

COMMON LAW NEGLIGENCE THEORY OF SOCIAL HOST LIABILITY FOR SERVING ALCOHOL TO OBVIOUSLY INTOXICATED GUESTS

Alcohol consumption and automobile driving have become part and parcel of modern life. When mixed, however, they are often fatal. In the past ten years, drunk drivers have killed over 250,000 people and, indeed, over fifty percent of all highway deaths involve the irresponsible use of alcohol.¹ Unfortunately, many of those killed were innocent third persons. Heightened societal awareness and concern over the social costs of alcohol related accidents has led to a public and judicial recognition for the need to fully compensate victims of drunk driving.² Thus, in addition to the typical liability of the drunk driver for injuries to a third person, recent cases have begun to extend liability to the furnisher of the alcohol, such as a commercial vendor or social host.³

Historically the injured third party had no cause of action against the furnisher of the alcohol.⁴ The judiciary's unwillingness to impose liability on individuals who furnish alcohol to another who subsequently injures a third party is based on several underlying principles. First among these principles is the belief that the consumption, and not the furnishing of the alcohol, is the proximate cause of the injury.⁵ Reasoning that a person

¹ PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT I (1983) [hereinafter cited as DRUNK DRIVING].

² See *Kelly v. Gwinell*, 96 N.J. 538, 551, 476 A.2d 1219, 1226 (1984).

³ Injured plaintiffs may seek recovery under a statute. See, e.g., MASS. GEN. LAWS ANN. ch. 138 §§ 34, 69 (West Supp. 1984-85) (liquor control statute); N.Y. GEN. OBLIG. LAW 11.01 (McKinney & Supp. 1984-85) (dram shop act). See also *infra* notes 28-47 and accompanying text. In addition, an injured plaintiff may also seek recovery under a common law negligence theory. See, e.g., *Michnik-Zilberman v. Gordon Liquors*, 14 Mass. App. Ct. 533, 538, 440 N.E.2d 1297, 1301 (1982) (holding retail liquor store owner liable), *aff'd*, 390 Mass. 6, 453 N.E.2d 430 (1983); *Kelly v. Gwinell*, 96 N.J. 538, 548, 476 A.2d 1219, 1224 (1984) (holding social host liable); *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982) (holding liquor vendor liable); *Baird v. Roach*, 11 Ohio App. 3d 16, 19, 462 N.E.2d 1229, 1233 (1983) (recognizing social host may be liable); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 639, 485 P.2d 18, 21 (1971) (recognizing social host may be liable); *Wilson v. Steinbach*, 98 Wash. 2d 434, 438, 656 P.2d 1030, 1032 (1982) (recognizing social host may be liable); *Halligan v. Pupo*, 37 Wash. App. 84, 88, 678 P.2d 1295, 1297 (1984) (recognizing social host may be liable); *McClennan v. Tottenhoff*, 666 P.2d 408, 411 (Wyo. 1983) (holding retail liquor store owner liable). See also *infra* notes 54-178 and accompanying text.

⁴ *Chastain v. Litton Systems, Inc.*, 694 F.2d 957, 960 (4th Cir. 1982) (under common law social host not liable), *cert. denied*, 462 U.S. 1106 (1983); *Wienke v. Champaign County Grain Ass'n*, 113 Ill. App. 3d 1005, 1008, 447 N.E.2d 1388, 1390 (1983); *Lowe v. Rubin*, 98 Ill. App. 3d 496, 497, 424 N.E.2d 710, 711 (1981); *Miller v. Moran*, 96 Ill. App. 3d 596, 598, 421 N.E.2d 1046, 1047 (1981) (quoting *Cunningham v. Brown*, 22 Ill. 2d 23, 29-30, 174 N.E.2d 153, 157 (1961)); *Felder v. Butler*, 292 Md. 174, 176, 438 A.2d 494, 495 (Md. App. 1981); *Holmes v. Circo*, 196 Neb. 496, 500-01, 244 N.W.2d 65, 68 (1976); *Gabrielle v. Craft*, 75 A.D.2d 939, 940, 428 N.Y.S.2d 84, 86 (N.Y. App. Div. 1980); see generally 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969).

⁵ *Lewis v. Wolf*, 122 Ariz. 567, 568, 596 P.2d 705, 706 (Ariz. Ct. App. 1979); *Keaton v. Kroger Co.*, 143 Ga. App. 23, 27, 237 S.E.2d 443, 447 (1977); *Miller v. Moran*, 96 Ill. App. 3d 596, 598, 421 N.E.2d 1046, 1047 (1981) (quoting *Cunningham v. Brown*, 22 Ill. 2d 23, 29-30, 174 N.E.2d 153, 157 (1961)); *Runge v. Watts*, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979); *Holmes v. Circo*,

cannot become intoxicated unless he or she chooses to drink, courts traditionally held the drunken driver, and not the furnisher of the alcohol, liable for the injuries to the third person.⁶ Second, courts reasoned that even if the act of furnishing the alcohol is considered to be negligent, the intoxicated individual's negligent conduct is an intervening, superseding cause of the injury.⁷ Finally, the refusal to hold a furnisher of alcohol liable has been justified on the basis that drunk or sober, individuals are responsible for their own actions.⁸

Over the course of many years, legislatures and courts began to limit this historical rule of refusing to impose liability on the furnisher of alcohol. This erosion of the nonliability rule has been gradual. The rule was first limited by legislative action. Statutes were enacted which directly provided for an action against a liquor vendor for injuries to innocent third persons.⁹ In addition, legislative action was used indirectly to hold vendors liable. For example, courts used criminal statutes that were enacted to regulate the furnishing of alcohol to the public to impose a duty of care on the vendor.¹⁰ In the 1950's, courts began to further limit this nonliability rule by imposing common law negligence liability on vendors of alcohol.¹¹

196 Neb. 496, 501, 244 N.W.2d 65, 68 (1976); *Klein v. Raysinger*, 504 Pa. 141, 148, 470 A.2d 507, 510 (1983); *Olsen v. Copeland*, 90 Wis. 2d 483, 486, 280 N.W.2d 178, 179 (1979), *overruled in Sorenson v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984). For a discussion of the *Sorenson* decision, see *supra* notes 79-81 and accompanying text. See generally 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969).

For an action to be the proximate cause of an injury, the plaintiff must show that his or her injury was a natural and probable consequence of the defendant's negligence which was or should have been reasonably foreseen by the defendant, and that but for the defendant's negligence, the plaintiff would not have been injured. See generally W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS §§ 41, 42 (1984) [hereinafter cited as PROSSER].

⁶ *Lewis v. Wolf*, 122 Ariz. 567, 568, 596 P.2d 705, 706 (Ariz. Ct. App. 1979), *overruled in Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983). The *Ontiveros* court overruled *Lewis* insofar as it stood for the proposition that the negligence of a tavern owner in continuing to serve alcohol to a patron who is intoxicated can never be the legal cause of a subsequent accident. *Id.* at 507-08, 667 P.2d at 207-08. See generally 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969).

⁷ *Cecil v. Hardin*, 575 S.W.2d 268, 271 (Tenn. 1978).

In determining whether an event is an intervening, superseding cause, Prosser has stated: [t]he question is always one of whether the defendant is to be relieved of responsibility, and the defendant's liability superseded, by the subsequent event. In general, this has been determined by asking whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated. It is therefore said that the defendant is to be held liable if, but only if, the intervening cause is "foreseeable."

PROSSER, *supra* note 5, at 302.

⁸ *Olsen v. Copeland*, 90 Wis. 2d 483, 488-89, 280 N.W.2d 178, 180 (1979) (quoting *Garcia v. Hargrove*, 46 Wis. 2d 724, 736, 176 N.W.2d 566, 572 (1970)), *overruled in Sorenson v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); *Garcia v. Hargrove*, 46 Wis. 2d 724, 736, 176 N.W.2d 566, 572 (1970), *overruled in Sorenson v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984). For a discussion of the *Sorenson* decision, see *infra* notes 79-81 and accompanying text.

⁹ See Note, *Social Host Liability for Injuries Caused By the Acts of an Intoxicated Guest*, 59 N.D.L. REV. 445, 450-51 (1983) [hereinafter cited as Note, *Social Host Liability*]. See also *infra* notes 28-34 and accompanying text.

¹⁰ *Graham, Liability of the Social Host for Injuries Caused by the Acts of An Intoxicated Guest*, 16 WILLAMETTE L.J. 561, 570-71 (1980). See also *infra* notes 42-47 and accompanying text.

¹¹ See, e.g., *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982); *McClennan v. Tottenhoff*, 666 P.2d 408, 412 (Wyo. 1983). See also *infra* notes 58-81 and accompanying text. The

While recognition of liability for commercial vendors developed, courts¹² and legislatures¹³ were traditionally unwilling to extend such liability to social hosts. The refusal to recognize such liability has been based mainly on policy considerations stemming from the nature of home entertaining.¹⁴ In recent years, however, a significant point in the gradual erosion of the historical rule of nonliability of social hosts has been reached. Courts have held that social hosts may be liable under a general common law negligence theory of recovery.¹⁵ For example, Washington courts have recognized an exception to the nonliability rule for obviously intoxicated persons.¹⁶ The Washington Court of Appeals has held that a social host may be liable for injuries proximately caused by the guest if the guest is obviously intoxicated when served.¹⁷ Similarly, in the recent and well publicized case of *Kelly v. Gwinnell*,¹⁸ the New Jersey Supreme Court held that a host who serves alcohol to a guest, knowing that the guest is intoxicated and will soon be driving, is liable to a third person injured as a result of that guest's negligent driving.¹⁹

This note analyzes the imposition of common law negligence liability on social hosts. Section I will examine the evolution of the historical rule of nonliability against furnishers of alcohol. This section will examine the rationale given by courts for refusing to recognize any cause of action against vendors and social hosts. It will then discuss the limitation of the historical rule by state statutes and why courts have refused to rely on this legislation as a theory of recovery to find social hosts liable. Section II will discuss the trend toward abrogation of the traditional rule of nonliability for furnishers of alcohol through the use of common law negligence principles. In Subsection A, cases finding tavern keepers and retail liquor store owners liable under a negligence theory will be analyzed. Subsection B will first review the traditional arguments for refusing to extend such liability to social hosts. This subsection will then discuss the recent decisions which have recognized common law negligence liability against social hosts. Finally,

traditional elements of a negligence cause of action would require that a plaintiff, in order to recover for negligence in furnishing alcohol, show that: 1) the defendant furnished 2) alcohol 3) to an individual the defendant knew or should have known was intoxicated 4) under such circumstances that a reasonable person in the same or similar circumstances would have stopped serving alcohol to the individual, 5) and that the defendant could reasonably foresee that the individual would drive, 6) and the individual's mental or physical abilities became impaired as a result of the consumption of the alcohol furnished by the defendant 7) so that such impairment was a proximate cause of the injury to the plaintiff. Note, *Injuries Arising From Negligence in Furnishing Liquor to Minors and Intoxicated Adults: New Tort Action in Wyoming*, 19 LAND & WATER L. REV. 285, 293 n.70 (1984) [hereinafter cited as Note, *Injuries in Furnishing Liquor*]. For a similar discussion, see *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 331 n.9, 431 N.E.2d 920, 926 n.9 (1982). For a discussion of the traditional elements of a negligence cause of action, see PROSSER, *supra* note 5, at 164-65; RESTATEMENT (SECOND) OF TORTS § 281 (1969).

¹² See, e.g., *Runge v. Watts*, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979) (refusing to find social host liable under Montana law). See also *infra* notes 47, 88-94 and accompanying text.

¹³ *Miller v. Owens*, 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964) (no social host liability under dram shop act); *Manning v. Andy*, 454 Pa. 237, 239, 310 A.2d 75, 76 (1973) (no social host liability under liquor control statute). See also *infra* notes 38-41 and accompanying text.

¹⁴ See *infra* notes 88-94 and accompanying text.

¹⁵ See *infra* notes 95-173 and accompanying text.

¹⁶ *Halligan v. Pupo*, 37 Wash. App. 84, 88, 678 P.2d 1295, 1297 (1984); see also *infra* notes 112-133 and accompanying text.

¹⁷ *Halligan v. Pupo*, 37 Wash. App. 84, 88, 678 P.2d 1295, 1297 (1984).

¹⁸ 96 N.J. 538, 476 A.2d 1219 (1984).

¹⁹ *Id.* at 548, 476 A.2d at 1224; see also *infra* notes 134-178 and accompanying text.

