Commercial Host (Dram Shop) Liability
Current Status and Trends
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Abstract: Commercial host liability (CHL, also called dram shop liability) holds alcohol retailers liable for alcohol-attributable harm caused by serving alcohol, illegally, to a patron who is already intoxicated (adult liability) or underage (underage liability). The Community Preventive Services Task Force, based on a systematic research literature review, concluded that CHL is an effective strategy for reducing excessive alcohol consumption. The current article describes the key components of CHL, its grounding in American jurisprudence, its adoption in the 50 states, and changes since 1989, when a similar assessment of these policies was conducted.

The current paper focuses on three legislatively enacted restrictions: (1) increased evidentiary requirements; (2) limitations on damage awards; and (3) limitations on who may be sued. Data were collected in 2011 and analyzed in 2012 and 2013. There has been substantial erosion of CHL during the past 2 decades. Fewer states recognized CHL in 2011 than in 1989, and more statutory restrictions were imposed during the study period among states that did recognize CHL; states are more likely to recognize underage than adult liability; and six states recognized a Responsible Beverage Services Practices affirmative defense in both 1989 and 2011. Implications of these findings for public health practitioners are discussed.

Introduction
Excessive Alcohol Consumption and Public Health

Excessive alcohol consumption, defined as binge drinking, heavy drinking, or any drinking by pregnant women or underage youth, is a leading cause of preventable death and disability, responsible for approximately 80,000 deaths annually in the U.S. The economic cost of excessive drinking was an estimated $223.5 billion in 2006, or approximately $1.90 per drink consumed. Reducing excessive alcohol consumption is thus a matter of substantial public health and economic interest.

More than one half of the deaths and three quarters of the economic costs associated with excessive alcohol consumption involve binge drinking, defined as 5 or more drinks in a single episode for men and 4 or more drinks for women. More than 85% of alcohol-impaired driving episodes among U.S. adults involve binge drinkers. According to a recent study from the CDC, most binge drinkers (54.3%) who reported driving after their most recent binge-drinking episode drank in an on-premises retail alcohol establishment (i.e., a bar, club, or restaurant), and 25.7% of this group reported consuming 10 or more drinks before getting behind the wheel.

On- and off-premise alcohol retail outlets are also sources of alcohol for underage drinkers, particularly those aged 18–20 years who have high rates of binge drinking and associated public health and safety problems. The implementation of evidence-based interventions that encourage compliance with laws prohibiting alcohol service to underage or intoxicated patrons represents an important opportunity for public health to reduce excessive alcohol consumption and related harm, while also helping to create an environment that does not place law-abiding retailers at an economic disadvantage.

Commercial Host Liability Defined

Commercial host liability (CHL) is an evidence-based intervention that can promote compliance with these laws. “Dram shop liability” is a term used in state laws for this form of liability. A dram is a unit of liquid measure equal to 1 ounce. In the 19th century, when dram shop liability was first introduced as a legal principle, alcohol was often served by the dram in on-premises retail outlets called dram shops. The term “commercial host
liability” is used here because it is more descriptive and less likely to be confusing to those without formal legal training.

Commercial host liability is grounded in the basic principle of American jurisprudence called tort liability, under which a negligent, reckless, or intentionally harmful defendant may be required to compensate a plaintiff who is injured by the defendant’s conduct. CHL is a form of tort liability, which holds retailers (both on-premises and off-premises) liable for alcohol-attributable harm (e.g., an alcohol-related automobile crash death) caused by a patron who was served alcohol illegally. The alcohol service is defined to be illegal if, at the time, the patron is either (1) intoxicated (adult liability) or (2) underage (underage liability).

The U.S. Congress and state legislatures can establish parameters for tort liability (including CHL) using numerous, often complex rules that permit compensation to be awarded under certain conditions (termed “statutory” liability). If the relevant legislative body has not taken action, the responsibility for establishing the rules regarding tort liability falls to state or federal courts, exercising their inherent powers based on common law to establish such rules, including those pertaining to CHL. Liability only comes into play when a plaintiff files a lawsuit—a tort claim against a defendant. Federal and state governments may provide arbiters and rules for resolving disputes about compensation related to CHL, but they otherwise do not take a proactive role in the process.

