INTOXICATING LIQUORS—INCREASING THE LIABILITY OF NEW JERSEY TAVERNS: WHERE TO DRAW THE LINE?—*Aliulis v. Tunnel Hill Corp.*, 114 N.J. Super. 205, 275 A.2d 751 (App. Div. 1971).

Alita Aliulis, a sixteen-year-old minor, Cynthia Zulauf, also a minor, and several others commenced a round of several taverns at eight o'clock in the evening which concluded at Tunnel Hill Tavern in the early hours of the following morning. While at Tunnel Hill Tavern, Cynthia was illegally served alcoholic beverages, contrary to a regulation of the Division of Alcoholic Beverage Control.[1] It is not known whether Alita was served by the tavern and it was not demonstrated that Alita was intoxicated when she left.[2] Upon leaving the tavern, Alita and the others voluntarily accepted a ride in Cynthia's automobile with full knowledge that she was unfit to drive her car at the time.[3] After a stop for gasoline, Alita and the other passengers fell asleep and Cynthia drove only a short distance before she collided with another automobile. Cynthia was killed and her three passengers were seriously injured in the accident.[4]

Several actions were instituted; however, all were settled prior to trial except a suit filed on behalf of Alita Aliulis by her guardian

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1 Regulation No. 20, Rule 1, Division of Alcoholic Beverage Control, New Jersey (1967) [hereinafter cited as ABC regulation] provides:

> No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person under the age of twenty-one (21) years or to any person actually or apparently intoxicated, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises. (footnote omitted).

The statutory authority for the regulation is N.J. STAT. ANN. § 33:1-39 (Supp. 1971-72). It has been repeatedly held that:

> Regulations promulgated pursuant to this authority have the [full] force and effect of law.

Galvin v. Jennings, 289 F.2d 15, 17 n.7 (3d Cir. 1961) (applying New Jersey law—ABC regulations have effect of statute in establishing standard of care); Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 590, 218 A.2d 630, 635 (1966) (ABC regulations have effect of statute designed to protect incompetents against consequences of own incompetency); Cino v. Driscoll, 130 N.J.L. 535, 538-40, 34 A.2d 6, 9 (Sup. Ct. 1943) (Commissioner of ABC has power to promulgate regulations having force and effect of statute).

2 Aliulis v. Tunnel Hill Corp., 114 N.J. Super. 205, 207, 275 A.2d 751, 752 (App. Div. 1971):

> At oral argument counsel agreed that despite the aforementioned activities, the record did not demonstrate that Alita was intoxicated when she left the defendant tavern.

Since the case is silent as to whether Alita was served in defendant tavern, this writer will assume that she was not. This fact will be relevant to this writer's subsequent discussion of the case but not to the court's ultimate holding.

3 *Id.* at 207, 275 A.2d at 752; Brief for Defendant-Respondent and Cross-Appellant at 6-7, Aliulis v. Tunnel Hill Corp., 114 N.J. Super. 205, 275 A.2d 751 (App. Div. 1971).

4 114 N.J. Super. at 207, 275 A.2d at 752.

ad litem, George Aliulis. Alita's claim sought recovery of damages for personal injuries sustained as a direct and proximate result of the Tunnel Hill Tavern's negligent service to Cynthia in violation of the ABC regulation.

At the trial, the judge charged the jury that a determination of proximate cause must be made before liability could be imposed upon defendant tavern, and that plaintiff could not recover, regardless of defendant's negligence, if the jury found plaintiff to be contributorily negligent.[5] Although not requested to return with specific findings, the jury found defendant tavern guilty of negligence and plaintiff guilty of contributory negligence.[6] A judgment in favor of defendant tavern was entered and plaintiff appealed on the basis of the trial judge's instructions on contributory negligence.[7]

On appeal, the Appellate Division of the Superior Court reversed and remanded for an entry of judgment in favor of plaintiff and a new trial as to damages alone. Citing *Rappaport v. Nichols*,[8] the court re-established that fundamental negligence principles are applicable.

> It is beyond question in this State that if a defendant tavern sells alcoholic beverages to a minor in violation of the regulation of the Division of Alcoholic Beverage Control proscribing that activity, such illegal conduct provides adequate support for a jury verdict of negligence from which liability for injuries caused to another by the minor may be adjudged.[9]

The court went on to state that the inability of a tavern to assert the defense of contributory negligence, established by *Soronen v. Olde Milford Inn, Inc.*,[10] extends to contributory negligence of third persons, as well as to the contributory negligence of negligently served patrons of the tavern, and that

> for *reasons of policy* clearly enunciated in *Rappaport* and *Soronen*, contributory negligence is not available as a defense to the defendant tavern in the circumstances here presented.[11]

Although barring the defense of contributory negligence, the court balked at imposing strict liability upon the tavern by retaining the

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5 *Id.* at 208, 275 A.2d at 752. For a discussion of how the issue of proximate causation bears on a tavern's liability, *see* Rappaport v. Nichols, 31 N.J. 188, 203-05, 156 A.2d 1, 9-10 (1959).