Section III will analyze these recent decisions removing the traditional limitations placed upon social host liability. This note will conclude that the adoption of a common law negligence theory of recovery against social hosts is both desirable and workable.

I. EVOLUTION OF THE COMMON LAW RULE OF NONLIABILITY FOR FURNISHERS OF ALCOHOL

Historically, neither vendors nor social hosts were held liable for injuries to a third person resulting from furnishing alcohol to an obviously intoxicated individual. This historical rule was based on the view that the consumption of the alcohol was the proximate cause of the injury.²⁰ Under this traditional view of nonliability of furnishers of alcohol, the act of furnishing alcohol in itself was harmless because the individual's drunkenness and subsequent negligent driving resulted from drinking the alcohol.²¹ The drunk driver was, therefore, held solely responsible for the injury.

The historical common law rule of nonliability for furnishers of alcohol was further based on several public policy considerations. One such consideration was the view that individuals are responsible for their own actions, regardless of whether they are drunk or sober.²² Another basis for the historical rule that a furnisher of alcohol was not liable for injuries to a third person was that even if the act of furnishing was negligent, the drunk individual's negligent driving was a superseding cause of the injury, so as to cut off the furnisher's liability.²³ The drunk driver's negligence was, therefore, viewed as an unforeseeable consequence of furnishing alcohol to an already intoxicated individual.²⁴

Courts have also based their refusal to impose common law liability on furnishers of alcohol on the argument that the issue of liability is best left to the legislature.²⁵ Courts have reasoned that the potential liability under a common law negligence theory would place an unwarranted heavy burden on furnishers of alcohol.²⁶ Noting that statutes which have imposed liability on vendors of alcohol generally limit the amount recoverable against the furnisher of alcohol, courts resisted creating a common law negligence cause of action which would lead to unlimited liability for these parties.²⁷

²⁰ See *supra* note 5.

²¹ *Lewis v. Wolf*, 122 Ariz. 567, 568, 596 P.2d 705, 706 (Ariz. Ct. App. 1979), *overruled in Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983). For a discussion of the *Ontiveros* court's overruling of *Lewis*, see *supra* note 6. See generally 45 AM. JUR. 2d *Intoxicating Liquors* § 533 (1969).

²² *Garcia v. Hargrove*, 46 Wis. 2d 724, 736, 176 N.W.2d 566, 572 (1970), *overruled in Sorenson v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984). For a discussion of *Sorenson*, see *infra* notes 79-81 and accompanying text.

²³ *Cecil v. Hardin*, 575 S.W.2d 268, 271 (Tenn. 1978).

²⁴ See PROSSER, *supra* note 5, at 303-06.

²⁵ See, e.g., *Wright v. Moffitt*, 437 A.2d 554, 556 (Del. 1981); *Holmes v. Circo*, 196 Neb. 496, 505, 244 N.W.2d 65, 70 (1976); *Hamm v. Carson City Nuggett, Inc.*, 85 Nev. 99, 101, 450 P.2d 358, 359 (1969). See *infra* note 94 for cases expressing the view that the decision to impose liability on social hosts should be left to the legislature.

²⁶ *Wienke v. Champaign County Grain Ass'n*, 113 Ill. App. 3d 1005, 1007, 447 N.E.2d 1388, 1391 (1983). The *Wienke* court asserted that "[t]he imposition of [a common law tort remedy] would impose a heavy burden upon those who serve liquor to others or who aid others who may be intoxicated in getting to their automobiles." *Id.* See also *Olsen v. Copeland*, 90 Wis. 2d 483, 490, 280 N.W.2d 178, 181 (1979).

²⁷ *Wienke*, 113 Ill. App. 3d at 1006-07, 447 N.E.2d at 1389; *Miller v. Moran*, 96 Ill. App. 3d 596, 601, 421 N.E.2d 1046, 1049 (1981).

While courts in the past were reluctant to hold any furnisher of alcohol liable to an injured third party, this historical common law rule was abrogated by statute in certain limited circumstances. In some states, liquor vendors are held liable under dram shop acts, which provide for an action against a vendor for injuries to a third person.²⁸ Originally enacted in the latter half of the 19th century as a response to prohibitionists' lobbying, these statutes were designed to control liquor traffic and mitigate "the evils of intoxicating liquors."²⁹ A suit based on a dram shop act is neither a common law negligence action, nor a criminal prosecution. Rather, it is a statutory tort action.³⁰ In order to recover against a vendor under a dram shop act, a plaintiff must prove that liquor was supplied in violation of the statute,³¹ that the intoxicated person consumed the alcohol, and that the alcohol contributed to the intoxication.³² In addition, the plaintiff must show causation between the intoxication and the injury.³³ The civil liability imposed by such a statute is strict; therefore no showing of negligence is necessary to recover against the furnisher.³⁴

Some states have broadly worded dram shop acts that provide for liability against *anyone* who sells or gives liquor to a minor or an obviously intoxicated individual.³⁵ Relying on the broad language of such statutes, certain courts extended liability under the dram shop act to social hosts.³⁶ These courts found that the statutes were compensatory in nature, and, thus, social hosts as well as vendors should be liable.³⁷ The legislatures of these states, however, responded to this judicial extension of liability by

²⁸ See, e.g., ALA. CODE § 6-5-71 (1975); N.D. CENT. CODE § 5-01-06 (1975). An example of such an act is the Alabama statute, which states in pertinent part:

(a) Every wife, child, parent or other person who shall be injured in person, property or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.

ALA. CODE § 6-5-71(a) (1975). Fourteen states currently have such dram shop acts in effect. See Note, *Social Host Liability*, *supra* note 9, at 446 n.10.

²⁹ Luckman, *Liquor Law Liability — Commercial Vendors and Social Hosts*, 53 CONN. B.J. 132, 133 (1979). See also Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175, 176-77 (1958).

³⁰ See Luckman, *supra* note 29, at 133.

³¹ Note, *Social Host Liability*, *supra* note 9, at 450-51.

³² *Id.* at 451.

³³ *Id.*

³⁴ See Graham, *supra* note 10, at 564.

³⁵ See, e.g., ALA. CODE § 6-5-71 (1975). See *supra* note 28 for text of statute.

³⁶ MINN. STAT. ANN. § 340.95 (West 1972); IOWA CODE ANN. § 129.2 (West 1949); see Williams v. Klemesrud, 197 N.W.2d 614, 615-16 (Iowa 1972) (statute affords right of action against those not engaged in liquor traffic), *overruled in* Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Ross v. Ross, 294 Minn. 115, 121-22, 200 N.W.2d 149, 153 (1972).

The Lewis court overruled Williams to the extent that it was inconsistent with the recognition of a common law right to recovery. Lewis, 256 N.W.2d at 191-92.

³⁷ Williams, 197 N.W.2d at 615-16; Ross, 294 Minn. at 120-21, 200 N.W.2d at 152-53. The Ross court, in holding that the legislature intended to create a cause of action against anyone violating the liquor laws, stated that "no reason occurs to us why those who furnish liquor to others, even on social occasions, should not be responsible for protecting innocent third persons from the potential dangers of indiscriminately furnishing such hospitality." *Id.* at 121-22, 200 N.W.2d at 153.

amending their statutes to make it clear that the dram shop acts were to apply only to persons who sell alcohol.³⁸ In other states with broadly worded dram shop acts, courts have refused to extend statutory liability to social hosts.³⁹ Reasoning that dram shop acts are penal in character, and require strict construction,⁴⁰ these courts found that the legislatures did not intend to impose liability on social hosts.⁴¹ Thus, while a judicial attempt was made to construe broadly worded dram shop acts to impose liability on social hosts, such a theory of recovery was not accepted as a viable limitation upon the historical nonliability rule.

Courts have also relied on liquor control statutes to impose civil liability on liquor vendors for injuries to a third person.⁴² These statutes regulate the furnishing of alcohol to the public, typically by prohibiting sale to minors, intoxicated persons, or other high risk individuals.⁴³ Violations of these statutes are typically treated as criminal misdemeanor offenses.⁴⁴ In construing these statutes to impose civil liability, courts have looked to the legislature's broad intent to protect the general public, and have reasoned that imposing a duty of care on a furnisher of alcohol is consistent with that legislative intent.⁴⁵ Although a few courts have used this reasoning to hold social hosts civilly liable under these statutes,⁴⁶ most courts which have considered this issue have restricted liability under liquor control statutes to commercial vendors.⁴⁷ Therefore, liability under

³⁸ MINN. STAT. ANN. § 340.95 (West Supp. 1982). The pertinent part of the statute provides: "Every . . . person who is injured . . . by an intoxicated person, or by the intoxication of any person, has a right of action . . . against any person who, by illegally selling or bartering intoxicating liquors . . . , caused the intoxication of that person, for all damages sustained . . ." *Id.* In 1972, the Iowa legislature also amended its dram shop act allowing a cause of action to be brought only against a licensee or permittee selling or giving liquor.

³⁹ New York courts, for example, have refused to extend liability to social hosts under a broadly worded dram shop act. *See Kohler v. Wray*, 114 Misc. 2d 856, 857-58, 452 N.Y.S.2d 831, 833 (N.Y. Sup. Ct. 1982); *Edgar v. Kajet*, 84 Misc. 2d 100, 102, 375 N.Y.S.2d 548, 551 (N.Y. Sup. Ct. 1975). Likewise, courts in Illinois, which has a broadly worded dram shop act, have also refused to extend liability to social hosts. *See Miller v. Owens*, 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964). In *Miller v. Owens*, the court stated that the legislature did not intend to make social drinking and giving of drinks to others by social hosts actionable under the dram shop act. *Id.* If such was the law, the court stated, a social drink with a neighbor or friend would become a hazardous act. *Id.* According to the Illinois court, this view of social host liability would open up the floodgates of litigation as to almost every happening where someone was injured. *Id.*

⁴⁰ *Miller v. Owens*, 48 Ill. App. 2d at 420, 199 N.E.2d at 305; *Edgar v. Kajet*, 84 Misc. 2d at 103, 375 N.Y.S.2d at 551-52.

⁴¹ *Miller v. Owens*, 48 Ill. App. 2d at 423, 199 N.E.2d at 306; *Edgar v. Kajet*, 84 Misc. 2d at 103, 375 N.Y.S.2d at 552.

⁴² *Marusa v. District of Columbia*, 484 F.2d 828, 833-34 (D.C. Cir. 1973); *Ono v. Applegate*, 612 P.2d 533, 539 (Hawaii 1980).

⁴³ *See, e.g., N.D. CENT. CODE* § 5-01-09 (1975), which provides in part: "Any person delivering alcoholic beverages to a person under twenty-one years of age, an habitual drunkard, an incompetent, or an intoxicated person is guilty of a class A misdemeanor . . ." *Id.* All states and the District of Columbia have adopted liquor control statutes. *See Note, Social Host Liability, supra* note 9, at 447 n.12.

⁴⁴ *Graham, supra* note 10, at 570.

⁴⁵ *Giardina v. Solomon*, 360 F. Supp. 262, 263-64 (M.D. Pa. 1973); *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 151-52, 577 P.2d 669, 673, 145 Cal. Rptr. 534, 538 (1978); *Brattain v. Herron*, 159 Ind. App. 663, 673-74, 309 N.E.2d 150, 156 (1974).

⁴⁶ *Giardina*, 360 F. Supp. at 263-64; *Coulter*, 21 Cal. 3d at 152, 577 P.2d at 673, 145 Cal. Rptr. at 538; *Brattain*, 159 Ind. App. at 674, 309 N.E.2d at 156.

⁴⁷ *See Edgar v. Kajet*, 84 Misc. 2d 100, 103-04, 375 N.Y.S.2d 548, 552 (N.Y. Sup. Ct. 1975);

liquor control statutes, like dram shop acts, has not been viewed as a viable theory of recovery against social hosts.

A few states have enacted statutes which specifically deal with civil liability of social hosts for serving alcohol to an intoxicated guest.⁴⁸ In 1979, the Oregon legislature statutorily defined the specific situations that may give rise to social host liability.⁴⁹ In addition to a section dealing with serving alcohol to minors,⁵⁰ the Oregon legislation states that a social host will not be liable unless the host served or provided alcohol to a visibly intoxicated guest.⁵¹ A recently enacted New Mexico statute provides that no social host will be liable unless the liquor was served recklessly in disregard of the rights of others.⁵²

Manning v. Andy, 454 Pa. 237, 239, 310 A.2d 75, 76 (1973) (per curiam). In *Manning* the per curiam opinion stated simply, "[o]nly licensed persons engaged in the sale of intoxicants have been held to be civilly liable to injured parties." *Id.* In a concurrence, Justice Pomeroy stated:

I hasten to add that in my view there is no reason in the nature of things why a private person should not be held liable if he serves liquor to one whom he knows or should know to be intoxicated, and who he knows or should know is about to drive an automobile or engage in some other activity involving the potentiality of harm to himself or to others, with resulting damage. No legislative enactment is required to accomplish that result; it is ordinary tort law.

