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NOTES

ROHLFS v. KLEMENHAGEN, LLC: IS IT TIME TO REVISE MONTANA’S DRAM SHOP ACT?

Ross Sharkey*

I. INTRODUCTION

Nearly every week, readers of Montana newspapers are reminded of the State’s drunk-driving epidemic. Whether the given news article details sentencing of a repeat DUI offender, 1 describes the Legislature’s most recent proposals to reform drunk-driving laws, 2 or chronicles the effects of a drunk-driving fatality, 3 the message remains the same: Montana has a problem with drinking and driving. Indeed, 103 of the State’s 229 traffic fatalities in 2008 were alcohol related. 4 Of those fatalities, 91 involved a driver with a blood alcohol content (BAC) over the .08 grams-per-deciliter legal limit. 5

* Thanks to Professor Stacey Gordon for her helpful comments and to my wife Lyndsey for her suggestions and support.


4. Alcohol Alert, Montana Drunk Driving Statistics, http://www.alcoholalert.com/drunk-driving-statistics-montana.html (last accessed Nov. 11, 2010). The National Highway Traffic Safety Administration considers a crash alcohol related if “at least one driver or non-occupant (such as a pedestrian or pedalcyclist) involved in the crash is determined to have had a blood alcohol concentration (BAC) of .01 gram per deciliter (g/dL) or higher.” Id.

5. Id.
Despite the attention drunk driving and alcohol-related traffic fatalities have received, Montana law fails to adequately punish drunk drivers and those who negligently serve them alcohol. For instance, drunk driving is not a felony until an offender’s fourth conviction. Additionally, Montana’s Dram Shop Act, which imposes civil liability on alcohol providers for the torts of their drunk patrons in certain situations, contains provisions that unnecessarily limit the ability of injured third parties to recover damages from negligent alcohol providers.

Recently, in Rohlfs v. Klemenhagen, LLC, the Montana Supreme Court upheld the Dram Shop Act’s strict 180-day notice requirement against equal-protection and special-legislation challenges. The decision denied plaintiff Cary Rohlfs recovery against the defendant tavern that served Joseph Warren alcohol over an 11-hour period before he injured Rohlfs in a motor-vehicle accident. Rohlfs’s claim was not denied on its merits; rather, it was denied because Rohlfs failed to notify the tavern of his claim within six months of the incident.

This note argues that the Montana Supreme Court’s decision in Rohlfs was incorrect because the challenged portion of the Dram Shop Act is unconstitutional special legislation, and the Court’s decision will hinder the State’s effort to cure its drunk-driving problem. This note also examines liquor-liability laws in other jurisdictions and suggests revisions to Montana’s dram-shop liability scheme. Part II of this note discusses the history of dram-shop liability nationally and in Montana specifically. Part III details Rohlfs’s facts and examines the Montana Supreme Court’s majority opinion, concurring opinion, and three dissenting opinions. Part IV compares the provisions of Montana’s Dram Shop Act with similar laws in other states, identifies flaws in Montana’s scheme, and suggests improvements to the Act. Part V concludes the note by calling for legislative action.

6. McKee, supra n. 2.
7. Mont. Code Ann. § 27-1-710 (2009). The Dram Shop Act provides that “[f]urnishing a person with an alcoholic beverage is not a cause of, or grounds for finding the furnishing person or entity liable for, injury or damage wholly or partly arising from an event involving the person who consumed the beverage unless: (a) the consumer was under the legal drinking age and the furnishing person knew that the consumer was underage or did not make a reasonable attempt to determine the consumer’s age; (b) the consumer was visibly intoxicated; or (c) the furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol.” Id. at § 27-1-710(3).
9. Id. at 50.
10. Id. at 45 (majority), 50 (Morris, J., concurring).
11. Id. at 45 (majority).
II. THE HISTORY OF DRAM-SHOP LIABILITY

A. Nationally

Black's Law Dictionary defines dram-shop liability as "[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer." Similar claims against private individuals, sometimes referred to as social-host liability, are also allowed in many jurisdictions and are generally governed by dram-shop laws.

The development of dram-shop liability can be likened to a pendulum, shifting back and forth over time, affected both by changing social norms and technological developments. Early common law did not provide an individual injured by an intoxicated person with a cause of action against the alcohol provider under any circumstances. Instead, alcohol consumption, rather than its provision, was the proximate cause of a consumer's or third party's injury. The injury was considered too remote from the act of serving alcohol to be foreseeable.

Seeking to encourage temperance in the mid-1800s, numerous states enacted dram-shop statutes imposing strict civil liability on liquor vendors for injuries caused by their intoxicated customers. However, many states repealed their dram-shop statutes after Prohibition ended in 1933. The common-law rule of nonliability remained predominant until the late 1950s, when courts began permitting negligent-service claims against liquor providers. Generally, these courts recognized a liquor provider's duty to not over-serve customers and, in light of drastic increases in automobile travel, determined that some injuries attributable to a customer's intoxication were reasonably foreseeable. Subsequently, numerous jurisdictions accepted this reasoning.

By the late 1970s, many state legislatures had adopted dram-shop statutes. Some of the statutes established that liquor providers were liable for their intoxicated customers' torts. Other statutes limited the availability

13. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 4.
20. Id. at 1099.
21. Id. at 1100.
of similar, judicially created claims. A number of states that did not pass dram-shop acts recognized alcohol providers' civil liability based on liquor-control statutes or common-law principles. Today, 43 states provide some kind of redress against negligent providers of alcohol, although the cause of action is severely limited in many jurisdictions.

Since the reinstatement of dram-shop liability in most jurisdictions, state courts and legislatures have struggled to define its conceptual and practical boundaries. Some of the most frustrating questions include: (1) What actions of an alcohol provider are sufficient to establish negligent service? (2) What is the proper burden of proof in dram-shop actions? (3) Should intoxicated consumers who injure themselves be able to recover from the alcohol providers, or should the cause of action only be available to innocent third parties? (4) How should liability be apportioned between multiple negligent parties? and (5) Should dram-shop liability extend to social hosts? Jurisdictions that have enacted dram-shop statutes have devised various solutions to these difficult questions, but the resulting laws are quite different in operation. The intricacies of these laws are addressed in Part IV.

