 737 N.Y.S.2d 192 (4th Dep't 2002) (parents not liable under GOL 11-100 where party was arranged by underage child while parents were out of town and parents neither furnished nor procured the alcoholic beverages for anyone at the party, nor was there evidence that they were aware of, or had given permission for, the consumption of alcoholic beverages on their premises by minors. Claims against underage daughter survived, however, because she admitted aiding the procurement of the alcohol served at the party to the underage guests.)

Under both GOL 11-100 and 11-101, the alcohol must be directly furnished to the underage drinker, not provided to surrogates or companions who then provide the alcohol to the minor. *See Sherman v. Robinson,* 80 N.Y.2d 483, 591, N.Y.S.2d 974 (1992) (the General Obligations Law is explicit in limiting liability for injuries caused by an intoxicated minor to the unlawful supply of alcoholic beverages to that person); *Fox v. Clare Rose Beverage, Inc.*, 262 A.D.2d 526, 692, N.Y.S.2d 658 (2d Dep't 1999) *lv. to appeal den.* 94 N.Y.2d 755, 701 N.Y.S.2d 711 (1999) (claims against beverage distributor under GOL 11-101 dismissed because distributor

did not directly sell beer to the intoxicant, but did sell to his companions); *Ahigian v. Davis*, 6 A.D.3d 956, 774 N.Y.S.2d 845 (3d Dep't 2004) *lv. to appeal den.* 3 N.Y.3d 608, 786 N.Y.S.2d 811 (2004); (GOL 11-100 and 11-101 claims dismissed against convenience store which sold alcohol to adult who then provided same to underage driver who was in the car and not visible to the convenience store counterman through the store's window); *Dalrymple v Southland Corp.*, 202 A.D.2d 548, 609 N.Y.S.2d 284 (2d Dep't 1994) (convenience store owner not responsible for personal injuries resulting from an indirect sale of alcoholic beverages to a minor absent any knowledge that the alcoholic beverages would be consumed by the particular minor.)

DRAM SHOP LIABILITY FOR SELLERS OF FAKE OR SIMULATED LICENSES

A seller of a simulated or fake license to an underage individual is not legally responsible under the Dram Shop Act Section 11-100 for furnishing or assisting in procuring alcoholic beverages. *Etu v. Cumberland Farms, Inc.*, 148 A.D.2d 821, 538 N.Y.S.2d 657 (3d Dep't 1989). (Note, however, that there is a proposed law which was introduced to the New York State Legislature in 2013 to extend Dram Shop liabilities to purveyors of fake licenses. *See* NY Legislature Bill s2334-2013, which was referred to the Judiciary Committee in January 2014 for further consideration).

SUFFOLK COUNTY SOCIAL HOST LAWS

Suffolk County Code Sections 294-6, 294-7 and 294-8 represent the Suffolk County Legislature's attempt to rein in underage drinking and driving. Section 294-8 makes it unlawful for any person over the age of 18 who owns or rents a private residence to knowingly allow alcoholic consumption by a minor. The Code mandates that the adult take reasonable corrective action if it becomes apparent to the adult that underage drinking is taking place on his or her property. "Reasonable corrective action" is defined to include demanding that the underage drinker refrain from further drinking, and contacting the police or the minor's parents. Exceptions to the no drinking rule include the consumption of alcohol for religious purposes or

the consumption of alcohol when the minor's parents are present and expressly consent to the drinking. Violators are subject to fines up to $500.00. *See Alotta v Diaz*, 2014 WL 2106254 (Supreme Court Suffolk County 2014) (claims under Dram Shop Law 11-100, 11-101 and Suffolk County Dram Shop laws dismissed against mother whose 14-year-old daughter and friend surreptitiously left the house and consumed alcohol, ultimately resulting in an accident; plaintiffs failed to demonstrate a lack of supervision in caring for the children entrusted to the mother).

GOL 11-103 : INJURIES CAUSED BY THE ILLEGAL SALE OF CONTROLLED SUBSTANCES

GOL 11-103 provides, in essence, a Dram Shop Claim against any person who caused or contributed to another's impairment by unlawfully selling or assisting in procuring a controlled substance for that person. In this context, "assisting in procuring" means that no sale is necessary. Merely furnishing the controlled substance is sufficient for liability. *See Terriginov. Zaleski*, 144 Misc.2d 474, 544 N.Y.S.2d 283 (Sup. Ct. Monroe Cty. 1989) (GOL 11-103 is not limited to commercial sales of drugs, and any transfer of a controlled substance, such as marijuana, without remuneration or receiving something of value in return, is sufficient to subject person to liability.) Actual and punitive damages are recoverable under the statute.

COMMON LAW DUTY TO PROTECT/ SUPERVISE PERSONS ON PROPERTY

Dram Shop liability is statutory. Alcohol providers are not responsible in the common law for furnishing alcohol to intoxicated persons who then go on to cause injuries. That is not to say, however, that there are no common law theories of liability applicable to landowners when an injury is caused by an intoxicated person. The common law does generally impose a duty on landowners, including bar and restaurant owners, to protect third persons from dangerous conditions on their property, which includes the duty to protect third persons from injuries caused by an intoxicated person. In addition, in appropriate circumstances, adults have a

common law duty to supervise minors and protect them from guests who become intoxicated at the adult's home.

A landowner is only responsible for injuries caused by an intoxicated guest if the injuries occurred **on the landowner's property, or in an area under the landowner's control**, and even then, only when the landowner had the opportunity to supervise the intoxicated guest. *See D'Amico v. Christie*, 71 N.Y.2d 76, 524 N.Y.S. 2d 1 (1987) (landowners have a common law duty to control the conduct of third persons, including intoxicated guests, on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control); *Panzera v. Johnny's II*, 253 A.D.2d 864, 678 N.Y.S.2d 336 (2d Dep't 1998) (question of fact whether bar was responsible in the common law to protect patron from shooting by intoxicated fellow patron); *Huyler v. Rose*, 88 A.D.2d 755, 451 N.Y.S.2d 478 (4th Dep't 1982) *appl. Dism.*, 57 N.Y.2d 777, 1982 WL 195047 (1982) (a property owner has the common law duty to control the conduct of persons present on his property when he knows that he can and has the opportunity to control the third parties' conduct and is reasonably aware of the necessity for such control).

No common law claim lies, however, after the intoxicant leaves the premises of the landowner. *See Martino v. Stolzman*, 18 N.Y.3d 905, 941 N.Y.S.2d 28 (2012) (no common law liability when intoxicated guest backed his car out of landowner's driveway and into traffic causing motor vehicle accident); *Lombart v Chambery*, 19 A.D.3d 1110, 797 N.Y.S.2d 216 (4th Dep't 2005) (no common law liability for vehicular accident which occurred miles away from landowner's home); *Sheehy v Big Flats Community Day, Inc.*, 137 A.D.2d 160, 528 N.Y.S.2d 213 (3d Dep't 1988) *aff'd.* 73 N.Y.2d 629, 543 N.Y.S.2d 18 (1989) (no landowner liability where accident occurred 200 yards from landowner's premises); *See generally, Milosevic v. O'Donnell*, 89 A.D.3d 628 934 N.Y.S.2d 375 (1st Dep't 2011) (employer won dismissal of claim arising out

of employee's intoxicated assault because there was no evidence the employer controlled the premises such that it could be held responsible for the injuries).

Similarly, adults who are entrusted with the care of minor children have a duty to adequately supervise those children, and the duty to supervise can arise in the context of injuries caused by alcohol intoxication. *See Parslow v. Leake*, 117 A.D.3d 55, 984 N.Y.S.2d 493 (4th Dep't 2014) (Hosts of parties where alcohol is consumed on premises they own or occupy risk exposure to liability under two separate and distinct theories of negligence: the duty to control the conduct of third persons for the protection of others on the premises; and the duty imposed on adults to adequately supervise intoxicated minors); *Aquino v. Higgins*, 15 N.Y.3d 903, 912 N.Y.S.2d 571 (2010) (question of fact whether parents appropriately supervised intoxicated minors).

For example. In *Aquino*, *supra*, numerous 13 and 14 year-old children were at a party hosted by a parent. No alcohol was to be permitted but, unbeknownst to the parent-defendants, the children consumed alcohol in the basement and several became intoxicated. The parent-defendants learned of the consumption of alcohol and intoxication when they went into the basement at the end of the party and observed beer cans. The parent-defendants then attempted to ensure that all of the minor guests had a safe ride home. The minor plaintiff was injured in a car accident after leaving the parent-defendants' home. The Court of Appeals denied the parents' motion for summary judgment concluding that there was a triable issue of fact whether the parent-defendants "properly supervised [the minor guests'] departure from the premises."