6 114 N.J. Super. at 208, 275 A.2d at 752.

7 *Id.*

8 31 N.J. 188, 156 A.2d 1 (1959).

9 114 N.J. Super. at 208, 275 A.2d at 752.

10 46 N.J. 582, 218 A.2d 630 (1966), *rev'g* 84 N.J. Super. 372, 202 A.2d 208 (App. Div. 1964).

11 114 N.J. Super. at 208, 275 A.2d at 752 (emphasis added).

traditional burden upon the plaintiff to demonstrate negligence and proximate cause.[12] This aspect of the court's decision is particularly significant because, ordinarily, in the State of New Jersey, contributory negligence is a total bar to recovery in a negligence action.[13] Thus, the *Aliulis* court has, by unqualifiedly barring the defense of contributory negligence, in effect, ruled that all infant third parties, regardless of how competent they may be, are unable as a matter of law to exercise a sufficient degree of care to protect themselves from negligently served tavern patrons.

During the last decade, at least nine jurisdictions have applied fundamental negligence principles to the question of dram shop liability. Among these jurisdictions are those which had followed the traditional common law rule of nonliability,[14] those which had repealed dram shop acts,[15] and those which still had dram shop acts in effect.[16]

The importance in New Jersey of the court's holding in *Aliulis* can be traced back to the Prohibition Era when New Jersey had a civil

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12 *Id.* at 210, 275 A.2d at 753. *See* W. PROSSER, THE LAW OF TORTS §§ 74, 78 (3d ed. 1964) [hereinafter cited as W. PROSSER], where the author states "contributory negligence of the plaintiff is not a defense in cases of strict liability." *Id.* § 78, at 538.

13 George Siegler Co. v. Norton, 8 N.J. 374, 86 A.2d 8 (1952) (contributorily negligent plaintiff barred from recovering against negligent railroad); Mattero v. Silverman, 71 N.J. Super. 1, 176 A.2d 270 (App. Div. 1961), *cert. denied*, 36 N.J. 305, 177 A.2d 341 (1962), *rev'd on other grounds*, 79 N.J. Super. 449, 191 A.2d 797 (App. Div.), *cert. denied*, 41 N.J. 115, 195 A.2d 14 (1963) (slight contributory negligence a complete bar to recovery in tractor-trailor accident); *see* Menger v. Laur, 55 N.J.L. 205, 26 A. 180 (Sup. Ct. 1893) (plaintiff's contributory negligence was a complete bar to recovery from defendant who negligently ran over the plaintiff's surveying instrument).

14 Davis v. Shiappacossee, 155 So. 2d 365 (Fla. Sup. Ct. 1963) (sale of alcoholic beverages to minor in violation of statute declared negligence per se); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968) (declaration seeking recovery from barroom for injuries sustained in collision with auto of drunken driver, who became intoxicated at the barroom, stated cause of action); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (Ct. App. 1964) (sale of intoxicating liquor in violation of statute gave rise to common law action against seller).

15 Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966) (in absence of special statutory provision, principles of common law negligence should apply to cases involving intoxicating liquors); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965) (repeal of earlier civil damage law left unimpaired the fundamental negligence principles prevailing in N.H.); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964) (repeal of dram shop act did not wipe out cause of action afforded victims of intoxicated persons).

16 Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (common law negligence action allowed where dram shop act had no extra-territorial effect); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965) (complaint charging wrongful deaths and injuries resulting from service of intoxicating liquors to inebriated persons stated cause of action in negligence as well as under dram shop act).

damage law, or dram shop act, imposing strict liability upon unlawful sellers of alcoholic beverages.[17] However, the law was repealed in 1934[18] and replaced by the Alcoholic Beverage Law,[19] which left unimpaired the fundamental negligence principles prevailing in New Jersey.[20]

The most significant New Jersey case to date delineating the negligence principles involved in serving intoxicants to minors and inebriates has been the landmark *Rappaport* case. There, a succession of taverns unlawfully sold alcoholic beverages to an intoxicated minor, causing or contributing to his subsequent negligent operation of an automobile which resulted in the death of an innocent third party. The widow of the decedent sued the taverns, alleging that their service of alcoholic beverages to the intoxicated minor constituted negligent conduct which proximately caused the decedent's death.[21] The New Jersey Supreme Court, applying fundamental negligence principles, held that the widow had a cause of action against the taverns. The court further stated that it could not hold, as a matter of law, that there could have been no proximate causal relationship between the tavern's negligent conduct and the decedent's death.[22] In so holding, the court rejected the position maintained in some jurisdictions that the consumption, and not the wrongful sale, of the alcoholic beverages is the true proximate cause of the plaintiff's injuries in a dram shop situation.[23] Basing its decision on public policy, the court interpreted the ABC regulation prohibiting service to minors and intoxicated persons as intending to protect, specifically, these two classes of persons and, more generally, the public at large.[24]

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17 Law of March 29, 1921, ch. 103, § 55, [1921] N.J. Laws 184; Law of March 17, 1922, ch. 257, § 1, [1922] N.J. Laws 628-29.