B. Montana

Unsurprisingly, the development of dram-shop liability in Montana paralleled its development nationwide. Shortly after Prohibition, the Montana Legislature passed the State Liquor Control Act, the Montana Beer

23. Id. Dram-shop acts are sometimes classified by their permissive or prohibitive language; about half of the statutes are worded to create or memorialize a cause of action while the other half restrict or prohibit one. See Sipes, supra n. 14, at 5.

24. O'Connor, supra n. 19, at 1100. States providing such causes of action often allow a plaintiff to utilize the negligence per se doctrine to establish liability predicated on the liquor control violation. Sipes, supra n. 14, at 7.


Act, and the Montana Retail Liquor License Act. In combination, these acts placed numerous restrictions on the sale of alcoholic beverages, including a prohibition on selling alcohol to obviously intoxicated individuals. However, none of the acts expressly provided a civil remedy to persons injured by an alcohol provider’s violation of the acts.

In the 1961 case *Nevin v. Carlasco*, the Montana Supreme Court was asked to determine whether the liquor-control statutes imposed a legal duty on alcohol providers and whether a violation of that duty was grounds for a civil suit. *Nevin’s* plaintiff was knocked to the floor of the defendant’s bar as a result of an altercation between two other patrons. She alleged the bar negligently violated the liquor-control statutes by serving an obviously intoxicated person. The Montana Supreme Court rejected the plaintiff’s claim, holding that “when damages arise from voluntary intoxication, the seller of the intoxicant is not liable in tort for the reason that his act is not the efficient cause of the damage.” Rather, the Court stated: “The proximate cause is the act of him who imbibes the liquor.”

The *Nevin* rule was followed until 1986, when the Montana Supreme Court decided *Nehring v. LaCounte*. *Nehring* was a wrongful-death-and-survival action against a tavern that allegedly served a visibly intoxicated patron who later caused the decedent’s death in a motor-vehicle accident. Although the Court rejected the plaintiff’s argument that violation of the liquor-control statutes is negligence *per se*, it did hold that such violations are relevant in determining whether a defendant’s conduct was negligent. Ultimately, the Court rejected the “Neanderthal” approach of exempting alcohol providers from liability without regard to their own negligence. It held that “consumption of the alcoholic beverages served, subsequent driving, and the likelihood of an injury-producing accident are foreseeable intervening acts which do not relieve the tavern operator of liability for negligence.”

28. Id.
29. Id. at 58.
31. Id. at 638.
32. Id. at 637.
33. Id. at 638–639.
34. Id. at 639.
35. Id.
37. Id. at 1331.
38. Id. at 1333.
39. Id. at 1335.
40. Id.
Less than three months after Nehring established dram-shop liability in Montana, the Legislature acted to severely restrict its application. Nehring was decided on January 21, 1986. The Legislature called a six-day special session in March 1986. During that session, it passed the Dram Shop Act, codified at Montana Code Annotated § 27-1-710 and effective on April 4, 1986. The Act’s stated purpose is to “set statutory criteria governing the liability of a person or entity that furnishes an alcoholic beverage for injury or damage arising from an event involving the person who consumed the beverage.” The Act superseded Nehring by providing that a violation of the liquor-control statutes—except a violation of Montana Code Annotated § 16-6-305, which prohibits the provision of alcohol to minors—is not a basis for establishing civil liability. Under the Act, a provider of alcoholic beverages can only be held liable for injuries caused by a consumer if: (1) the consumer was a minor and the provider either knew the consumer’s age or failed to make a reasonable effort to determine the consumer’s age; (2) the consumer was visibly intoxicated; or (3) the provider forced or coerced the consumer to drink alcohol, or told the consumer a beverage was non-alcoholic when the provider knew the beverage contained alcohol.

A review of legislative history from the 1986 special session offers insight into the Legislature’s motivations for enacting the Dram Shop Act. The Act was introduced as House Bill 13 to the House Judiciary Committee on March 25, 1986, and the committee held a hearing on the Bill the following day. Representative Dave Brown introduced the Bill by stating that it “places the responsibility for one’s actions back on the individual where it belongs and from where the Supreme Court chose to take it.”

House Bill 13 drew considerable support from tavern owners and liquor distributors. Those who testified in favor of the Bill cited rising insurance premiums resulting from the Nehring decision and the importance of placing responsibility on the consumer as the primary reasons for its pas-
There was no testimony in opposition to House Bill 13. There were no discussions considering consumer or public safety, and although the necessity of making consumers accountable for their actions was discussed at length, there were no countervailing arguments that tavern owners should also accept responsibility to monitor their customers' consumption. The House Judiciary Committee unanimously recommended that the Bill pass.

Two days later, the Senate Committee on Business and Industry held a hearing on House Bill 13. Senator J.D. Lynch introduced the Bill to the committee by stating that it "simply tries to address a ridiculous ruling of the Montana Supreme Court . . . that hardly anyone thinks makes sense." Senator Lynch described *Nehring* as imposing strict liability on a tavern for any subsequent injury caused by one of its intoxicated consumers. He also suggested that the State of Montana could now be held liable for such an injury because it sold the alcohol to the tavern. Proponents of the Bill again testified about the rising cost of liquor liability insurance and the need for consumer responsibility, and Representative Bob Pavlovich ominously predicted that if tavern owners did not get some relief "the main streets of Montana were going to be pretty dark." There was no testimony opposing House Bill 13 in the Senate hearing; the Bill soon passed and was signed into law.

Despite these restrictions, plaintiffs still had some success litigating dram-shop claims. The most notable of these successes, a $750,000 jury verdict in *Cusenbary v. Mortensen*, was a driving force behind various amendments to the Dram Shop Act in 2003. Plaintiff Jonathan Cusenbary, a patron of the Town Tavern in Great Falls, was injured when James Wells drove a vehicle through the tavern wall. Wells had been drinking at the Town Tavern before the incident, despite a condition from an old neck injury that caused him to lose control of his legs when he con-
sumed alcohol. He entered and exited the Town Tavern in a wheelchair and was assisted out of the bar and helped into his vehicle moments before the accident. By all accounts, he was very intoxicated at that time.