PARTIES WHO MAY SUE

The Dram Shop statute runs in favor of those persons injured in "person, property, means of support, or otherwise." The statute does not create a cause of action for the party whose intoxication caused the injury. That is, the drunken party cannot sue for his own injuries. Similarly, if the intoxicant dies, the estate of the deceased intoxicant cannot sue for the

intoxicant's death. Interestingly, however, the dependents of the intoxicated person may sue the supplier of the alcohol for their own "loss in support" occasioned by the death of the intoxicant. *See, e.g. Powers v Niagara Mohawk Power Corp.* 129 A.D.2d 37, 516 N.Y.S.2d 811 (3d Dep't 1987); *Sheehy v Big Flats Community Day, Inc.*, 137 A.D.2d 160, 528 N.Y.S.2d 213 (3d Dep't 1988) *aff'd.* 73 N.Y.2d 629, 543 N.Y.S.2d 18 (1989); *Matalavage v. Sadler*, 77 A.D.2d 39, 432 N.Y.S.2d 103 (2d Dep't 1980). Note, however, that the potential plaintiffs who can recover for "loss of support" by virtue of the death of the intoxicant are NOT limited to the decedent's statutory wrongful death distributees, or only those he had a legal duty to support. Instead, the right to recover extends to any person who lost the decedent's support. *See Rutledge v. Rockwells of Bedford.* 200 A.D.2d 36, 613 N.Y.S.2d 179 (2d Dep't 1994) (stepchild who had been receiving support from decedent not barred from recovery under Dram Shop law).

THE GUILTY PARTICIPANT DEFENSE

The Dram Shop laws do not permit recovery for one who actively causes or procures the intoxication of the person responsible for the accident. That is the "guilty participant" who affirmatively causes the intoxication of the tortfeasor cannot then profit from his wrongdoing when he is injured by the intoxicated tortfeasor. *See Powers v Niagara Mohawk Power Corp.*, 129 A.D.2d 37, 516 N.Y.S.2d 811 (3d Dep't 1987) (friends who contributed to the purchase of beer precluded from suing for injuries sustained when intoxicated driver involved in accident); *Pineda v. Javar Corp.*, 96 A.D.3d 731, 945 N.Y.S.2d 763 (2d Dep't 2012) *lv. to appl. Denied* 19 N.Y.3d 813, 954 N.Y.S.2d 8 (2012) (where the plaintiff procured the alcohol for the intoxicant, the plaintiff is precluded from recovering against the tavern owner under the Dram Shop Act).

To be a guilty participant, however, requires more than just being a mere drinking companion. *See Mitchell v. Taylor*, 19 N.Y.2d 338, 280 N.Y.S.2d 113 (1967) (drinking companion not precluded from suit because she neither purchased the drinks nor encouraged intoxicant to drink more than he could tolerate).

An interesting question is whether the tavern owner can implead the drinking companions as third party defendants when the tavern owner is sued under the Dram Shop because the companions assisted in procuring the alcohol for the intoxicant. The tavern owner cannot. *See Luciere v Rahner,* 29 Misc.3d 963, 909 N.Y.S.2d 329 (Supreme Court Nassau County 2010) (Plaintiff sued intoxicant and tavern under Dram Shop theory. Tavern brought third party claim against companions of the intoxicant who purchased alcohol for him despite the fact that he was to be the designated driver for the group. The third party complaint against the companions was dismissed because the companions did not have a legal duty to refrain from purchasing drinks for their designated driver.)

LOSS OF SERVICES AND LOSS OF CONSORTIUM CLAIMS

Because the Dram Shop is a statutory cause of action and has no common law complement, claims for loss of services and loss of consortium are not recognized. *See Sullivan v Mulinos of Westchester*, 73 A.D.2d 318, 901 N.Y.S.2d 663 (2d Dep't 2010).

ARTICLE 16, CONTRIBUTION AND COMPARATIVE NEGLIGENCE

In a Dram Shop Act case, the seller of the alcohol and the intoxicated tortfeasor may claim contribution between themselves as to compensatory damages awarded to the injured party. *See* CPLR 1401, *Zona v. Oatka Restaurant & Lounge, Inc.*, 68 N.Y.2d 824, 507 N.Y.S.2d 615 (1986); *Smith v. Guli*, 106 A.D.2d 120, 484 N.Y.S.2d 740 (4th Dep't 1985); *Herrick v Second Cuthouse, Ltd.*, 100 A.D.2d 952, 475 N.Y.S.2d 91, *aff'd*, 64 N.Y.2d 692, 485 N.Y.S.2d 518 (1984). In addition, the alcohol seller can seek contribution from a third party (aside from the drunk) who was negligent in causing the accident. *Weinheimer v. Hoffman,* 97 A.D.2d 314, 470 N.Y.S.2d 804 (3d Dep't 1983). If the injured party sues the intoxicated person, the intoxicated person can seek contribution from the seller of the alcohol. *Cresswell v. Warden,* 164 A.D.2d 120, 484 N.Y.S.2d 740 (2d Dep't 1990).

Exemplary damages are specifically provided for in GOL 11-101. Any exemplary damages awarded, however, are not subject to contribution. *See Smith v. Guli,* 106 A.D.2d 120, 484 N.Y.S.2d 740 (4th Dep't 1985).

Under Article 16 of the CPLR, defendants will be liable for their specific percentage of fault for non-economic damages, unless a particular defendant's liability exceeds 50% of the fault. Article 16 applies in Dram Shop cases, except if the case falls into one of Article 16's broad exceptions. *See Spatz v Riverdale Greentree Rest.*, 256 A.D.2d 207, 682 N.Y.S.2d 370 (1st Dep't 1998); *Van Vlack v. Baker,* 242 A.D.2d 704, 663 N.Y.S.2d 49 (2d Dep't 1997); *Robinson v. June*, 167 Misc.2d 483 (N.Y. Sup. Ct. 1996). As between plaintiff and defendants, plaintiff can always attempt to prove an exception to apportionment, such as "reckless conduct" on the part of the bar. *See Spatz v. Riverdale Greentree Rest.*, 256 A.D.2d 207, 682 N.Y.S.2d 370 (1st Dep't 1998) (court should have given the charge relating to plaintiff's "reckless disregard" theory of liability, to which the parties had consented, because a jury verdict for plaintiff on this theory would have held the bar defendants fully liable for any judgment per CPLR 1602 [7]).

It has been held that plaintiff's own percentage of comparative negligence will not be deducted from the liability of the joint defendants to calculate whether a particular defendant is more than 50% at fault. *See Smith v. Guli,* 106 A.D.2d 120, 484 N.Y.S.2d 740 (4th Dep't 1985).

The rule permitting contribution among defendants in a Dram Shop act case is different, however, when the survivors of a deceased intoxicant sue the tavern or bar for "loss of support." Remember that one of the purposes of the statute is to protect the spouse and children of the intoxicated person when they were deprived of the means of support as a result of his intoxication. Where individuals unlawfully served alcohol are themselves injured or killed as a result of the intoxication, the defendant-vendor (the bar) cannot obtain contribution from the estate or the decedent's survivors for the negligence of the intoxicant. *See, e.g., Coughlin v. Barker Ave. Assocs.*, 202 A.D.2d 622, 609 N.Y.S.2d 646 (2d Dep't 1994); *Bartlett v Grande,* 103

A.D.2d 671, 481 N.Y.S.2d 566 (4th Dep't 1984); compare *Zona v Oatka Rest. & Lounge*, 68 N.Y.2d 824, 507 N.Y.S.2d 615 (1986) (restaurant can obtain contribution from estate of drunk driver, when his death was unrelated to the accident and was not the subject matter of the lawsuit). The rationale for these holdings is that when the person served alcohol and the decedent are one and the same, allowing contribution would enable the vendor to reduce its liability for conduct that essentially amounts to its own wrongdoing--unlawfully providing the alcohol.

Where, however, decedent driver and the intoxicant are not the same person, decedent's fault is independent for the purposes of the Dram Shop Act. In that particular circumstance, the verdict can be reduced by the non-drunk driver's comparative fault in causing the accident with the intoxicant. *See Adamy v Ziriakus*, 92 N.Y.2d 396, 681 N.Y.S.2d 483 (1998) (contribution between defendants and plaintiff's estate permitted in lawsuit brought by the estate where deceased driver was not the intoxicant, but the driver of a second vehicle involved in the accident who was allegedly a cause of the accident also).

STATUTE OF LIMITATIONS

Dram Shop cases under the GOL 11-101 are subject to the three year statute of limitations period prescribed by CPLR 214(2). *See Bongiorno v. D.I.G.I., Inc.*, 138 A.D.2d 120, 529 N.Y.S.2d 804 (2d Dep't 1988). Even where the plaintiff dies as a result of a car accident caused by an intoxicant, the heirs complaining of loss of support have three years to assert their claim, and are not bound by the two year wrongful death statute of limitations. *Id.*

Michael G. Glass
Rappaport, Glass, Levine & Zullo, LLP
1355 Motor Parkway
Hauppauge, NY 11749
631-293-2300
mglass@rapplaw.com

FAMILY COURT:
Relevant Sections of the Family Court Act and Selected Cases
– Jennifer A. Mendelsohn

JENNIFER ANN MENDELSOHN
500 Portion Road
Suite 12
Ronkonkoma, New York 11779
Phone: (631) 648-6182
Facsimile: (631) 738-0631
Email: Jennifer@jamendelsohnlaw.com

EDUCATION:

Touro College, Jacob D. Fuchsberg Law Center – J.D., 1991

Hofstra University – M.A., 1987

Hofstra University – B.A., 1986

PROFESSIONAL HISTORY:

Law Office of Jennifer A. Mendelsohn, November 2004 through the present. Self-employed. Practice is limited to handling Matrimonial and Family Law matters.

