# IN THE SUPREME COURT OF TEXAS

NO. 02-0381

F.F.P. OPERATING PARTNERS, L.P., D/B/A MR. CUT RATE #602, PETITIONER,

v.

XAVIER DUENEZ AND WIFE IRENE DUENEZ, AS NEXT FRIENDS OF CARLOS DUENEZ AND PABLO DUENEZ, MINORS, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

**Argued November 30, 2005**

CHIEF JUSTICE JEFFERSON, dissenting.

If a bar sells liquor to a person so "obviously intoxicated" that he is "a clear danger to himself and others," to what extent does the sale "proximately cause" the harm that person inflicts when he gets behind the wheel? The Legislature has answered that it does not matter. If the bar sells to a drunk, it must pay damages when the drunk's intoxication (not the provider's sale) causes the sort of trauma at the heart of this case. The Legislature plainly believes that deterring such a sale is sound public policy. By imposing potentially crippling financial penalties on those who ignore its dictates, the statute has the salutary effect of enlisting providers in the state's campaign against drunk driving. Under the Court's construction, however, the bar may *avoid* liability precisely *because* its patron was so "obviously intoxicated" and such a "clear danger" that the sale could not have proximately caused

carnage on a Texas road. The dram shop thus has a perverse incentive to establish at trial that its customer was in such a drunken state that selling him "one for the road" could not have contributed to the harm his intoxication later caused. I cannot agree that the Legislature intended as a defense to liability proof that the dram shop completed a sale that the statute quite sensibly forbids.

The Court relies heavily on our opinion in *Sewell*, but as I demonstrate below, the Court's reliance on that case only perpetuates our prior error in interpreting the Dram Shop Act. *See Smith v. Sewell*, 858 S.W.2d 350, 356 (Tex. 1993). I would hold, contrary to *Sewell*, that the Legislature has imposed a form of vicarious liability on a dram shop for the acts of its intoxicated customer. Because the shop's conduct is statutorily irrelevant in relation to the plaintiff's injury, there is no legitimate basis for comparing its responsibility with that of the intoxicated person.

## I
## Vicarious Liability and the Dram Shop Act

The question here is whether and, if so, how chapter 33's proportionate responsibility scheme applies to claims based on the Dram Shop Act. Our separate writings in this case demonstrate that the statutes are not easily harmonized. *See also Fid. & Guar. Ins. Underwriters Inc. v. Wells Fargo Bank*, No. H-04-2833, 2006 U.S. Dist. LEXIS 23545, at *17 (S.D. Tex. Mar. 31, 2006) (noting that "courts and commentators alike have recognized the difficulty in reconciling the language of the Proportionate Responsibility Statute with certain causes of actions, including vicarious and/or derivative liability actions"). This is not the first time we have struggled to reconcile chapter 33 with another statute's terms. *See, e.g., Southwest Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 111 (Tex. 2004) (concluding that, even assuming a UCC conversion claim is a tort, "the Legislature

did not intend to upset the UCC's carefully balanced liability provisions by applying Chapter 33 to a UCC-based conversion claim" and "[t]o hold otherwise would ignore the UCC itself and thwart its underlying purpose"). Nor have we been the only court to recognize exceptions to the statute's apportionment scheme. *See, e.g., Fid. & Guar. Ins. Underwriters*, 2006 U.S. Dist. LEXIS 23545, at *18 ("Although the language of the statute itself indicates a clear legislative preference for apportionment of responsibility in all tort actions, it is equally clear that an apportionment scheme is not proper in certain cases."); *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 656-57 (Tex. App.—Dallas 2002, pet. denied).