Cusenbary sued Glen Mortensen, owner of the Town Tavern, under the Dram Shop Act, alleging that the Town Tavern's employees were negligent in serving Wells when he was visibly intoxicated and that their negligence was a proximate cause of his injuries. The jury awarded Cusenbary $750,000. Mortensen appealed and argued the district court erred in dismissing his proposed jury instruction regarding his intervening, superseding cause defense and in excluding evidence of subsequent criminal proceedings against Wells.

The Montana Supreme Court rejected Mortensen's arguments regarding proximate causation and his intervening, superseding cause defense. The Court ruled that an injury from drunk driving is a foreseeable, intervening act that does not relieve an alcohol provider from dram-shop liability. The Court held that the Dram Shop Act imposed a duty on the Town Tavern to refrain from serving Wells when he was visibly intoxicated, regardless of his apparent inability to operate a motor vehicle. Since Wells' subsequent drunk driving was reasonably foreseeable, the Court also affirmed the district court's refusal to admit evidence of Wells' criminal convictions.

The Cusenbary decision and other dram-shop plaintiffs' victories, together with the rising cost of liquor-liability insurance, led the Montana Tavern Association and other potential dram-shop defendants to seek another legislative fix. Senator Joe Tropila of Cascade County introduced Senate Bill 337 to the 58th Legislature during the 2003 Regular Session. As introduced, the Bill sought to: (1) reduce the statute of limitations for dram-shop claims from three years to two years; (2) allow for evidence of criminal charges filed against an intoxicated consumer to be introduced at

62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Cusenbary, 987 P.2d at 353. Mortensen also argued that the district court erred in allowing evidence regarding Wells' BAC at the time of the accident and in dismissing his third-party complaint against Wells and his family. Id. The Legislature addressed all of the issues Mortensen raised on appeal when it amended the Dram Shop Act in 2003. See infra n. 73 and accompanying text.
68. Cusenbary, 987 P.2d at 358.
69. Id.
70. Id.
71. Id. at 359.
trial; (3) eliminate the ability of a consumer or his estate to make a dram-shop claim; (4) cap noneconomic and punitive damages at $250,000; and (5) permit the jury to consider the consumption of alcohol, in addition to its provision, when determining the cause of injuries suffered by a plaintiff.\textsuperscript{73}

Senator Tropila introduced the Bill to the Senate Committee on Business and Labor by stating: “SB 337 is a bill about responsibility. It professes an alcohol licensee’s and social host’s responsibility to the public and also the responsibility of adult customers and guests for their own behavior.”\textsuperscript{74} Senator Tropila stated the Bill was also about “the timeliness of making a claim . . . so that recollections are reasonably intact and witnesses still available.”\textsuperscript{75}

Senate Bill 337 drew considerable support from the tavern industry, the insurance industry, the Montana University System, and the Montana Chamber of Commerce.\textsuperscript{76} In addition to Senator Tropila, 12 individuals testified in support of the Bill.\textsuperscript{77} Only Al Smith of the Montana Trial Lawyers Association testified in opposition to Senate Bill 337.\textsuperscript{78}

Notably, Glen Mortensen, the defendant in \textit{Cusenbary}, provided lengthy testimony supporting Senate Bill 337.\textsuperscript{79} Mortensen testified that nearly three years lapsed between the accident and the time he received notice of the lawsuit, and by that time he was “unable to find a lot of people who were ‘players’ in the case.”\textsuperscript{80} Mortensen also testified that the Bill’s remaining provisions would have helped him adequately defend his lawsuit.\textsuperscript{81}

Although a relatively large number of people testified in support of Senate Bill 337, much of the testimony lacked substance.\textsuperscript{82} Regardless, the

\begin{itemize}
  \item \textsuperscript{73} Id. at 2–3.
  \item \textsuperscript{74} Id. at 2. Senator Tropila is a tavern owner and commented that his family had been in the liquor business for years. Id.
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} Id. The University System and Chamber of Commerce supported the Bill because each hosts events where alcohol is served and thus they could be subject to liability under the Dram Shop Act. Id. at 4, 7.
  \item \textsuperscript{77} Mont. Sen. Comm. on Bus. & Lab., \textit{Hearing on Sen. 337}, at 3–7. Tavern owners from across the State provided most of the testimony. Id.
  \item \textsuperscript{78} Id. at 7.
  \item \textsuperscript{79} Id. at 5–6.
  \item \textsuperscript{80} Id. at 5. This was a curious assertion considering Mortensen was certainly on notice of facts potentially establishing dram-shop liability.
  \item \textsuperscript{81} Id. at 6. Mortensen expressly supported the evidentiary rules contained in Senate Bill 337 as well as the damage cap.
  \item \textsuperscript{82} As noted above, the majority of the supporting testimony in front of the Senate Committee on Business and Labor was presented by tavern owners or their representatives. Mont. Sen. Comm. on Bus. & Lab., \textit{Hearing on Sen. 337}, at 3–7. Most of the testimony was arguably self-serving, consisting of conclusory statements and vague legal arguments regarding the scope of the Dram Shop Act. See \textit{Rohlfs}, 227 P.3d at 65–67 (Nelson, J., dissenting). For example, tavern owners Ralph Ferraro and Glen
\end{itemize}
Senate Committee on Business and Labor passed the Bill by a vote of nine to zero, and shortly thereafter, the Senate passed the Bill. Similar testimony was presented to the House Committee on Business and Labor. Both that Committee and the full House supported the Bill by wide margins. Governor Judy Martz signed the Bill into law on April 24, 2003.

The enacted law was very similar to Senator Tropila's original proposal. Not only did it contain all the protections enumerated in the original version of Senate Bill 337, but it was also amended to include a provision requiring all dram-shop plaintiffs to give defendants notice of their intent to file suit within 180 days from the date the defendant sold to or served the consumer-tortfeasor. The inclusion of the requirement was first suggested by Mark Staples of the Montana Tavern Association as an alternative to shortening the Dram Shop Act's statute of limitations. The Bill was subsequently amended to include a notice requirement as well as a shortened statute of limitations, and both provisions became part of the amended Dram Shop Act.