18 Law of March 14, 1934, ch. 32, [1934] N.J. Laws 104.

19 N.J. STAT. ANN. §§ 33:1-1 *et seq.* (1940).

20 Rappaport v. Nichols, 31 N.J. 188, 200-01, 156 A.2d 1, 8 (1959).

21 *Id.* at 192-93, 156 A.2d at 3-4.

22 *Id.* at 204, 156 A.2d at 9.

23 Cole v. Rush, 45 Cal. 2d 345, 356, 289 P.2d 450, 457 (1955) (patron's widow had no cause of action against saloon for negligent sale of alcoholic beverages which caused patron's death); Fleckner v. Dionne, 94 Cal. App. 2d 246, 248-51, 210 P.2d 530, 532-34 (Dist. Ct. App. 1949) (sale of intoxicating liquor to inebriated minor defendant, which resulted in injuries to plaintiffs, did not state cause of action against tavern owner); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 254-56, 78 A.2d 754, 756-57 (1951) (in absence of statute, no cause of action could be predicated against seller of intoxicating liquors for causing intoxication of person whose negligence caused injury to plaintiff); Cowman v. Hansen, 250 Iowa 358, 370, 92 N.W.2d 682, 689 (1958) (patron's negligent driving of automobile and resultant tort were not natural consequences of tavern's service of beer to the patron). *See also* Annot., 130 A.L.R. 352 (1941).

24 31 N.J. at 202, 156 A.2d at 8.

Seven years after *Rappaport*, the prospective liability of taverns was greatly increased when the New Jersey Supreme Court decided *Soronen*. The case involved an action for wrongful death by a widow whose husband suffered a fatal fall in the defendant tavern. Prior to the fall, the deceased had been illegally served alcoholic beverages while in an apparent state of intoxication.[25] The tavern owner asserted the defense of the decedent's contributory negligence, and the court was confronted with the issue of whether or not that contributory negligence should be a bar to recovery.

The *Soronen* court prefaced its opinion by pointing out that the plaintiff herself was not charged with any contributory fault, and then proceeded to discuss a number of cases which denied the defense of contributory negligence[26] on the basis of section 483 of the *Restatement of Torts*,[27] which stands for the proposition that plaintiff's contributory negligence cannot be a valid defense when the defendant has violated a statutory prohibition designed to protect a class of persons, including the decedent, from the "consequences of their [own] incompetency."[28] The court, in concluding that the defense was legally

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25 The case was remanded for retrial on the specific issue of whether or not the decedent exhibited visible intoxication. 46 N.J. at 584-85, 594, 218 A.2d at 631-32, 637.

26 Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961) (applying New Jersey law—contributory negligence not a bar to recovery by patron for injuries suffered in automobile mishap after being served at tavern while inebriated); Majors v. Broadhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965) (defense of contributory negligence not available to hotel that served inebriated guest); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958) (recovery by inebriated patron for injuries received in bar brawl not barred by defense of contributory negligence).

27 RESTATEMENT (SECOND) OF TORTS § 483 (1965):

> **Defense to Violation of Statute**
>
> The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.
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> **Comment:**
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> *c.* There are, however, exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves. . . .

Viewed by the *Soronen* court as being particularly illustrative of the case law dealing with the exceptional statutes referred to in comment *c* are: Pitzer v. M.D. Tomkies & Sons, 136 W. Va. 268, 67 S.E.2d 437 (1951) (child labor acts); Tamiami Gun Shop v. Klein, 109 So. 2d 189 (Fla. Dist. Ct. App. 1959), *aff'd*, 116 So. 2d 421 (Fla. Sup. Ct. 1959) (statutory prohibitions against sale of firearms to minors); Koenig v. Patrick Constr. Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948) (safety acts for protection of workmen). *See* W. PROSSER, *supra* note 12, § 64, at 435-36.

28 Soronen v. Olde Milford Inn, Inc., 46 N.J. at 591, 218 A.2d at 635 (held that the

insufficient, made it clear that its reasoning was designed to afford the negligently served patron, not a negligent third party, a cause of action against the tavern, despite the patron's contributory negligence.