Id. at 242, 310 A.2d at 77.

Some recent court decisions, however, have held a social host civilly liable under a liquor control statute for serving alcohol to a minor. *See Brattain v. Herron*, 159 Ind. App. 663, 674, 309 N.E.2d 150, 156 (1974); *Longstreth v. FitzGibbon*, 125 Mich. App. 261, 266, 335 N.W.2d 677, 679-80 (1983); *Congini v. Portersville Valve Co.*, 504 Pa. 157, 162-63, 470 A.2d 515, 518 (1983); *Koback v. Crook*, 366 N.W.2d 857, 865 (Wis. 1985). In *Congini*, the court noted that legislation dealing with serving to a minor and with a minor purchasing alcohol represents an obvious legislative decision to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age. 504 Pa. at 162, 470 A.2d at 518. *See also Sutter v. Hutchings*, 254 Ga. 194, 327 S.E.2d 716 (1985). In *Sutter*, the court held that the hostess owed a duty to those using the highways not to subject them to an unreasonable risk of harm by furnishing alcohol to a noticeably intoxicated minor who the hostess knew would soon be driving. *Id.*

⁴⁸ CAL. BUS. & PROF. CODE § 25602(b), (c) (West Supp. 1985); N.M. STAT. ANN. § 41-11-1(D) (1984); OR. REV. STAT. §§ 30.955, .960 (1983). In 1978, the California legislature codified the traditional rule that the drinking, and not the furnishing of the alcohol, is the proximate cause of any resulting injury. CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1985). No vendor or social host, therefore, can be held civilly liable for injuries caused by the intoxicated individual. *Id.* at § 25602(b). The constitutionality of this statute was upheld in *Cory v. Shierloh*, 29 Cal. 3d 430, 439-41, 629 P.2d 8, 13-14, 174 Cal. Rptr. 500, 505-06 (1981). The *Cory* court found that the legislature might have reasonably assumed that imposing sole responsibility on the drunk driver would encourage a sense of responsibility in the driver for his acts, ultimately reducing the frequency of injuries caused by alcohol. *Id.* at 440, 629 P.2d at 13, 174 Cal. Rptr. at 505.

⁴⁹ OR. REV. STAT. §§ 30.955, 30.960 (1983).

⁵⁰ *Id.* § 30.960. That section provides in pertinent part:

[N]o . . . social host shall be liable to third persons injured by or through persons not having reached 21 years of age who obtained alcoholic beverages from the licensee, permittee or social host unless it is demonstrated that a reasonable person would have determined that identification should have been requested or that the identification exhibited was altered or did not accurately describe the person to whom the alcoholic liquor was sold or served.

Id.

⁵¹ *Id.* § 30.955. That section provides in full: "No private host is liable for damages incurred or caused by an intoxicated social guest unless the private host has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated." *Id.*

⁵² N.M. STAT. ANN. § 41-11-1(D) (1984). That section provides:

Although the historical nonliability rule has been limited to some extent by legislation, that legislation has covered only certain circumstances and generally has been narrowly construed by the courts. While this legislation serves as a limited method by which individuals injured by drunk drivers can recover against the furnisher of the alcohol, courts have generally refused to employ these statutes to impose a common law negligence cause of action against vendors or social hosts.⁵³

II. RECOGNITION OF A COMMON LAW NEGLIGENCE CAUSE OF ACTION AGAINST FURNISHERS OF ALCOHOL

While some courts continue to adhere to the historical rule of nonliability, others began in the late 1950's to reject the traditional rule of nonliability for furnishers of alcohol and to recognize a common law negligence cause of action against these parties.⁵⁴ The courts which have recognized such a cause of action are no longer relying on statutes for extending a remedy to an injured third party. The impetus for the imposition of common law negligence liability on furnishers of alcohol has been the recognition that the furnishing of alcohol to an obviously intoxicated person is the proximate cause of a resulting injury.⁵⁵

The erosion of the historical nonliability rule is an evolutionary process which is still developing. While courts began in the 1950's to impose negligence liability on commercial vendors of alcohol,⁵⁶ the judiciary continued in its refusal to impose such liability on social hosts. Only recently have courts in a few jurisdictions extended a common law negligence cause of action to social hosts.⁵⁷ Subsection A examines the imposition of common law negligence liability on commercial vendors. Subsection B discusses the recent extension of a common law negligence cause of action to social hosts.

A. Commercial Vendors

In the late 1950's, courts began to recognize a common law negligence cause of action against one class of liquor vendors, tavern keepers. In holding that tavern keepers could be liable to injured third parties under a negligence theory, courts rejected the main justification for the traditional rule of nonliability — that the drinking, and not the furnishing of the alcohol, was the proximate cause of the resulting injury.⁵⁸ In reaching this result, courts reasoned that, with the increasing frequency of accidents involving drunk driving, the consequences of serving alcohol to an intoxicated person

No person who has gratuitously provided alcoholic beverages to a guest in a social setting may be held liable in damages to any person for bodily injury, death or property damage arising from the intoxication of the social guest unless the alcoholic beverages were provided recklessly in disregard of the rights of others, including the social guest.

Id.

⁵³ See Graham, *supra* note 10, at 577.

⁵⁴ See *infra* notes 58–85 and accompanying text. See generally 48A C.J.S. *Intoxicating Liquors* § 428 (1981).

⁵⁵ See *infra* notes 59–61 and accompanying text.

⁵⁶ See Luckman, *supra* note 29, at 138.

⁵⁷ See *infra* notes 95–173 and accompanying text.

⁵⁸ See *supra* note 5–6 and accompanying text.

whom the server knows will be driving a car are reasonably foreseeable.⁵⁹ Noting that the serious danger to the public posed by drunk drivers was not present when the traditional rule of nonliability was developed and society's main mode of transportation was horse and buggy, courts have stated that the law must be adjusted to reflect changes in society.⁶⁰ In the age of the automobile, therefore, courts held that the serving of alcohol can be the proximate cause of injuries resulting from drunk driving.⁶¹ As in any other negligence case, courts have held that a tavern keeper is under a duty to use reasonable care to avoid creating situations that pose an unreasonable risk of harm to others.⁶² As the Idaho Supreme Court stated in *Alegria v. Payonk*, there is no justification for excusing a vendor from this general duty which each person owes all others in society.⁶³

In rejecting the traditional nonliability of tavern keepers, courts were also faced with the contention that the issue of whether to recognize a negligence cause of action against commercial vendors is best left to the legislature.⁶⁴ In responding to this argument, courts have noted that since the historical rule was judicially created, it is within the province of the courts to alter it when it becomes unsound.⁶⁵ For example, in the recent case of *McClennan v. Tottenhoff*, the Wyoming Supreme Court asserted that "... several courts have bemoaned the fact that an injured third person had no cause of

⁵⁹ *Elsperman v. Plump*, —Ind. App. —, 446 N.E.2d 1027, 1030 (1983); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 501, 233 N.E.2d 18, 20 (1968); *Carver v. Schafer*, 647 S.W.2d 570, 573 (Mo. Ct. App. 1983); *Lopez v. Macz*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982).

As the Pennsylvania Supreme Court stated in *Jardine v. Upper Darby Lodge*:

The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute. The person who would put into the hands of an obviously demented individual a firearm with which he shot an innocent third person would be amenable in damages to that third person for unlawful negligence. An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm. He is as much a hazard to the safety of the community as a stick of dynamite that must be de-fused in order to be rendered harmless. To serve an intoxicated person more liquor is to light the fuse.

413 Pa. 626, 631-32, 198 A.2d 550, 553 (1964).

⁶⁰ *Buchanan v. Merger Enterprises, Inc.*, 463 So. 2d 121, 125-26 (Ala. 1984); *Lopez v. Macz*, 98 N.M. 625, 629, 651 P.2d 1269, 1273 (1982). The *Buchanan* court noted that "[t]oday, lounge patrons no longer typically walk or rely on horses to travel to and from taverns. They almost always travel by motor vehicle." *Id.* at 125. See also *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 767, 458 P.2d 897, 901-02 (1969) (Finley, J., dissenting).

⁶¹ *Vance v. United States*, 355 F. Supp. 756, 761 (D. Alaska 1973) (majority view is that the furnishing of the alcohol is the proximate cause of the injury); *Buchanan*, 463 So. 2d at 125-26.

⁶² See *Nazareno v. Urie*, 638 P.2d 671, 674 (Alaska 1981); *Ontiveros v. Borak*, 136 Ariz. 500, 508, 667 P.2d 200, 208-09 (1983); *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980); *Carver v. Schafer*, 647 S.W.2d 570, 573-75 (Mo. Ct. App. 1983); *McClennan v. Tottenhoff*, 666 P.2d 408, 411 (Wyo. 1983) ("cases involving vendors of liquor and injured third parties will be approached in the same manner as other negligence cases").

⁶³ *Alegria*, 101 Idaho at 619, 619 P.2d at 137.

⁶⁴ See *supra* note 25 and accompanying text.

⁶⁵ *Lopez v. Macz*, 98 N.M. 625, 630, 651 P.2d 1269, 1274 (1982); *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 767-68, 458 P.2d 897, 902 (1969) (Finley, J., dissenting); *Garcia v. Hargrove*, 46 Wis. 2d 724, 731, 176 N.W.2d 566, 572 (1970), *overruled in Sorenson v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 119 (1984) (court decided on other grounds not to change rule).

action, even though they have continued to defer to the legislature. We do not choose to stand by and wring our hands at the unfairness which we ourselves have created."⁶⁶

In addition to tavern keepers, courts have recently begun to impose liability under a common law negligence theory on another type of liquor vendor — retail liquor store owners.⁶⁷ Unlike tavern keepers, retail liquor store owners do not have contact with an individual each time he or she takes another drink. This distinction has been asserted as a basis for refusing to hold retail liquor store owners liable.⁶⁸ In *Michnik-Zilberman v. Gordon's Liquor*, however, the Massachusetts Appeals Court stated that the argument that retailers have no control over the consumption of alcohol ignores the fact that the furnishing, rather than the consumption of the alcohol, may be found to constitute negligence.⁶⁹ The *Michnik-Zilberman* court further noted that there is no distinction between tavern keepers and retail sellers which requires taking the question of foreseeability from the jury when the sale is by a retail seller.⁷⁰ In *Michnik-Zilberman*, Gordon negligently sold beer to a minor who, as a result of drinking the beer, negligently drove his car, striking and injuring the plaintiff's husband.⁷¹ In determining the liability of the liquor store owner, the court noted that, while a statutory violation of selling alcohol to a minor serves as some evidence of negligence, liability in cases dealing with furnishers of alcohol are grounded on the common law doctrine of negligence.⁷² The court thus held that liquor store owners, like tavern keepers, have a duty to refuse to sell alcohol to persons they know or reasonably should know are intoxicated.⁷³

Similarly, in the 1984 case of *Sorenson v. Jarvis*,⁷⁴ the Wisconsin Supreme Court held that the historical common law rule of nonliability was wholly abrogated. In *Sorenson*, a liquor dealer negligently sold alcohol to a minor.⁷⁵ Twenty minutes later he returned and purchased another bottle of liquor.⁷⁶ Later that evening the minor injured two children and killed their parents when he failed to stop at a stop sign and collided with their car.⁷⁷ In an action brought against the minor and the liquor store,⁷⁸ the *Sorenson* court expressly overruled cases which have held that the act of selling is too remote to be a proximate cause of an injury.⁷⁹ Noting that the chain of causation between the furnishing of alcohol, driving while intoxicated, and the resulting injuries was a routine causation question,⁸⁰ the court held that a liquor retailer could be liable under a common law negligence action.⁸¹

⁶⁶ *McClennan v. Tottenhoff*, 666 P.2d 408, 415 (Wyo. 1983).