The Court and JUSTICE O'NEILL would submit both the provider and the intoxicated person in the apportionment question, the Court employing it to reduce the dram shop's liability and JUSTICE O'NEILL to facilitate the shop's contribution action against the intoxicated tortfeasor. While I concede that *Sewell* supports a comparative submission of the provider and the intoxicated person, such a submission is inconsistent both with the provider's essentially vicarious liability and chapter 33's mandate to apportion liability only among those causing the harm at issue. The Court holds that dram shop liability cannot be vicarious, reiterating our holding in *Sewell* that such liability is based on the provider's own conduct. JUSTICE O'NEILL writes that liability is both direct and vicarious, as it includes the provider's wrongful sale and imputes to the provider the harm caused by the drunk's intoxication. I disagree with those interpretations. To give effect to each statute, we must acknowledge that the Dram Shop Act imposes a form of vicarious liability.

Both the Dram Shop Act and chapter 33 support such an interpretation. While liability under the Dram Shop Act is premised on the provider's sale, the requisite causal link focuses solely on the

drunk's actions. Once alcohol is provided to a person so "obviously intoxicated to the extent that he presented a clear danger to himself and others," the provider's role is complete. *See* TEX. ALCO. BEV. CODE § 2.02(b)(1). From that point forward, any harm caused by the intoxicated person is imputed to the provider; indeed, for purposes of the Dram Shop Act, the provider virtually becomes the drunk. Hence, the only causation required under the statute focuses on the intoxicated person's, not the dram shop's, actions. *Id.* § (b)(2) (requiring proof that "the *intoxication* of the recipient of the alcoholic beverage was a proximate cause of the damages suffered") (emphasis added).

F.F.P. concedes that, under the Dram Shop Act, the provider's actions need not be a cause-in-fact of the harm.[1] Earlier versions of the act included such an element, but the Legislature deleted it before the statute was enacted. *Compare* Tex. C.S.H.B. 1652, 70th Leg., R.S. (1987) (Dram Shop Act claim requires proof that "the provider was the last known contributor to the intoxication of the recipient; and that the recipient consumed no alcoholic beverage subsequent to that served by the last contributor") *with* TEX. ALCO. BEV. CODE § 2.02(b) (containing no such requirement). Instead, unlike other states,[2] the Texas statute imposes liability even absent causation relating to the provision

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[1] F.F.P.'s reply brief asserts, correctly, that "[u]nder [the statutory] elements, the dram shop plaintiffs need not prove that 'but for' the alcohol seller's conduct, the harm would not have occurred—presumably because it will always be hard to prove that any injury occurred because of any particular sale of alcoholic beverage."

[2] Some states require that the dram shop's provision of alcohol cause the harm. *See, e.g.*, ARK. CODE § 16-126-104 (2006) (requiring jury in dram shop case to determine "whether or not the *sale* constitutes a proximate cause of any subsequent injury to other persons") (emphasis added); GA. CODE § 51-1-40 (2000) ("[A] person who . . . knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such minor or person *when the sale, furnishing, or serving is the proximate cause of*

of alcohol.[3] If the dram shop's conduct need not be a substantial factor in bringing about the injury, then it cannot be said to have caused or contributed to the accident. *See Union Pump Co. v. Allbritton,* 898 S.W.2d 773, 775 (Tex. 1995).

That Texas omitted such a requirement is significant. Chapter 33 requires apportionment among claimants, defendants, settling persons, and responsible third parties, but not all such persons are submitted in the apportionment question. *See* TEX. CIV. PRAC. & REM. CODE § 33.003. Instead, chapter 33 imposes an important limitation on the allocation of responsibility: *Only those persons who "caus[ed] or contribut[ed] to cause in any way the harm for which recovery of damages is*

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*such injury or damage*.") (emphasis added); MICH. COMP. LAWS § 436.1801 (2001) ( "[A]n individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, *if the unlawful sale is proven to be a proximate cause of the damage, injury, or death*, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person *who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death*") (emphasis added); TENN. CODE § 57-10-102 (2002)(imposing liability if a jury finds, "beyond a reasonable doubt that the *sale* by such person of the alcoholic beverage or beer *was the proximate cause of the personal injury or death sustained* and that such person . . . [s]old the alcoholic beverage or beer to an obviously intoxicated person and such person *caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold*") (emphasis added).