Commercial host liability can be established by legislatures through statutes or by courts using their common law powers. When in place, CHL allows a party suffering the harm (personal injury, damage to property, emotional distress, and/or other forms of personal harm) to sue a retailer that served alcohol to a patron who caused the harm. It can (1) provide compensation for those harmed by the negligent alcohol service and (2) create a deterrent, discouraging retailers from serving intoxicated or underage patrons.8,9

History of Commercial Host Liability
The Temperance Movement promoted the first CHL statutes in the mid-19th century to highlight the adverse role of saloons in profiting from habitual drunkenness to the detriment of family life. The statutes typically had limited scope, went into disuse during Prohibition, and were repealed or largely ignored after Prohibition ended. Until the 1960s, the courts generally adhered to the “old” CHL common law rule that protected retailers from liability for the injuries caused by their underage and intoxicated patrons. Under that rule, the drinker causing the injury was a “superseding” or “intervening cause” of the injury and was considered entirely responsible for any resulting harm, overriding any negligent behavior by the server.

In the 1960s, state courts started to reject the superseding cause principle and began implementing a new common law rule that imposed a duty on both the patron and the retailer to protect the public from harm and allowed both to be held liable.8–10 This shift in jurisprudence may have reflected the gradual erosion of the pre-Prohibition view that drunkenness was a moral failing and that the drinker needed to be held solely accountable for his/her actions to encourage behavioral change. The shift also may reflect the courts’ concern that injured plaintiffs are often unable to obtain adequate compensation from the drinker causing the harm. Many courts have concluded as a matter of fairness that the innocent victim should not have to bear the burden of the injury when the retailer acted in a negligent and illegal manner that contributed to the harm.8–11 The judicial shift in many states toward the new common law prompted many state legislatures to enact statutes that limit the scope of the courts’ rulings and establish barriers to plaintiffs seeking compensation, a legislative trend that has been largely ignored among public health practitioners and scholars.

The Role of Commercial Host Liability in Preventing Alcohol-Related Harms
To strengthen the scientific basis for the prevention of excessive alcohol consumption, the Alcohol Program in the National Center for Chronic Disease Prevention and Health Promotion at the CDC collaborated with the Guide to Community Preventive Services (the Community Guide) to systematically review all available scientific evidence on the effectiveness of various public health strategies, including CHL, for preventing excessive alcohol consumption and related harm.12 In 2011, the Community Guide reviewed the extensive research literature on CHL13,14 and found that CHL was associated with substantial reductions in alcohol-related problems, including a 6.4% median reduction (range=3.7%–11.3%) in alcohol-related motor-vehicle crash deaths in states with CHL, compared to those that did not have this law in place.13,14 The review also found that legislation limiting the scope of CHL may undercut these positive public health effects.13,14 Based on these findings, the Community Preventive Services Task Force, an independent, nonfederal, unpaid body appointed by the director of the CDC, concluded that “dram shop [commercial host] liability is effective in preventing and reducing alcohol-related harms.”14
In 1985, the National Institute on Alcohol Abuse and Alcoholism funded the development of a model CHL law (Model Law) in order to enhance the health benefits of this legal doctrine. This Model Law relied on the “new” common law rule and featured a Responsible Beverage Service (RBS) practices affirmative defense. (An affirmative defense will absolve a defendant from liability if he/she can prove the elements of the defense in question.)

The RBS practices include instituting effective ID checks; training staff on identifying signs of intoxication; discontinuing marketing practices that encourage intoxication (e.g., drink specials); hiring security staff; and other management policies and staff practices. If a retailer can show that RBS practices were adhered to at the time of alcohol service to an underage or intoxicated patron, this may serve as a defense for a retailer to avoid liability. The RBS affirmative defense’s underlying purpose is therefore to expand the role of CHL so that it promotes more responsible business retail practices, standardizes those practices, and in turn, promotes public health prevention and compensation.

Many states now mandate or encourage retailers to participate in programs that train managers and staff in RBS practices. Research has shown inconsistent public health outcomes because of variability in research design, program quality, and implementation of RBS training curricula. This led the Community Preventive Services Task Force to conclude that there is “insufficient evidence to determine the effectiveness of responsible beverage service training programs for reducing excessive alcohol consumption and related harms at the community level.” The Model Law addresses these weaknesses by limiting the RBS practices’ affirmative defense to cases where the retailer shows that RBS standards were actually implemented.