⁶⁷ *Michnik-Zilberman v. Gordon Liquors, Inc.*, 14 Mass. App. 533, 539-40, 440 N.E.2d 1297, 1301-02 (1982), *aff'd*, 390 Mass. 6, 453 N.E.2d 430 (1983); *Sorenson v. Jarvis*, 119 Wis. 2d 627, 646, 350 N.W.2d 108, 118 (1984).

⁶⁸ *Michnik-Zilberman*, 14 Mass. App. at 539, 440 N.E.2d at 1301.

⁶⁹ *Id.*

⁷⁰ *Id.* The Appeals Court affirmed the trial court's decision for the plaintiff. *Id.* at 543, 440 N.E.2d at 1303.

⁷¹ *Id.* at 534, 440 N.E.2d at 1298.

⁷² *Id.* at 537, 440 N.E.2d at 1300.

⁷³ *Id.* at 538, 440 N.E.2d at 1301.

⁷⁴ 119 Wis. 2d 627, 350 N.W.2d 108 (1984).

⁷⁵ *Id.* at 630, 350 N.W.2d at 110.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 640 n.10, 350 N.W.2d at 115 n.10.

⁸⁰ *Id.* at 643, 350 N.W.2d at 116.

⁸¹ *Id.* at 646, 350 N.W.2d at 118.

Thus, while some courts still adhere to the historical nonliability rule, a majority of jurisdictions now recognize common law negligence liability against tavern keepers or retail liquor store owners.⁸² These courts express the emerging view that the serving of alcohol is recognized as a proximate cause of injuries resulting from drunk driving.⁸³ Moreover, they have explicitly or implicitly rejected the argument that the issue of liability for furnishers of alcohol is best left to the legislature.⁸⁴ Extending liability to retail liquor store owners demonstrates the courts' concern with the control of the liquor supply, and not control over the consumption.⁸⁵

B. Social Hosts

Despite the widespread recognition of a common law negligence theory in determining the liability of liquor vendors, courts in the past have refused to extend the reasoning expressed in the cases concerning liquor vendors to social hosts.⁸⁶ These courts have largely relied on policy considerations to distinguish furnishing alcohol commercially from furnishing alcohol in a social setting.⁸⁷ Imposing liability on social hosts, courts contended, involved a myriad of practical and policy concerns. It has been stated that if social host liability were imposed, simply having a drink with a neighbor or friend would become a dangerous act.⁸⁸ Courts have also expressed the concern that potentially every social gathering could give rise to liability.⁸⁹ Practical problems in determining an individual's level of intoxication have also been the basis for a refusal to recognize a common law cause of action against a social host. Accordingly, courts have pointed out that a vendor is in a better position to monitor an individual's level of intoxication because the patron must have some contact with the bartender or server each time another drink is ordered.⁹⁰ Social hosts, on the other hand, do not have the same control over the supply of alcohol because guests often serve each other.⁹¹ A related concern regarding the atmosphere of social gatherings is that a great deal of social pressure is involved in policing the activities of friends.⁹² Moreover, courts have noted that, since the injured party can always sue the drunk driver, the imposition of liability on social hosts cannot be characterized as necessary to provide adequate remedies for an injured

⁸² *Nazareno v. Urie*, 638 P.2d 671, 674 n.3 (Alaska 1981). The *Nazareno* court listed the following jurisdictions as imposing liability on bar owners: Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, and Washington. *Id.* Since the *Nazareno* decision, the following jurisdictions have recognized liability against commercial vendors: Alabama, Alaska, New Mexico, and Wyoming.

⁸³ See *supra* notes 59-61 and accompanying text.

⁸⁴ See *supra* notes 65-66 and accompanying text.

⁸⁵ See *supra* notes 69, 80 and accompanying text.

⁸⁶ See *infra* notes 88-94 and accompanying text.

⁸⁷ See *infra* notes 88-94 and accompanying text.

⁸⁸ *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964).

⁸⁹ *Edgar v. Kajet*, 84 Misc. 2d 100, 103-04, 375 N.Y.S.2d 548, 552 (N.Y. Sup. Ct. 1975).

⁹⁰ *Runge v. Watts*, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979); *Kelly v. Gwinnell*, 96 N.J. 538, 566, 476 A.2d 1219, 1234 (1984) (Garibaldi, J., dissenting); cf. *Edgar*, 84 Misc. 2d at 1003, 375 N.Y.S.2d at 552 (social host unable to supervise guest's activities).

⁹¹ *Kelly*, 96 N.J. at 566, 476 A.2d at 1234 (Garibaldi, J., dissenting).

⁹² *Garcia v. Hargrove*, 46 Wis. 2d 724, 734, 176 N.W.2d 566, 570 (1970), *overruled in Sorenson v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); see also *Kelly*, 96 N.J. at 567, 476 A.2d at 1234 (Garibaldi, J., dissenting).

person.⁹³ Many courts have stated that the issue of social host liability is, therefore, best left to the legislature.⁹⁴

However, since 1971, when the first case to recognize a common law negligence cause of action against a social host was decided,⁹⁵ several jurisdictions have recognized such liability.⁹⁶ Most of these recent decisions have struggled with the same dilemma. Each one recognized that the furnishing of alcohol to an obviously intoxicated person, whether by a vendor or social host, can be the proximate cause of a resulting injury. At the same time, however, these courts seemed reluctant to definitively reject the historical rule of nonliability, and instead stated its holding as an exception to that rule.

The first case which recognized social host liability under a common law negligence theory was *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*.⁹⁷ In *Wiener*, a minor was served a large quantity of beer at a college fraternity party, and while driving from the party was involved in an accident which injured the plaintiff.⁹⁸ The Oregon Supreme Court held that under certain circumstances, a host may have a duty to deny a guest further access to alcohol.⁹⁹ The court stated that the duty to refuse further alcohol would arise if the host knew that the individual's characteristics, such as youth or severe intoxication, make it likely that he or she will act unreasonably.¹⁰⁰ Finding that

⁹³ *Lowe v. Rubin*, 98 Ill. App. 3d 496, 498, 424 N.E.2d 710, 712 (1981) (quoting *Miller v. Moran*, 96 Ill. App. 3d 596, 601, 421 N.E.2d 1046, 1049 (1981)); *Miller v. Moran*, 96 Ill. App. 3d 596, 601, 421 N.E.2d 1046, 1049 (1981).

⁹⁴ See, e.g., *Cartwright v. Hyatt*, 460 F. Supp. 80, 82 (D.D.C. 1978); *Miller v. Moran*, 96 Ill. App. 3d 596, 601, 421 N.E.2d 1046, 1049 (1981); *Runge v. Watts*, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979); *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 765, 458 P.2d 897, 900 (1969).

⁹⁵ *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971).

⁹⁶ *Kelly v. Gwinnell*, 96 N.J. 538, 548, 476 A.2d 1219, 1224 (1984); *Figuly v. Knoll*, 185 N.J. Super. 477, 480, 449 A.2d 564, 565 (1982); *Linn v. Rand*, 140 N.J. Super. 212, 220, 356 A.2d 15, 19 (1976); *Baird v. Roach*, 11 Ohio App. 3d 16, 19, 462 N.E.2d 1229, 1233 (1983); *Wilson v. Steinbach*, 98 Wash. 2d 434, 438, 656 P.2d 1030, 1032 (1982); *Halligan v. Puppo*, 37 Wash. App. 84, 88, 678 P.2d 1295, 1297 (1984). See also *infra* notes 104-73 and accompanying text.

⁹⁷ 258 Or. 632, 485 P.2d 18 (1971).

⁹⁸ *Id.* at 636-37, 485 P.2d at 20.

⁹⁹ *Id.* at 639, 485 P.2d at 21. The court stated that "[a] host may have the responsibility under certain circumstances to prevent a guest from voluntarily making himself a hazard to himself and others." *Id.* at 641-42, 485 P.2d at 22.

¹⁰⁰ *Id.* at 639, 485 P.2d at 21. Similarly, in *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), the California Supreme Court found that a cause of action may arise against a social host under general negligence principles. *Id.* at 149-50, 577 P.2d at 672, 145 Cal. Rptr. at 537. In that case, the plaintiff alleged that the defendant negligently served an individual extremely large quantities of alcohol, and that the defendant's should have known that their conduct would expose third persons to "foreseeable serious risk of injury." *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536. The court noted that under a common law negligence theory, a host, like a vendor, owes a duty to the general public to refuse to furnish alcohol to an obviously intoxicated person if, under the circumstances, that person constitutes a reasonably foreseeable danger to a third person. *Id.* at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539. The court further noted that:

it is small comfort to the widow whose husband has been killed in an accident involving an intoxicated driver to learn that the driver received his drinks from a hospitable social host rather than by purchase at a bar The danger and risk to the potential victim on the highway is equally as great, regardless of the source of the liquor.

Id. at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.

The *Coulter* court also stated that there are many outward manifestations of intoxication which

the facts of *Wiener* were sufficient to raise that duty,¹⁰¹ the court reversed a summary judgment for the defendant and remanded for trial.¹⁰² Although the 1979 Oregon legislation limited the *Wiener* decision by statutorily defining the situations which give rise to liability,¹⁰³ the decision was a significant development in the area of liability against social hosts.

In spite of the ground breaking lead of *Wiener*, it was not until 1982 that several other jurisdictions suggested that a social host may be liable under a common law negligence theory. In the 1983 case of *Baird v. Roach*,¹⁰⁴ the Ohio Appellate Court addressed the issue of whether a social host may be held liable under a negligence theory. While not definitively rejecting the historical limitations on social host liability, the Ohio court in *Baird* recognized that the liability of vendors and social hosts should not be distinguished, and that the proximate cause issue in either case should be left to the jury.¹⁰⁵ In *Baird* two employees attended their employer's annual picnic where they were served alcohol and became intoxicated.¹⁰⁶ They left the party driving their cars, and while drag racing one or both went left of center and collided with another car, injuring the plaintiff.¹⁰⁷ The *Baird* court noted that the Ohio Supreme Court has held that the issue of proximate cause is properly left to the jury in a case dealing with a common law negligence cause of action against a vendor.¹⁰⁸ Although the *Baird* court determined that the complaint did not allege sufficient circumstances to impose liability,¹⁰⁹ it reasoned that liability could be imposed on a social host if the host knew that the furnished alcohol would be consumed by the guest, that the guest was or would become intoxicated,¹¹⁰ and that the guest would act so as to create an unreasonable risk of harm to third persons.¹¹¹

Unlike the Ohio court in *Baird*, the Washington Supreme Court has explicitly stated that liability for serving alcohol to an obviously intoxicated person is an "exception" to the historical rule of nonliability.¹¹² This exception was announced in *Wilson v. Stein-*

social hosts can easily recognize. *Id.* at 155, 577 P.2d at 675, 145 Cal. Rptr. at 540. Imposing liability on a social host when a guest is "obviously intoxicated," therefore, is not too subjective a standard. *Id.* The California legislature expressly abrogated the *Coulter* decision in 1978. See *supra* note 48.

¹⁰¹ *Wiener*, 258 Or. at 643, 485 P.2d at 23.

¹⁰² *Id.*

¹⁰³ See OR. REV. STAT. § 30.955 (1983), discussed *supra* note 51 and accompanying text (social host liable for serving alcohol to obviously intoxicated person); *Id.* § 30.960, discussed *supra* note 50 and accompanying text (social host liable to third parties injured by minor who obtained alcohol from social host).

¹⁰⁴ 11 Ohio App. 3d 16, 462 N.E.2d 1229 (1983).

¹⁰⁵ *Id.* at 19, 462 N.E.2d at 1233.

¹⁰⁶ *Id.* at 16, 462 N.E.2d at 1230.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 18-19, 462 N.E.2d at 1232-33. The *Baird* court found that there was no clear Ohio authority on whether a social host could be held liable. *Id.* at 18, 462 N.E.2d at 1232. The court recognized, however, that other jurisdictions have extended the reasoning of vendor cases to hold social hosts liable. *Id.* at 19, 462 N.E.2d at 1233.