Law Offices of Siben & Ferber, LLP, Hauppauge, New York, March 1995 through October 2004. Experience included handling of all of the firm's Matrimonial, Family Law and Real Estate matters.

Law Offices of Peter B. Gierer, Esq. Hauppauge, New York, June 1992 through March 1995. Experience included handling of all of the firm's Matrimonial and Family Law matters.

PROFESSIONAL ORGANIZATIONS / COMMITTEES:

New York State Bar Association
- Family Law Committee

Suffolk County Bar Association
-Judicial Screening Committee 2004 – 2006
-Charity Foundation Board Member 2013- 2014

Suffolk Academy of Law
-Academy Officer 2012-2013; 2013-2016

Matrimonial Bar Association of Suffolk County

Suffolk County Bar Association Matrimonial & Family Law Committee

Women's Bar Association of the State of New York (Suffolk County Chapter)
- Vice President of Membership 2007-2008 and 2008-2009
- Awards Committee Member 2006-2007 (WBASNY)

- Nominating Committee Alternate 2002-2003, 2003-2004, 2004-2005, 2007-2008, 2008 -2009 and 2012 - 2013 (WBASNY)
- Director 2006-2007 and 2007-2008
- Delegate 2000-2001, 2003-2004; 2005-2006, 2009-2010 and 2012-2013
- Alternate Delegate 2008-2009 and 2011-2012
- Convention Committee Member 2000-2001 and 2003-2004 (WBASNY)
- Legislation Committee Member 2009-2010 and 2010-2011 (WBASNY)
- Recording Secretary 2010-2011 and 2011- 2012

Tour Law Center Alumni Council Member

ADMITTED TO PRACTICE:

Supreme Court of the United States of America
United States District Court for the Eastern District of New York
United States District Court for the Southern District of New York
New York – Second Judicial Department

PRESENTATIONS AND SEMINARS:

Lectured on a quarterly basis from May 1995 through April 2005 to the Suffolk Vocational Center/Displaced Homemaker Center on "Women & Divorce"

P.E.A.C.E. Facilitator 2000 – 2007

Suffolk Academy of Law – *Ethics in Family Court & Matrimonial Cases* (11/30/09)

The Suffolk County Women's Bar Association - *No Fault Divorce & The New Matrimonial Laws: The Good, the Bad & the Ugly* (1/18/11)

Long Island Association For Marriage And Family Therapy – *Overview of Matrimonial and Family Law Proceedings* (3/27/11)

Suffolk Academy of Law – *Calculating Maintenance & Child Support* (8/3/11)

Suffolk Academy of Law – *Update on Support and Paternity Cases* (12/7/11)

Suffolk Academy of Law – *Family Court Update - Custody & Visitation 101 (2/5/13)*

Suffolk Academy of Law – *Support Violations in Family Court* (7/16/13)

Suffolk Academy of Law – *Representing Challenged Clients* (5/28/14)

continue to refuse such necessary services and is unwilling to secure such services independently or otherwise prepare for the child's return home; provided, however, that if the court finds that adequate justification exists for the failure to engage in or secure such services, including but not limited to a lack of child care, a lack of transportation, and an inability to attend services that conflict with the parent's work schedule, such failure shall not constitute an aggravated circumstance; or where a court has determined a child five days old or younger was abandoned by a parent with an intent to wholly abandon such child and with the intent that the child be safe from physical injury and cared for in an appropriate manner.

(k) "Permanency hearing" means a hearing held in accordance with section one thousand eighty-nine of this act for the purpose of reviewing the foster care status of the child and the appropriateness of the permanency plan developed by the social services district or agency.

(Added L.1970, c. 962, § 9. Amended L.1971, c. 469, § 1; L.1972, c. 1015, §§ 1, 2; L.1973, c. 276, § 32; L.1973, c. 1039, § 5; L.1976, c. 666, § 27; L.1977, c. 518, § 1; L.1981, c. 984, § 1; L.1984, c. 191, § 1; L.1985, c. 676, § 19; L.1996, c. 309, § 276; L.1999, c. 7, §§ 39, 40, eff. Feb. 11, 1999; L.2005, c. 3, pt. A, § 8, eff. Dec. 21, 2005; L.2005, c. 3, pt. B, § 3, eff. Nov. 21, 2005; L.2006, c. 320, § 28, eff. Nov. 1, 2006; L.2009, c. 329, § 1, eff. Aug. 11, 2009.)

[1] So in original. The word "or" probably should be inserted.

§ 1013. Jurisdiction

(a) The family court has exclusive original jurisdiction over proceedings under this article alleging the abuse or neglect of a child.

(b) For the protection of children, the family court has jurisdiction over proceedings under this article notwithstanding the fact that a criminal court also has or may be exercising jurisdiction over the facts alleged in the petition or complaint.

(c) In determining the jurisdiction of the court under this article, the age of the child at the time the proceedings are initiated is controlling.

(d) In determining the jurisdiction of the court under this article, the child need not be currently in the care or custody of the respondent if the court otherwise has jurisdiction over the matter.

(Added L.1970, c. 962, § 9, eff. May 1, 1970.)

§ 1014. Transfer to and from family court; concurrent proceedings

(a) The family court may transfer upon a hearing any proceedings originated under this article to an appropriate criminal court or may refer such proceeding to the appropriate district attorney if it concludes, that the processes of the family court are inappropriate or insufficient. The family court may continue the proceeding under this article after such transfer or referral and if the proceeding is continued, the family court may enter any preliminary order, as authorized by section one thousand twenty-seven, in order to protect the interests of the child pending a final order of disposition.

(b) Any criminal complaint charging facts amounting to abuse or neglect under this article may be transferred by the criminal court in which the complaint was made to the family court in the county in which the criminal court is located, unless the family court has transferred the proceeding to the criminal court. The family court shall then, upon a hearing, determine what further action is appropriate. After the family court makes this determination, any criminal complaint may be transferred back to the criminal court, with or without retention of the proceeding in the family court, or may be retained solely in the family court, or if there appears to be no basis for the complaint, it may be dismissed by the family court. If the family court determines a petition should be filed, proceedings under this act shall be commenced as soon as practicable.

(c) Nothing in this article shall be interpreted to preclude concurrent proceedings in the family court and a criminal court.

(d) In any hearing conducted by the family court under this section, the court may grant the respondent or potential respondent testimonial immunity in any subsequent criminal court proceeding.

(Added L.1970, c. 962, § 9. Amended L.1972, c. 1016, § 4.)

§ 1015. Venue

(a) Proceedings under this article may be originated in the county in which the child resides or is domiciled at the time of the filing of the petition or in the county in which the person having custody of the child resides or is domiciled. For the purposes of this section, residence shall include a dwelling unit or facility which provides shelter to homeless persons or families on an emergency or temporary basis.

(b) If in another proceeding under this act the court directs the filing of an abuse or neglect petition, the venue provision of the article under which the other proceeding is brought and the provisions of part seven of article one shall apply.

(Added L.1970, c. 962, § 9. Amended L.1987, c. 97, § 1.)

§ 1015-a. Court-ordered services

In any proceeding under this article, the court may order a social services official to provide or arrange for the provision of services or assistance to the child and his or her family to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care. Such order shall not include the provision of any service or assistance to the child and his or her family which is not authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect. In any order issued pursuant to this section the

of the petition and of the hearing that will be held pursuant to section one thousand twenty-seven of this article shall be given to the parent or legally responsible person. Unless the child is returned sooner, a petition shall be filed within three court days from the date of removal. In such a case, a hearing shall be held no later than the next court day after the petition is filed and findings shall be made as required pursuant to section one thousand twenty-seven of this article.

(Added L.1970, c. 962, § 9. Amended L.1980, c. 843, § 217; L.1990, c. 205, § 1; L.2005, c. 3, pt. A, § 12, eff. Dec. 21, 2005.)

§ 1022. Preliminary orders of court before petition filed

(a) (i) The family court may enter an order directing the temporary removal of a child from the place where he or she is residing before the filing of a petition under this article, if (A) the parent or other person legally responsible for the child's care is absent or, though present, was asked and refused to consent to the temporary removal of the child and was informed of an intent to apply for an order under this section and of the information required by section one thousand twenty-three of this part; and

(B) the child appears so to suffer from the abuse or neglect of his or her parent or other person legally responsible for his or her care that his or her immediate removal is necessary to avoid imminent danger to the child's life or health; and

(C) there is not enough time to file a petition and hold a preliminary hearing under section one thousand twenty-seven of this part.

(ii) When a child protective agency applies to a court for the immediate removal of a child pursuant to this subdivision, the court shall calendar the matter for that day and shall continue the matter on successive subsequent court days, if necessary, until a decision is made by the court.

(iii) In determining whether temporary removal of the child is necessary to avoid imminent risk to the child's life or health, the court shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child and where appropriate, whether reasonable efforts were made prior to the date of application for the order directing such temporary removal to prevent or eliminate the need for removal of the child from the home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding.

(iv) If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that such efforts were appropriate under the circumstances, the court shall order the child protective agency to provide or arrange for the provision of appropriate services or assistance to the child and the child's family pursuant to section one thousand fifteen-a of this article or subdivision (c) of this section.