> In aid of the policy embodied in this prohibition, we held in *Rappaport* that when injuries proximately result to a third person from service to a patron who is visibly intoxicated, the tavern keeper may fairly be held civilly accountable. In further aid of the policy, a tavern keeper may with equal reason be held civilly accountable for injuries which proximately result to the patron himself. The accountability may not be diluted by the fault of the patron for that would tend to nullify the very aid being afforded. Since the patron has become a danger to himself and is in no position to exercise self-protective care, it is right and proper that the law view the responsibility as that of the tavern keeper alone.[29]

Aliulis has no direct precedent in New Jersey nor, apparently, in any other jurisdiction.[30] Although the fact situations in *Rappaport* and *Soronen* are similar, they each differ from that of *Aliulis* in several important respects. In *Rappaport*, the deceased third party was presumably *innocent* of any negligence proximately contributing to his death, and contributory negligence was not an issue in the case.[31] In *Soronen*, the deceased was an illegally served patron who was in an apparent state of intoxication and unable to exercise the degree of self-protective care normally required of a plaintiff in such a situation.[32] *Aliulis* is clearly distinguishable from these cases in that plaintiff was an apparently sober and fully capable third party who *knowingly and willfully* accepted a ride with an illegally served intoxicated driver who, according to plaintiff's own testimony, "was not fit to drive the car . . . ."[33]

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reasoning of § 483 of the RESTATEMENT (SECOND) OF TORTS was appropriate, despite the fact that the case was concerned with the violation of a departmental regulation rather than a statute); *see* cases cited note 1 *supra*. For a discussion of the denial of the defense of contributory negligence, *see* Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105, 118-23 (1948); Note, *Contributory Negligence as Defense to Statutory Tort*, 15 U. CHI. L. REV. 779 (1948); *see generally* Annot., 10 A.L.R.2d 853 (1948).

29 46 N.J. at 592, 218 A.2d at 636.

30 *See* Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969) (dicta to the effect that contributory negligence by third party would bar recovery in jurisdiction applying fundamental negligence principles to dram shop situations). For an informative discussion on the problem of third-party contributory negligence in dram shop situations, *see* Comment, *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995, 1024-26 (1969).

31 31 N.J. at 192-93, 156 A.2d at 3-4.

32 46 N.J. at 584-85, 594, 218 A.2d at 631-32, 637.

33 114 N.J. Super. at 207, 275 A.2d at 752. Brief for Defendant, *supra* note 3, at 6-7.

Although plaintiff was a companion to the illegal drinking activities of Cynthia Zulauf, she was not herself served at defendant tavern.[34] However, plaintiff was apparently aware that her companion's activities were illegal. Even in those jurisdictions having dram shop acts imposing strict liability on taverns, relief is often barred, under the doctrine of complicity, to injured third parties who voluntarily participate in the illegal consumption of alcoholic beverages by a minor or inebriate.[35] In some of these jurisdictions, mere willful association, or companionship, by a third party with an illegally served minor or inebriated tavern patron during the illegal service has been held sufficient participation to bar subsequent recovery by the third party from the tavern for injuries sustained as a direct and proximate result of the illegal service, even where the third party was *not* himself indulging in the illegal consumption of alcoholic beverages nor purchasing drinks for the illegally served patron.[36]

It appears that the most reasonable interpretation of the *Aliulis* decision, which would bring plaintiff within the ambit of protection afforded by *Soronen*, is that the *Aliulis* court may have characterized plaintiff as a minor patron of defendant tavern, due merely to her presence at the tavern, and may have thus placed plaintiff within the specific protection of the ABC regulation, creating a duty on the part of defendant tavern not to expose her to an unreasonable degree of risk by negligently serving her intoxicated companion, Cynthia Zulauf. Viewing *Aliulis* in this light, plaintiff was not a contributorily negligent third party, but a patron of the tavern against whom, under the literal interpretation of *Soronen*, the defense of contributory negligence could not be asserted. The *Aliulis* court, however, did not base its

34 114 N.J. Super. at 207, 275 A.2d at 752. *See* note 2 *supra*.

35 Osinger v. Christian, 43 Ill. App. 2d 480, 193 N.E.2d 872 (1963) ("complicity" as defense in a dram shop situation means that one who has participated in bringing about intoxication of another cannot recover for resulting injuries).