¹⁰⁹ *Id.* The plaintiffs in this case did not even allege that the individuals who were drag racing were intoxicated. *Id.* Since the court in *Baird* did not reach the merits of this case, it based its holding on the "[a]ssum[ption] that the gratuitous serving of liquor to a social or business guest can give rise to liability on the part of the host under Ohio law" *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Wilson v. Steinbach*, 98 Wash. 2d 434, 438, 656 P.2d 1030, 1032 (1982). This case interpreted an earlier Washington case, *Halvorson v. Birchfield*, 76 Wash. 2d 759, 458 P.2d 897 (1969), as

bach,¹¹³ in which a minor plaintiff consumed an undetermined amount of alcohol at a party hosted by the defendants.¹¹⁴ After leaving the party, the plaintiff was killed when she lost control of her car and struck a utility pole.¹¹⁵ The plaintiff's estate sued the host.¹¹⁶ Although the plaintiff was the drunk driver, and not an innocent third person, the *Wilson* court stated that the identification of the injured party is irrelevant in determining the duty owed by the host.¹¹⁷ Instead, the relevant inquiry, the court noted, is whether the standard of care was observed or breached by the host.¹¹⁸ The court indicated that an exception to the historical rule existed for furnishing alcohol to obviously intoxicated persons, persons in a state of helplessness, or persons in a special relationship to the furnisher of alcohol.¹¹⁹ In the facts of this case, however, the defendants were granted summary judgment because the plaintiffs failed to establish that the

recognizing an exception to the traditional common law rule of nonliability when the person served was obviously intoxicated. See *infra* note 119 and accompanying text. In holding that no common law negligence action existed, the *Halvorson* court cited authority which stated that "there can be no cause of action . . . so long as the person to whom the liquor was sold or given was not in such a state of helplessness or debauchery as to be deprived of his willpower or responsibility for his behavior." 76 Wash. 2d at 762, 458 P.2d at 899 (citing 30 AM. JUR. § 521 *Intoxicating Liquors* (1958)). It is the inclusion of this quotation which has been relied upon by later courts, which interpreted it as a recognition of an exception to the rule of nonliability. The *Halvorson* court, however, noted that any decision about liability should be left to the legislature, stating:

It may be that the social and economic consequences of "mixing gasoline and liquor" should lead to a rule of accountability by those who furnish intoxicants to one who becomes a tort-feasor by reason of intoxication, but such a policy decision should be made by the legislature after full investigation, debate and examination of the relative merits of the conflicting positions.

76 Wash. 2d at 765, 458 P.2d at 900.

Similarly, the Supreme Court of Connecticut, in *Kowal v. Hohfer*, 181 Conn. 355, 436 A.2d 1 (1980), attempted to adhere to the historical rule of nonliability while creating an exception for wanton and reckless conduct. In *Kowal*, the court dealt with the question of whether the policy considerations that justify immunizing vendors and social hosts from common law liability for negligent conduct also apply when the conduct is wanton and reckless. *Id.* at 360, 436 A.2d at 3. In that case, the plaintiff alleged that the defendant served alcohol to the driver when the driver was already in an intoxicated condition. *Id.* at 356, 436 A.2d at 1. The driver later collided with the plaintiff's car, injuring the plaintiff. *Id.* The court held that liability for wanton and reckless conduct may exist. *Id.* at 362, 436 A.2d at 4. The *Kowal* court indicated that as a matter of policy, an individual should bear a greater responsibility when acting wantonly or recklessly than when acting merely negligently. *Id.* at 361-62, 436 A.2d at 4. Although the facts of the case involved a restaurant owner serving to an obviously intoxicated person, *id.* at 356, 436 A.2d at 1, the court's holding is worded so as to apply equally to vendors and social hosts. *Id.* at 360-61, 436 A.2d at 3. While the court did recognize that a problem exists, and that vendors and social hosts should be treated in the same manner to alleviate the problem, the court's reasoning did not demonstrate how the historical rule and the rule as enunciated by the court can coexist.

¹¹³ 98 Wash. 2d 434, 656 P.2d 1030 (1982).

¹¹⁴ *Id.* at 436, 656 P.2d at 1031.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 439, 656 P.2d at 1033.

¹¹⁸ *Id.* at 440, 656 P.2d at 1033.

¹¹⁹ *Id.* at 438, 656 P.2d at 1032. The *Wilson* court noted that such an exception to the traditional rule of nonliability was recognized in *Halvorson*. *Id.*

Similarly, in *Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834 (1983), the Washington Supreme Court relied on the same interpretation of *Halvorson* to hold that a negligence cause of action existed against a commercial vendor. *Id.* at 657-58, 663 P.2d at 836.

guest was obviously intoxicated while at the hosts' home.¹²⁰ According to the Washington court, the fact that the guest was a minor had no bearing on the court's decision; the crucial question was whether the guest was obviously intoxicated when served alcohol.¹²¹ The court further noted that the guest's intoxication is to be judged by the way she appeared to those around her and not by what a blood alcohol test may subsequently reveal.¹²²

The exception to the historical rule of nonliability that was first established in *Wilson* was most recently applied by the Washington Appeals Court in *Halligan v. Pupo*.¹²³ In that case, an employee of the defendant attended the defendant's Christmas party.¹²⁴ The party featured an open bar tended by two bartenders hired for the occasion.¹²⁵ Wine was continuously available at each table.¹²⁶ The plaintiff alleged that the employee/guest drank an undetermined amount of alcohol until it became obvious that he was intoxicated.¹²⁷ He then left the party and shortly thereafter was involved in a car accident, in which he injured the plaintiff.¹²⁸ The Washington Court of Appeals stated that the key to this cause of action was the guest's obvious intoxication.¹²⁹ The court held,

¹²⁰ *Wilson*, 98 Wash. 2d at 438-39, 656 P.2d at 1032-33.

¹²¹ *Id.*

¹²² *Id.* In *Dickinson v. Edwards*, 37 Wash. App. 834, 682 P.2d 971 (1984), the Washington Court of Appeals relied on this statement in *Wilson* to affirm the trial court's granting of summary judgment in favor of a host. *Id.* at 839, 682 P.2d at 973. In *Dickinson*, the guest consumed eight to ten hard liquor drinks and a glass of champagne at a banquet sponsored by his employer. *Id.* at 836, 682 P.2d at 972. After leaving the party, the guest drove the wrong way on a one-way ramp and had a head-on collision with the plaintiff's motorcycle. *Id.* The court noted that the only evidence of the guest's condition was his own admissions as to the number of drinks he consumed, and the investigating officer's observations that the guest was obviously intoxicated at the accident site approximately five minutes after he left the banquet. *Id.* at 839, 682 P.2d at 972, 973. The officer further reported that the guest had a .17 percent blood alcohol level an hour after the accident. *Id.* at 836, 682 P.2d at 972. The court noted that there were no statements as to how the guest appeared to others attending the banquet. *Id.* at 839, 682 P.2d at 973. The court concluded that there was no material question of fact, therefore, relating to the guest's conduct at the banquet that would lead a reasonable person to conclude that he appeared "obviously intoxicated" to those who served him. *Id.*

A case which the *Wilson* court relied on for the conclusion that the guest's intoxication is to be judged by the way she appeared to those around her and not by what a blood alcohol test may subsequently reveal is distinguishable from the instant case. In *Barrie v. Hosts of America*, 94 Wash. 2d 640, 618 P.2d 96 (1980), the court noted that two hours had elapsed between the time the consumer was last observed and the time of death, and there was no evidence as to whether he had consumed alcohol elsewhere. *Id.* at 643 n.1, 618 P.2d at 643 n.1.

In *Wilson*, the court granted summary judgment to the defendant hosts because the plaintiffs failed to establish that the guest was obviously intoxicated or in a helpless condition while at the host's home. 98 Wash. 2d at 439, 656 P.2d at 1033.

¹²³ 37 Wash. App. 84, 678 P.2d 1295 (1984).

¹²⁴ *Id.* at 85, 678 P.2d at 1296.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 85-86, 678 P.2d at 1296.

¹²⁸ *Id.* at 86, 678 P.2d at 1296. The plaintiff filed suit, alleging that the sponsors of the party were negligent by continuing to furnish alcohol to the guest despite his state of obvious intoxication. *Id.* The plaintiff also alleged that this negligence proximately caused her injuries. *Id.* Defendants moved for and were granted summary judgment based on *Halvorson*. *Id.* Plaintiff appealed, and the court of appeals reversed and remanded for trial of the factual issues. *Id.*

¹²⁹ *Id.* at 88, 678 P.2d at 1297. The Washington Court of Appeals based its decision on the

therefore, that if the plaintiff pleads and proves that the host furnished alcohol to an obviously intoxicated person, the host can be liable for injuries that are proximately caused by that guest.¹³⁰ In response to the defendant's contention that no "furnishing" occurred because alcohol was merely made available, and the guests helped themselves to it,¹³¹ the court stated that the manner in which the alcohol is served is of no consequence.¹³² The relevant inquiry, the court noted, is who had authority to deny further service of alcohol when the intoxication of the guest became apparent.¹³³ Thus, under the exception to the historical rule of nonliability established by the Washington courts in *Wilson* and *Halligan*, a common law negligence cause of action may exist against a social host who serves alcohol to an obviously intoxicated guest.

While the Ohio and Washington courts were willing to impose liability on social hosts, the New Jersey Supreme Court, in the 1984 landmark case of *Kelly v. Gwinnell*,¹³⁴ became the first court to definitively reject the historical rule of nonliability of social hosts. The *Kelly* decision was the culmination of a series of New Jersey cases which involved social host liability. The first New Jersey case to deal with liability of social hosts was *Linn v. Rand*.¹³⁵ In *Linn*, the defendant served an excessive amount of alcohol to a minor, and negligently permitted the minor to drive her car.¹³⁶ While driving, the minor ran down and seriously injured the plaintiff.¹³⁷ The injured plaintiff sued both the drunk driver and the host.¹³⁸ Reversing the trial court's granting of summary judgment in favor of the host,¹³⁹ the *Linn* court rejected the view that furnishing alcohol in a social setting gives immunity to the social host for negligence of the guests which is the proximate

Washington Supreme Court's recent interpretation of *Halvorson* as recognizing an exception to the traditional rule of nonliability. *Id.* See *supra* notes 112, 119 and accompanying text.

¹³⁰ *Halligan*, 37 Wash. App. at 88, 678 P.2d at 1297. The court determined that the plaintiff had created a genuine issue of fact as to whether the guest was furnished alcohol while obviously intoxicated. *Id.* at 88, 678 P.2d at 1297-98. The court ruled, therefore, that summary judgment should not have been granted. *Id.* at 88, 678 P.2d at 1298. The court found that the deposition of another guest at the party created a genuine issue of fact. *Id.* The deposition stated that the guest was unsteady on his feet and totally obnoxious when he made a presentation before the other guests, and that after the speech he continued to drink at his table. *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 88-89, 678 P.2d at 1298.

¹³⁴ 96 N.J. 538, 476 A.2d 1219 (1984). For a discussion of *Kelly*, see *infra* notes 150-178 and accompanying text.

¹³⁵ 140 N.J. Super. 212, 356 A.2d 15 (1976). The *Linn* court relied on an earlier New Jersey case which imposed common law liability on vendors. See *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959). The *Linn* court quoted portions of *Rappaport* which discussed actionable negligence, focusing on foreseeability of harm to others and proximate cause. 140 N.J. Super. at 216-17, 356 A.2d at 18. The *Linn* court noted that:

[t]he forward-looking and far-reaching philosophy expressed in *Rappaport* should also be applicable to negligent social hosts and should not be limited to holders of liquor licenses and their employees It makes little sense to say that the licensee in *Rappaport* is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed.

Id. at 216-17, 356 A.2d at 17-18.

¹³⁶ *Id.* at 214, 356 A.2d at 16.

¹³⁷ *Id.*

¹³⁸ *Id.* at 212, 356 A.2d at 15.

