

AM I MY BROTHER'S KEEPER? SOCIAL HOST LIABILITY UNDER DRAMSHOP ACTS AND COMMON LAW NEGLIGENCE

I. INTRODUCTION

Drunk driving is a problem of national concern.¹ In recent years,

1. Note, *Torts-Negligence—Social Host Held Liable for Serving Liquor to Intoxicated Guest Who Causes Auto Accident Injuring Third Party*, 15 SETON HALL L. REV. 616 (1985) (discusses the national concern regarding drunk driving). See also U.S. PRESIDENTIAL COMM'N ON DRUNK DRIVING—FINAL REPORT 1 (1983) (cost of drunk driving to society is between \$21 and \$24 billion a year) [hereinafter FINAL REPORT]; SECRETARY OF HEALTH AND HUMAN SERVICES, 5TH SPECIAL REPORT TO U.S. CONGRESS ON ALCOHOL AND HEALTH 25 (1983) (discusses legislative and executive concerns regarding drunk driving); NATIONAL TRANSPORTATION SAFETY BOARD, DEFICIENCIES IN ENFORCEMENT, JUDICIAL AND TREATMENT PROGRAMS RELATED TO REPEAT OFFENDER DRUNK DRIVERS 2 (1984) (examines the problems with treatment programs designed to help repeat drunk drivers) [hereinafter NATIONAL TRANSPORTATION SAFETY BOARD]. For a discussion of the health risks associated with alcohol consumption, see *Smoking Prevention Education Act: Hearings on H.R. 1824 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 309 (1983). For an example of incentive programs that encourage states to increase the drinking age as a legislative solution to the drunk driving problem, see Highway Safety Act of 1982, Title II (1983) (expands Department of Transportation incentive programs to include grants encouraging states to raise legal drinking age to 21); see also *Surface Transportation Issues, 1984: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 98th Cong., 2nd Sess. 598 (1984) (support for Uniform Drinking Age Act of 1984 to reduce, by 25% a year, federal highway funds to states failing to establish 21 as the minimum drinking age). For a discussion of increasing public awareness of the drunk driving problem and various solutions, see *Department of Transportation and Related Agencies Appropriations for 1986, 1983: Hearings Before the Subcomm. on Appropriations of the House Comm.*, 99th Cong., 1st Sess. 98 (1983) (discusses highway programs, including state and community highway safety grants, contract programs, alcohol safety programs, and state incentive grants). FINAL REPORT, *supra*, at 1 (Presidential Commission recommendations for curbing drunk driving); 23 U.S.C. § 408 (1982) (passed in 1982 to inspire states to increase their efforts to eliminate drunk driv-

almost two-thirds² of all fatal car accidents involved drunk drivers.³ Judicial, legislative, and public response to the problem varies.⁴ One legislative response is the enactment of dramshop acts. Dramshop acts hold vendors liable for serving alcoholic beverages to intoxicated customers who subsequently injure a third party. A more recent judicial and legislative response is the development of social host liability.⁵ This cause of action imposes criminal and civil liability on a social host for serving alcohol to an intoxicated guest at a social gathering if the

ing; government appropriated \$25 million for 1983, \$50 million for 1984, and \$50 million for 1985 to fund programs aimed at curbing drunk driving).

2. U.S. PRESIDENTIAL COMM'N ON DRUNK DRIVING—INTERIM REPORT 1 (1983) [hereinafter INTERIM REPORT]. Drunk driving played a role in 65% of the 42,000 fatal car accidents in 1983. Between one in 500 and one in 2,000 drivers on the road who are legally intoxicated are arrested for drunk driving. *Id.*

3. NATIONAL TRANSPORTATION SAFETY BOARD, *supra* note 1, at 2. Heavy problem drinkers who regularly abuse alcohol cause a majority of alcohol related deaths. INTERIM REPORT, *supra* note 2.