This report provides an inventory of CHL laws (both statutory and common law) for all 50 states and the District of Columbia (DC) as of January 1, 2011. The data included an assessment of changes in those laws since 1989 based on a similar assessment conducted that year. Adult liability, underage liability, and RBS provisions in CHL laws are reported separately.

Legal Research Protocols
Underage liability data for 2011 were taken from the Report to Congress on the Prevention and Reduction of Underage Drinking, 2011 (Report to Congress). The five-step coding and validation process used to collect and organize data on underage liability (described below) was applied to adult liability data from 2011. Standard online legal research tools, including Lexis-Nexis and Westlaw, were used to identify and retrieve relevant statutes and case law. Data were collected in 2011 and analyzed in 2012 and 2013 for all 50 states and DC that included statutory and common law CHL addressing both underage and adult liability.

Steps 1–5

Step 1: Assess whether the state recognizes common law commercial host liability for service to underage and/or intoxicated adults. States that do not recognize common law liability were coded as having no liability. States that do not recognize either common law or statutory liability were coded as having no liability.

Step 2: Determine whether the state has statutory liability for service to underage and/or intoxicated adults.

Step 3: For states with statutory liability, determine whether the laws include major limitations to common law liability. Three limitations were selected based on the assessment made by an expert panel that guided the 1989 research study.

1. Increased evidentiary requirements for finding liability. Many states make it more difficult for plaintiffs to succeed in a commercial liability claim by enacting statutes that impose stricter evidentiary requirements (Table 1). These include the following:

   Increased burden of proof: Common law claims require the plaintiff to prove that the defendant served a minor or visibly intoxicated person by the “preponderance of the evidence” (i.e., the evidence shows that it is more likely than not that such service did occur. Some states require that the elements be established with “clear and convincing” evidence or “beyond a reasonable doubt” standards which require the plaintiff to present much more substantial evidence of wrongdoing on the part of the defendant.

   More egregious behavior on the part of alcohol retailers: Common law claims require proof that the retailer acted negligently (i.e., he/she did not act as a reasonable person would act in like circumstances). Evidence that the server was careless or non-attentive may be sufficient. Some states require proof that the retailer acted recklessly, willfully, with criminal negligence, or with actual knowledge of the patron’s underage or intoxicated status.
Additional elements of proof: Common law claims require proof that the retailer furnished alcohol to a minor or visibly intoxicated person in a negligent manner and that this was a causative factor in the resulting alcohol-related damage or injury to the plaintiff. Some states have added additional evidentiary requirements, including requirements that the minor was obviously intoxicated when served or that the retailer knew the patron would be driving a motor vehicle shortly after being served.

2. Limitations on damage awards (damage caps). Many states have established a damage cap limiting how much the plaintiff can recover regardless of the losses and rights to punitive damages that he/she can establish.

3. Restrictions on who may be sued. Some states exempt off-premise alcohol retailers that are selling alcohol for consumption at another location. Texas permits underage CHL claims only if the server is aged ≥21 years and serves a minor aged ≤18 years. The 1989 report did not include this variable, apparently because no states imposed such a restriction.

When any of these three types of statutory restrictions was identified, case law was reviewed to determine if the courts have interpreted statutory language in a manner that affects coding.

Step 4: States with statutory liability were analyzed to determine whether they recognized an RBS affirmative defense as defined by the Model Act.

Step 5: Secondary sources were reviewed to identify conflicts with coding performed based on the research described above. Secondary sources included the Liquor Liability Law22 and O’Connor.23 When conflicts were identified, additional review was conducted to ensure that the initial coding was accurate.

A lead attorney (a coauthor) conducted these five steps for each state. A second attorney (also a coauthor) validated the findings by conducting reviews of the lead attorney’s research, secondary sources, and all coding decisions. To assess changes in CHL policies in states and the District of Columbia, the current authors retrieved data from a 1989 study of CHL policies that used a similar research design and coding rules. Authors of the current study supervised the legal research for both the 2011 Report to Congress and the 1989 study. The 1989 data do not distinguish between common law and statutory liability. This distinction is therefore reported for 2011 only.