¹³⁹ *Id.* at 220, 356 A.2d at 20.

cause of injury to an innocent third party.¹⁴⁰ The court stated that a social host who acts negligently with resulting harm to others will not be given "the special privilege of immunity."¹⁴¹ While this case involved a minor rather than an adult guest, there was nothing in the court's reasoning which indicated that the application of the doctrine set forth by the court would be limited to minors.¹⁴²

In 1982, the New Jersey Superior Court, in *Figuly v. Knoll*,¹⁴³ relied on the *Linn* decision to deny summary judgment to a social host for injuries to a third person.¹⁴⁴ In that case, the guest attended a party conducted by the defendant.¹⁴⁵ The plaintiff alleged that the guest was in attendance for over five hours, was served approximately a dozen alcoholic drinks during that time, and became obviously drunk.¹⁴⁶ The defendant in *Figuly* had previously worked as a commercial bartender, and knew the guest in that capacity.¹⁴⁷ He acknowledged that he could recognize levels of intoxication in the guest, and further admitted that the guest was an alcoholic or "close to it."¹⁴⁸ The court held that a social host who furnished alcohol to any obviously intoxicated person under circumstances which create a reasonably foreseeable risk of harm to others may be held legally responsible to third persons injured when that harm does occur.¹⁴⁹

While the impact of *Figuly* and *Linn* may have been limited because they were decisions of the Superior Court, in the 1984 case of *Kelly v. Gwinnell*¹⁵⁰ the New Jersey Supreme Court also addressed the issue of whether a social host can be held liable under common law negligence for serving alcohol to an obviously intoxicated adult guest. In *Kelly* the guest spent an hour or two at the defendant's home, during which time he consumed two or three alcoholic drinks.¹⁵¹ Defendant then accompanied his friend to his car, talked with him, and watched as he drove off toward his home.¹⁵² About twenty-five minutes after the guest left, the host telephoned his home to make sure he had arrived safely.¹⁵³ On the way home, however, the guest was involved in a head on collision with a car driven by the plaintiff, who was seriously injured.¹⁵⁴ After the accident a blood alcohol test indicated that the guest's blood alcohol concentration was .286%.¹⁵⁵ The plaintiff sued the guest and the hosts.¹⁵⁶ The New Jersey Supreme Court reversed the

¹⁴⁰ *Id.* at 220, 356 A.2d at 19. The New Jersey courts have not hesitated to place responsibility on a person committing a tortious act, the *Linn* court noted, and have changed old common law doctrines that grant wrongdoers immunity. *Id.* at 217-18, 356 A.2d at 18.

¹⁴¹ *Id.* at 217-18, 356 A.2d at 18.

¹⁴² See *Figuly*, 185 N.J. Super. at 480, 449 A.2d at 565.

¹⁴³ 185 N.J. Super. 477, 449 A.2d 564 (1982).

¹⁴⁴ *Id.* at 480, 449 A.2d at 565.

¹⁴⁵ *Id.* at 479, 449 A.2d at 564.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 480, 449 A.2d at 565.

¹⁵⁰ 96 N.J. 538, 476 A.2d 1219 (1984).

¹⁵¹ *Id.* at 541, 476 A.2d at 1220.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* The plaintiff's expert witness concluded that the guest had actually consumed the equivalent of thirteen drinks, and must have been severely intoxicated while at the defendant's home. *Id.*

¹⁵⁶ *Id.* at 541-42, 476 A.2d at 1220. The defendants moved for, and were granted, summary judgment, contending that as a matter of law social hosts are not liable for the negligence of an

Superior Court decision which had affirmed the granting of summary judgment in favor of the hosts.¹⁵⁷ The New Jersey Supreme Court held that a host who serves alcohol to an adult guest whom the host knows is already intoxicated and will soon be driving, is liable for injuries to a third party as a result of the guest's negligent driving when that negligence is caused by the intoxication.¹⁵⁸

The *Kelly* court began its decision by stating that a conventional negligence analysis would lead to a finding of liability against a social host.¹⁵⁹ The court stated that a reasonable person in the host's position could foresee that continuing to serve alcohol to his guest would make it more likely that the guest would drive his car negligently.¹⁶⁰ The court further noted that the host could also foresee that if he kept serving the guest, someone else was likely to get injured as a result of the guest's negligent driving.¹⁶¹ Hence, the court noted, the usual elements of a negligence cause of action were present in this case.¹⁶² The only question that had to be considered, the court concluded, was whether a duty to prevent the risk existed.¹⁶³

In its analysis of the duty issue, the *Kelly* court relied on public policy considerations.¹⁶⁴ The court stated that the policy considerations served by imposing the duty far outweigh the considerations asserted in opposition.¹⁶⁵ Imposing a duty on the social host,

adult guest who becomes intoxicated while at the host's home. *Id.* at 542, 476 A.2d at 1220-21. The Appellate Division affirmed, and noted that common law liability had been extended to a social host only when the guest was a minor. *Id.* at 542, 476 A.2d at 1221.

¹⁵⁷ *Id.* at 560, 476 A.2d at 1230.

¹⁵⁸ *Id.* at 548, 476 A.2d at 1224. The court emphasized three times throughout the opinion that the holding is limited to the facts of the case. *Id.* at 556, 559, 476 A.2d at 1228, 1230.

¹⁵⁹ *Id.* at 543, 476 A.2d at 1221. *See Davis v. Sam Goody, Inc.*, 195 N.J. Super. 423, 425, 480 A.2d 212, 213 (1984). The *Davis* court cited *Kelly* and stated that liability in New Jersey depends not on the nature or character of the supplier of alcohol nor on whether the tortfeasor is a minor or adult, but on the conventional negligence analysis respecting foreseeability. *Id.* The *Davis* court, therefore, reversed the determination of the trial judge denying, as a matter of law, "vicarious liability for alcohol consumption." *Id.*

¹⁶⁰ *Kelly*, 96 N.J. at 544, 476 A.2d at 1222.

¹⁶¹ *Id.*

¹⁶² *Id.* The host's actions created an unreasonable risk of harm to the plaintiff. That risk was clearly foreseeable, and resulted in an injury that was just as foreseeable. *Id.* For elements of a common law negligence cause of action, see *supra* note 11.

¹⁶³ 96 N.J. at 544, 476 A.2d at 1222.

¹⁶⁴ *Id.* at 544-45, 476 A.2d at 1222. The court stated that:

{i}n most cases the justice of imposing such a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury. In fact, however, more is needed, "more" being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care . . . [W]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.

Id. at 544, 476 A.2d at 1222.

Before dealing with specific policy arguments, the *Kelly* court discussed the progression of the law in New Jersey. *Id.* at 545-47, 476 A.2d at 1222-24. The court noted that the considerations against liability involved in *Kelly* were also present in *Linn*. *Id.* at 546-47, 476 A.2d at 1223. These considerations included the fact that the furnishing of alcohol occurred in a social setting, not a tavern; that the furnisher was a host, not a licensee; and the argument that the sole responsibility is on the drinker. *Id.*

¹⁶⁵ *Id.* at 548, 476 A.2d at 1224.

the court opined, results in added assurance that victims of drunk drivers will be justly compensated.¹⁶⁶ In addition, the *Kelly* court noted that imposition of the duty is consistent with the social goal of reducing drunk driving.¹⁶⁷ Although the court discussed the concern that the potential liability of the social host may be disproportionate to the fault,¹⁶⁸ it pointed out that this concern is based on the assumption that society does not consider a host's actions under these circumstances to be very serious.¹⁶⁹ Contrasting the injury or loss of life of an innocent third party to the social host's possible substantial economic loss, the court concluded that liability was not clearly disproportionate to the fault.¹⁷⁰ The court also addressed the contention that the issue of social host liability is best left to the legislature.¹⁷¹ In considering this question, the *Kelly* court noted that determining the scope of a duty in negligence cases has traditionally been accepted as the responsibility of the courts.¹⁷² Moreover, the court stated that it did "not perceive the potential revision of cocktail party customs as constituting a sufficient threat to social well being to warrant staying [their] hand."¹⁷³

Although the *Kelly* decision was a bold step in the area of social host liability, the New Jersey Supreme Court did limit its decision to some extent. The court emphasized

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 545, 476 A.2d at 1222.

¹⁶⁸ *Id.* at 549, 476 A.2d at 1225. While a vendor can "spread the loss" of liability to its customers, the court stated that a host stands to lose everything, especially if traditional insurance protection is not sufficient. *Id.* at 550, 476 A.2d at 1225. The court suggested that a special form of insurance might be designed. *Id.* at 550, 476 A.2d at 1225.

The dissent contended that even if homeowner's insurance covered this cause of action, the premiums would probably go up as a result. *Id.* at 568, 476 A.2d at 1235 (Garibaldi, J., dissenting). Also, the dissent noted, many homeowners and apartment dwellers have either no insurance or insufficient insurance to cover this limitless liability, resulting in the possibility of losing everything if found negligent. *Id.*

¹⁶⁹ *Id.* at 549, 476 A.2d at 1225.

¹⁷⁰ *Id.* at 550-51, 476 A.2d at 1225.

¹⁷¹ *Id.* at 552-56, 476 A.2d at 1226-28. The court addressed the dissent's contentions that the court should defer to the legislature because the legislature can better devise an appropriate remedy. *Id.* at 569-70, 476 A.2d at 1235 (Garibaldi, J., dissenting). The legislature, the dissent stated, would have superior knowledge of the issues involved through investigation and hearings. *Id.* at 570, 476 A.2d at 1235 (Garibaldi, J., dissenting). The dissent also addressed the suggestion that the majority's ruling would have potential extraordinary effects on the average citizen. *Id.* at 560-69, 476 A.2d at 1230-35.

¹⁷² *Id.* at 552, 555, 476 A.2d at 1226, 1228.

¹⁷³ *Id.* at 555, 476 A.2d at 1227.

On February 20, 1985, a settlement of \$172,500 was reached in the case after it was remanded to the Superior Court. N.Y. Times, Feb. 21, 1985, at A1, B5, col. 2. The settlement will be paid by the guest's automobile insurance company (\$100,000), and the host's homeowner's insurance company (\$72,500). *Id.* at B5, col. 2. The settlement was reached after the jury had been selected and the lawyers had completed their opening arguments. *Id.* at A1. The plaintiff, who suffered a broken jaw and broken ankle in the accident, said she was pleased with the settlement. *Id.* at A1, B5, col. 2.

The settlement reached in this case seems to weaken the argument espoused by courts in the past for refusing to recognize a cause of action against social hosts that common law negligence liability would be a financial burden on these individuals. See *supra* notes 89, 168-170 and accompanying text. In this case, the host's homeowner's insurance company is paying the settlement. The concern expressed in the Supreme Court's decision in *Kelly*, that the host stands to lose everything if found liable, is not relevant given the terms of this settlement. See *supra* notes 168-170 and accompanying text.

that its decision applies where the host directly served the guest after the host knew that the guest was intoxicated.¹⁷⁴ The court also stressed the factor that the host knew the guest would shortly be driving.¹⁷⁵ The *Kelly* court noted that this liability is imposed solely for the foreseeable consequences to third parties resulting from the drunken driving.¹⁷⁶ The court noted that the duty imposed on the social host evolves from the control of the liquor supply.¹⁷⁷ The court found that no distinction can be made, therefore, between a vendor who profits from serving alcohol and a host who serves alcohol gratuitously.¹⁷⁸

Thus, in recent years, the historical rule of nonliability against furnishers of alcohol has been limited, so that now a majority of jurisdictions recognize liability against commercial vendors. Most jurisdictions, however, still have not extended such liability to social hosts. In 1971, the Oregon Supreme Court was the first court to recognize that a host has a duty to refuse alcohol to a guest when that guest's characteristics, such as severe intoxication, make it likely that he or she will act unreasonably.¹⁷⁹ Although the Oregon legislature, in 1979, statutorily defined the situations which give rise to social host liability, it recognized that a host may be liable if he or she provides alcohol to a visibly intoxicated guest.¹⁸⁰ In *Baird*, although the Ohio Appellate Court did not reach the merits of the case, it reasoned that liability could be imposed if the social host knew that the guest would consume the furnished alcohol, that the guest was or would become intoxicated, and that the guest would create an unreasonable risk of harm to third persons.¹⁸¹ In *Wilson* and *Halligan*, the Washington courts stated their holding that a social host can be liable if the plaintiff proves that the host furnished alcohol to an obviously intoxicated guest as an exception to the historical rule of nonliability.¹⁸² The Washington courts have stated that the historical rule must be changed by the legislature.¹⁸³ Of the jurisdictions which have recently recognized that social hosts may be liable under a common law negligence theory, the New Jersey Supreme Court in *Kelly* made the boldest move by wholly abrogating the historical nonliability rule against social hosts who serve intoxicated guests.¹⁸⁴

III. ANALYSIS OF COMMON LAW NEGLIGENCE LIABILITY OF SOCIAL HOSTS

The traditional rule of nonliability for those who furnish alcohol to intoxicated persons has been under attack in recent years. A trend has developed in the courts to abolish the historical limitations on the liability of furnishers of alcohol to injured third

¹⁷⁴ *Kelly*, 96 N.J. at 556, 559, 476 A.2d at 1228, 1230.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 559, 476 A.2d at 1230. The court further held that the host and guest are liable as joint tortfeasors. *Id.*

¹⁷⁷ *Id.* at 548, 476 A.2d at 1224.