4. *See supra* note 1 (various congressional solutions to the drunk driving concern). A number of interest groups have formed to help reduce drunk driving, such as Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD). Special Project, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058, 1059 (1985). For a discussion of MADD's role in litigation, see Comment, *MADD at the Court*, 22, 23 JUDGES J. 36 (1984). For an examination of the constitutionality of drunk driver roadblocks, see Comment, *The Constitutionality of Drunk Driver Roadblocks in Oklahoma*, 20 TULSA L. REV. 286 (1984).

For additional judicial and state legislative response to drunk driving, see Comment, *Punitive Damages in California: The Drunk Driver*, 36 HASTINGS L.J. 793 (1985) (§ 3294 of California's Civil Code imposes punitive damages on drunk drivers); Special Section, *Alcohol Abuse: The New Legal Challenge*, 46 MONT. L. REV. 307 (1984); Legislation Note, *S. 432: Ohio Enacts Stringent Penalties to Deter Drunk Driving*, 9 U. DAYTON L. REV. 147 (1983).

5. Social host liability arises when a social host furnishes alcoholic beverages to an obviously intoxicated person under circumstances creating a reasonably foreseeable risk of harm to others. The social host may be held legally accountable to those third persons who are injured when that harm occurs. *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 150, 577 P.2d 669, 672, 145 Cal. Rptr. 534, 537 (Cal. 1978). *See infra* notes 133-45 and accompanying text. For a background discussion of social host liability, see Gutman, *Drinking, Driving and the Social Host*, CASE & COMMENT 3 (Nov.-Dec. 1985). Courts primarily use common law negligence principles to determine social host liability. *See infra* notes 116-64 and accompanying text.

State legislatures developed dramshop acts that prohibit the selling or furnishing of alcohol to intoxicated persons. A typical dramshop act reads: "No person shall sell, dispense, or give to any intoxicated person, or one simulating intoxication, any alcoholic liquor or beer." IOWA CODE § 123.49(1) (1983). *See infra* notes 23-67 and accompanying text (discusses vendor and social host liability under dramshop acts).

guest subsequently injures a third party.⁶ Social host liability developed as an extension of both state dramshop statutes and common law negligence principles.⁷

This Note examines a commercial vendor's and a social host's statutory and common law liability for serving alcohol to intoxicated persons. Part II of this Note discusses the history of vendor and social host liability under dramshop acts and common law negligence principles.⁸ Section A of Part II focuses on commercial vendor and social host liability under dramshop statutes⁹ and analyzes the problems of social host liability under dramshop acts.¹⁰ Section B examines commercial vendor and social host liability under common law negligence principles.¹¹ The problems associated with extending common law negligence principles to create social host liability are evaluated in the conclusion of this section.¹² Part III analyzes the impact of social host liability both on society and the particular individuals involved.¹³ The Note's conclusion proposes alternative solutions¹⁴ that effectively address and remedy liability problems arising from drunk driving accidents.¹⁵

II. HISTORY

Traditionally, the common law held that any person who sold or served alcoholic beverages to someone who subsequently injured a

6. Note, *Civil Damages Act—Preemption of Social Hosts' Common Law Liability*, 5 *HAMLIN L. REV.* 489 (1982).

7. The statutory cause of action against social hosts falls under state dramshop acts. For a discussion of social host liability under dramshop acts, see Comment, *Liability of Social Host for Off Premises Negligence of Inebriated Guest*, 68 *ILL. B.J.* 396 (1980). The common law cause of action against a social host arises under ordinary negligence principles. Note, *Denial of Social Host Liability for Furnishing Alcohol to a Visibly Intoxicated Guest in Klein v. Raysinger: A Failure in Judicial Reasoning*, 23 *DUQ. L. REV.* 1121 (1983) (critical discussion of court's refusal to impose social host liability). See *infra* notes 116-17 and accompanying text (discusses social host liability under common law negligence principles).