(v) The court shall also consider and determine whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection, pursuant to section one thousand twenty-nine of this part, directing the removal of a person or persons from the child's residence.

(vi) Any order directing the temporary removal of a child pursuant to this section shall state the court's findings with respect to the necessity of such removal, whether the respondent was present at the hearing and, if not, what notice the respondent was given of the hearing, whether the respondent was represented by counsel, and, if not, whether the respondent waived his or her right to counsel.

(vii) At the conclusion of a hearing where it has been determined that a child should be removed from his or her parent or other person legally responsible, the court shall set the date certain for an initial permanency hearing pursuant to paragraph two of subdivision (a) of section one thousand eighty-nine of this act. The date certain shall be included in the written order issued pursuant to subdivision (b) of this section and shall set forth the date certain scheduled for the permanency hearing.

(b) Any written order pursuant to this section shall be issued immediately, but in no event later than the next court day following the removal of the child. The order shall specify the facility to which the child is to be brought. Except for good cause shown or unless the child is sooner returned to the place where he or she was residing, a petition shall be filed under this article within three court days of the issuance of the order. The court shall hold a hearing pursuant to section one thousand twenty-seven of this part no later than the next court day following the filing of the petition if the respondent was not present, or was present and unrepresented by counsel, and has not waived his or her right to counsel, for the hearing pursuant to this section.

(c) The family court, before the filing of a petition under this article, may enter an order authorizing the provision of services or assistance, including authorizing a physician or hospital to provide emergency medical or surgical procedures, if (i) such procedures are necessary to safeguard the life or health of the child; and

(ii) there is not enough time to file a petition and hold a preliminary hearing under section one thousand twenty-seven. Where the court orders a social services official to provide or contract for services or assistance pursuant to this section, such order shall be limited to services or assistance authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect.

(d) The person removing the child shall, coincident with removal, give written notice to the parent or other person legally responsible for the child's care of the

right to appl
child pursua
this act, th
telephone n
name and te
which the ch
number of th
child, and t
thousand twe
personally se
the residence
is not presei
removal, a co
of such resid
person at his
twenty-four h
place of rem
the notice sha
person legally
or affixed to
mailed to the
for the child'
residence wit
The form of t
administrator

(e) Nothing
that the court
a condition of
emergency mc
subdivision (c)

(f) The cou
tion pursuant t
article as an a
other order or

(Added L.1970 § 1; L.1987, L.1988, c. 527, § 2; L.1990, c Dec. 21, 2005.)

§ 1022-a. Pr ment of co

At a hearing
twenty-two of
present, the co
allegations in t
for the respon
sixty-two of thi

(Added L.1990,

§ 1023. Proce

Any person v
this article may
may issue, an or
one thousand tw
or an order for
including emer
pursuant to sut
twenty-two, or a
to section ten h

right to apply to the family court for the return of the child pursuant to section one thousand twenty-eight of this act, the name, title, organization, address and telephone number of the person removing the child, the name and telephone number of the child care agency to which the child will be taken, if available, the telephone number of the person to be contacted for visits with the child, and the information required by section one thousand twenty-three of this act. Such notice shall be personally served upon the parent or other person at the residence of the child provided, that if such person is not present at the child's residence at the time of removal, a copy of the notice shall be affixed to the door of such residence and a copy shall be mailed to such person at his or her last known place of residence within twenty-four hours after the removal of the child. If the place of removal is not the child's residence, a copy of the notice shall be personally served upon the parent or person legally responsible for the child's care forthwith, or affixed to the door of the child's residence and mailed to the parent or other person legally responsible for the child's care at his or her last known place of residence within twenty-four hours after the removal. The form of the notice shall be prescribed by the chief administrator of the courts.

(e) Nothing in this section shall be deemed to require that the court order the temporary removal of a child as a condition of ordering services or assistance, including emergency medical or surgical procedures pursuant to subdivision (c) of this section.

(f) The court may issue a temporary order of protection pursuant to section ten hundred twenty-nine of this article as an alternative to or in conjunction with any other order or disposition authorized under this section.

(Added L.1970, c. 962, § 9. Amended L.1982, c. 379, § 1; L.1987, c. 776, §§ 1, 2; L.1988, c. 478, § 3; L.1988, c. 527, § 1; L.1988, c. 673, § 1; L.1989, c. 727, § 2; L.1990, c. 171, § 1; L.2005, c. 3, pt. A, § 13, eff. Dec. 21, 2005.)

§ 1022-a. Preliminary orders; notice and appointment of counsel

At a hearing held pursuant to section ten hundred twenty-two of this act at which the respondent is present, the court shall advise the respondent of the allegations in the application and shall appoint counsel for the respondent pursuant to section two hundred sixty-two of this act where the respondent is indigent.

(Added L.1990, c. 336, § 2.)

§ 1023. Procedure for issuance of temporary order

Any person who may originate a proceeding under this article may apply for, or the court on its own motion may issue, an order of temporary removal under section one thousand twenty-two or one thousand twenty-seven or an order for the provision of services or assistance, including emergency medical or surgical procedures pursuant to subdivision (c) of section one thousand twenty-two, or a temporary order of protection pursuant to section ten hundred twenty-nine. The applicant or, where designated by the court, any other appropriate person, shall make every reasonable effort, with due regard for any necessity for immediate protective action, to inform the parent or other person legally responsible for the child's care of the intent to apply for the order, of the date and the time that the application will be made, the address of the court where the application will be made, of the right of the parent or other person legally responsible for the child's care to be present at the application and at any hearing held thereon and, of the right to be represented by counsel, including procedures for obtaining counsel, if indigent.

(Added L.1970, c. 962, § 9. Amended L.1973, c. 1039, § 6; L.1987, c. 776, § 3; L.1988, c. 527, § 2; L.1988, c. 673, § 2; L.1990, c. 170, § 1.)

§ 1024. Emergency removal without court order

(a) A peace officer, acting pursuant to his or her special duties, police officer, or a law enforcement official, or a designated employee of a city or county department of social services shall take all necessary measures to protect a child's life or health including, when appropriate, taking or keeping a child in protective custody, and any physician shall notify the local department of social services or appropriate police authorities to take custody of any child such physician is treating, without an order under section one thousand twenty-two of this article and without the consent of the parent or other person legally responsible for the child's care, regardless of whether the parent or other person legally responsible for the child's care is absent, if (i) such person has reasonable cause to believe that the child is in such circumstance or condition that his or her continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and

(ii) there is not time enough to apply for an order under section one thousand twenty-two of this article.

(b) If a person authorized by this section removes or keeps custody of a child, he shall (i) bring the child immediately to a place approved for such purpose by the local social services department, unless the person is a physician treating the child and the child is or will be presently admitted to a hospital, and

(ii) make every reasonable effort to inform the parent or other person legally responsible for the child's care of the facility to which he has brought the child, and

(iii) give, coincident with removal, written notice to the parent or other person legally responsible for the child's care of the right to apply to the family court for the return of the child pursuant to section one thousand twenty-eight of this act, and of the right to be represented by counsel in proceedings brought pursuant to this article and procedures for obtaining counsel, if indigent. Such notice shall also include the name, title, organization, address and telephone number of the person removing the child, the name, address, and telephone

number of the authorized agency to which the child will be taken, if available, the telephone number of the person to be contacted for visits with the child, and the information required by section one thousand twenty-three of this act. Such notice shall be personally served upon the parent or other person at the residence of the child provided, that if such person is not present at the child's residence at the time of removal, a copy of the notice shall be affixed to the door of such residence and a copy shall be mailed to such person at his or her last known place of residence within twenty-four hours after the removal of the child. If the place of removal is not the child's residence, a copy of the notice shall be personally served upon the parent or person legally responsible for the child's care forthwith, or affixed to the door of the child's residence and mailed to the parent or other person legally responsible for the child's care at his or her last known place of residence within twenty-four hours after the removal. An affidavit of such service shall be filed with the clerk of the court within twenty-four hours of serving such notice exclusive of weekends and holidays pursuant to the provisions of this section. The form of the notice shall be prescribed by the chief administrator of the courts.. Failure to file an affidavit of service as required by this subdivision shall not constitute grounds for return of the child.

(iv) inform the court and make a report pursuant to title six of the social services law,[1] as soon as possible.

(c) Any person or institution acting in good faith in the removal or keeping of a child pursuant to this section shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as a result of such removal or keeping.

(d) Where the physician keeping a child in his custody pending action by the local department of social services or appropriate police authorities does so in his capacity as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution, or his designated agent, who shall then become responsible for the further care of such child.

(e) Any physician keeping a child in his custody pursuant to this section shall have the right to keep such child in his custody until such time as the custody of the child has been transferred to the appropriate police authorities or the social services official of the city or county in which the physician maintains his place of business. If the social services official receives custody of a child pursuant to the provisions of this section, he shall promptly inform the parent or other person responsible for such child's care and the family court of his action.

(Added L.1970, c. 962, § 9. Amended L.1973, c. 1039, § 7; L.1976, c. 880, § 9; L.1980, c. 843, § 218; L.1982, c. 379, § 2; L.1985, c. 677, § 29; L.1987, c. 162, § 1; L.1989, c. 727, § 3; L.1990, c. 170, § 2; L.2009, c. 329, § 2, eff. Aug. 11, 2009.)