**Summary of Findings**

**Commercial Host Liability for Service to Intoxicated Adults**

In 1989, a total of 25 states and the District of Columbia (51% of the 51 jurisdictions) recognized liability without any of the three types of restrictions for service to intoxicated adults. Ten states recognized liability with one restriction; one state recognized it with two restrictions; 13 states did not recognize liability; and West Virginia’s status was determined to be unclear (the State Supreme Court issued an opinion that was ambiguous; Figure 1). By contrast, in 2011, the District of Columbia and 21 states (43%) recognized liability without major restrictions; 13 states imposed one restriction; and three states imposed two restrictions. The same 13 states that

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**Table 1. Restrictions on evidence applied to adult commercial host liability**

<table>
<thead>
<tr>
<th>Type of restriction</th>
<th>Least restrictive (common law)</th>
<th>Moderately restrictive</th>
<th>Most restrictive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burden of proof</td>
<td>Preponderance of evidence</td>
<td>Clear and convincing</td>
<td>Beyond reasonable doubt</td>
</tr>
<tr>
<td>(how strong the injured</td>
<td>(more likely than not)</td>
<td>(more than 50%</td>
<td>(a reasonable person would</td>
</tr>
<tr>
<td>party’s evidence must be)</td>
<td></td>
<td>certain but some</td>
<td>have no doubt)</td>
</tr>
<tr>
<td>Retailer behavior</td>
<td>Negligent (e.g., failed to</td>
<td>Reckless, criminally</td>
<td>Actual knowledge</td>
</tr>
<tr>
<td></td>
<td>notice signs of intoxication)</td>
<td>negligent (e.g.,</td>
<td>(e.g., knew patron</td>
</tr>
<tr>
<td></td>
<td></td>
<td>disregarded obvious</td>
<td>was a minor and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>signs of intoxication)</td>
<td>served anyway)</td>
</tr>
<tr>
<td>Elements of proof</td>
<td>Negligent service</td>
<td>Minor was obviously</td>
<td></td>
</tr>
<tr>
<td>(what injured party must</td>
<td>caused injury</td>
<td>intoxicated when</td>
<td></td>
</tr>
<tr>
<td>prove)</td>
<td></td>
<td>served/retailer knew</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>patron was going to be</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>driving a motor vehicle</td>
<td></td>
</tr>
</tbody>
</table>

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**Figure 1. Adult commercial host liability: 50 states and District of Columbia**

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did not recognize liability in 1989 still did not recognize it in 2011.

Evidentiary requirements and limitations on who can be sued accounted for the increase in statutory restrictions between the study’s two time periods (Figure 2). In 1989, there were six evidentiary restrictions and six damage cap restrictions. In 2011, there were 11 evidentiary restrictions, six damage cap restrictions, and three limitations on who may be sued. This represents a 67% increase in the total number of restrictions across all states (from 12 to 20; www.alcoholpolicyconsultations.com provides details regarding each state’s laws and legal references.)

**Commercial Host Liability for Service to Underage Youth**

In 1989, 29 states and the District of Columbia (59%) recognized liability without any of the three types of restrictions, 11 states imposed at least one restriction, one state imposed two restrictions, and eight states did not recognize liability (Figure 3). The status of underage liability in West Virginia was determined to be unclear. In 2011, a total of 28 states and the District of Columbia (57%) recognized liability without major restrictions, nine states imposed at least one restriction, and seven states imposed two restrictions. Six states did not recognize either statutory or common-law underage commercial liability.

As with adult liability, the most substantial change in statutory limitations for underage youth liability involved evidentiary requirements and limitations on who may be sued (Figure 4). In 1989, there were seven evidentiary restrictions and six damage cap restrictions. In 2011, there were 12 evidentiary restrictions, seven damage cap restrictions, and four limitations on who may be sued. This represents a 77% increase in the total number of restrictions across all 51 jurisdictions (from 13 to 23).

**Common Law Versus Statutory Liability**

In 2011, a total of 11 of the 28 states and the District of Columbia (43%) that imposed underage liability without major restrictions relied on common law court decisions. Seven of the 21 states (33%) imposed adult liability without major restrictions through common law court decisions. As noted earlier, data for 1989 on this variable are not available.