8. See *infra* notes 176-77 and accompanying text.

9. See *infra* notes 23-77 and accompanying text.

10. See *infra* notes 68-77 and accompanying text.

11. See *infra* notes 78-177 and accompanying text.

12. See *infra* notes 165-77 and accompanying text.

13. See *infra* notes 178-91 and accompanying text.

14. See *supra* note 1 (legislative solutions to the drunk driving problem).

15. See *infra* notes 189-91 and accompanying text.

third party was immune from liability.¹⁶ The rationale behind this theory was that the consumption of alcohol, not the selling or serving of alcohol, was the proximate cause¹⁷ of the injury.¹⁸ Courts believed that the alcohol drinker was responsible for alcohol related accidents.¹⁹ Yet, during the past twenty-five years, in response to the drunk driving problem, legislatures have enacted dramshop acts that prohibit the sale of alcohol to intoxicated persons.²⁰ As a result, a growing number of courts have rejected the common law vendor immunity theory.²¹ Thus, under dramshop acts and through extensions of common law negligence principles, commercial alcohol vendors may be held liable for injuries to a third party that occur subsequent to the vendor's sale of alcohol to an intoxicated person.²²

16. See, e.g., *King v. Henkie*, 80 Ala. 50 (1876) (retailer of spirituous liquors not liable for serving intoxicated patron); *State ex rel. Joyce v. Hatfield*, 19 Md. 249, 78 A.2d 754 (1951) (tavern owner not liable for selling liquor to minor who negligently operated his car and injured plaintiff). For a general discussion of vendor liability under traditional common law, see Note, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119 (1984).

17. Proximate cause establishes legal responsibility for an injury. W. KEETON, PROSSER & KEETON ON TORTS 273 (5th ed. 1984). The test for proximate cause is whether the defendant's act was a substantial factor in producing the injury. *Id.* at 278.

18. Note, *supra* note 16, at 1143. For a discussion of the traditional theory of proximate cause, see Note, *Kelly v. Gwinnet: Imposing Third Party Liability on Social Hosts*, 5 PACE L. REV. 809, 811 (1985) (discusses shift in proximate cause theories); see also *Rappaport v. Nichols*, 31 N.J. 188, 194-200, 156 A.2d 1, 4-5 (1959) (examines the proximate cause of drunk driving injuries). The rationale behind the traditional theory was that intoxication is not an excuse for crime or tortious behavior. *State ex rel. Joyce v. Hatfield*, 19 Md. at 251, 78 A.2d at 756 (tavern owner not liable for serving intoxicated patron who later injured plaintiff in a car accident).

19. Comment, *Social Hosts and Drunk Drivers: A Duty to Intervene?*, U. PA. L. REV. 867 (1985) (discusses the common law development and the goals of the tort system regarding drunk driving).

20. See *supra* note 5 (typical dramshop statute).

21. Special Project, *supra* note 4, at 1086.

22. *Id.* For a discussion of the standard of conduct required of a vendor, see Comment, *supra* note 19, at 877 (liability under common law negligence principles based on a reasonable person's ability to foresee a guest's drunk driving); Special Project, *supra* note 4, at 1086 (courts hold that the reasonable person who sells or serves liquor to a person does not foresee that his or her guest will drive while under the influence of alcohol).

For several examples of courts imposing liability on vendors, see *Nazareno v. Urie*, 638 P.2d 671 (Alaska 1981) (bar owners liable for third party's injuries from intoxicated patron's collision with the third party on the dance floor); *Ontiveros v. Borak*, 136 Ariz. 500, 638 P.2d 671 (1983) (en banc) (tavern owner liable for injuries when he served intoxicated patron who was later involved in a car accident); *Taylor v. Ruiz*, 394 A.2d 765 (Del. Super. Ct. 1978) (liability can be imposed on a tavern owner who serves alco-

A. *Dramshop Acts*

1. Commercial Vendor and Tavern Owner Liability Under Dramshop Acts

Because commercial vendors and tavern owners traditionally were immune from liability under the common law,²³ an injured party had no remedy against a negligent licensee.²⁴ To rectify this problem, courts developed an exception to the common law rule, recognizing the special relationship that liquor licensees have with their customers. This special relationship creates a duty of care²⁵ that is owed to the customers.²⁶ This duty arises from an implied service contract between licensee and customer, which allows the licensee to receive economic benefit from the sale of alcohol.²⁷ Despite this exception, only a few courts recognized a duty of care that flowed from the licensee-customer relationship and runs to third persons injured by intoxicated customers.²⁸ Consequently, state legislatures enacted dramshop acts.²⁹