The 2003 amendments, codified in Montana Code Annotated § 27–1–710(4) to (9), placed significant limitations on a plaintiff's ability to recover under the Dram Shop Act. However, it was not long before a plaintiff challenged the constitutionality of one of these provisions: the 180-day notice requirement.

III. **ROHLS v. KLEMENHAGEN, LLC**

A. Facts


84. *Id.*
86. Detailed Bill Information Sen. 337, *supra* n. 83.
87. *Id.*
90. Mont. Sen. Comm. on Bus. & Lab., *Hearing on Sen. 337* at 7. Mr. Staples suggested that if the statute of limitations under the Dram Shop Act continued to be three years, the Committee should consider including a notice provision so “the business could begin notifying and searching for witnesses and preparing for a possible trial.” *Id.*
92. **Rohls**, 227 P.3d at 45.
93. *Id.* at 55 (Nelson, J., dissenting).
Stumble Inn in Victor, Montana, for 11 hours prior to the accident. In fact, Warren only traveled some 200 feet from the Stumble Inn’s parking lot before crashing into Rohlfs’s vehicle. Montana Highway Patrol officers investigating the accident testified that Warren appeared intoxicated, and fellow Stumble Inn patrons noted that Warren was “obviously too drunk to drive.”

In July 2007, Rohlfs filed suit against the Stumble Inn under the Dram Shop Act. Rohlfs alleged the tavern was liable for his injuries because its employees served Warren alcohol while he was visibly intoxicated. Stumble Inn moved to dismiss the complaint based on Rohlfs’s failure to comply with the Dram Shop Act’s 180-day notice requirement. Rohlfs admitted he failed to satisfy the notice requirement but argued his failure was excusable because that portion of the Dram Shop Act was unconstitutional special legislation and violated his right to equal protection. The district court granted Stumble Inn’s motion to dismiss, and Rohlfs appealed his constitutional claims to the Montana Supreme Court.

B. The Supreme Court Majority Opinion

A divided Montana Supreme Court affirmed the district court’s dismissal of Rohlfs’s claim. It is important to note that Rohlfs’s constitutional attack on the notice requirement was a “facial” rather than an “as-applied” challenge. Rohlfs argued the notice requirement unconstitutionally distinguished dram-shop cases from other negligence cases. Despite Rohlfs’s two-pronged attack on the dram-shop notice requirement, the Court’s five competing opinions focused primarily on his special-legislation claim.

94. Defendant Klemenhagen, LLC does business as the Stumble Inn. Id. at 44 (majority).
95. Id. at 55 (Nelson, J., dissenting).
96. Id. at 56.
97. Id.
98. Rohlfs, 227 P.3d at 45 (majority).
99. Id.
100. Id. Mont. Code Ann. § 27-1-710(6) provides in part: “[a] civil action may not be commenced under this section against a person who furnished alcohol unless the person bringing the civil action provides notice of an intent to file the action to the person who furnished the alcohol by certified mail within 180 days from the date of sale or service.”
101. The Montana Constitution provides that “[t]he legislature shall not pass a special or local act when a general act is, or can be made, applicable.” Mont. Const. art. V, § 12.
103. Rohlfs, 227 P.3d at 45.
104. Id. at 50.
105. Id. at 45.
106. Id. Rohlfs argued that such a classification violated the Montana Constitution’s guarantee of equal protection and its prohibition on special legislation.
Generally, a law is not special legislation if it operates uniformly on all persons in like circumstances. Conversely, a law is special legislation if it "confers particular privileges or imposes peculiar disabilities on a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privileges conferred or disabilities imposed." Laws that protect only a certain class of people are not unconstitutional special laws if the "classification is made upon some natural, intrinsic, or constitutional distinction between the persons within the class and others not embraced within it."

A clear example of an unconstitutional special law is provided in State ex rel. Redman v. Meyers, County Superintendent of Schools. The suspect law in Redman provided that all school districts divided by the creation of a new county under the New County Acts would become joint school districts. However, the law did not apply to school districts divided by the creation of a new county when the county was created by a direct legislative act. Because there was no legitimate reason to differentiate between the two scenarios, the Montana Supreme Court declared the law unconstitutional special legislation.

The Rohlfs Court's majority opinion, authored by Justice John Warner, acknowledged that the Dram Shop Act notice requirement establishes a class of persons. However, the Court narrowly defined the class as "plaintiffs who utilize a statutory scheme to bring an action against a defendant that is not immediately aware it may be held liable." The relevant inquiry thus became whether or not it was reasonable for the Legislature to differentiate dram-shop plaintiffs from common-law-negligence plaintiffs. Deferring to the Legislature's judgment, the Court concluded the distinction was reasonable because of the "special nature of the Dram Shop Act." Having limited the established class to persons seeking redress under the Dram Shop Act, the Court had no problem holding the notice.

108. Id. at 487 (citing Leuthold v. Brandjord, 47 P.2d 41, 45 (Mont. 1935)).
109. Id. at 486-487.
111. Id. at 1065-1066.
112. Id. at 1066.
113. Id. The Court explained that the law was not unconstitutional merely because it was class legislation. Id. Rather, the law was unconstitutional because the classification was arbitrary; the favored class (school districts divided by a county created by the New County Acts) did not exhibit any special quality or attribute making the law necessary. Id.
114. Rohlfs, 227 P.3d at 46.
115. Id. at 47.
116. Id.
117. Id.
requirement was not special legislation because it operated equally upon every member of the established class.\textsuperscript{118}

The Court employed similarly narrow reasoning to swiftly reject Rohlfs's equal-protection challenge.\textsuperscript{119} As the Court stated, "[t]he basic rule of equal protection 'is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment.'"\textsuperscript{120} If two classes of persons are not similarly situated with respect to a given law, an equal-protection argument cannot be made based on the law's disparate treatment of the two classes.\textsuperscript{121} However, even a law that benefits one class of persons over a similarly situated second class of persons does not violate equal protection if it passes judicial scrutiny and operates equally upon all those within the benefitted class.\textsuperscript{122}

