****

The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

****

SULLIVAN, C. J., with whom ZARELLA, J., joins, dissenting. Today the majority both overrules a case directly on point that properly had concluded that the Dram Shop Act (act) preempts the common law, and overrules more than 100 years of common-law precedent in creating a new cause of action for the negligent sale of alcohol. By doing so, the majority eviscerates a scheme of recovery that the legislature carefully had crafted in reliance upon these very long-standing, but now abandoned, common-law precedents. Because I believe, as this court has twice previously stated, that "[i]f the damage limitation [in the act] is inadequate, then the proper remedy is to increase the statutory limitation by legislative enactment rather than by overturning established judicial principles and precedents"; (internal quotation marks omitted) *Quinnett* v. *Newman*, 213 Conn. 343, 348, 568 A.2d 786 (1990); I respectfully dissent.

As the majority notes, "the legislature enacted the act to alleviate the harsh effects of the common-law rule on innocent third parties." Page of the majority opinion, citing *Nolan* v. *Morelli*, 154 Conn. 432, 437, 226 A.2d 383 (1967). More specifically, "this act, in situations where it was applicable, displaced the common-law rule that the proximate cause of intoxication was not the furnishing of the liquor but its consumption." *Nolan* v. *Morelli*, supra, 437. Thus, the rule displaced by the act is that "[a]t common law there is no cause of action based upon negligence in selling alcohol to adults who are known to be intoxicated." *Quinnett* v. *Newman*, supra, 213 Conn. 345.

Although the act provides that one who sells alcohol to an intoxicated person may be held liable for damages caused by that person in consequence of his intoxication, since 1959[1] the act has imposed limitations on the amount of damages that may be recovered from the seller. General Statutes § 30-102 ("[i]f any person, by himself or his agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of twenty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of fifty thousand dollars"). I believe that an examination of the circumstances under which the act was enacted and amended, and particularly its relationship to the common law as it then existed, indicate that the legislature intended the act to be the exclusive remedy for those whom it enables to recover.

As noted previously, the act was intended to provide relief to persons denied recovery in negligence by the

common law. In its earliest form, and until 1959; see Public Acts 1959, No. 631, § 1; the act permitted recovery of "just damages,"[2] subject to no statutory limitation. Public Acts 1872, c. XCIX, § 8.[3] Although it did not require proof of negligence and, therefore, also provided relief to some plaintiffs who could not have prevailed in a negligence action, the act did not require plaintiffs to prove any *additional* element beyond what would have been required to prevail in a negligence action. The act, therefore, provided for recovery of "just damages" by all plaintiffs who could have recovered in negligence if such a right had been recognized by the common law. Thus, until 1959, the act provided for full recovery against the negligent seller of alcohol for injuries caused by intoxicated persons.

The 1959 amendment, however, limited damages that might be recovered under the act, and thus limited damages that might be recovered by persons who could have proved the elements of a negligence action, had one existed, as well as the damages that might be recovered by those who could not prove that the seller had been negligent. Had the legislature intended the limitation to apply only to sellers who had not been negligent, it could have so provided. Instead, having created a right of recovery for those denied recovery by the common-law rule—that is, those who could have prevailed in a negligence action had the common law permitted one—the legislature chose to limit that right of recovery. Moreover, in 1961, when the legislature revisited the damages limitation, far from providing for unlimited damages for those who could demonstrate negligence, it lowered the ceiling on damages that it had established in 1959.[4] More than forty years have now passed since the 1961 amendment, during which the legislature could have provided by statute the unlimited damages that the majority supplies with its opinion. The legislature has not done so. Thus, the circumstances behind the enactment and amendment to the act lead me to conclude, as we concluded in *Quinnett* v. *Newman*, supra, 213 Conn. 348, that the legislature has preempted the judicial lawmaking in which the majority engages today.

The relationship of the act to other legislation in this area further suggests that the legislature did not intend to leave for the courts the question of whether to recognize a separate cause of action sounding in negligence, free from limitations on damages. "It is to state the obvious to observe that the liquor industry is heavily regulated." *Schieffelin & Co.* v. *Dept. of Liquor Control*, 194 Conn. 165, 180, 479 A.2d 1191 (1984). "This court . . . has recognized that the state's power and authority over the regulation of the liquor business is broad and pervasive." *Nelseco Navigation Co.* v. *Dept. of Liquor Control*, 226 Conn. 418, 422, 627 A.2d 939 (1993).

The legislature has exercised this power through voluminous and detailed statutes. Title 30 of the General

Statutes, the Liquor Control Act, not only empowers the department of consumer protection to adopt regulations in furtherance of that act; see General Statutes § 30-6a; but it also directly, and in great detail, regulates the provision of alcohol to consumers. For example, it regulates the issuance and revocation of literally dozens of varieties of permits, including distinct permits, with distinct conditions, for cafes, nightclubs, taverns, restaurants, airport bars, airport restaurants, and airport airline clubs, among many others. General Statutes §§ 30-14 through 30-37k.