The purpose of dramshop acts is to protect the general public from the injurious consequences of contact with an intoxicated person.³⁰ Dramshop acts provide a cause of action for third parties injured by

hol to an intoxicated patron, who then injures a third party, if the tavern owner had reason to know or knew that the patron was intoxicated); *Carver v. Schafer*, 647 S.W.2d 570 (Mo. Ct. App. 1983) (tavern owner liable for serving alcohol to an intoxicated patron who later killed plaintiff's decedent in an automobile accident).

23. Note, *supra* note 18, at 811 (discusses the development of liability for negligent tavern owners and vendors). See also *supra* notes 16-19 and accompanying text (discusses vendor immunity).

24. Note, *supra* note 18, at 812. For the purposes of this Note, a licensee includes both a commercial vendor and tavern owner.

25. A duty is defined as an obligation to conform to a particular standard toward another. W. KEETON, *supra* note 17, at 356. Duty is a question of whether the defendant is under any obligation for a particular plaintiff's benefit. *Id.* In negligence cases, the duty is to conform to the legal standard of reasonable conduct examined in light of the situation's apparent risk. *Id.*

26. Note, *supra* note 18, at 812.

27. Note, *supra* note 18, at 812-13 (thorough discussion of the reasoning behind imposing a duty on vendors).

28. Most jurisdictions adhered to the traditional vendor immunity theory. *Id.* at 813.

29. *Id.* Dramshop acts are also referred to as civil damages acts. *Id.* See *supra* note 5 (typical dramshop act).

30. Note, *The Safe Roads Act: The Dram Shop Provisions*, 62 N.C.L. REV. 1415, 1417 (1984) (objective discussion of dramshop acts).

intoxicated patrons against liquor licensees.³¹ To further their goal of protection, dramshop acts do not require a showing of negligence. The statutes base recovery instead on strict liability.³² To establish a prima facie case,³³ the plaintiff must prove four elements: (1) the defendant transferred an intoxicating liquor to the patron,³⁴ (2) the patron consumed the liquor and became intoxicated,³⁵ (3) the intoxicated patron injured the plaintiff,³⁶ and (4) the patron's intoxication caused the plaintiff's injury.³⁷ Proving these elements entitles the plaintiff to recover for such injuries from a vendor or tavern owner who served alcohol to the intoxicated patron.³⁸

2. Extending Liability to Social Hosts Under Dramshop Acts

A majority of courts and legislatures are reluctant to extend liability to social hosts under dramshop acts.³⁹ Even if a dramshop act is arguably broad enough to include social hosts,⁴⁰ courts usually limit the

31. Note, *supra* note 18, at 813.

32. Comment, *Social Host Liability: No More "One For the Road,"* 61 CHI.-KENT L. REV. 165, 166 (1985). Strict liability means liability imposed on an actor apart from either an intent to interfere with a legally protected interest or a breach of duty to exercise reasonable care. W. KEETON, *supra* note 17, at 534. This concept is often referred to as liability without fault. *Id.*

33. A prima facie case is one that proceeds upon sufficient proof to that stage at which it will support a finding if evidence to the contrary is disregarded. BLACK'S LAW DICTIONARY 1071 (5th ed. 1979).

34. Note, *Dram Shop Litigation*, 12 AM. JUR. 2D *Trials* 729, 738 (1966). The specific elements required under a typical dramshop act are:

- (1) an intoxicating liquor is involved,
- (2) defendant must transfer the liquor,
- (3) transferee must consume the liquor,
- (4) transferee must become intoxicated or the drink must contribute to his existing state of intoxication,
- (5) the intoxicated transferee must cause actual injury to the plaintiff,
- (6) the intoxication must have a causal connection to the plaintiff's injury, and
- (7) the plaintiff must be entitled to sue under the dramshop act.