The Court began its analysis by determining that individuals who make claims under the Dram Shop Act are similarly situated to those who make general negligence claims.\textsuperscript{123} Having reached this initial conclusion, the Court next had to determine what level of judicial scrutiny to apply in analyzing the notice requirement.\textsuperscript{124} Rohlfs argued that strict-scrutiny review was appropriate because the notice requirement had the effect of closing the courthouse doors to dram-shop plaintiffs who failed to give notice, in violation Article II, §16 of the Montana Constitution.\textsuperscript{125} However, the Court noted that the courthouse doors were open to Rohlfs and that they only closed after he failed to give the required notice within the statutory period.\textsuperscript{126} The Court determined rational-basis scrutiny was appropriate because the notice requirement did not involve a suspect class or a fundamental right.\textsuperscript{127}

Noting that the Act was intended to benefit potential defendants who were likely not present at an injury-causing accident, the Court held that the notice requirement bore a rational relationship to the government's legitimate interest "in establishing rules for the conduct of litigation and in set-

\textsuperscript{118} Id.
\textsuperscript{119} Specifically, Rohlfs argued that the notice requirement violated equal protection principles by imposing an unconstitutional burden on dram-shop plaintiffs that was not imposed on general negligence plaintiffs. \textit{Id.} at 48.
\textsuperscript{120} \textit{Rohlfs}, 227 P.3d at 48 (quoting \textit{Oberson v. U.S. Dept. of Agric., Forest Serv.}, 171 P.3d 715, 720 (Mont. 2007)).
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.} Although the Court determined dram-shop plaintiffs and general negligence plaintiffs were similarly situated, it gave no reason for classifying them separately in the first place.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} The Montana Constitution provides that "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." Mont. Const. art II, § 16.
\textsuperscript{126} \textit{Rohlfs}, 227 P.3d at 47.
\textsuperscript{127} \textit{Id.} at 49. The Court also concluded that middle-tier scrutiny was inappropriate because the notice requirement did not involve a discriminatory classification based on sex or illegitimacy. \textit{Id.}
ting periods of limitation for particular types of claims.” 128 Since the notice requirement applied equally to all dram-shop plaintiffs, the Court ultimately concluded it was constitutional. 129

C. The Opinions of Justices Morris, Leaphart, and Cotter

Justice Brian Morris filed a short concurring opinion. 130 He agreed that Rohlfs’s facial challenge to the notice requirement was properly dismissed. 131 However, he indicated that, in light of the Stumble Inn’s actual knowledge of the circumstances surrounding Rohlfs’s injury, he would have considered an “as-applied” challenge to the notice requirement. 132

Justice William Leaphart filed a short dissenting opinion in which he too addressed Stumble Inn’s immediate knowledge of Rohlfs’s injury. According to Justice Leaphart, the purpose of the notice requirement was served when Stumble Inn acquired such knowledge; thus, requiring Rohlfs to provide Stumble Inn with further notice would be superfluous. 133 Since Stumble Inn was not damaged by Rohlfs’s failure to provide it with notice of his claim, Justice Leaphart would not have enforced the notice requirement. 134

In her dissenting opinion, Justice Patricia Cotter provided her view that the notice requirement was “plainly unconstitutional special legislation” because there was no evidence showing that a law of general application could no longer govern dram-shop liability. 135

D. Justice Nelson’s Dissent

In a strong dissent, Justice James Nelson called the notice requirement “quintessential special legislation” and criticized the majority for giving “mere lip service to the constitutional provisions and then twist[ing] the provisions to reach the desired conclusion.” 136 Justice Nelson argued the relevant class created by the notice requirement was not limited to plaintiffs suing under the Dram Shop Act; rather, it included “all tort plaintiffs in-

128. Id. at 49–50. The Court cited special periods of limitation for discrimination and medical malpractice claims that survived equal protection challenges as further support for its conclusion. Id.
129. Id. at 49. Although Rohlfs argued that the evidence relied on by the Legislature in enacting the notice requirement was inadequate, the Court refused to question the “wisdom or expediency” of the notice requirement. Rohlfs, 227 P.3d at 49.
130. Id. at 50 (Morris, J., concurring).
131. Id.
132. Id.
133. Id. at 51 (Leaphart, J., dissenting).
134. Id.
136. Id. at 52 (Nelson, J., dissenting).
jured by an absent defendant who is unaware of the injury-causing incident.”

Justice Nelson made two key points in favor of the latter classification. First, Justice Nelson reasoned that defendants in dram-shop actions are not the only defendants who lack notice that their negligence caused an injury. Indeed, product manufacturers, snowmobile-area operators, and slip-and-fall defendants are similarly situated in that they may not be present at an injury-causing incident and they may not learn of it until a lawsuit is filed. Since the notice requirement naturally relates to all absent and unaware defendants, they should all be included in the relevant class for analyzing Rohlfs’s special-legislation challenge. Because the notice requirement only benefits dram-shop defendants, burdens dram-shop plaintiffs, and does not apply to other similarly situated plaintiffs and defendants, Justice Nelson argued it was unconstitutional special legislation.

Second, Justice Nelson took issue with the majority’s assertion that dram-shop plaintiffs are a class of their own because they utilize a statutorily authorized cause of action. Justice Nelson chronicled the history of dram-shop liability in Montana and concluded that the Dram Shop Act did not statutorily create dram-shop liability; rather, it limited the cause of action created in Nehring. Since dram-shop claims are not “statutory” claims, Justice Nelson concluded it was unreasonable to separately classify dram-shop litigants because the scope of their cause of action is statutorily limited.