**Responsible Beverage Service Practices Defense**

Six states had RBS defense provisions in both 1989 and 2011. Four states (Maine, New Hampshire, Rhode Island, and Vermont) had RBS affirmative defense provisions that applied to both underage and adult liability in both years. Washington repealed its RBS affirmative defense provision during the study period, and Michigan added its provision in 1998. North Carolina had an RBS affirmative defense provision throughout the study period that applied only to underage liability. Texas adopted an RBS defense provision after 1989 that
requires retailers to provide RBS training to staff to receive liability protection, without requiring that RBS practices be in place at the time of the alleged service to an underage or intoxicated patron. Because requiring training without also requiring that RBS practices are in place when an alleged offense occurred does not meet the Model Act requirements, Texas was coded as not having an RBS affirmative defense provision.

Discussion

The Community Preventive Services Task Force recommends CHL as an evidence-based strategy for preventing excessive alcohol consumption and related harm. Adoption of this recommendation by states is incomplete and declined substantially between 1989 and 2011. The number of jurisdictions recognizing adult liability without major restrictions declined by 22% (from 26 states and DC to 21 states and DC) and the number of major restrictions across the states increased by 58% (from 12 to 19). Similarly, the number of states recognizing underage liability without major restrictions declined by 7% (from 29 states and DC to 28 states and DC) and the number of restrictions across the states increased by 77% (from 13 to 23). Finally, the number of states that allowed an RBS affirmative defense consistent with the Model Law (six states) did not change from 1989 to 2011.

Commercial host liability statutory restrictions can substantially undermine the effectiveness of these laws for deterring illegal alcohol service. Prosecuting a CHL lawsuit is expensive and time-consuming, and the outcome is highly speculative even when no special restrictions exist. Because plaintiffs’ attorneys generally assume these claims on a contingency basis, and receive payment only in the event of a successful outcome, only the few claims with the greatest potential for generating large awards are filed. Adding restrictions that require substantial additional evidence of wrongdoing or that limit the amount of the potential damage award reduces the likelihood and size of successful claims by plaintiffs and probably reduces the likelihood of claims being filed. This reduces incentives for retailers to adopt RBS practices and curtail sales to underage and intoxicated patrons. This in turn puts retailers who are attempting to comply with laws prohibiting these sales at a competitive disadvantage.

The relatively small number of states with common law liability in 2011 (11 states for underage liability and seven states for adult liability) provides additional evidence of the gradual erosion of the CHL policy. As discussed in the Introduction, the origin of the policy in most states began with court-imposed common law liability, and the restrictions on liability have been introduced by legislation. This research focused on three of the most substantial legislative restrictions to CHL, but the shift from common law to statutory liability in most states includes additional restrictions not addressed here (e.g., special notice requirements, limitations on who may sue, limitations on the time period by which lawsuits must be filed) that also can substantially reduce liability exposure for retailers.

Opponents of CHL often cite as justification for special restrictions on this liability the uncertainty retailers face in identifying intoxicated and/or underage patrons and the lack of clear standards for responsible and non-negligent alcohol service practices. They argue that these factors can lead to arbitrary and unfair claims being brought against retailers. The RBS practices affirmative defense addresses these potential problems by establishing clear standards of non-negligent conduct. However, despite the benefits to both parties and the public, legislatures have largely ignored the RBS practices defense and have instead enacted the special restrictions on CHL described in this report.

Commercial host liability is one of several evidence-based strategies for preventing excessive alcohol consumption and related harm that is recommended by the Guide to Community Preventive Services. However, the results of this legal research indicate that CHL has been substantially eroded in many states during the past 2 decades, largely because of increased evidentiary requirements, limitations on damage awards, restrictions on who can sue, or some combination of these limitations. These results emphasize that no progress has been made in implementing the RBS affirmative defense in states, despite the potential benefits to both public health and retailers. These findings underscore the need for state and local public health departments, enforcement agencies, and state and community coalitions to monitor current state laws and proposed legislation addressing CHL, and to help inform the enactment and maintenance of CHL laws that support RBS practices and thereby curtail alcohol sales to underage and intoxicated patrons.

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