Id. See *Gabrielle v. Craft*, 75 A.D.2d 939, 428 N.Y.S.2d 84 (1980) (lack of sale is fatal to action under dramshop act).

35. Note, *supra* note 34, at 738.

36. *Id.*

37. *Id.*

38. *Id.*

39. Special Project, *supra* note 4, at 1064-88 (judicial reluctance to apply dramshop acts to social hosts). See *Stein v. Beta Rho Alumni Ass'n, Inc.*, 49 Or. 965, 621 P.2d 632 (1980) (court refused to extend liability to social host under dramshop act).

40. Some state dramshop acts are broad enough to include social hosts. See, e.g.,

statute's application to vendors,⁴¹ claiming that legislatures did not intend to include social hosts in dramshop acts.⁴²

*Kohler v. Wray*⁴³ typifies the traditional reluctance to extend dramshop act coverage to include social hosts. The Supreme Court of New York found that the New York dramshop act does not apply to a social host.⁴⁴ In *Kohler* the defendant held a party and served several kegs of beer.⁴⁵ One guest became intoxicated, a fight ensued, and the intoxicated guest exchanged punches with the plaintiff.⁴⁶ The majority held that a social host is not liable for injuries that result from serving alcohol to an intoxicated guest.⁴⁷ The court found that neither the dramshop act nor the common law⁴⁸ recognizes a cause of action against a social host based merely on the serving of alcohol to an individual who later injures a third party.⁴⁹ Rather, the court stated that such a cause

ALA. CODE § 6-5-71 (1975); ME. REV. STAT. ANN. tit. 17, § 2002 (1964) (right of action against any person who sells or gives alcoholic beverages); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1984-85) (right of action against any person who unlawfully sells or assists in procuring liquor); OHIO REV. CODE ANN. § 4399.01 (1978) (broad dramshop act). *But see, e.g.*, CONN. GEN. STAT. § 30-102 (1985) (limits cause of action to sellers of intoxicating liquor); WYO. STAT. § 12-5-502 (1984) (limits cause of action to licensees and permittees).

41. Special Project, *supra* note 4, at 1115-18 (legislative intent for dramshop acts). *See DeLoach v. Mayer Elec. Supply Co.*, 378 So. 2d 733 (Ala. 1973) (no liability under dramshop act absent sale of liquor); *cf.* *Clark v. Mincks*, 364 N.W.2d 226 (Iowa 1985) (social host liable under dramshop act). For a discussion of *Clark*, see *infra* notes 52-61 and accompanying text.

42. *See Cady v. Coleman*, 315 N.W.2d 593 (Minn. 1982) (legislature did not intend to include social hosts under dramshop acts); *Gabrielle v. Craft*, 75 A.2d 939, 428 N.Y.S.2d 84 (N.Y. App. Div. 1980) (sale of alcohol by defendant is required to maintain a cause of action under dramshop act). For a discussion of social host liability under dramshop acts, see Special Project, *supra* note 4, at 1115-20.

43. 114 Misc. 2d 856, 452 N.Y.S.2d 831 (N.Y. Sup. Ct. 1982). In *Kohler* the plaintiff arrived at defendant's party and was encouraged to help himself to beer. *Id.* at 856-57, 452 N.Y.S.2d at 832. The plaintiff approached a married woman and asked her to dance. *Id.* at 857, 452 N.Y.S.2d at 833. A fight between plaintiff and the woman's husband then occurred. *Id.*

44. *Id.* at 856, 452 N.Y.S.2d at 832.

45. *Id.*

46. *Id.* at 857, 452 N.Y.S.2d at 838.

47. *Id.* The court found that the plaintiff offered nothing to rebut defendant's proof that the host had no notice or opportunity to prevent the assault. *Id.* at 861, 452 N.Y.S.2d at 835.

48. *See infra* notes 116-64 and accompanying text (social host liability under common law negligence principles).