The legislature's attention to detail in its regulation of purveyors of alcohol has taken many forms. The legislature has established on what days and during what hours alcohol may be sold, determined which nonmembers of clubs holding club permits are to be considered guests, established a maximum number of days per year on which the holder of a nonprofit theater permit is permitted to sell alcohol when no theater performance is given, and imposed a minimum number of bowling lanes for a bowling establishment permit and a minimum number of racquetball courts necessary to obtain a racquetball facility permit. General Statutes §§ 30-24, 30-35a, 30-37c and 30-91. It is thus against a background of extremely detailed and pervasive regulation of sellers of alcohol that we must consider the intent underlying the act as amended.

The pervasiveness of legislation in this area strongly suggests that the legislature, in enacting standards of liability for sellers of alcohol for damage caused by their intoxicated patrons, did not intend to leave for the courts the question of whether, and under what circumstances, liability beyond the statutory limits may be imposed on sellers for damage caused by their patrons. Instead, like its relationship to the common law at the time at which it was enacted and amended, the relationship of the act to the larger framework of legislation in this area leads me to conclude that the act was intended to provide the plaintiffs' exclusive remedy in the present case.

This same statutory background and the doctrine of stare decisis would strongly counsel against our recognition of a new common-law negligence action even had the legislature not preempted our common-law authority. "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and it is an obvious manifestation of the notion that decisionmaking consistency itself has normative

value.'' (Citations omitted.) *State* v. *Ferguson*, 260 Conn. 339, 367–68 n.18, 796 A.2d 1118 (2002). Moreover, as the United States Court of Appeals for the Second Circuit recently noted in a different context, ''[w]here a common-law principle is well established . . . the courts may take it as given that [the legislature] has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.'' (Internal quotation marks omitted.) *Attorney General of Canada* v. *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 127 (2d Cir. 2001). In my view, the doctrine of stare decisis has particular force in this case because of the long-standing nature of the common law upon which our legislature has relied in crafting the remedies available to parties such as the plaintiffs.

In its enactment and repeated amendment of the act, the legislature has no doubt been aware that, for more than 130 years, there has been no common-law right of recovery in negligence for plaintiffs such as those in the present case.[5] We have said as much in case after case before this court, all of which the majority overrules on this point today. See, e.g., *Quinnett* v. *Newman*, supra, 213 Conn. 345; *Boehm* v. *Kish*, 201 Conn. 385, 389, 517 A.2d 624 (1986); *Kowal* v. *Hofher*, 181 Conn. 355, 357, 436 A.2d 1 (1980); *Nolan* v. *Morelli*, supra, 154 Conn. 436. As such, the act represents the recovery scheme desired by the legislature in the absence of possible recovery at common law. Accordingly, the majority's radical change in the common law will upset the scheme of recovery envisioned by the legislature. In other words, the legislature's actions in this area were in reliance on our long established common law, and this reliance counsels against deviating from the principle of stare decisis.[6]

The majority's argument that '' 'the most cogent reasons and inescapable logic' '' justify overruling *Quinnett* is unpersuasive. Page of the majority opinion, quoting *State* v. *Ferguson*, supra, 260 Conn. 367 n.18. First, the majority notes that the act does not contain an express exclusivity provision. See page of the majority opinion. In light of the fact, however, that at the time the act was enacted, and for 130 years since that enactment, there has been *no* common-law cause of action, it would be surprising if the legislature had provided such an express provision.

Second, the majority seems to suggest that its position is supported by the legislature's silence in the years between our decision in *Kowal* v. *Hofher*, supra, 181 Conn. 358–59, in which we concluded that the act did not preempt the common law, and our decision in *Quinnett* in 1990, in which we properly concluded that it did. Page of the majority opinion. The majority seems to acknowledge, however, that it cannot reasonably rely upon such legislative silence as an affirmation of our decision in *Kowal* for the obvious reason that the

legislature has, in the twelve years following *Quinnett*, expressed no disagreement with our decision in *that* case. Page of the majority opinion. Indeed, contrary to the majority's statement that this post-1990 "legislative silence could just as reliably reflect an implied adoption of *Kowal* as of *Quinnett*"; page of the majority opinion; legislative silence since 1990, if it has any significance, can mean only that the legislature has acquiesced in our decision in *Quinnett*. This is because *Quinnett* cannot possibly be reconciled with *Kowal*, as the majority elsewhere acknowledges; page of the majority opinion; and, thus, *Quinnett* clearly overruled *Kowal*. Therefore, the majority's analysis of possible legislative acquiescence does not support its position.