Justice Nelson also wrote at length about the insufficiency of evidence in the legislative record supporting the notice requirement’s enactment. Justice Nelson was particularly critical of the testimony offered before the legislative committees. The primary testimony regarding the necessity of

137. Id. at 70.
138. Id. at 69.
139. Id. at 70.
140. Id.
141. Rohlfs, 227 P.3d at 70 (Nelson, J., dissenting). Justice Nelson admonished the majority for “defining the class in such a fashion as to yield a self-sustaining classification—i.e., by defining the class as those who are burdened by the challenged law and then upholding the law because it discriminates against all of those people ‘uniformly and equally’ [when Montana] caselaw makes clear that the relevant class consists of all persons who are similarly situated with respect to the law’s purpose . . . .” Id.
142. Id.
143. Id. at 61–62, 70.
144. Id. at 71. The Stumble Inn also argued that the 2003 amendments to the Dram Shop Act were justifiable because of the rapidly increasing cost of liquor-liability insurance. Interestingly, only New Jersey’s dram-shop act mentions the server’s difficulty in obtaining liquor-liability insurance as a primary purpose for the statute’s existence. N.J. Stat. Ann. § 2A:22A–2 (2010).
146. Id. at 65–66.
a shorter statute of limitation and notice requirement came from Glen Mortensen.\textsuperscript{147} Although Mortensen told the committees that he was prejudiced by the disappearance of numerous witnesses during the three-year period between Cusenbary’s injury and the filing of his suit, such allegations never appeared in Mortensen’s briefs.\textsuperscript{148} Justice Nelson criticized Mortensen’s statements to the legislative committees as well as statements of other proponents of Senate Bill 337 as false, misrepresented, or unsubstantiated.\textsuperscript{149} The complete absence of testimony substantiating the allegedly unique difficulties faced by alcohol providers in locating witnesses and gathering evidence made the law even more repugnant to Justice Nelson.\textsuperscript{150}

Throughout his opinion, Justice Nelson described the history of Montana’s Dram Shop Act as a series of bills designed to progressively limit the liability of tavern owners, regardless of their actions.\textsuperscript{151} He questioned the policy behind such legislation, especially in light of Montana’s “culture and deadly tradition of alcohol abuse and drunk driving.”\textsuperscript{152} Recognizing the high percentage of Montana highway fatalities that are alcohol related, Justice Nelson urged that bartenders and servers are the first line of defense against drunk driving and should be held more accountable for their actions.\textsuperscript{153} Absent significant social-policy changes, Justice Nelson questioned whether the State’s efforts to reduce the incidence of drunk driving and alcohol-related fatalities can ever be successful.\textsuperscript{154}

\textbf{E. Analysis: Montana Needs to Change Its Attitude toward Alcohol and Its Law}

In addition to his well-founded attacks on the majority’s questionable legal conclusions, Justice Nelson’s analysis of Montana’s drinking culture and the State’s problem with drunk driving is enlightening. Notwithstanding Montana’s high incidence of alcohol-related traffic fatalities,\textsuperscript{155} many people accept, or even promote, the notion that drinking and driving is part

\textsuperscript{147} Id. at 64.
\textsuperscript{148} Id. Indeed, it would have been ridiculous for Mortensen to claim that he was not on notice of the facts creating his potential liability considering Cusenbary was injured by a vehicle that crashed through the wall of Mortensen’s bar.
\textsuperscript{149} Id. at 67.
\textsuperscript{150} Id.
\textsuperscript{151} Rohlfs, 227 P.3d at 57–63 (Nelson, J., dissenting).
\textsuperscript{152} Id. at 72.
\textsuperscript{153} Id. Justice Nelson stated that “alcohol purveyors need to shoulder their share of responsibility for the carnage on our highways” and that making tavern owners “less accountable does not encourage them to be more responsible, as Stumble Inn’s conduct on June 29 and 30, 2006, demonstrates.” Id.
\textsuperscript{154} Id.
\textsuperscript{155} See supra nn. 4–5 and accompanying text.
of being a Montanan. Additionally, the tavern industry appears to have great influence over the State Legislature. The combination of these two factors has caused the Legislature to protect alcohol providers and pass a number of laws without giving proper consideration to the State’s increasing drunk-driving problems. Addressing such problems should become a true priority for lawmakers, and the Legislature should amend the Dram Shop Act accordingly.

Dram-shop liability exists for incidents like the one that occurred outside the Stumble Inn on January 30, 2006. Stumble Inn’s employees served Joseph Warren alcohol for 11 hours and then allowed him to exit the bar, get in his car, and drive away. He made it less than 200 feet before crashing into and injuring Cary Rohlfs. It is undisputed that Stumble Inn employees served Warren when he was visibly intoxicated and that his intoxication caused Rohlfs’s injury. Absent application of the notice requirement, the Stumble Inn would clearly be liable under the Dram Shop Act.

The most frustrating part of Rohlfs is that the 180-day notice requirement, which was supposedly added to the Dram Shop Act to lessen the difficulty tavern owners were having locating witnesses and defending dram-shop litigation, operated as a complete bar to liability. It is even more troubling that the passage of the notice requirement can be directly traced to misleading, self-serving testimony of tavern owners and other interested persons. However, this is not the only time the Legislature has yielded to the special interests of the tavern industry and failed to give proper consideration to the State’s problem with drunk driving. Legislative testimony concerning the enactment of Montana’s open-container law further highlights the tavern industry’s influence over the State Legislature and the dangerous attitude some Montana lawmakers have toward drinking and driving.

The 1998 Transportation Equity Act for the 21st Century (“TEA–21”), which provided states over $200 billion in federal highway funding, required that every state ban the possession of open alcoholic beverages within the passenger compartment of any vehicle traveling on public roads. Starting in October 2000, the federal government began diverting

157. See supra nn. 49–58, 76–91 and accompanying text.
158. The notice requirement is essentially a condition precedent to establishing liability under the Dram Shop Act. Failure to comply with it, even if its purpose has been served, forecloses the only cause of action an injured person has against a negligent provider of alcohol.
159. Mont. Code Ann. § 61–8–460. The open-container law makes it illegal for any person to possess an open alcoholic beverage in the passenger area of a motor vehicle on a highway.
160. Peterson, supra n. 156.
a percentage of federal highway funding from construction funds to highway-safety funds for states that had not passed an open-container law.\textsuperscript{161} The percentage of federal highway money transferred between funds increased the longer a state refused to enact an open-container law.\textsuperscript{162} Not until 2005 did states face the prospect of losing federal highway funding for failing to comply with TEA-21.\textsuperscript{163}