¹⁷⁸ *Id.* Since the control of the liquor supply is the crucial factor, the motive for making the alcohol available, the court stated, is irrelevant. *Id.*

¹⁷⁹ *Wiener*, 258 Or. at 639, 485 P.2d at 21. See *supra* notes 99-100 and accompanying text.

¹⁸⁰ OR. REV. STAT. §§ 30.955, 30.960 (1983). See *supra* note 50.

¹⁸¹ *Baird*, 11 Ohio App. 3d at 19, 462 N.E.2d at 1233. See *supra* notes 105, 108-11 and accompanying text.

¹⁸² *Wilson*, 98 Wash. 2d at 438, 656 P.2d at 1032; *Halligan*, 37 Wash. App. at 88, 678 P.2d at 1297. See *supra* notes 119, 129 and accompanying text.

¹⁸³ *Wilson*, 98 Wash. 2d at 441-42, 656 P.2d at 1034.

¹⁸⁴ *Kelly*, 96 N.J. at 548, 476 A.2d at 1224. See *supra* note 158 and accompanying text.

parties. Today, a majority of jurisdictions recognize a common law negligence action against commercial vendors of alcohol. In the 1980's several courts have continued this extension of liability to social hosts under a common law negligence theory. This note submits that the recent decisions¹⁸⁵ recognizing a common law negligence cause of action against social hosts for furnishing alcohol to an obviously intoxicated individual demonstrate that such a theory of recovery is both desirable and workable.

A. Common Law Negligence — The Most Appropriate Theory of Social Host Liability

A few courts have based social host liability on dram shop acts and liquor control statutes.¹⁸⁶ Because some liquor control statutes and dram shop acts are not explicitly limited to the sale of alcohol, some courts have construed them to impose a duty on social hosts.¹⁸⁷ A social host who serves alcohol to a *minor* knows that he or she is breaking the law, and therefore arguably should be held to a duty implied from a liquor control statute. But dram shop acts and liquor control statutes, even if broadly worded, cannot be extended to social hosts serving alcohol to an adult. Social hosts are not aware of the fact that serving alcohol to an adult is in violation of a statute.¹⁸⁸ Moreover, courts have noted that dram shop acts, which provide for strict liability, are penal in character and therefore should be narrowly construed so as only to apply to commercial vendors.¹⁸⁹ Due to these difficulties with a statutorily implied duty, the current view seems to be that these statutes will not be broadly construed so as to impose liability on social hosts.¹⁹⁰

While some courts have construed statutes so as to impose social host liability, many courts justified their refusal to extend liability to social hosts on the basis that the matter is best left to the legislature.¹⁹¹ Clearly, legislatures may and have enacted legislation specifically dealing with social host liability.¹⁹² Such legislation may codify a recognized requirement of the common law negligence cause of action,¹⁹³ or may even abrogate a judicial decision recognizing social host liability.¹⁹⁴ While legislative action is possible,

¹⁸⁵ *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984); *Figuly v. Knoll*, 185 N.J. Super. 477, 449 A.2d 564 (1982); *Linn v. Rand*, 140 N.J. Super. 212, 356 A.2d 15 (1976); *Baird v. Roach*, 11 Ohio App. 3d 16, 462 N.E.2d 1229 (1983); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971); *Wilson v. Steinbach*, 98 Wash. 2d 434, 656 P.2d 1030 (1982); *Halligan v. Pupo*, 37 Wash. App. 84, 678 P.2d 1295 (1984).

¹⁸⁶ *See, e.g., Williams v. Klemesrud*, 197 N.W.2d 614, 615-16 (Iowa 1972) (social host held liable under dram shop act); *Giardina v. Solomon*, 360 F. Supp. 262, 263-64 (M.D. Pa. 1973) (plaintiff stated "viable theory of liability" under liquor control statute); *see also supra* notes 36-37, 46 and accompanying text.

¹⁸⁷ *See supra* notes 36-37, 45-46 and accompanying text.

¹⁸⁸ *See Graham, supra* note 10, at 568.

¹⁸⁹ *See supra* notes 40-41 and accompanying text.

¹⁹⁰ *See Kohler v. Wray*, 114 Misc. 2d 856, 857-58, 452 N.Y.S.2d 831, 833 (N.Y. Sup. Ct. 1982); *Manning v. Andy*, 454 Pa. 237, 239, 310 A.2d 75, 76 (1973); *see also supra* notes 38-42, 47 and accompanying text.

¹⁹¹ *Miller v. Moran*, 96 Ill. App. 3d 596, 601, 421 N.E.2d 1046, 1049 (1981); *Runge v. Watts*, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979). *See also supra* note 94 and accompanying text.

¹⁹² CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1985); N.M. STAT. ANN. § 41-11-1(D) (1984); OR. REV. STAT. § 30.955 (1983); *see also supra* notes 48-52 and accompanying text.

¹⁹³ OR. REV. STAT. § 30.955 (1983). *See also supra* notes 49-52 and accompanying text.

¹⁹⁴ CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1985) (abrogating *Coulter v. Superior Court of San Mateo County*, 29 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978)). *See also supra* note 48.

legislative inaction cannot be used as a justification for denying a court the power to act.¹⁹⁵ The historical rule of nonliability was judicially created; therefore it is within the province of the courts to change the rule.¹⁹⁶ The historical rule applied equally to vendors and social hosts, and can similarly be rejected as applied to both. Indeed, courts have been limiting the historical rule for years, so that now a majority of jurisdictions recognize liability against commercial vendors. In addition, some jurisdictions have taken the step of completely abolishing the traditional rule and have recognized such liability against social hosts.

As evidenced by these courts' rejections of the nonliability rule, it becomes apparent that a common law negligence theory would be the most appropriate method of holding a social host liable for injuries to a third person caused by a drunken guest. A negligence standard, unlike statutorily imposed strict liability, would take into account the relative inexperience of social hosts in dealing with intoxicated individuals. Under a negligence standard, a social host would be held to the standard of a reasonable person in the same circumstances. The duty of reasonable care under common law negligence is one which every person owes to society.¹⁹⁷ It is appropriate, therefore, to hold a social host liable under such a theory.

B. Policy Arguments Concerning the Imposition of Social Host Liability

In refusing to extend social host liability, courts have stated that to recognize liability to an injured third person would make it dangerous to have a drink with a friend.¹⁹⁸ The focus of the extension of liability to social hosts is not on sober friends enjoying a single drink. Instead, the imposition of social host liability involves serving a guest who has already had several drinks. In that situation, having a drink with a friend can be dangerous, either to the drinker or an innocent third person injured because of such hospitality.¹⁹⁹ When a host serves an intoxicated guest more drinks, and knows that the guest will be driving soon, it is likewise foreseeable that the furnishing of alcohol will make it more likely that the guest will drive negligently, possibly injuring or killing an innocent third person.²⁰⁰ Even courts that have not totally rejected the historical rule have accepted this view of foreseeability. For example, although the Ohio Appellate

¹⁹⁵ *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984); *McClennan v. Tottenhoff*, 666 P.2d 408, 415 (Wyo. 1983). See also *supra* notes 65-66 and accompanying text.

¹⁹⁶ *Lopez v. Maez*, 98 N.M. 625, 630, 651 P.2d 1269, 1274 (1982).

¹⁹⁷ *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980); see also *supra* notes 62-63, 160-162 and accompanying text for discussions of the application of a common law negligence duty to social hosts.

¹⁹⁸ *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964).

¹⁹⁹ See *DRUNK DRIVING*, *supra* note 1. Each case discussed in this note which involved a social host demonstrates this danger. *Kelly*, 96 N.J. at 541, 476 A.2d at 1220 (1984) (plaintiff seriously injured in head-on collision with intoxicated guest); *Figuly*, 185 N.J. Super. at 479, 449 A.2d at 564 (plaintiff injured in car accident with intoxicated guest); *Linn*, 140 N.J. Super. at 214, 356 A.2d at 16 (intoxicated guest ran down and seriously injured plaintiff); *Baird*, 11 Ohio App. 3d at 16, 462 N.E.2d at 1230 (accident when allegedly intoxicated guests went left of center while drag racing); *Wiener*, 258 Or. at 636-37, 485 P.2d at 20 (plaintiff injured in accident with intoxicated guest); *Wilson*, 98 Wash. 2d at 436, 656 P.2d at 1031 (plaintiff-guest killed when lost control of car and struck utility pole); *Halligan*, 37 Wash. App. at 86, 678 P.2d at 1296 (plaintiff injured by intoxicated guest).

²⁰⁰ *Kelly*, 96 N.J. at 544, 476 A.2d at 1222; *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 501, 233 N.E.2d 18, 20 (1968). See also *supra* notes 59-61, 80, 160-162 and accompanying text.

Court in *Baird* did not definitively recognize a common law negligence cause of action, it did make the crucial recognition that the question of proximate cause should be left to the jury.²⁰¹ This recognition results in treating actions between social hosts and injured third parties like other negligence actions.²⁰²

Another argument in opposition to liability of social hosts involves the inability of a social host to monitor her guest's drinking. This argument becomes irrelevant when it is realized that the duty that a social host owes to her guests arises from the control of the liquor supply.²⁰³ A cause of action has been recognized against a retail seller, whose control over the alcohol is analogous to that of a social host. Both individuals supply the alcohol, but do not have the control over the consumption which a tavern keeper does.²⁰⁴ The cases involving retail liquor store owners demonstrate that the control over the supply of alcohol, and not control over the consumption, is the crucial factor in determining liability. A social host who has control over the supply of alcohol should therefore be held responsible for negligent actions stemming from that control. As the *Halligan* court noted, the manner in which the alcohol is served is not important; the relevant concern is "who had authority to deny further access of alcohol when intoxication became apparent."²⁰⁵

There is no logical reason to distinguish vendors and social hosts when determining liability under common law negligence for furnishing alcohol to an obviously intoxicated person. Much of the reasoning of the courts which have imposed liability on commercial vendors can be equally applied to social hosts. Courts which have recognized a common law negligence cause of action against vendors and social hosts have abandoned the historical rule that the proximate cause of the injury is the drinking, rather than the furnishing of the alcohol.²⁰⁶ Cases imposing liability on commercial vendors have indicated that the furnishing of the alcohol, not merely its sale or consumption, is seen as the proximate cause of a resulting injury.²⁰⁷ The danger of serving alcohol to an already intoxicated person is well known to the public at large — including commercial vendors as well as social hosts.²⁰⁸ Any furnisher of alcohol, therefore, has a duty to use reasonable care to avoid creating unreasonable risks to others.²⁰⁹

In recognizing that the furnishing of alcohol to an obviously intoxicated person, whether by a vendor or social host, can be the proximate cause of a resulting injury, the policy arguments which courts have used for refusing to recognize social host liability

²⁰¹ *Baird*, 11 Ohio App. 3d at 18-19, 462 N.E.2d at 1232-33. See also *supra* notes 108-111 and accompanying text.

²⁰² *Kelly*, 96 N.J. at 543-44, 476 A.2d at 1221-22. See also *supra* notes 62-63, 160-162 and accompanying text.

²⁰³ *Kelly*, 96 N.J. at 548, 476 A.2d at 1224; *Halligan*, 37 Wash. App. at 88-89, 678 P.2d at 1298.

²⁰⁴ *Michnik-Zilberman*, 14 Mass. App. at 539-40, 440 N.E.2d at 1301-02.

²⁰⁵ *Halligan*, 37 Wash. App. at 88-89, 678 P.2d at 1298.

²⁰⁶ For a discussion of the historical rule, see cases cited *supra* notes 5-6 and accompanying text.

²⁰⁷ See, e.g., *Vance v. United States*, 355 F. Supp. 756, 761 (D. Alaska 1973) (modern view in cases involving liquor vendor liability is that the furnishing of alcohol may be the proximate cause of the injuries).

²⁰⁸ *Jardine v. Upper Darby Lodge*, 413 Pa. 626, 631-32, 198 A.2d 550, 553 (1964). See also *supra* note 59 and accompanying text.

²⁰⁹ *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980); see also *supra* notes 62-63 and accompanying text.

become irrelevant.²¹⁰ As the *Kelly* court noted, many of these concerns are based on the fear of "revision of cocktail party customs."²¹¹ Cocktail party customs may indeed change when social host liability is recognized, but as the *Kelly* court stated, that is not a sufficient reason to warrant judicial restraint in this area.²¹²

The hazards of drunken driving are reported in the media nearly every day. Over half of all fatal car accidents involve a drunk driver.²¹³ As the number of drunk driving accidents and deaths continue to escalate, it becomes apparent that placing sole responsibility on the driver is not an effective solution and is not serving as a deterrent.²¹⁴ Furthermore, because injury to a third party is a foreseeable result of furnishing alcohol to an obviously intoxicated individual,²¹⁵ it is unfair to the injured party to immunize the host from liability.