[1] So in original. Probably should read "title six of article six of the social services law".

[§ 1025. Repealed. L.1970, c. 962, § 8, eff. May 1, 1970]

§ 1026. Action by the appropriate person designated by the court and child protective agency upon emergency removal

(a) The appropriate person designated by the court or a child protective agency when informed that there has been an emergency removal of a child from his or her home without court order shall (i) make every reasonable effort to communicate immediately with the child's parent or other person legally responsible for his or her care, and

(ii) except in cases involving abuse, cause a child the removed to be returned, if it concludes there is not an imminent risk to the child's health in so doing. In cases involving abuse, the child protective agency may recommend to the court that the child be returned or that a petition be filed.

(b) The child protective agency may, but need not, condition the return of a child under this section upon the giving of a written promise, without security, of the parent or other person legally responsible for the child's care that he or she will appear at the family court at the time and place specified in the recognizance and may also require him or her to bring the child with him or her.

(c) If the child protective agency for any reason does not return the child under this section after an emergency removal pursuant to section one thousand twenty-four of this part on the same day that the child is removed, or if the child protective agency concludes it is appropriate after an emergency removal pursuant to section one thousand twenty-four of this part, it shall cause a petition to be filed under this part no later than the next court day after the child was removed. The court may order an extension, only upon good cause shown, of up to three court days from the date of the child's removal. A hearing shall be held no later than the next court day after the petition is filed and finding shall be made as required pursuant to section one thousand twenty-seven of this part.

(Added L.1970, c. 962, § 9. Amended L.1973, c. 1039, § 8; L.1987, c. 478, § 1; L.1988, c. 233, § 1; L.2005, c. 3, pt. A, § 14, eff. Dec. 21, 2005.)

§ 1027. Hearing and preliminary orders after filing petition

(a) (i) In any case where the child has been removed without court order or where there has been a hearing pursuant to section one thousand twenty-two of this part at which the respondent was not present or was not represented by counsel and did not waive his or her right to counsel, the family court shall hold a hearing. Such hearing shall be held no later than the next court day after the filing of a petition to determine whether the child's interests require protection, including whether the child should be returned to the parent or other person legally responsible, pending a fi

order of disposition and s
court days, if necessary, un
court.

(ii) In any such case
removed, any person orig
this article shall, or the atto
for, or the court on its own
at any time after the pet
whether the child's interest
final order of dispositio
scheduled for no later than
application for such hearing

(iii) In any case under th
not been removed from
person legally responsible f
originating a proceeding
attorney for the child may
own motion may order, a
petition is filed to determi
ests require protection, i
should be removed from
rson legally responsible
disposition. Such hearing
ater than the next court
such hearing has been mad

(iv) Notice of a hearing
ection one thousand twent

(b) (i) Upon such hear
emoval is necessary to
hild's life or health, it sh
emoval of the child. If
determination that remova
mmediately inquire as to t
the local social services
e child, including any no
of the child's grandparen
ection one thousand sev
ourt shall also inquire as
ge of five, has identifi
ve played a significant p
d whether any responde
on parent has identified
uiry shall include wheth
ated has expressed an i
rent for the child or in s
d. Upon completion o
hild or place the child:

A) with the local com
the court may direct su
d reside with a relative
indicated a desire to b
hild and further direct su
ulations of the office of
ommence an investig
ive or other suitable
and thereafter expe
ch relative or other su
ster parent. If such ho
approval or certificat

the child and the child's family pursuant to section one thousand fifteen-a or as enumerated in subdivision (c) of section one thousand twenty-two of this article, notwithstanding the fact that a petition has been filed.

(c) The court may issue a temporary order of protection pursuant to section ten hundred twenty-nine of this article as an alternative to, or in conjunction with any other order or disposition authorized under this section.

(d) The court shall also consider and determine whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection, pursuant to section ten hundred twenty-nine of this article, directing the removal of a person or persons from the child's residence.

(Added L.1970, c. 962, § 9. Amended L.1987, c. 469, § 2; L.1988, c. 478, § 6; L.1988, c. 527, § 5; L.1988, c. 673, § 3; L.1989, c. 727, § 5; L.1990, c. 140, § 1; L.1991, c. 198, § 6; L.1992, c. 697, § 1; L.1994, c. 36, § 3; L.2000, c. 145, § 16, eff. July 1, 2000; L.2010, c. 41, § 52, eff. April 14, 2010.)

§ 1028-a. Application of a relative to become a foster parent

(a) Upon the application of a relative to become a foster parent of a child in foster care, the court shall, subject to the provisions of this subdivision, hold a hearing to determine whether the child should be placed with a relative in foster care. Such hearing shall only be held if:

(i) the relative is related within the third degree of consanguinity to either parent;

(ii) the child has been temporarily removed under this part, or placed pursuant to section one thousand fifty-five of this article, and placed in non-relative foster care;

(iii) the relative indicates a willingness to become the foster parent for such child and has not refused previously to be considered as a foster parent or custodian of the child, provided, however, that an inability to provide immediate care for the child due to a lack of resources or inadequate housing, educational or other arrangements necessary to care appropriately for the child shall not constitute a previous refusal;

(iv) the local social services district has refused to place the child with the relative for reasons other than the relative's failure to qualify as a foster parent pursuant to the regulations of the office of children and family services; and

(v) the application is brought within six months from the date the relative received notice that the child was being removed or had been removed from his or her home and no later than twelve months from the date that the child was removed.

(b) The court shall give due consideration to such application and shall make the determination as to whether the child should be placed in foster care with the relative based on the best interests of the child.

(c) After such hearing, if the court determines that placement in foster care with the relative is in the best interests of the child, the court shall direct the local commissioner of social services, pursuant to regulations of the office of children and family services, to commence an investigation of the home of the relative within twenty-four hours and thereafter expedite approval or certification of such relative, if qualified, as a foster parent. No child, however, shall be placed with a relative prior to final approval or certification of such relative as a foster parent.

(Added L.2005, c. 671, § 3, eff. March 15, 2006. Amended L.2006, c. 12, § 2, eff. March 15, 2006.)

§ 1029. Temporary order of protection

(a) The family court, upon the application of any person who may originate a proceeding under this article, for good cause shown, may issue a temporary order of protection, before or after the filing of such petition, which may contain any of the provisions authorized on the making of an order of protection under section one thousand fifty-six. If such order is granted before the filing of a petition and a petition is not filed under this article within ten days from the granting of such order, the order shall be vacated. In any case where a petition has been filed and an attorney for the child has been appointed, such attorney may make application for a temporary order of protection pursuant to the provisions of this section.

(b) A temporary order of protection is not a finding of wrongdoing.

(c) The court may issue or extend a temporary order of protection ex parte or on notice simultaneously with the issuance of a warrant directing that the respondent be arrested and brought before the court pursuant to section ten hundred thirty-seven of this article.

(d) Nothing in this section shall: (i) limit the power of the court to order removal of a child pursuant to this article where the court finds that there is imminent danger to a child's life or health; or (ii) limit the authority of authorized persons to remove a child without a court order pursuant to section one thousand twenty-four of this article; or (iii) be construed to authorize the court to award permanent custody of a child to a parent or relative pursuant to a temporary order of protection.

(Added L.1975, c. 495, § 1. Amended L.1981, c. 416, § 19; L.1987, c. 67, § 1; L.1988, c. 673, § 4; L.2010, c. 41, § 53, eff. April 14, 2010.)

§ 1030. Order of visitation by a respondent

(a) A respondent shall have the right to reasonable and regularly scheduled visitation with a child in the temporary custody of a social services official pursuant to this part or pursuant to subdivision (d) of section one thousand fifty-one of this article, unless limited by an order of the family court.

(b) A respondent who has not been afforded such visitation may apply to the court for an order requiring

73 N.Y.2d 629 (1989)

Margaret A. Sheehy et al., Appellants,

v.

Big Flats Community Day, Inc., et al., Defendants, and American Legion Ernest Skinner Memorial Post 1612, Respondent.

Court of Appeals of the State of New York.

Argued April 25, 1989.
Decided June 6, 1989.

James B. Reed for appellants.

William S. Yaus and *Patricia M. Curtin* for respondent.

Chief Judge WACHTLER and Judges SIMONS, KAYE, ALEXANDER, HANCOCK, JR., and BELLACOSA concur.

631 *631TITONE, J.

Penal Law § 260.20 (4), which makes it a crime for anyone but a parent or guardian to furnish alcoholic beverages to a person who is under the legal purchase age, does not give rise to an implied private right of action in favor of such a person who has been injured as a result of his or her own consumption of alcohol. Accordingly, since recovery under
632 traditional common-law tort principles is also precluded on *632 this record, this minor plaintiff's complaint against the party that furnished her with alcohol was properly dismissed.

On the evening of June 24, 1983, plaintiff Margaret Sheehy, who was then 17 years old, attended the "Big Flats Community Days" celebration, an outdoor event that was sponsored by defendant Big Flats Community Days, Inc. (Big Flats). According to the allegations in her complaint, Sheehy was served several beers in a beer tent operated by defendant American Legion Ernest Skinner Memorial Post 1612 (American Legion). Sheehy claimed that she had not been asked for proof of her age before she was admitted to the tent or served. At the time of the incident the legal age for purchasing alcoholic beverages in New York was 19 (Alcoholic Beverage Control Law § 65 [former (1)], as amended by L 1982, ch 159, § 1).