Third, the majority claims that its recognition of a new common-law cause of action with unlimited liability for the negligent provision of alcohol does not conflict with the act's statutory limitation on damages. I disagree. The majority states that the "act provides a means of recovery for plaintiffs *who are unable to prove causation and culpability* . . . ." (Emphasis added.) Page of the majority opinion. Although this is technically true, the statute also provides recovery to those who *are* able to prove causation and culpability. As explained previously, the legislature reacted to our common law by adopting a statute in this precise area that *provides a limit on recoverable damages*. In my view, to provide a further remedy, which the legislature itself has *not* chosen to provide, is inconsistent with the damages limitation that the legislature *has* adopted.

Moreover, the well established common-law rule abandoned by the majority was based upon a commonsense observation that maintains its validity today. "The reason generally given for the rule was that the proximate cause of the intoxication was not the furnishing of the liquor, but the consumption of it by the purchaser or donee. The rule was based on the obvious fact that one could not become intoxicated by reason of liquor furnished him if he did not drink it." *Nolan* v. *Morelli*, supra, 154 Conn. 436–37. In my view, the responsibility of an individual for injuries resulting from his driving while intoxicated should not be reduced because another individual has provided the alcohol to him. As a result of the majority's decision today, juries will be permitted to apportion liability between the consumer and the provider, and a drunken driver's liability for the consequences of his actions will be reduced to the extent that the provider is held liable.[7]

Although the change in the law brought about by today's decision clearly will have a considerable impact on business and social relationships, the scope and nature of that impact remain unclear. This uncertainty suggests that the legislature, which can invite public participation in the analysis of all relevant policy considerations and provide clear prospective rules to imple-

ment that policy, is better suited than this court to determine the costs and benefits of various liability regimes. As the majority indicates, drunken driving is a serious social ill that frequently results in tragedy, just as it did in the present case. Our sympathy for the victims of drunk drivers, however, should not lead us to usurp the legislature's authority to formulate public policy in this area. As we noted just this year, ''just as the primary responsibility for formulating public policy resides in the legislature . . . so, too, does the responsibility for determining, within constitutional limits, the methods to be employed in achieving those policy goals.'' (Citations omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 715, 802 A.2d 731 (2002). The majority's opinion disregards this fundamental principle.

Finally, not only do I believe that the majority has improperly created a new common-law cause of action, I also have some difficulty understanding what a plaintiff must show in order to prevail under such an action. One statement in the opinion suggests that the majority broadly is ''recogniz[ing] an action against a purveyor who negligently serves alcoholic liquor to an adult patron who, as a result of his intoxication, injures another.'' Page of the majority opinion. As I discuss subsequently, however, the majority also formulates the cause of action in several other differing ways, leaving me, and, I suspect, the trial courts of this state, uncertain as to the showing required to demonstrate such negligence.

To begin with, although it is not perfectly clear from the previous quotation, I assume that the majority intends at least to require that, in order to prevail, the plaintiff must demonstrate that the defendant's negligent *service of liquor*, as opposed to merely the patron's *intoxication*, is causally related to the plaintiff's injury. See page of the majority opinion (stating that common-law negligence action can be satisfied upon proof that, inter alia, defendant's ''negligence is a substantial factor in causing harm to a third person'' [internal quotation marks omitted]), quoting *Slicer* v. *Quigley*, 180 Conn. 252, 273, 429 A.2d 855 (1980) (*Bogdanski, J.*, dissenting).

Second, notwithstanding the broad preceding quotation, the majority seems to clarify elsewhere in the opinion that in order to establish the negligent service of alcohol, it is not sufficient merely to demonstrate that the defendant served an intoxicated person. Rather, the plaintiff must demonstrate that the defendant ''[knew] or should have known [that the] person [was] intoxicated . . . .'' (Internal quotation marks omitted.) Page of the majority opinion, quoting *Slicer* v. *Quigley*, supra, 180 Conn. 273 (*Bogdanski, J.*, dissenting); see also footnote 20 of the majority opinion (same language); page of the majority opinion (serving alco-

hol to an ''*obviously* intoxicated person'' may be negligent [emphasis added]); page of the majority opinion (discussing ''element of scienter essential to a negligence action'').