The traditional rule of nonliability operates to exclude one class of risk producers, the social hosts. This rule leaves the innocent victim with an action against only the driver, who is often inadequately insured.²¹⁶ The justification for recognizing a common law negligence cause of action is that an individual acts negligently in serving alcohol to an obviously intoxicated person. When that negligence results in injury to an innocent third person, therefore, the social host should be treated like any other negligent actor and held accountable. As the *Kelly* court noted, imposing liability on social hosts will not only result in added assurance that the victims of drunk drivers will be justly compensated,²¹⁷ but it is also consistent with society's goal of reducing drunk driving.²¹⁸

C. Proposal for the Extension of Common Law Negligence Liability to Social Hosts

Since it is apparent that a common law negligence theory of liability against social hosts is desirable, this note proposes the adoption of a negligence standard which would find a social host liable when he or she serves alcohol to an intoxicated person, under circumstances where a reasonable person would have stopped serving the guest in the same or similar situation. In such a case, a social host would be treated like a defendant in a typical negligence case. As in other negligence cases, in order to recover against a social host, an injured plaintiff will have to prove the four traditional elements of a negligence cause of action — duty, breach, causation and harm.²¹⁹ This will require that the plaintiff show that the host served alcohol to the guest in a situation where the host knew or should have known that the guest was intoxicated and would later be driving.²²⁰ The plaintiff must further prove that this furnishing was done under such circumstances

²¹⁰ *Kelly*, 96 N.J. at 544-51, 476 A.2d at 1222-25.

²¹¹ *Id.* at 554-55, 476 A.2d at 1227.

²¹² *Id.* at 555, 476 A.2d at 1227. The *Kelly* court recognized that if the legislature did not agree with its ruling, it could override the decision by statute. *Id.*

²¹³ See DRUNK DRIVING, *supra* note 1.

²¹⁴ Over the past ten years, an average of 25,000 people have been killed each year by drunk drivers. DRUNK DRIVING, *supra* note 1.

²¹⁵ *Kelly*, 96 N.J. at 543-44, 476 A.2d at 1221-22. See also *supra* notes 59-61, 158-162 and accompanying text.

²¹⁶ Note, *Liability of Commercial Vendor of Alcohol-Duty Derived from Violation of Criminal Statute*, 22 DUQ. L. REV. 1105, 1115 (1984).

²¹⁷ *Kelly*, 96 N.J. at 548, 476 A.2d at 1224.

²¹⁸ *Id.* at 545, 476 A.2d at 1222.

²¹⁹ Note, *Injuries in Furnishing Liquor*, *supra* note 11, at 293 n.70. See also *supra* note 11.

²²⁰ Note, *Injuries in Furnishing Liquor*, *supra* note 11, at 293 n.70.

that a reasonable person would have stopped serving alcohol to the guest in the same or similar situation.²²¹ Finally, the plaintiff must prove that the guest's abilities became impaired by the furnished alcohol so that the impairment was a proximate cause of the plaintiff's injuries.²²²

It has been argued that recognizing common law negligence liability will expose a host to unlimited liability.²²³ This liability, however, is no different than the potential liability of anyone who may act negligently, causing injury to a third person. As the *Kelly* court noted, such liability is not disproportionate to the injury resulting from the host's negligence.²²⁴

Because the principles of strict liability are inappropriate in dealing with social hosts, obvious intoxication of the guest must be the threshold for holding a social host liable.²²⁵ Otherwise, a social host will be held to strict liability for any injuries which result from a guest's drunk driving, even if the host served only *sober* guests. For example, the *Baird* court stated that the host could be held liable, not for serving to an obviously intoxicated guest, but for serving to any guest whom the host knew "would become intoxicated" and create an unreasonable risk of harm to third persons.²²⁶ While such strict liability would likely be the surest method of achieving the broad social goals of stopping drunk driving, this would be placing too great a burden on social hosts. As long as alcohol consumption is accepted by society, a host is not negligent and therefore would not be held liable when he or she only serves sober guests. Furthermore, liability for serving alcohol to a sober guest is not in accord with the liability imposed in the majority of cases which have recognized a common law negligence cause of action against a furnisher of alcohol.²²⁷ While the concern that potentially every social gathering can give rise to liability²²⁸ may be correct, this liability would only be imposed if the host acted negligently by serving the guest when the host knew that the guest was already intoxicated, and would be driving.²²⁹

As in any other negligence case, a reasonable person standard would be applied in cases involving a social host,²³⁰ because after hearing all of the evidence, the judge or jury will determine whether a reasonable person would stop serving a guest alcohol under the same or similar circumstances.²³¹ It has been argued that because a social host

²²¹ *Id.*

²²² *Id.*

²²³ See *Kelly*, 96 N.J. at 568, 476 A.2d at 1234-35 (Garibaldi, J., dissenting).

²²⁴ *Id.* at 550-51, 476 A.2d at 1225. See also *supra* notes 168-170 and accompanying text.

²²⁵ *Halligan*, 37 Wash. App. at 88, 678 P.2d at 1297. See also *supra* note 129 and accompanying text.

²²⁶ *Baird*, 11 Ohio App. 3d at 19, 462 N.E.2d at 1233. See also *supra* notes 110-111 and accompanying text.

²²⁷ *Kelly*, 96 N.J. at 556, 559, 476 A.2d at 1228, 1230; *Figuly*, 185 N.J. Super. at 480, 449 A.2d at 565; *Halligan*, 37 Wash. App. at 88, 678 P.2d at 1297. See also *supra* notes 59, 73 and accompanying text for a discussion of the requirement of obvious intoxication in an action against a vendor.

²²⁸ *Edgar v. Kajet*, 84 Misc. 2d 100, 103-04, 375 N.Y.S.2d 548, 552 (N.Y. Sup. Ct. 1975). See also *supra* notes 88-89 and accompanying text.

²²⁹ *Kelly*, 96 N.J. at 548, 556, 559, 476 A.2d at 1224, 1228, 1230; *Baird*, 11 Ohio App. 3d at 19, 462 N.E.2d at 1233. See also *supra* notes 110-111, 174-175 and accompanying text.

²³⁰ For a discussion of the reasonable person standard, see *Prosser*, *supra* note 5, at 175. "[N]egligence is a failure to do what the reasonable person would do under the same or similar circumstances." *Id.*

²³¹ *Id.*

does not have the experience of a vendor in determining when a person is intoxicated, liability should not be imposed on hosts.²³² There are, however, outward manifestations of intoxication which can be easily recognized by a host.²³³ Moreover, a jury or judge in assessing liability would certainly weigh this factor along with other evidence as to negligence. A social host would be held to the standard of a reasonable person, not the standard of a reasonable vendor.

The *Wilson* court held that sobriety of the guest can only be judged by the way the individual appeared, and not by objective evidence such as blood tests.²³⁴ The cases which the *Wilson* court relied on for this proposition must be limited to the facts. For example, in one case, two hours had elapsed between the time the guest was last observed by the defendants and the time of death.²³⁵ Furthermore, there was no evidence as to whether he had consumed alcohol elsewhere after leaving the defendant's home.²³⁶ In a case such as that, it may be appropriate to contend that the objective evidence obtained at the time of death was not indicative of how the guest appeared to the host two hours earlier. In *Wilson* the court granted summary judgment because, although the attorney alleged that the guest had a high blood alcohol level, there was no evidence to support that contention before the court.²³⁷ Yet, if only subjective evidence can be used, it is likely that in the very situation in which liability would be most desirable — a one-on-one situation — liability could be denied because the hosts, who would be the only eye witnesses, could claim that the guest did not appear intoxicated.²³⁸ The *Kelly* court was faced with just such a dilemma. The hosts, who were also the only eye witnesses to the guest's appearance while at their home, stated that he had had only two drinks.²³⁹ The plaintiff's expert, on the other hand, concluded that the guest had consumed approximately thirteen drinks and must have been obviously intoxicated when he left the defendant's home.²⁴⁰ The expert based this conclusion on the guest's blood alcohol level.²⁴¹ The accident occurred within twenty-five minutes of the guest's departure from the host's home.²⁴² The court ruled that the objective evidence could be used as an indication of how the guest may have appeared to the host.²⁴³ Thus, as the *Kelly* case manifests, objective evidence should be admissible to counter the inherent problem of proving the guest's true appearance when the only eye witness of the guest's actions is the defendant-host. The recognition of an objective standard will allow the jury to hear the objective evidence, and weigh it against the testimony of the social host/eye witness. The concern that, because alcohol affects everyone differently, objective evidence is no guarantee of how

²³² See *Kelly*, 96 N.J. at 565, 476 A.2d at 1233 (Garibaldi, J., dissenting).

²³³ *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 155, 577 P.2d 669, 675, 145 Cal. Rptr. 537, 540 (1978).

²³⁴ *Wilson*, 98 Wash. 2d at 439, 656 P.2d at 1033. See also *supra* note 122 and accompanying text.

²³⁵ *Barrie v. Hosts of America, Inc.*, 94 Wash. 2d 640, 643 n.1, 618 P.2d 96, 98 n.1 (1980).

²³⁶ *Id.*

²³⁷ *Wilson*, 98 Wash. 2d at 436, 656 P.2d at 1031.

²³⁸ *Id.* at 438-39, 656 P.2d at 1032-33; see also *supra* note 120 and accompanying text.

²³⁹ *Kelly*, 96 N.J. at 541, 476 A.2d at 1220.

²⁴⁰ *Id.* See also *supra* note 155.

²⁴¹ *Kelly*, 96 N.J. at 541, 476 A.2d at 1220.

²⁴² *Id.*

²⁴³ *Id.* at 559, 476 A.2d at 1230.

the guest actually appeared,²⁴⁴ while true, is just another factor that should be weighed by the jury.

CONCLUSION

Drunk driving and its devastating effects are a pervasive problem in society. The historical rule, which was developed when horse and buggy were the only mode of transportation, was that the furnisher of alcohol was not held liable for injuries to a third person. Legislatures and courts have recognized that this historical rule is inappropriate in current society, and accordingly have limited the rule. Statutes, which were used to impose liability on vendors, however, have not developed as a viable theory of recovery against social hosts. Common law negligence liability instead developed as a theory to expand the liability of furnishers of alcohol. A negligence cause of action has been increasingly applied to commercial vendors, both tavern keepers and retail liquor store owners. Commercial vendor cases demonstrate the reasonableness of applying such a theory to hold a furnisher of alcohol liable for injuries to innocent third persons. Furnishers of alcohol owe a duty, as in other negligence cases, to avoid creating unreasonable risks of harm to others. The consequences of giving alcohol to an intoxicated person whom the furnisher knows will be driving are clearly foreseeable. This is true whether or not the furnisher is deriving profit. Furthermore, retail liquor store owners, who have the same control over the alcohol as a social host, have been held liable under common law negligence. The differences between commercial vendors and social hosts are irrelevant in determining whether a duty exists.

A trend has begun in the courts to recognize a common law negligence cause of action against social hosts. Most of the courts which have recognized such a cause of action seemed reluctant to totally reject the historical rule. Instead, these courts view social host liability as an exception to the historical rule. The New Jersey Supreme Court in *Kelly v. Gwinnell*, however, totally rejected the historical rule of nonliability of social hosts. In reaching this decision, the *Kelly* court fully addressed the policy arguments which courts had used in the past for refusing to recognize such a cause of action. The *Kelly* court demonstrated that these policy concerns become irrelevant once it is recognized that furnishing alcohol to an obviously intoxicated person can be the proximate cause of an injury. These policy concerns do not justify deference to the legislature on this issue. While the legislature can act in such an area, this fact should not restrict judicial action. The historical common law rule was judicially created, and it is clearly within the province of the court to alter the rule to meet society's changing needs. A common law negligence cause of action is a workable theory by which to hold a social host liable. As in other negligence cases, a reasonable person standard would be applied, which would take into account the many differences between vendors and social hosts which for so long have been used as a justification for adhering to the historical rule of nonliability. Courts should, therefore, follow the lead of the *Kelly* court in recognizing that social host liability should be imposed by the judiciary.

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²⁴⁴ *Id.* at 565-66, 476 A.2d at 1233-34 (Garibaldi, J., dissenting).