36 *See, e.g.*, Cookinham v. Sullivan, 23 Conn. Supp. 193, 179 A.2d 840 (Super. Ct. 1962) (dram shop act does not contemplate giving remedies to one who contributes to violation of it); Baker v. Hannan, 44 Ill. App. 2d 157, 194 N.E.2d 563 (1963) (drinking companions of illegally served patron barred from recovery under dram shop act); Berge v. Harris, 170 N.W.2d 621 (Iowa Sup. Ct. 1969) (participant in drinking activities is not an innocent person entitled to protection under dram shop act); Kangas v. Suchorski, 372 Mich. 396, 126 N.W.2d 803 (1964) (drinking companion of intoxicated patron is not an innocent person entitled to recover against tavern operator); Heveron v. Village of Belgrade, 181 N.W.2d 692 (Minn. Sup. Ct. 1970) (affirmative participation in minor's intoxication relieves a defendant tavern of civil liability to participating party); *cf.* Mitchell v. Shoals, Inc., 19 N.Y.2d 338, 227 N.E.2d 21, 280 N.Y.S.2d 113 (Ct. App. 1967) (plaintiff's conduct did not amount to guilty participation in situation where she did not cause or procure her escort's intoxication). *See also* 48 C.J.S. *Intoxicating Liquors* § 446 (1950); Annot., 26 A.L.R.3d 1112 (1967).

decision upon the *Soronen* reasoning, but instead decided the case on the ground that it would be inequitable to protect a negligent patron and not a negligent third party.

> Finally, we see no reason for a distinction that would otherwise result: The negligent patron, more closely associated with the wrongful act of the tavern keeper, receives the benefit of the unavailability of a contributory negligence defense to the tavern keeper. The other members of the general public, less intimately connected with the wrongdoing, do not, and this to the advantage of the tavern keeper, the party who had it within his control to avoid implication by the exercise of reasonable care.[37]

This reasoning would certainly indicate that the *Aliulis* court did not believe that plaintiff's age was a crucial issue and, inferentially, refutes the interpretation that the court based its conclusion upon the reasoning that plaintiff, due to her tender years, came within the class of persons intended by the Legislature to be protected against the consequences of their own incompetency.

Generally speaking, however, third parties usually are neither legally nor physically incompetent to protect themselves.[38] Furthermore, contributory negligence is likely to affect only a small percentage of injured third parties.[39] Thus, the availability of the defense of contributory negligence against third parties would hardly preclude an entire class of persons from a civil remedy, as is usually the case where contributory negligence is available as a defense against a class of illegally served minors and inebriates.[40] It is, therefore, urged that the court went too far in *Aliulis* in *unqualifiedly* barring the defense of contributory negligence against third parties in dram shop situations. Certainly, it is realized that

> [t]hose who enter the licensed liquor business do so with full awareness that it is heavily fraught with dangers and that the members of the general public as well as the individual patron are entitled to receive . . . high measures of protection from its abuses.[41]

In this sense, the imposition of civil liability upon a tavern for damages resulting from its negligent service of alcoholic beverages strongly serves the public interest and does not impose any "unjustifiable burdens" upon it, for the tavern may readily protect itself "by the exercise of

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37 114 N.J. Super. at 210, 275 A.2d at 753.

38 Comment, *supra* note 30, at 1026.

39 *Id.*

40 *Id.*

41 46 N.J. at 592, 218 A.2d at 636.

due care."[42] On the other hand, it may be an undue burden to impose civil liability upon a tavern in circumstances in which a third party who is fully capable of protecting himself proximately contributes to his resultant injuries through a kind of aggravated misconduct or a complete lack of self-protective care.[43]

Surely, the fundamental tort concepts of foreseeability and proximate cause must control the extent of the tavern's liability if the negligence principles called for in *Rappaport* and *Soronen* are to be applied in a consistent and just manner. It is readily conceded that some dram shop situations exist in which an *ordinary* degree of contributory fault on the part of a third party may be reasonably foreseeable, and hence, according to the weight of authority, would not break the chain of legal causation.[44] However, there is substantial authority to the effect that acts of wanton recklessness by a third party are, like intentional misconduct, usually unforeseeable in most circumstances and, therefore, are superseding causes which break the chain of proximate causation.[45]

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[42] *Id.* at 588-89, 218 A.2d at 634 (quoting from Rappaport v. Nichols, 31 N.J. at 205-06, 156 A.2d at 10).

[43] For a discussion on aggravated negligence and degrees of negligence, *see* W. PROSSER, *supra* note 12, § 34, at 183-91.

[44] For a discussion on the foreseeability of ordinary negligence and intervening causes, *see* W. PROSSER, *supra* note 12, § 51, at 309.

> [O]ccasional negligence . . . is one of the ordinary incidents of human life and therefore [is] to be anticipated.

Id. § 33, at 174 (quoting from RESTATEMENT OF TORTS § 302, comment *l* (1939)); Menth v. Breeze Corp., 4 N.J. 428, 441, 73 A.2d 183, 189 (1950) (occupier liable for damage resulting from fire started by third person, if act was reasonably foreseeable):

> A tortfeasor is not relieved from liability for his negligence by the intervention of the acts of third persons, including the act of a child, if those acts were reasonably foreseeable.