Senator Dale Mahlum presented Senate Bill 39 to the 58th Legislature in 2003, at a time when Montana had one of the highest rates of alcohol-related fatalities in the nation.\textsuperscript{164} The Bill would have prohibited the possession of an open container of alcohol in the passenger compartments of vehicles traveling on Montana roads.\textsuperscript{165} Judy Martz, then governor of Montana, fully supported the Bill, as did the Montana Highway Patrol, Mothers Against Drunk Driving, and the Montana Anesthesiologists, Orthopedic Surgeons, and Neurosurgeons.\textsuperscript{166} Because of the highway-construction funding at stake, the Montana Contractors' Association also supported the Bill.\textsuperscript{167}

Despite considerable testimony in favor of Senate Bill 39, and little testimony against it, some members of the Senate Judiciary Committee expressed their concerns about the enforcement of an open-container law.\textsuperscript{168} Senator Jerry O'Neil questioned whether the Bill would make it illegal for a person gathering firewood in the woods to have a beer with lunch in a truck parked on the side of the road.\textsuperscript{169} Senator Gary Perry asked whether a person "sleeping it off" on the shoulder could be convicted of an open-container violation.\textsuperscript{170} Senator Perry also wondered whether the law would apply to snowmobiles in West Yellowstone or Red Lodge.\textsuperscript{171} Other senators questioned whether it was necessary to prohibit vehicle passengers from drinking.\textsuperscript{172} Notwithstanding these concerns, Senate Bill 39 passed in the Senate.\textsuperscript{173}

\begin{footnotesize}
\begin{enumerate}
\item[161.] Id.
\item[162.] Id.
\item[166.] Id.
\item[167.] Id. Because of the Bill's divergent support, about half of the legislative testimony in favor of passing the Bill concerned highway funding and the other half addressed reducing alcohol-related deaths on Montana highways.
\item[168.] Id. at 8–14.
\item[169.] Id. at 11.
\item[170.] Id. at 13.
\item[172.] Id.
\end{enumerate}
\end{footnotesize}
Governor Martz personally introduced the Bill to the House Judiciary Committee on March 14, 2003. She stated that the open-container law would address the State’s problem with drunk driving and that it would keep $5.6 million in the highway-construction fund. Unlike at the Senate hearing, Mark Staples of the Montana Tavern Association and Christy Blazer of the Montana Beer and Wine Wholesalers Association testified in opposition to Senate Bill 39. Each stated that the open-container law would not address the State’s problem with drinking and driving. Brad Gerrity, a bartender at the Overland Express Lounge in Helena, closed the testimony against Senate Bill 39 by stating: “[T]he mountains are high, the valleys are low, and the city is far, far away.” Shortly after the hearing, the Bill was voted down. At that time, Montana was one of only two states without any law restricting the consumption or possession of alcohol within a moving vehicle.

Two years later, the open-container bill was reintroduced as Senate Bill 80. If the Bill had not passed in 2005, Montana would have lost around six-million dollars in highway funding. The Bill received significant support and was touted as a “cultural change for the residents of the State.” The Montana Beer and Wine Wholesalers Association even supported the Bill, acknowledging that the “political writing was on the wall.” The Bill passed the Senate after members of the Judiciary Committee were assured that “the bill they had in front of them was as basic as it could be made to make it compliant [with TEA–21].”

The Legislature should not struggle so mightily to pass laws that can potentially reduce alcohol-related highway fatalities; nor should it be so quick to pass a law that hinders tort recovery for the victims of drunk driving. It is time for Montana lawmakers to stop protecting alcohol providers and focus on solving the State’s drinking and driving problems. Currently, the Legislature is working to address Montana’s “culture and deadly tradi-

175. Id. at 1. According to Governor Martz, 42 jobs are provided for every million dollars in the highway construction fund.
176. Id. at 3.
177. Id.
178. Id.
180. Peterson, supra n. 156.
182. Id.
183. Id. at 3. The statement was made by Don Hargrove who was representing the Montana Addicitive Services Providers. Id.
184. Id. at 4.
185. Id. at 9.
vation of alcohol abuse and drunk driving.” Yet, as Justice Nelson noted, “one of the factors contributing to this problem is staring lawmakers in the face: alcoholic beverages are still being sold or furnished to underage and visibly intoxicated consumers.” The narrow scope of liability under Montana’s Dram Shop Act imposes a correspondingly narrow responsibility on alcohol providers to refrain from serving their visibly intoxicated patrons, and the Act should be revised to ensure negligent servers are held accountable for their actions.

While some statutory restrictions on dram-shop liability may be prudent, the Legislature should tailor such restrictions to either deal with specific, narrowly defined issues, or provide relief provisions to avoid the elimination of meritorious claims. Ideally, the strength and reasoning of Justice Nelson’s dissenting opinion, together with his vivid description of Montana’s troubles with drunk driving and alcohol-related fatalities, will trigger some kind of reform. Since rehearing was denied in Rohlfs on March 23, 2010, such change will likely need to come from the Legislature. In considering revisions to the Dram Shop Act, the Legislature should take note of dram-shop laws in other jurisdictions.

IV. RECOMMENDATIONS BASED ON THE LAWS OF OTHER JURISDICTIONS

A. Dram-Shop Laws in Other Jurisdictions

Although most dram-shop laws contain largely similar provisions, subtle variations in language can significantly affect their coverage. For instance, dram-shop laws in most states forbid the sale of liquor to an individual displaying some type of visible intoxication. However, the requisite level of visible intoxication varies from merely “intoxicated” to “physically incapacitated.” Clearly, a dram-shop plaintiff is much more likely to establish that a consumer was intoxicated than physically incapacitated.