An affidavit submitted by one of Sheehy's witnesses alleged that she entered the American Legion beer tent for the second time just before midnight and was served additional beers, although she was staggering and was visibly intoxicated. She then crossed the highway and entered the bar operated by defendant Driscoll's Tavern, Inc. (Driscoll's), where she was served another alcoholic beverage. When Sheehy attempted to cross the highway and return to the grounds of the "Community Days" celebration, she was struck by an automobile and severely injured.

Sheehy commenced the present action against Big Flats, American Legion and Driscoll's, claiming that their conduct in serving her alcoholic beverages in violation of law was the proximate cause of the accident. Defendant American Legion, the only defendant involved in this appeal, denied the factual allegations in Sheehy's complaint, alleging instead that plaintiff had been asked for proof of her age before having been served and that she had displayed a false driver's license. Defendant also claimed that Sheehy had immediately been told to leave the beer tent after she was recognized by someone who knew her true age.

In response to American Legion's motion for summary judgment, Supreme Court dismissed Sheehy's asserted causes of
633 action against that defendant.[1] Viewing the complaint's *633 allegations and the supporting submissions in the light most favorable to Sheehy, the court nevertheless concluded that neither her common-law claim nor the claim based upon a violation of Penal Law § 260.20 (4)[2] was legally maintainable. The Appellate Division affirmed, holding that the existence of a recently enacted statute providing for civil liability in cases involving the provision of alcoholic beverages to individuals

under the legal purchase age (General Obligations Law § 11-100) precluded any inference that the Legislature intended a judicially created right of recovery based upon the Penal Law provision (137 AD2d 160, 163-164). The court then granted Sheehy leave to appeal to this court, certifying the following question of law: "Did this court err as a matter of law in affirming the order of Supreme Court partially granting a motion by defendant American Legion * * * for summary judgment dismissing the complaint against it?"

The primary issue on this appeal, an issue on which there has been some disagreement among the Appellate Divisions (*compare*, 137 AD2d 160, *supra*, *with* Stambach v Pierce, 136 AD2d 329), is whether a private right of action for damages exists under Penal Law § 260.20 (4). At the time of Sheehy's accident, that statute imposed criminal penalties on any person, other than a parent or guardian, who "gives or sells or causes to be given or sold any alcoholic beverage * * * to a child less than nineteen years old" (Penal Law § 260.20 [4], as amended L 1982, ch 159, § 4).[3] Since the statute does not make express provision for civil damages, recovery under Penal Law § 260.20 (4) may be had only if a private right of action may fairly be implied.

Of central importance in this inquiry is the test set forth in *Burns Jackson Miller Summit & Spitzer v Lindner* (59 N.Y.2d 314; *see also*, *CPC Intl. v McKesson Corp.*, 70 N.Y.2d 268). Under that test, the essential factors to be considered are: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent
634 with the legislative scheme (*CPC Intl. v McKesson Corp., supra*, at 276-277; *634*Burns Jackson Miller Summit & Spitzer v Lindner, supra*, at 329-331). It was the third prong of this test that led to a rejection of a private right of action in *CPC Intl. v McKesson Corp.* (*supra*), one of the more recent applications of the *Burns Jackson* analysis. We reach the same result here.

In this case, there is no doubt that the first, and perhaps most easily satisfied, prong of the *Burns Jackson* test has been met. The statutory provision criminalizing the provision of alcoholic beverages to those under the legal purchase age (Penal Law § 260.20 [4]), which is located within the Penal Law article dealing with offenses against children and incompetents (Penal Law art 260), was unquestionably intended, at least in part, to protect such individuals from the health and safety dangers of alcohol consumption, dangers of which their limited experience provides little warning (*see*, *People v Arriaga*, 45 Misc 2d 399, 401; Governor's Mem of Approval, 1985 McKinney's Session Laws of NY, at 3288, quoted in Hechtman, 1985 Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 260.20, 1989 Cum Ann Pocket Part, at 87; *see also*, *People v Martell*, 16 N.Y.2d 245, 247). Plaintiff, who was under the legal purchase age at the time of her accident, was clearly within this category.

Similarly, it cannot be denied that recognition of a private right of action for civil damages would, as a general matter, advance the legislative purpose. In making the provision of alcohol to individuals under the legal purchase age a crime, the Legislature plainly intended to create a deterrent for those who might, intentionally or carelessly, engage in the proscribed conduct. Obviously, permitting civil damage suits for injuries arising from the same conduct would also further this deterrent goal.

These conclusions, however, do not end the inquiry. In addition to determining whether Sheehy was within the intended protected class and whether permitting her claim would advance the legislative goal, we must, "most importantly, [determine] the consistency of doing so with the purposes underlying the legislative *scheme*" (*Burns Jackson Miller Summit & Spitzer v Lindner, supra*, at 325 [emphasis supplied]). For, the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its
635 consistency with the basic legislative goal, a private *635 right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme (*see*, *CPC Intl. v McKesson Corp., supra*, at 276, 277).

In this case, in addition to establishing criminal penalties for the provision of alcoholic beverages to individuals under the legal purchase age, the Legislature has deliberately adopted a scheme for affording civil damages to those injured by the negligent or unlawful dispensation of alcohol. General Obligations Law § 11-101 (the Dram Shop Act), which applies only to commercial alcoholic beverage sales (*D'Amico v Christie*, 71 N.Y.2d 76), expressly provides for a right of action by any

person "injured in person, property, means of support, or otherwise by any intoxicated person" against the person who unlawfully sold or assisted in the procuring of the intoxicated person's alcohol. However, this statute has been held not to authorize recovery in favor of the individual whose intoxication resulted from the unlawful sale (*see, e.g.*, *Mitchell v The Shoals, Inc.*, 19 N.Y.2d 338, 340-341; *Reuter v Flobo Enters.*, 120 AD2d 722; *Allen v County of Westchester*, 109 AD2d 475, *appeal dismissed* 66 N.Y.2d 915; *Matalavage v Sadler*, 77 AD2d 39; *Moyer v Lo Jim Cafe*, 19 AD2d 523, *affd* 14 N.Y.2d 792).

Even more to the point, General Obligations Law § 11-100, which was enacted in 1983, provides for recovery against a person who knowingly caused a young person's intoxication by furnishing alcoholic beverages, with or without charge, "with knowledge or reasonable cause to believe that such person was [a person under the legal purchase age]." Significantly, in enacting this statute, which specifically addresses the problem of civil damages resulting from youthful alcoholic excesses, the Legislature authorized suit only by persons "injured in person, property, means of support, or otherwise, by [the intoxicated person]", the same language as that used in General Obligations Law § 11-101. Since the Legislature must be presumed to have been aware of the long-standing judicial construction of that language as precluding recovery by the intoxicated person, it is reasonable to infer that the Legislature intended the same result in cases arising under section 11-100.

When this background is considered, it becomes apparent that a private right of action in favor of the intoxicated minor
636 cannot fairly be implied from the prohibition contained in *636 Penal Law § 260.20 (4). Where the Legislature has not been completely silent but has instead made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage, on the basis of a different statute, at least where, as here, the two statutes address the same wrong (*see, CPC Intl. v McKesson Corp., supra*, at 282-283 [applying Federal law]; *Carpenter v City of Plattsburgh*, 105 AD2d 295, 298-299, *affd* 66 N.Y.2d 791; *Drinkhouse v Parka Corp.*, 3 N.Y.2d 82). Indeed, it would be anomalous to infer from its silence that the Legislature intended to permit a private right of recovery based upon the duty created by Penal Law § 260.20 (4) when that body has so recently adopted a specific statute on the same subject, which was clearly intended to exclude the class of injureds in which this plaintiff falls.

Manifestly, the Legislature has already considered the use of civil remedies to deter the sale of alcoholic beverages to those under the legal purchase age and has determined that the approach embodied in General Obligations Law § 11-100 is the most suitable. Recognizing a private right of action in favor of the intoxicated youth under Penal Law § 260.20 (4) would be inconsistent with the evident legislative purpose underlying the scheme embodied in General Obligations Law §§ 11-100 and 11-101: to utilize civil penalties as a deterrent while, at the same time, withholding reward from the individual who voluntarily became intoxicated for his or her own irresponsible conduct. We cannot, and will not, use Penal Law § 260.20 (4) as a predicate for overriding this legislative policy judgment (*cf.*, *D'Amico v Christie, supra*, at 84).