See also Buccafusco v. Public Serv. Elec. & Gas Co., 49 N.J. Super. 385, 140 A.2d 79 (App. Div. 1958) (defendant electric company not relieved from liability in a situation where its negligence combined with some other independent but foreseeable intervening cause to occasion the harm); Somerset Crushed Stone, Inc. v. Explosives Sales Co. of N.J., 28 N.J. Super. 210, 100 A.2d 325 (App. Div. 1953) (test of proximate cause is foreseeability according to the common experience of mankind).

[45] Defendant in *Aliulis* asserted, by the way of cross-appeal, that the jury did not find proximate causation. This contention was apparently grounded upon the belief that the jury, knowing that a finding of contributory negligence would bar recovery, ignored the issue of proximate causation in finding defendant tavern guilty of negligence. However, the *Aliulis* court refuted this argument by stating that the jury was adequately charged on the necessity for a finding of proximate causation in determining negligence, and that a finding of proximate causation must necessarily be equated with their finding of negligence on the part of defendant tavern. 114 N.J. Super. at 210, 275 A.2d at 753. *See* RESTATEMENT OF TORTS § 440 (1939):

> A superseding cause is an act of a third person or other force which by its

New Jersey no longer recognizes any meaningful distinction between the concepts of assumption of risk and contributory negligence.[46] For instance, in the leading case of *Meistrich v. Casino Arena Attractions, Inc.*,[47] the New Jersey Supreme Court stated that in a negligence action there are but two real issues, negligence and contributory negligence.[48] Some four years later, a similar conclusion was reached by the same court in the case of *McGrath v. American Cyanamid Co.*,[49] where the court stated that

> the term "assumption of risk" is so apt to create mist that it is better banished from the scene. . . . Henceforth let us stay with "negligence" and "contributory negligence."[50]

New Jersey courts also do not appear to recognize any meaningful distinction between degrees of negligence. However, New Jersey still recognizes a kind of wrongdoing called wanton and willful misconduct which is characterized by behavior which is " 'so gross as to evince recklessness or design.' "[51] The established test in this jurisdiction for wanton and willful misconduct is as follows:

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intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

W. PROSSER, *supra* note 12, § 64, at 436-37:

> [I]f the plaintiff's own conduct is "wilful," "wanton," or "reckless," it will be balanced against similar conduct on the part of the defendant, and recognized as a bar to his action.

See also Roadman v. Bellone, 379 Pa. 483, 108 A.2d 754 (1954) (relates concept of superseding cause to automobile negligence situation); Reek v. Lutz, 90 R.I. 340, 158 A.2d 145 (1960) (relates concept of superseding cause to landlord and tenant problem); Johnson v. Cone, 112 Vt. 459, 28 A.2d 384 (1942) (discusses concept of superseding cause in terms of efficient intervening causes in automobile negligence situation); Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1937); *cf.* Rickards v. Sun Oil Co., 23 N.J. Misc. 89, 41 A.2d 267 (Sup. Ct. 1945) (discusses concept of superseding cause in terms of natural, probable and possible consequences in negligence situation involving stone quarry accident).

46 Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 51, 155 A.2d 90, 94 (1959) (concepts of assumption of risk and contributory negligence are "indistinguishable in . . . nature"); Benton v. YMCA, 27 N.J. 67, 69, 141 A.2d 298, 299 (1958) ("used interchangeably"); White v. Ellison Realty Corp., 5 N.J. 228, 235, 74 A.2d 401, 404 (1950) ("virtually identical"); Castino v. Di Menzo, 124 N.J.L. 398, 401, 11 A.2d 738, 739 (Sup. Ct. 1940) ("barely distinguishable"); Scheirek v. Izsa, 26 N.J. Super. 68, 75, 97 A.2d 167, 169 (App. Div. 1953) (twins); *see* James, *Assumption of Risk*, 61 YALE L.J. 141 (1952); Annot., 82 A.L.R.2d 1218, 1227 (1959).

47 31 N.J. 44, 155 A.2d 90 (1959).

48 *Id.* at 54, 155 A.2d at 96.

49 41 N.J. 272, 196 A.2d 238 (1963).

50 *Id.* at 276, 196 A.2d at 240-41.