[3] This may seem punitive, as it risks imposing liability without fault, but the Legislature also provides a relatively cost-free safe harbor: the trained server defense. As the Court's original opinion noted, section 106.14(a) provides that "the actions of an employee shall not be attributable to the employer if" the provider establishes that it required the employee to attend a training course approved by the Texas Alcoholic Beverage Commission, the employee actually attended the course, and the provider did not encourage the employee to violate the Alcoholic Beverage Code. Act of May 21, 1987, 70th Leg., R.S., ch. 582, § 3, 1987 Tex. Gen. Laws 2298, 2299 (amended 2003) (current version at TEX. ALCO. BEV. CODE § 106.14(a)).

*sought"* must be included in apportioning responsibility for that harm.[4] *Id.* §§ 33.003, 33.011(4) (emphasis added); William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by Another*, 55 BAYLOR L. REV. 617, 638 (2003) (hereinafter "*Apportioning Responsibility*") ("[U]nder section 33.003, the jury apportions responsibility among only those persons whose *conduct caused or contributed to cause the plaintiff's injury*.") (footnote omitted) . This restriction is "especially significant" in cases involving claims against persons whose liability is vicarious:

> A person whose liability was purely vicarious had not personally engaged in "conduct or activity" that had "caused or contributed to cause" the harm. Liability was based instead entirely on the relationship between the person whose tortious conduct proximately caused the harm and the person who was vicariously responsible. Thus, rather than allocating responsibility among persons directly liable and persons vicariously liable, whatever responsibility existed for persons directly liable was simply passed on to persons vicariously liable. The vicariously liable defendant essentially stepped into the shoes of the tortfeasor who was directly responsible and assumed that person's responsibility to the claimant.

*Id.* at 628-29 (footnote omitted). Because the inquiry involves the harm for which recovery of damages is sought, "it is obvious that it concerns only the primary conduct of the active participants in the event, accident, or physical episode giving rise to the injuries complained of by the claimant, and the causational role of that primary conduct in the episode." Carl David Adams, *The "Tort" of*

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[4] This is consistent with *Borneman v. Steak & Ale of Texas, Inc.*, 22 S.W.3d 411, 412-13 (Tex. 2000), a dram shop case in which we held that it was error to submit a jury question asking whether the conduct of an alcohol provider was a proximate cause of the occurrence in question. After the Court issued its November 3, 2006 opinion, the Duenezes moved for rehearing, asserting that the Court's latest interpretation of the statute directly conflicts with *Borneman*. A comparative submission, which the Court now requires in this case, presupposes that the provider's conduct is in issue. In this respect, the Court's current holding certainly undermines, if not overrules, *Borneman*.

*Civil Conspiracy in Texas*, 54 BAYLOR L. REV. 305, 315 (2002); Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 TEX. TECH L. REV. 1125, 1184-86 (2004) (noting that "[i]t is problematic to assign the jury the task of apportioning responsibility between the intoxicated person and the dram shop when the dram shop's statutory liability is not necessarily based on true responsibility for the accident, in the sense of causing the accident, at all").

Courts applying chapter 33's apportionment scheme in negligent entrustment cases—a variant of vicarious liability—have used similar reasoning to conclude that an entrustor should not be included in the apportionment question. In *Rosell v. Central West Motor Stages, Inc.*, the Rosells, plaintiffs in a wrongful death and survival action, contended that the trial court erred by refusing to submit Central West, employer of the allegedly negligent bus-driver and owner of the vehicle that struck and killed their son, in the jury's apportionment question. The court of appeals disagreed:

> The Rosells contend that Central West should be included because it was a producing or contributing cause of the injuries to Chad. Although negligent entrustment and negligent hiring are considered independent acts of negligence, these causes are not actionable unless a third party commits a tort. In that respect, these causes are similar to the respondeat superior theory of recovery where, unless the employee commits a tort in the scope of employment, the employer has no responsibility. In reviewing the application of section 33.003 to responsibility, we observe that, while the statute on its face requires all defendants to be included in the apportionment question, it would not be proper for an employer to be included along with the driver if its only responsibility was that of respondeat superior. Section 33.003 has not been used to require both a driver and employer to be submitted in the apportionment question in that situation.
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> Similarly, the causes of action for negligent entrustment and hiring are a means to make a defendant liable for the negligence of another. Once negligent hiring or entrustment is established, the owner/employer is liable for the acts of the driver, and the degree of negligence of the owner/employer is of no consequence. Thus, because

> Rieve's negligence would be passed on, it was proper to apportion fault among those directly involved in the accident.

*Rosell*, 89 S.W.3d at 656-57 (citations and footnote omitted).

Even before chapter 33's 1995 amendments, courts engaged in similar analysis to conclude that the entrustor should not be included in an apportionment question. In *Loom Craft Carpet Mills, Inc. v. Gorrell*, the court of appeals noted that:

> Negligent entrustment liability is derivative in nature. While entrusting is a separate act of negligence, and in that sense not imputed, it is still derivative in that one may be extremely negligent in entrusting and yet have no liability until the driver causes an injury. If the owner is negligent, his liability for the acts of the driver is established, and the degree of negligence of the owner would be of no consequence. When the driver's wrong is established, then by negligent entrustment, liability for such wrong is passed on to the owner. We believe the better rule is to apportion fault only among those directly involved in the accident, and to hold the entrustor liable for the percentage of fault apportioned to the driver.

*Loom Craft*, 823 S.W.2d 431, 432 & n.7 (Tex. App.—Texarkana 1992, no pet.) (declining to follow cases from other jurisdictions in which fault was apportioned to the entrustor); *see also Wyndham Hotel Co. v. Self*, 893 S.W.2d 630, 640 (Tex. App.—Corpus Christi 1994, writ denied); *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. App.—El Paso 1966, writ ref'd n.r.e.) (noting that, in a negligent entrustment case, "[t]he proximate cause of the accident or the occurrence is the negligence of the driver and not that of the owner").

More recently, the Fort Worth Court of Appeals grappled with the proper submission of a negligent entrustment claim. *Bedford v. Moore*, 166 S.W.3d 454 (Tex. App.—Fort Worth 2005, no pet.). Based in part on this Court's now-withdrawn opinion in this case, the court concluded that the entrustor should be submitted in the apportionment question. The court then held, however, that

failure to submit the entrustor was not reversible error:

> There were only two people involved in the accident. Therefore, the submission of the acts of "other parties" whose actions preceded the actions of [the driver] at the time of the accident could only have contributed to her actions at the accident scene, that is, to her forty percent negligence. In other words, because there were only two parties involved in the incident, the jury has decided how those actions at the time of the accident should be apportioned as far as responsibility is concerned. What led up to those actions at the time of the accident does not change those actions at the accident scene but can only be subparts of those respective responsibilities. [The entrustors] did not cause [the plaintiff] to cross the highway or [the driver] to strike that truck. Therefore . . . we conclude that it was harmless error to omit them from those questions.

*Bedford*, 166 S.W.3d at 464.[5] This passage captures the proper submission in a vicarious liability case: If, in fact, the entrustor's share of responsibility is merely a "subpart" of the entrustee's share, then the entrustor should not be submitted separately. Only the entrustee should be submitted, and his or her negligence would then be imputed to the entrustor as a matter of law.

Under similar reasoning, even after chapter 33's 1995 amendments, the provider should not be included in the apportionment question. The Dram Shop Act is "intended to deter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury on themselves and on innocent members of the general public." *Sewell*, 858 S.W.2d at 356. The Court's holding runs counter to that policy. As commentators recognize:

> If a person whose conduct creates a foreseeable risk of misconduct by another (in

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[5] On the failure-to-submit issue, Chief Justice Cayce concurred in the result only, as he felt that the sixty-percent responsibility the jury placed on the plaintiff barred her recovery as a matter of law, rendering harmless any error in failing to submit the employer's negligence. *Bedford*, 166 S.W.3d at 456 (Cayce, C.J., concurring).