Finally, the majority opinion is unclear as to the need to demonstrate that the defendant knew or should have known that the patron was an alcoholic and that he intended to drive after being served. See page footnote 20 of the majority opinion (question of fact whether ''defendants actually knew or should have known that [the patron] . . . was an alcoholic, and that he would operate a motor vehicle''); page of the majority opinion (''we expressly reject the claim that a purveyor who provides alcoholic beverages to . . . a *patron known to him to be an alcoholic cannot*, as a matter of law, be the proximate cause of subsequent injuries caused by the intoxicated patron'' [emphasis altered]); page of the majority opinion (serving to ''intoxicated person by one who knows or reasonably should know that such intoxicated person *intends to drive* a motor vehicle creates a reasonably foreseeable risk of injury'' [emphasis added]).[8]

In summary, I believe that the radical change in the law wrought by the majority usurps the function of the legislature and is unwarranted on its merits. Since the majority is determined to take this step, however, it should, at the very least, set forth the precise elements of the new cause of action that it is creating. Accordingly, I respectfully dissent.

[1] In 1959, the legislature amended the act to impose limitations on damages to be recovered under the act. Public Acts 1959, No. 631, § 1 (imposing liability on sellers ''up to the amount of twenty-five thousand dollars''). The limitation was lowered to its present level in 1961. Public Acts 1961, No. 432.

[2] Under the act, '' '[j]ust damages' means simply compensatory . . . damages.'' *Gionfriddo* v. *Gartenhaus Cafe,* 15 Conn. App. 392, 399–400, 546 A.2d 284 (1988), aff'd, 211 Conn. 67, 557 A.2d 540 (1989).

[3] Section 8 of chapter XCIX of the 1872 Public Acts provides: ''If any person shall, while in a state of intoxication, do or cause (in consequence thereof) any damage or injury to any other person, or to the property of another, then, in such case, whoever sold the liquor to such person, whereby the person doing or causing such injury became intoxicated, shall be liable to pay to the party injured just damages, to be recovered in an action on this statute; and if the party selling such liquor is a licensed dealer under this act, said amount may be recovered from the surety or sureties on his or her bond, provided it does not exceed the sum of one thousand dollars.''

[4] See footnote 1 of this opinion.

[5] We previously have permitted actions in negligence against defendants who provide alcohol to minors where those minors have harmed third parties in consequence of their intoxication. See *Bohan* v. *Last*, 236 Conn. 670, 671, 674 A.2d 839 (1996); *Ely* v. *Murphy*, 207 Conn. 88, 95, 540 A.2d 54 (1988). The propriety of such actions is not presently before the court.

[6] Sellers of alcohol also presumably have a reliance interest in our long-standing common-law rule prohibiting recovery in negligence in such cases. Although the majority notes that parties who engage in tortious conduct seldom consider the rule of law that will be applied to their conduct if damage results; page of the majority opinion, citing *Conway* v. *Wilton*, 238 Conn. 653, 660, 680 A.2d 242 (1996); this principle is of very doubtful application to business establishments facing the prospect of vicarious liability for the acts of their employees, such as waiters, waitresses and bartenders. Presumably, in many cases, these proprietors will have obtained liability insurance to cover losses imposed by the act, and the proprietors and their insurers will have acted in justified reliance on the belief that their liability

was limited according to the terms of the act and the long-standing common law that the majority abrogates.

[7] Under General Statutes § 52-572h (c), "[i]n a negligence action to recover damages resulting from personal injury, wrongful death or damage to property occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages except as provided in subsection (g) of this section." While there are cases in which plaintiffs will be able to recover more money as a result of today's holding, owing to the deeper pockets of the individual or institution providing alcohol to the negligent consumer, there will also be cases in which the majority's rule will have the opposite effect. Among the drunken drivers who will be able to add the providers of alcohol as defendants for apportionment of liability purposes under General Statutes § 52-102b (a) will be some who have the ability to pay the full amount of damages. See General Statutes § 52-102b (a) ("[a] defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability"). In some cases, the establishment or social host who has served alcohol to the consumer will be unable to pay the proportion of damages assigned, and the consumer's evasion of some of the responsibility for the consequences of his or her voluntary intoxication will be at the expense not of the provider but of the victim. I would consider such a case an injustice. See General Statutes § 52-572h (g) (2) (limiting amount of noneconomic damages, unrecoverable from one joint tortfeasor, that may be reallocated to another).

[8] The majority opinion also could be read to state that merely providing a single drink to a person known to be an alcoholic could be negligent, even if such provision did *not* result in intoxication, if the person subsequently became intoxicated and caused an injury. See page of the majority opinion ("we expressly reject the claim that a purveyor who provides alcoholic beverages to . . . *a patron known to him to be an alcoholic cannot*, as a matter of law, be the proximate cause of subsequent injuries caused by the intoxicated patron" [emphasis altered]). I assume that the majority did not mean to dispense with the requirement that the drink caused the alcoholic to become intoxicated, or was provided to an intoxicated alcoholic, in view of the fact that the majority has advanced no rationale for dispensing with the intoxication requirement in order to establish negligence in the context of serving to a known alcoholic.