187. Id. Justice Nelson continued: “Those who do should be held accountable for such conduct, but instead they are allowed to hide behind legislatively conferred special protections . . . .” Id.
188. Interestingly, Justice Warner, author of the Rohlfs majority opinion, resigned from the Court effective December 31, 2009 and thus did not vote on Rohlfs’s motion for rehearing. His replacement, Associate Justice Mike Wheat, also did not partake in the vote. Id.
189. See e.g. Tenn. Code Ann. § 57-10-102(2) (2009).
191. See e.g. W. Va. Code R. § 60-7-12 (Westlaw current through 2010).
A little more than half of jurisdictions disallow first-party dram-shop claims and only extend a cause of action to third parties injured by an intoxicated person.\textsuperscript{193} Some of these jurisdictions further limit third-party claims to persons who did not contribute to or were unaware of the consumer's intoxication.\textsuperscript{194} Of the jurisdictions that allow some types of first-party dram-shop claims, most limit first-party liability to providers who knowingly served minors or served minors without making a reasonable attempt to determine their age.\textsuperscript{195} Additionally, about half of all jurisdictions with dram-shop liability extend it beyond licensed alcohol providers and impose it on social hosts as well.\textsuperscript{196}

Eight states, including Montana, have some kind of notice requirement in their dram-shop acts.\textsuperscript{197} However, only Montana and Idaho do not provide some kind of relief from their notice requirements.\textsuperscript{198} The Colorado, Iowa, Maine, and Oregon dram-shop acts all extend the time granted under their notice requirements for a wrongful-death action, the plaintiff's incapacitation, or the plaintiff's inability to reasonably discover the alcohol provider's identity.\textsuperscript{199} Michigan and Minnesota's dram-shop statutes toll the notice requirement until the plaintiff hires an attorney to prosecute his dram-shop claim.\textsuperscript{200} Additionally, the Minnesota statute excuses a plaintiff's failure to provide notice if the alcohol provider has actual notice of the facts surrounding the plaintiff's injury.\textsuperscript{201}

States also use a number of techniques to limit the amount of recoverable damages under their respective dram-shop acts. Eight states, including Montana,\textsuperscript{202} have implemented a damages cap. These caps range from New Mexico's allowance of $50,000 for personal injury and $20,000 for property damage\textsuperscript{203} to Utah's $2 million-aggregate-damage cap.\textsuperscript{204} Some jurisdictions limit liability by excluding recovery of punitive or exemplary

\textsuperscript{193} See generally O'Connor, supra n.19.
\textsuperscript{194} See e.g. Or. Rev. Stat. § 471.555(2)(b).
\textsuperscript{195} See e.g. Mo. Rev. Stat. Ann. § 537.053(4).
\textsuperscript{196} See e.g. N.D. Cent. Code § 5-01-06.1 (Westlaw current through 2010).
\textsuperscript{197} See supra n. 26.
\textsuperscript{198} Mont. Code Ann. § 27-1-710(6); Idaho Code Ann. § 23–808.
\textsuperscript{201} Minn. Stat. Ann. § 340A.802(2).
\textsuperscript{202} In Montana, noneconomic damages may not exceed $250,000 and punitive damages may not exceed $250,000. Mont. Code Ann. § 27–1–710(7)–(8).
\textsuperscript{203} N.M. Stat. § 41–1–11 (Westlaw current through 2010).
damages in dram-shop actions.\textsuperscript{205} Other states have unique comparative-negligence provisions written into their statutes. For instance, under New Jersey's dram-shop act, a licensed alcoholic-beverage server cannot be responsible for "more than that percentage share of the damages which is equal to the percentage of negligence attributable to the server or other party."\textsuperscript{206} New Hampshire allows taverns to prove as an affirmative defense that they instituted responsible business practices in serving their customers.\textsuperscript{207} While these examples are not exhaustive, they represent the various techniques jurisdictions use to alter or limit dram-shop liability.

B. Recommendations

If the Montana Legislature desires to fairly limit dram-shop liability, it should revise the Dram Shop Act to include a number of the provisions discussed above. While completely restructuring the Dram Shop Act\textsuperscript{208} may be tempting, and even prudent, the Legislature's immediate focus should be on relieving dram-shop plaintiffs from the harsh effects of the notice requirement identified in \textit{Rohlfs}. Such revisions would significantly reduce the possibility that the notice requirement could bar an otherwise legitimate dram-shop claim while ensuring that consumers remain responsible for their actions.

Removing the notice requirement from the Dram Shop Act would surely solve the problem. However, if the Legislature is genuinely concerned about disappearing evidence and witnesses in dram-shop cases, the Dram Shop Act should provide relief from the notice requirement to potential plaintiffs who are legitimately unable to give notice. The Dram Shop Act should be amended to toll the notice requirement for the period of time that a plaintiff is unable to give notice because of injury. The notice requirement should also be tolled until the plaintiff has had a reasonable opportunity to discover the alcohol server's identity. In lieu of these two amendments, the 180-day period within which notice must be given should begin on the day the plaintiff hires an attorney to pursue his rights under the Dram Shop Act. Either method would provide alcohol servers with advance notice in most situations while preserving meritorious claims.

Additionally, Montana's Dram Shop Act should provide an exception to the notice requirement for plaintiffs who can prove the defendant was on notice of sufficient facts to establish a possible dram-shop claim prior to the expiration of the 180-day period. In such circumstances, defendants would

\begin{itemize}
\item \textsuperscript{205} See \textit{e.g.} id. at § 32A-14a-101(1)(a)(i)(A).
\item \textsuperscript{208} Perhaps instituting a comparative-negligence regime similar to the New Jersey dram-shop statute would be a reasonable way to apportion dram-shop liability.
\end{itemize}
still be able to collect and preserve evidence, and plaintiffs would still be able to pursue their claims. One thing is certain: the current notice requirement arbitrarily eliminates viable dram-shop claims and is not a just way to limit liability.

V. Conclusion

The Montana Supreme Court erred in *Rohlfs* when it upheld the constitutionality of the notice requirement contained in Montana’s Dram Shop Act. Perhaps as important, the facts of *Rohlfs* reveal a number of deficiencies in Montana’s dram-shop liability scheme. Rather than fulfilling its intended purpose of preserving evidence in dram-shop cases, the notice requirement eliminated Cary Rohlfs’s meritorious cause of action against the Stumble Inn despite the fact the owners knew about the crash, the injury, and that a consumer they had served was responsible. Without an amendment providing some kind of relief to dram-shop plaintiffs, the miscarriage of justice in *Rohlfs* will likely be duplicated.