> other words, a person whose liability is derivative) can largely escape responsibility simply because the very event which made his own conduct wrongful in the first place actually occurs, then the incentive to take precautions against the risk is substantially reduced. This concern is especially great when the foreseeable event is a crime of violence given the likelihood that a jury, when asked to apportion responsibility between a person who commits a crime of violence and a person whose conduct simply involved facilitating that crime through negligence, might be expected to apportion most of the responsibility to the person who actually committed the crime. Allocating responsibility in cases of vicarious or derivative liability would not only be bad policy, but has not traditionally been how Texas courts have interpreted and applied the allocation of responsibility provisions in Chapter 33. Moreover, nothing in the language or the legislative history of the 1995 tort reform revisions to the allocation of responsibility provisions of Chapter 33 either requires or justifies departure from the traditional rule that juries are not asked to allocate responsibility between persons who are directly liable and persons whose liability is either derivative or vicarious.

*Apportioning Responsibility*, 55 BAYLOR L. REV. at 624-25 (footnotes omitted). Thus, "given that causation is imputed to the provider in an action under the [Dram Shop] Act, section 33.003 neither contemplates or permits the apportionment of responsibility between the intoxicated patron and the provider in an action brought by an injured third party." *Id.* at 642. This approach is supported by the Restatement, which provides that "[a] person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 (2000).

The Court concludes that it is improper to analogize dram shop claims to other vicarious liability situations, because those situations typically rely on a right of control or an employer/employee relationship, which may be absent in a dram shop situation. In this case,

however, the Legislature chose to impose vicarious liability for Dram Shop Act claims and consciously opted to omit control as a prerequisite. That the justification for doing so may not comport with the rationale for common-law vicarious liability is beside the point.

The Court reasons that, because the Dram Shop Act was not among the explicit exceptions to proportionate liability set forth in chapter 33, it must be included. This is not necessarily so. As we recognized in *Southwest Bank*, if another statute enacts a comparative responsibility scheme, chapter 33 will not govern a claim brought under the other statute, notwithstanding that the other statute is not among chapter 33's enumerated exceptions. *See Southwest Bank*, 149 S.W.3d at 111. Nor did the Legislature exclude negligent entrustment or respondeat superior claims from the reach of chapter 33. Applying the Court's logic, by omitting those actions the Legislature intended that employers or entrustors be submitted in an apportionment question even though their liability is purely vicarious. More likely, the Legislature never envisioned that a court would include in the apportionment question persons whose only liability was vicarious.

The Court's decision to include the provider in the apportionment question would first necessitate an inquiry otherwise unnecessary under the Dram Shop Act: whether the provider's conduct caused or contributed to cause the plaintiff's injuries. *Apportioning Responsibility,* 55 BAYLOR L. REV. at 638.

> If the jury's answer was no, then under the express language of section 33.003, the jury could not consider the provider in apportioning responsibility. Since no responsibility could be apportioned to the provider, one possible result would be that the provider would not be liable for any of the plaintiff's damages. This result would have the effect of rewriting the Dram Shop Act to read into the Act a causation requirement that simply is not there. *The provider would always escape all*

> *responsibility unless the jury found a causal connection between the provider's conduct and the plaintiff's injury. That result obviously would be wrong.*

*Id*. (footnote omitted) (emphasis added). The Legislature meant to make providers liable *whether or not* their conduct played a causative role in subsequent harm. The Court's holding eviscerates that policy choice and requires that the Duenezes prove not only that Ruiz consumed F.F.P.'s alcohol, but also that his consumption so aggravated the danger he posed pre-sale that the sale (and not just his prior intoxicated condition) "caused" the ultimate harm. But the statute does not require that the patron consume the alcohol, that the sale aggravate the patron's prior intoxication, or that the provider play any role in causing or contributing to the accident. Ironically, under the Court's interpretation, the provider now has an incentive to establish that its patron was so drunk at the time of sale that its conduct could not, as a matter of law, have contributed to the harm the patron ultimately caused. As a result, the very instrument that the Legislature employed to deter drunk driving (liability for serving a drunk) becomes a means to escape responsibility entirely.