51 Tabor v. O'Grady, 61 N.J. Super. 446, 450, 161 A.2d 267, 269 (App. Div. 1960) (quoting from Vandegrift v. Rediker, 22 N.J.L. 185, 189 (Sup. Ct. 1849) (defendant guilty of wanton and willful misconduct as matter of law for wild and reckless driving

> "To establish a willful or wanton injury it is necessary to show that one with *knowledge* of existing conditions, and *conscious* from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, *consciously and intentionally* does some wrongful act or omits to discharge some duty which produces the injurious result." (Emphasis supplied).[52]

Wanton and willful misconduct, when expressed in terms of culpability, thus appears to represent a kind of misconduct or wrongdoing which is located somewhere on a scale between negligence and intentional wrongdoing.

The case of *Tabor v. O'Grady*[53] is particularly illustrative of the legal consequences which may attach to a finding of wanton and willful misconduct on the part of either or both parties in a negligence case. *Tabor* involved an automobile negligence action in which the defendant, the driver of the injury-producing automobile, was found to be guilty of wanton and willful misconduct as a matter of law.[54] The case was remanded for retrial for a determination of whether or not the plaintiff, who was injured while a passenger in the defendant's automobile, was also guilty of wanton and willful misconduct for knowingly and willfully exposing himself "to the danger of riding or continuing to ride" in the automobile of the defendant.[55] The *Tabor* court ruled that if the plaintiffs were subsequently found to be guilty of ordinary contributory negligence, then they could still recover, but if the plaintiffs were found to be guilty of contributory wantonness, then they would be barred from recovering, since both plaintiffs and defendant would be guilty of the same kind of wrongful behavior.[56]

The issue of the kind of misconduct of which defendant was guilty

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of automobile). *See* McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 266 A.2d 284 (1970) (evidence did not show defendant guilty of wanton and willful misconduct as matter of law for maintaining a dangerous diving board); Eagen v. Erie R.R., 29 N.J. 243, 148 A.2d 830 (1959) (railroad's failure to provide a watchman did not amount to wanton and willful misconduct); Staub v. Public Serv. Ry., 97 N.J.L. 297, 117 A. 48 (Ct. Err. & App. 1922) (railroad not guilty of wanton and willful misconduct for running its trains over its private right of way without warning).

52 Tabor v. O'Grady, 61 N.J. Super. 446, 454, 161 A.2d 267, 271 (App. Div. 1960) (quoting from Staub v. Public Serv. Ry., 97 N.J.L. 297, 300, 117 A. 48, 49-50 (Ct. Err. & App. 1922)).

53 61 N.J. Super. 446, 161 A.2d 267 (App. Div. 1960).

54 *Id.* at 452-53, 161 A.2d at 270-71.

55 *Id.* at 456, 161 A.2d at 272.

56 *Id.* at 453-54, 161 A.2d at 271. *See also* 38 AM. JUR. *Negligence* § 179, at 856 (1941); 65A C.J.S. *Negligence* § 131, at 110 (1950); 2 HARPER & JAMES, THE LAW OF TORTS § 22.6, at 1213-15 (1956); RESTATEMENT (SECOND) OF TORTS §§ 482(2), 503(2) (1956); Anont., 41 A.L.R. 1379 (1926).

was not raised by plaintiff in *Aliulis*. In order to avoid the defense of contributory negligence on these grounds, plaintiff had to assert, either in her pleadings or by pre-trial motion, that the defense of contributory negligence was legally insufficient in the face of defendant tavern's aggravated kind of misconduct. Since the issue was not so raised, it could not be charged to the jury or urged for the first time on appeal.[57]

The *Tabor* court has, in effect, held that the faults of the parties may be compared for the purposes of determining the availability of the defense of contributory negligence. The court made certain to point out, however, that its decision was in no way an adoption of the doctrine of comparative negligence, by stating that "[t]he doctrine of comparative negligence involves a reduction of plaintiff's damages in proportion to his negligence," while its rule simply holds that a "plaintiff's [ordinary contributory] . . . negligence has no legal consequence whatever" in situations where the defendant is guilty of wanton and willful misconduct.[58]

Tabor did not involve a negligent tavern and is clearly distinguishable from the instant case on these and other grounds. Nevertheless, the case has significance as a particularly illustrative example of an opinion shared by a growing segment of the legal profession of this State, namely, that a serious wrongdoer should not escape liability altogether because of a relatively trivial misstep on the part of the other party.[59] This view was most recently reinforced by Justice Francis of the New Jersey Supreme Court in his concurring opinion in *O'Brien v. Bethlehem Steel Corp.*,[60] in which he severely criticized the doctrine of contributory negligence as

> almost universally regarded as unjust and inequitable [for imposing] . . . an entire accidental loss on one of the parties whose

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57 Borelli v. Frollani, 98 N.J. Super. 203, 236 A.2d 613 (App. Div. 1967) (legal insufficiency of a defense must be asserted in pleadings or at trial in order to be framed within scope of issues submitted to jury). *But see* Douglas v. Harris, 35 N.J. 270, 173 A.2d 1 (1961) (rule requiring affirmative pleading of contributory negligence is mandatory, but rule should be relaxed when its enforcement would be inconsistent with substantial justice).