49. *Kohler*, 114 Misc. 2d at 857, 452 N.Y.S.2d at 838.

of action applies only to licensees who sell alcohol to the intoxicated individual.⁵⁰

Until recently, no jurisdiction allowed recovery against a social host under a dramshop act.⁵¹ Iowa and Indiana departed from this view and now hold social hosts liable under dramshop acts for serving intoxicated guests.⁵² In *Clark v. Mincks*⁵³ defendants hosted a cookout and served beer.⁵⁴ One guest became intoxicated and subsequently attempted to drive.⁵⁵ The guest had an accident that killed her passenger.⁵⁶ The Supreme Court of Iowa found that an injured party may have a cause of action against a social host under Iowa's dramshop act.⁵⁷ Under the act, the plaintiff must prove that the host knowingly made alcohol available to an intoxicated guest, the guest drank the alcohol, and the guest then drove a vehicle causing injury to a third party.⁵⁸ Placing great emphasis on the strong public policy against drunk driving,⁵⁹ the court held that a cause of action against the host for serving alcohol to the intoxicated guest extended to the guest's passenger.⁶⁰ The court stated that any positive change in social behavior that results from the expansion of dramshop liability is beneficial.⁶¹

Similarly, in *Ashlock v. Norris*⁶² the Indiana Court of Appeals extended liability under its state dramshop act to include social hosts.⁶³ In *Ashlock* the plaintiff brought a wrongful death action against a de-

50. *Id.*

51. Commnet, *supra* note 32, at 165-79 (supportive discussion of social host liability).

52. See *Clark v. Mincks*, 364 N.W.2d 226 (Iowa 1985); *Ashlock v. Norris*, 475 N.E.2d 1167 (Ind. Ct. App. 1985). For a discussion of *Ashlock*, see *infra* notes 62-67 and accompanying text.

53. 364 N.W.2d 226 (Iowa 1985).

54. *Id.* at 227.

55. *Id.*

56. *Id.*

57. *Id.* at 229.

58. *Id.* The Iowa Dramshop Act reads: "No person shall sell, dispense or give to any intoxicated person or on simulating intoxication, any alcohol, liquor or beer." IOWA CODE § 123.46(3) (1983).

59. 364 N.W.2d 230.

60. *Id.*

61. *Id.* For a general discussion of the effects of *Clark*, see Gutman, *Drinking, Driving, and the Social Host*, CASE & COMMENT, 3-8 (Nov.-Dec. 1985).

62. 475 N.E.2d 1167 (Ind. Ct. App. 1985).

63. The Indiana Dramshop Act reads: "It is unlawful for a person to sell, barter, deliver or give away any alcoholic beverage to another person who is in the state of

defendant who had purchased several drinks for a friend at a bar.⁶⁴ The friend left the bar and drove about a mile before striking and killing a jogger.⁶⁵ The majority reversed the circuit court's summary judgment in favor of the plaintiff and held that a cause of action existed against the defendant under Indiana's Dramshop Act only if the defendant knew the friend was intoxicated and would soon be driving.⁶⁶ The court reasoned that legislative intent and sound public policy against drunk driving allowed it to extend the dramshop act to reach this form of conduct.⁶⁷

3. Analysis of the Scope of Dramshop Act Liability

The Iowa and Indiana courts remain a minority in their abandonment of absolute immunity for social hosts under dramshop acts.⁶⁸ Most courts find numerous policy reasons for refusing to extend dramshop acts to social hosts.⁶⁹ One justification is express legislative intent to confine dramshop liability to vendors.⁷⁰ Because legislatures presume that vendors and bartenders have the expertise to determine whether a patron is intoxicated,⁷¹ dramshop acts do not require actual

intoxication if the person knows that the other person is intoxicated." IND. CODE § 7.1-5-7-8 (1978).

64. 475 N.E.2d at 1168. In *Ashlock*, Morrow went to a restaurant and lounge and consumed two mixed drinks and three shots of straight alcohol that the defendant purchased for her. *Id.* After observing her intoxication, defendant unsuccessfully tried to dissuade Morrow from driving.