Joining the intoxicated person as a responsible third party does not change this result. *See* TEX. CIV. PRAC. & REM. CODE § 33.011. As commentators have noted:

> By adding the [responsible third party language] to section 33.003, the Texas legislature clearly intended to change existing law regarding the apportionment of responsibility among tortfeasors with direct liability. But there is absolutely no indication in either the legislative history or the text of the amended apportionment of responsibility provisions of Chapter 33 that the legislature intended to now permit apportionment of responsibility among directly liable tortfeasors and those whose liability was only derivative or vicarious.

*Apportioning Responsibility*, 55 BAYLOR L. REV. at 631. Whatever percentage of responsibility is attributed to the drunk should be imputed to the provider, who may then seek indemnity from the intoxicated person. *Cf. Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 819-20 (Tex. 1984).

## II
## *Sewell* and Third-Party Actions

If I were writing on a clean slate, my analysis could end here. But in *Smith v. Sewell*, we determined that "[chapter 33] is applicable to Chapter 2 causes of action" and held that "an intoxicated person suing a provider of alcoholic beverages for his own injuries under Chapter 2 will be entitled to recover damages only if his percentage of responsibility is found to be less than or equal to 50 percent." *Sewell*, 858 S.W.2d at 356. Although our holding was not limited to first-party claims (*i.e.* a drunk suing a dram shop), our reasoning arguably supports such a limitation:

> Chapter 2 is intended to deter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury on themselves and on innocent members of the general public. But when it is the intoxicated individual who is injured due to his own intoxication, it is particularly appropriate that his conduct in contributing to his injury should be considered in assessing the amount of recovery, if any, to which he is entitled. Application of the principles of comparative responsibility to causes of action brought under Chapter 2 establishes a consistent and equitable approach to the issue of "dramshop liability" generally, and first party "dramshop liability" specifically. This approach provides an effective solution to a difficult and controversial issue.

*Id*.

Even if limited to first-party claims, however, *Sewell* presents another, more difficult, problem. In *Sewell*, we held—incorrectly, in my opinion—that a provider should be included in the apportionment question because its conduct violated an applicable legal standard. *Sewell*, 858 S.W.2d at 356 (quoting "percentage of responsibility" definition and holding that "[b]ecause Chapter

2 clearly establishes a legal standard and creates a cause of action for conduct violative of that legal standard, the definition of 'percentage of responsibility' provides additional support for our determination that the Comparative Responsibility Act is applicable to Chapter 2 causes of action"). Implicitly, therefore, we held that the provider in a dram shop case must have "caused or contributed to cause" the harm for which recovery of damages was sought. For the reasons set forth above, that simply need not be the case. While *Sewell* remains workable for first-party claims, as apportionment between the drunk and the provider approximates what would occur in an indemnity action,[6] *Sewell*'s reasoning breaks down when applied to third-party dram shop actions. Submitting both the drunk and the provider as parties who "caused or contributed to cause" the harm, rather than imputing the drunk's actions to the provider, would allow the provider to lessen or escape liability altogether.