Turning to Sheehy's purported common-law claim, we conclude that it too is fatally flawed and was therefore properly dismissed. Rejecting any argument that a duty exists to protect a consumer of alcohol from the results of his or her own voluntary conduct, the courts of this State have consistently refused to recognize a common-law cause of action against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication (*e.g.*, *Wellcome v Student Coop.*, 125 AD2d 393; *Allen v County of Westchester, supra*; *Gabrielle v Craft*, 75 AD2d 939; *Paul v Hogan*, 56 AD2d 723; *Bizzell v N.E.F.S. Rest.*, 27 AD2d 554; *Moyer v Lo Jim Cafe, supra*; *Scatorchia v Caputo*, 263 App Div 304; *Vadasy v Feigel's Tavern*, 88 Misc 2d 614, *affd* 55 AD2d 1011; *see also*, *Reuter v Flobo Enters.*, 120 AD2d 722, *supra*).
637 *637 An exception to the general common-law rule that providers of alcoholic beverages have no duty to protect against the consequences of voluntary intoxication has been recognized in cases where a property owner has failed to protect others on the premises, or in other areas within the property owner's control, from the misconduct of an intoxicated person, at least when the opportunity to supervise was present (*see, D'Amico v Christie, supra*, at 85 [and cases cited therein]). However, that exception has no application in a case such as this, which involves an attempt to recover by the person who voluntarily became intoxicated. Finally, while Sheehy now contends that a new exception to the common-law rule should be recognized when the person who became intoxicated was under the legal purchase age (*see, Dynarski v U-Crest Fire Dist.*, 112 Misc 2d 344; *see also*, *Allen v County of Westchester, supra*, at 478), she did not make a similar argument in the court of first instance, and we therefore have no occasion to consider it now.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

Order affirmed, etc.

[1] Plaintiff Margaret Sheehy's claims against Driscoll's and Big Flats remain pending. Additionally, Sheehy's mother's Dram Shop Act claim (*see*, General Obligations Law § 11-101) against all three defendants remains pending, as do the potential cross claims arising from that cause of action.

[2] Although the complaint did not directly refer to Penal Law § 260.20 (4), we agree with the courts below that Sheehy's pleadings may fairly be read to encompass a claim for a private right of action resulting from a violation of that provision.

[3] The statute has since been amended to reflect the change in the legal purchase age from 19 to 21 (L 1985, ch 274, § 5).

274 A.D.2d 816 (2000)
710 N.Y.S.2d 482

In the Matter of AUSTIN MARKEY, Respondent,

v.

SUSAN BEDERIAN, Appellant.

Appellate Division of the Supreme Court of the State of New York, Third Department.

Decided July 20, 2000.

Cardona, P.J., Mercure, Spain and Lahtinen, JJ., concur.

Crew III, J.

Petitioner and respondent are the biological parents of two children, born in 1987 and 1989. The parties separated permanently in December 1992 and, insofar as is relevant to this appeal, ultimately consented in January 1995 to joint legal custody, with physical custody to respondent and visitation to petitioner.

Beginning in January 1998, petitioner filed three modification petitions alleging, *inter alia*, that respondent had interfered with his visitation rights, impeded his telephone access to the children and was abusing **alcohol** and seeking physical
817 custody of the minor children. Following a lengthy hearing *817 at which the parties appeared and testified and the children were interviewed in camera, Family Court granted petitioner's application and awarded petitioner sole legal and physical custody, with liberal visitation to respondent. This appeal by respondent ensued.

We affirm. As the case law makes clear, "alteration of an established custody arrangement will be ordered only upon a showing of sufficient change in circumstances reflecting a real need for change in order to insure the continued best interest of the **child**" (*Matter of* Van Hoesen v Van Hoesen, 186 AD2d 903; *see*, Brodsky v Brodsky, 267 AD2d 897, 898; *Matter of* Crawson v Crawson, 263 AD2d 656, 657).[1] Such a change in circumstances may be demonstrated by, *inter alia*, a deterioration of the relationship between the joint custodial parents (*see, e.g., Matter of* Moreau v Sirles, 268 AD2d 811, 812, *lv denied* 95 NY2d 752; *Matter of* Gaudette v Gaudette, 262 AD2d 804, 805, *lv denied* 94 NY2d 790; Ulmer v Ulmer, 254 AD2d 541, 542), interference with the noncustodial **parent's** visitation rights and/or telephone access (*see, e.g.*, Brodsky v Brodsky, *supra*, at 898-899; *Matter of* Betancourt v Boughton, 204 AD2d 804, 806-807) or the existence of an **alcohol** or substance abuse problem (*see, e.g., Matter of* Weeden v Weeden, 256 AD2d 831, 832, *lv denied* 93 NY2d 804; *Matter of* Mooney v Mooney, 243 AD2d 840, 841). To that end, Family Court's factual findings traditionally are accorded great deference and should be set aside only where they lack a sound and substantial basis in the record (*see, Matter of* Moreau v Sirles, *supra*, at 812; *Matter of* Betancourt v Boughton, *supra*, at 806).

Based upon our review of the record as a whole, we cannot say that petitioner failed to demonstrate a sufficient change in circumstances to trigger the best interest analysis undertaken by Family Court. In this regard, respondent argues that her demonstrated misdeeds—denying petitioner visitation on two occasions, relocating the children to a new residence and refusing to provide petitioner with their address, enrolling the children in a new school district without consulting with petitioner, failing to permit and/or facilitate telephone contact between the children and petitioner and abusing **alcohol** on at least two occasions—amount to nothing more than isolated incidents and fall far short of demonstrating a pattern of
818 persistent interference or abuse. While such incidents, standing alone, *818 indeed do not establish a persistent interference with petitioner's visitation rights, a persistent denial of telephone access to the children or a pervasive problem with **alcohol**,[2] respondent's conduct does demonstrate and reflect a pattern of immature decision making and the exercise of poor judgment. Such actions, taken together and viewed in the context of the embattled and deteriorating relationship between the parties, constitute a sufficient change in circumstances to warrant modification of the then-existing custodial situation.[3]

With respect to Family Court's best interest inquiry, the record amply supports the court's findings that the children's best interests would be served by awarding sole legal and physical custody to petitioner. The record plainly demonstrates that the parties cannot work together in a cooperative fashion, thereby rendering joint legal custody inappropriate (*see, Matter of Jemmott v Jemmott*, 249 AD2d 838, 839, *lv denied* 92 NY2d 809). As to physical custody, we reject respondent's assertion that the record is not sufficiently developed to permit this Court to assess the quality of home life the children would have with petitioner and his spouse and/or petitioner's ability to be an effective parent to the children. While much of the evidence gathered at the hearing indeed centered around the asserted grounds for modification, sufficient testimony was adduced to permit this Court to conclude that petitioner is financially and emotionally capable of providing for the children's various needs.

Morever, although by no means determinative, Family Court's award of custody reflected both the Law Guardian's position (*see, Matter of Weeden v Weeden*, 256 AD2d 831, 833, *supra*) and, as acknowledged by the parties, the children's wishes. To the extent that the court-appointed evaluator recommended that physical custody continue with respondent, this recommendation was significantly undercut by the evaluator's testimony on cross-examination, wherein he
819 acknowledged that petitioner could provide more structure and consistency for the *819 children and conceded that his recommendation may have been motivated, in part, by sympathy for respondent.

In sum, we are of the view that Family Court's findings have a sound and substantial basis in the record and, therefore, will not be disturbed. Respondent's remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Ordered that the order is affirmed, without costs.

[1] To the extent that Family Court's written decision does not expressly recite this rule of law, it is apparent from a review thereof that Family Court was aware of the parties' prior stipulation as to custody and undertook an appropriate evidentiary analysis.

[2] Respondent submitted a letter from a certified rehabilitation counselor indicating that respondent "does not appear to have an alcohol or substance diagnosis".

[3] To the extent that respondent asserts there is no proof in the record that the children have been harmed by her conduct, two points are worth noting. First, we disagree with respondent's interpretation of the record evidence. Moreover, even accepting that the children have not suffered significant harm in this regard, such a finding, although plainly relevant in assessing respondent's ability to be an effective parent and in ascertaining to whom custody should be awarded, is of no moment in determining whether a sufficient change in circumstances has been demonstrated in the first instance.

90 A.D.2d 674 (1982)

George Comeau, Respondent-Appellant,

v.

Frank Lucas et al., Respondents, and Michael Ruggero, Appellant-Respondent. (Appeal No. 1.)

Appellate Division of the Supreme Court of the State of New York, Fourth Department.

October 29, 1982

Present — Simons, J. P., Hancock, Jr., Callahan, Denman and Boomer, JJ.