58 61 N.J. Super. at 452, 161 A.2d at 270.

59 The legal consequences attaching to wanton and willful misconduct, which are illustrated in *Tabor v. O'Grady*, were recently reaffirmed in McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 266 A.2d 284 (1970). *See also* Chazen, *An Equitable Concept of Comparative Negligence*, 94 N.J.L.J. 785 (1971); Haugh, *Comparative Negilgence: A Reform Long Overdue*, 49 ORE. L. REV. 38 (1969); James, *et al., Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968).

60 59 N.J. 114, 125, 279 A.2d 827, 833 (1971) (Francis, J., concurring).

> negligent conduct combined with the negligence of the other party to produce the loss.[61]

In most situations, it is the plaintiff who is victimized by the defense of contributory negligence, but occasionally, when the defense is unqualifiedly barred, as in *Aliulis*, the defendant may also be victimized by being forced to bear legal responsibility for the entire loss, even though he may have been only slightly responsible. Justice Francis, in *O'Brien*, suggested a far more equitable solution:

> If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.[62]

In summary, it appears that the *Aliulis* rule, barring the defense of contributory negligence, is fundamentally fair when applied to third-party dram shop situations where the plaintiff is guilty of only ordinary and foreseeable contributory negligence. In cases of this nature, justice and sound public policy require that the plaintiff should not be forced to bear the whole of a loss which could have readily been prevented by the exercise of a reasonable degree of care on the part of the defendant. Some human frailties are to be expected and foreseen, and it appears to be quite reasonable to require a defendant tavern to foresee such negligence on the part of a plaintiff and to take reasonable precautions to avoid contributing in any manner toward injuring him. On the other hand, it appears unreasonable to *unqualifiedly* bar the defense of contributory negligence to taverns in third-party dram shop situations, because it is just as inequitable to subject a negligent tavern to full liability in a situation where a plaintiff through his own wanton and willful misconduct is responsible to a far larger degree for his own injuries than is the tavern.

Clearly, then, a balance needs to be struck if a sound, general rule is to be arrived at which will fairly limit the liability of taverns in third-party dram shop situations without placing undue burdens upon the third-party victims. There seems to be no clear-cut and simple solution under existing New Jersey law. It appears that application of the doctrine of comparative negligence to such situations would offer the most reasonable solution toward providing

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[61] *Id.* at 126, 279 A.2d at 833.

[62] *Id.* Justice Francis went on to state that:

> Since the present bar of contributory negligence is judge-made law, our authority to humanize that law by adopting comparative negligence is not open to reasonable question, and the time seems ripe to make the change.

Id., 279 A.2d at 834.

> a more just and socially desirable distribution of loss than that ever achieved by the application of the long-standing rule of contributory negligence.[63]

A variety of formulas which express the general fault-sharing principles taught by the doctrine of comparative negligence have been applied in other jurisdictions.[64] However, Justice Francis suggests the formula adopted by the State of Wisconsin as a "fair formula which has been in operation for some years."[65] The Wisconsin rule is:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death, or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.[66]

Certainly, it is arguable that the adoption of such a formula for comparative negligence would produce a fairer measure of justice for the tavern in third-party dram shop situations, while at the same time it would further the avowed public policy considerations referred to in *Rappaport*, *Soronen* and *Aliulis*. Situations where a jury would find a non-patron plaintiff guilty of a degree of contributory negligence amounting to a majority, or a high percentage, of the total fault for the accident would seldom occur, and verdicts could be reached solely by apportioning the loss among the parties in proportion to their relative negligence, without resorting to a possibly unjust and inequitable application of the rule of contributory fault, or some confusing variation thereof. Yet, in situations where a non-patron plaintiff is found to be guilty of a majority of the total fault for the accident, the tavern would be provided with a reasonable defense and would not be inequitably forced to bear the brunt of a loss for which it was only marginally responsible.[67]

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[63] *Id.*, 279 A.2d at 833.

[64] Examples of the three most common formulas for comparative negligence may be found in the following statutes: ARK. STAT. ANN. §§ 27-1730.1, -1730.2 (1962 repl.); MISS. CODE ANN. § 1454 (1956 repl.); WIS. STAT. ANN. § 895.045 (1966).

[65] 59 N.J. at 127, 279 A.2d at 834.

[66] WIS. STAT. ANN. § 895.045 (1966).

[67] On Dec. 6, 1971, the New Jersey Supreme Court affirmed this decision, holding that the defense of contributory negligence is not available under the circumstances of this case.