Thus, for example, a jury could determine that a provider's "percentage of responsibility" is zero—a not unlikely scenario given that the provider's actions are compared with a person so obviously intoxicated he posed a danger to himself and others—notwithstanding that the drunk's intoxication proximately caused the harm. This contravenes the purpose as well as the text of the Dram Shop Act, which imposes liability even absent causation relating to the provision of alcohol, and is unnecessary to a proper application of chapter 33. *See* TEX. ALCO. BEV. CODE § 1.03 (requiring that the Dram Shop Act be liberally construed to accomplish its purpose of protecting the welfare, health, and safety of the people). "To paraphrase Dean Prosser, it simply cannot be the law

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[6] *See B & B Auto Supply, Sand Pit, & Trucking Co. v. Cent. Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980) (recognizing common law right to indemnity when a party's liability is vicarious).

that a defendant can be relieved of the consequences of his wrongful conduct by the occurrence of the very risk which made his conduct negligent in the first instance." *Apportioning Responsibility*, 55 BAYLOR L. REV. at 650.

In *Sewell*, we were faced with a person suing a dram shop for damages he suffered in a one-car accident due to his own intoxication. Although *Sewell* correctly held that chapter 33 applies to first-party Dram Shop Act claims, its holding regarding the submission of the provider in the apportionment question cannot apply to third-party claims, and its reasoning for that submission does not comport with the statute's terms. Thus, I would limit *Sewell* to first-party claims and overrule its holding that the provider is properly included within those persons who caused the harm.

## III
## Conclusion

The Legislature, confronting a serious question of public health, enacted a strong deterrent to curb the plague of drunk driving in Texas. If a provider sells to a drunk, it must answer in damages for the injury its patron's intoxication visits upon an innocent person, even if the sale is not itself the proximate cause. The policy reflects a concern not only for the victim. It is a comprehensive approach designed to discourage the sale of liquor to a person whose intoxication poses an obvious danger to the public. Faced with the specter of catastrophic financial loss, a provider is more likely to intervene (for selfish interests, and to the public good) by closely monitoring a customer's alcohol intake, by refusing to serve more liquor to an obviously drunk person and, where appropriate, by offering to arrange alternative transportation or by alerting law enforcement. At a minimum, the provider has a direct incentive to enroll its employees in training

that emphasizes how to recognize the debilitating effects of excessive alcohol consumption and offers methods to avoid its devastating consequences. *See* TEX. ALCO. BEV. CODE § 106.14(a). Considerations like these justify the Legislature's intentional omission of a proximate cause element with respect to the provider's sale. The Court's insertion of that defense, contrary to the statute's terms, seriously undermines an important deterrent.

In an appeal to cozening hope, the Court offers that a jury will not *always* assign most of the responsibility to a provider's patron. ___ S.W.3d at ___. The Duenezes will take cold comfort in that pronouncement. The record shows that Ruiz—already so intoxicated that he was a clear danger to others before F.F.P. completed the sale—drank, at most, one more beer in 1.5 miles of highway driving afterwards. Under the legal sufficiency standards announced in *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005), that evidence will never support a finding that F.F.P. caused the accident. The Court's remand for a new trial is, in reality, a decree of rendition.

I would affirm the court of appeals' judgment.[7] *See* TEX. R. APP. P. 60.2(a).

Wallace B. Jefferson
Chief Justice

**OPINION DELIVERED:** May 11, 2007

[7] F.F.P. also contends the trial court erred in refusing to instruct the jury on sole proximate cause. F.F.P. bases its claimed entitlement to that instruction on evidence that Ruiz was reaching under the seat for a compact disc when the accident occurred, and it was this inattention, rather than Ruiz's intoxication, that caused the accident. The court of appeals held that Ruiz's carelessness was indistinguishable from his intoxication and, therefore, the trial court did not abuse its discretion in refusing to give the requested instruction. 69 S.W.3d at 809. In this Court's original opinion, the Court concluded that, as "[t]he instruction . . . ask[ed] the jury to compare the actions of two different people rather than distinguish between the same person's intoxication and inattention[,] [t]he requested instruction would not have focused the jury's attention on the act that F.F.P. contends was the sole proximate cause of the Duenezes' injuries; thus, the trial court did not err in refusing to submit it." I agree with both the court of appeals and the Court's original opinion on this point.