Judgment unanimously reversed, on the law and facts, with costs to plaintiff, and a new trial granted, in accordance with the following memorandum: Plaintiff George Comeau sustained a serious head injury as the result of an intentional assault by defendant Michael Ruggero, a member of a rock band, who was apparently in an intoxicated condition while playing at a party held in the home of defendants Mr. and Mrs. Frank Lucas. In his action to recover damages, plaintiff alleged negligence on the part of Mr. and Mrs. Lucas for failure to supervise a party given by their 16-year-old daughter Lori while they were out of the country, but for which they had given their consent, despite knowing that beer would be served; that a rock band was engaged; and that many of the guests would be under 18 years of age. Plaintiff further alleged that Lori was individually liable as the agent of her parents for negligence in failing properly to supervise the party in her parents' absence. At the close of plaintiff's proof, the court granted summary judgment dismissing the complaint against the Lucases, but held that Ruggero was liable for injuries inflicted on plaintiff as a matter of law. The jury awarded plaintiff $250,000 compensatory damages and $30,000 punitive damages less a 10% reduction based on plaintiff's culpable conduct in drinking and engaging in disruptive behavior. Plaintiff appeals from the trial court's order dismissing his complaint against Mr. and Mrs. Lucas and Lori Lucas; from denial of his motion to amend his pleadings to conform to the proof (CPLR 3025, subd [c]); and to that portion of the court's charge which advised that the jury could reduce the amount of damages in proportion to the culpable conduct attributed to the plaintiff (CPLR art 14-A). Defendant Ruggero appeals on the grounds that the verdict is excessive. The court erred in dismissing plaintiff's causes of action for negligence against Mr. and Mrs. Lucas. As recently stated in *Huyler v Rose* (88 AD2d 755): "A property owner * * * has the duty to control the conduct of persons present on his property when he 'knows that he can and has the opportunity to control the third parties' conduct and is reasonably aware of the necessity for such control' (*Mangione v Dimino*, 39 AD2d 128, 129; see, also, *Basso v Miller*, 40 N.Y.2d 233, 241; *Bartkowiak v St. Adalbert's R. C. Church Soc.*, 40 AD2d 306)." We held there that the trial court erred in dismissing the cause of action of a plaintiff injured when a guest pushed him into a bonfire on premises owned by defendants while plaintiff was attending a graduation party at the defendants' home. We found that the plaintiff in that case alleged sufficient facts to establish that the property owner defendants knew or should have known of the necessity to control the conduct of the third-party defendant because of his intoxicated and otherwise combative state. Similarly, we find in the present case that plaintiff has established a prima facie case that the Lucases breached their duty as owners of the premises, who had an opportunity to control the party held by their minor daughter with their consent, and
675 that they reasonably should have been aware of the *675 necessity for such control. Whether defendants failed to exercise due care in allowing their daughter to host the party under the circumstances of this case is a question of fact for the jury. A jury could reasonably conclude that it was foreseeable that someone would get drunk at the party, engage in a fight, and cause injury to a third party. Additionally, plaintiff has made out a prima facie case of negligence against the Lucases for failure to supervise their daughter as the result of their participation in and consent to their child's tortious conduct (see *Steinberg v Cauchois*, 249 App Div 518, 519). Further, plaintiff has alleged sufficient facts to show that Lori Lucas was the agent of her parents at the time plaintiff's injury occurred and, as such, owed plaintiff the same duty owed by her parents to prevent an unreasonable risk of bodily harm (see 3 NY Jur 2d, Agency, § 295, p 114). The record indicates that Mr. and Mrs. Lucas expressly placed Lori in control of the premises, authorized the party at their home, and gave a number of instructions to Lori with which she apparently complied. An infant has the capacity to act as an agent (Restatement, Agency 2d, § 21) and is responsible for her own torts, the applicable standard of care being that which "'it is reasonable to expect of children of like age, intelligence and experience'" (Prosser, Torts [4th ed], § 32, p 155). The court did, however,

act properly in instructing the jury regarding principles of comparative negligence pursuant to CPLR article 14-A and in denying plaintiff's motion to amend the complaint to conform to the proof pursuant to CPLR 3025 (subd [c]). To have permitted an amendment to the pleadings at the close of plaintiff's proof in order to allege an agency relationship between defendant Ruggero and the Lucas family would have unduly prejudiced defendants. Nevertheless, our ruling is without prejudice to renewal of the motion if plaintiff be so advised. Since the case must be remitted for a new trial, we need not address defendant Ruggero's argument that the jury verdict was excessive. We note only that punitive damages are not subject to apportionment.

274 A.D.2d 816 (2000)
710 N.Y.S.2d 482

In the Matter of AUSTIN MARKEY, Respondent,

v.

SUSAN BEDERIAN, Appellant.

Appellate Division of the Supreme Court of the State of New York, Third Department.

Decided July 20, 2000.

Cardona, P.J., Mercure, Spain and Lahtinen, JJ., concur.

Crew III, J.

Petitioner and respondent are the biological parents of two children, born in 1987 and 1989. The parties separated permanently in December 1992 and, insofar as is relevant to this appeal, ultimately consented in January 1995 to joint legal custody, with physical custody to respondent and visitation to petitioner.

Beginning in January 1998, petitioner filed three modification petitions alleging, *inter alia*, that respondent had interfered with his visitation rights, impeded his telephone access to the children and was abusing alcohol and seeking physical
817 custody of the minor children. Following a lengthy hearing *817 at which the parties appeared and testified and the children were interviewed in camera, Family Court granted petitioner's application and awarded petitioner sole legal and physical custody, with liberal visitation to respondent. This appeal by respondent ensued.

We affirm. As the case law makes clear, "alteration of an established custody arrangement will be ordered only upon a showing of sufficient change in circumstances reflecting a real need for change in order to insure the continued best interest of the child" (*Matter of Van Hoesen v Van Hoesen*, 186 AD2d 903; *see, Brodsky v Brodsky*, 267 AD2d 897, 898; *Matter of Crawson v Crawson*, 263 AD2d 656, 657).[1] Such a change in circumstances may be demonstrated by, *inter alia*, a deterioration of the relationship between the joint custodial parents (*see, e.g., Matter of Moreau v Sirles*, 268 AD2d 811, 812, *lv denied* 95 NY2d 752; *Matter of Gaudette v Gaudette*, 262 AD2d 804, 805, *lv denied* 94 NY2d 790; *Ulmer v Ulmer*, 254 AD2d 541, 542), interference with the noncustodial parent's visitation rights and/or telephone access (*see, e.g., Brodsky v Brodsky*, *supra*, at 898-899; *Matter of Betancourt v Boughton*, 204 AD2d 804, 806-807) or the existence of an alcohol or substance abuse problem (*see, e.g., Matter of Weeden v Weeden*, 256 AD2d 831, 832, *lv denied* 93 NY2d 804; *Matter of Mooney v Mooney*, 243 AD2d 840, 841). To that end, Family Court's factual findings traditionally are accorded great deference and should be set aside only where they lack a sound and substantial basis in the record (*see, Matter of Moreau v Sirles*, *supra*, at 812; *Matter of Betancourt v Boughton*, *supra*, at 806).

Based upon our review of the record as a whole, we cannot say that petitioner failed to demonstrate a sufficient change in circumstances to trigger the best interest analysis undertaken by Family Court. In this regard, respondent argues that her demonstrated misdeeds—denying petitioner visitation on two occasions, relocating the children to a new residence and refusing to provide petitioner with their address, enrolling the children in a new school district without consulting with petitioner, failing to permit and/or facilitate telephone contact between the children and petitioner and abusing alcohol on at least two occasions—amount to nothing more than isolated incidents and fall far short of demonstrating a pattern of
818 persistent interference or abuse. While such incidents, standing alone, *818 indeed do not establish a persistent interference with petitioner's visitation rights, a persistent denial of telephone access to the children or a pervasive problem with alcohol,[2] respondent's conduct does demonstrate and reflect a pattern of immature decision making and the exercise of poor judgment. Such actions, taken together and viewed in the context of the embattled and deteriorating relationship between the parties, constitute a sufficient change in circumstances to warrant modification of the then-existing custodial situation.[3]

With respect to Family Court's best interest inquiry, the record amply supports the court's findings that the children's best interests would be served by awarding sole legal and physical custody to petitioner. The record plainly demonstrates that the parties cannot work together in a cooperative fashion, thereby rendering joint legal custody inappropriate (*see, Matter of Jemmott v Jemmott*, 249 AD2d 838, 839, *lv denied* 92 NY2d 809). As to physical custody, we reject respondent's assertion that the record is not sufficiently developed to permit this Court to assess the quality of home life the children would have with petitioner and his spouse and/or petitioner's ability to be an effective parent to the children. While much of the evidence gathered at the hearing indeed centered around the asserted grounds for modification, sufficient testimony was adduced to permit this Court to conclude that petitioner is financially and emotionally capable of providing for the children's various needs.

Moreover, although by no means determinative, Family Court's award of custody reflected both the Law Guardian's position (*see, Matter of Weeden v Weeden*, 256 AD2d 831, 833, *supra*) and, as acknowledged by the parties, the children's wishes. To the extent that the court-appointed evaluator recommended that physical custody continue with respondent, this recommendation was significantly undercut by the evaluator's testimony on cross-examination, wherein he
819 acknowledged that petitioner could provide more structure and consistency for the *819 children and conceded that his recommendation may have been motivated, in part, by sympathy for respondent.

In sum, we are of the view that Family Court's findings have a sound and substantial basis in the record and, therefore, will not be disturbed. Respondent's remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Ordered that the order is affirmed, without costs.

[1] To the extent that Family Court's written decision does not expressly recite this rule of law, it is apparent from a review thereof that Family Court was aware of the parties' prior stipulation as to custody and undertook an appropriate evidentiary analysis.

[2] Respondent submitted a letter from a certified rehabilitation counselor indicating that respondent "does not appear to have an alcohol or substance diagnosis".

[3] To the extent that respondent asserts there is no proof in the record that the children have been harmed by her conduct, two points are worth noting. First, we disagree with respondent's interpretation of the record evidence. Moreover, even accepting that the children have not suffered significant harm in this regard, such a finding, although plainly relevant in assessing respondent's ability to be an effective parent and in ascertaining to whom custody should be awarded, is of no moment in determining whether a sufficient change in circumstances has been demonstrated in the first instance.