65. *Id.*

66. *Id.* at 1170.

67. *Id.* at 1169. The court stated that considering the carnage on the public highways involving intoxicated drivers, the legislative intent and sound public policy is clearly to hold a social host liable. *Id.*

68. Not a single jurisdiction before *Clark* and *Ashlock* held a social host liable under dramshop acts. Comment, *supra* note 32, at 165-79.

69. For a discussion of policy reasons for refusing to extend dramshop acts to include social hosts, see *Edgar v. Kajet*, 84 Misc. 2d 100, 103, 375 N.Y.S.2d 548, 552 (N.Y. Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976).

70. Special Project, *supra* note 4, at 1103. For a discussion of the legislative intent issue, see Note, *supra* note 16, at 1184 (stresses the importance of deference to the legislature); Comment, *Social Host Liability Under the Common Law: Kelly v. Gwinell*, 1985 DET. C.L. REV. 97, 108 (1985).

71. Note, *supra* note 18, at 836-41 (discusses the differences between vendors and social hosts). See also *supra* notes 34-38 and accompanying text (courts holding social hosts liable under dramshop acts do not inquire into the defendant's knowledge that the guest was intoxicated).

knowledge⁷² of the guest's or patron's intoxication. Social hosts, on the other hand, have no such expertise. For the average citizen, determining whether a person is intoxicated is extremely difficult.⁷³ This reasoning suggests that state legislatures do not intend to impose this burden on inexperienced social hosts.

An additional reason for limiting the scope of dramshop act liability to vendors is that they can spread the cost of insurance or liability among their customers.⁷⁴ Social hosts do not have this opportunity. If social hosts cannot afford additional liability insurance, or if such insurance is not available, liability judgments will deplete and perhaps exhaust their personal savings. This is implausible legislative intent.

Reacting to judicial uncertainty regarding legislative intent behind dramshop acts, some states enacted statutes expressly excluding social host liability.⁷⁵ Other states enacted broad dramshop acts that leave the question of social host liability open to judicial interpretation.⁷⁶ Even if legislatures intend to cover social hosts in dramshop acts, including them does not further the acts' purpose: eliminate injuries at the hands of intoxicated individuals.⁷⁷ Social host liability merely places blame on an innocent party and virtually eliminates the liability of the responsible party, the drunk driver. This arbitrary blame-placing will not deter drunk driving, but will cause it to increase. Guests

72. Knowledge is the belief in the existence of a fact, which coincides with the truth. W. KEETON, *supra* note 17, at 182. "It rests upon perception of the actor's surroundings, memory of what has gone before, and a power to correlate the two with previous experience." *Id.* Unless an actor's attention is legitimately distracted, the actor must give his surroundings the attention that a standard reasonable person would consider necessary under the circumstances, and he must use his sense to discover what is readily apparent. *Id.*

73. *Id.* See *Kelly v. Gwinell*, 190 N.J. Super. 320, 463 A.2d 387 (App. Div. 1983) (dissent in *Kelly* believes the problem with social host liability is that it places too great a burden on an inexperienced host to recognize an intoxicated guest); *rev'd*, 96 N.J. 538, 476 A.2d 1219 (1984). For a discussion of *Kelly*, see *infra* notes 146-64 and accompanying text.

74. Special Project, *supra* note 4, at 1103.

75. See, e.g., ALASKA STAT. § 04.21.020 (1980); CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984); OR. REV. STAT. § 30.955 (1983); but see, e.g., FLA. STAT. ANN. § 768.125 (West. Supp. 1984) (statute potentially applicable to social host). For a discussion of the legislative reaction to social host liability, see Note, *supra* note 16, at 1136.

76. See *supra* notes 40, 75 and accompanying texts (list of broad and narrow dramshop acts).

77. See *supra* note 30 and accompanying text (purpose of dramshop act is to protect the public from injuries resulting from drunk driving).

that drive are less likely to drink responsibly knowing they can share part, if not shift all, of the liability to their host if a third party is injured.

B. *Common Law Negligence*

1. Commercial Vendor Liability Under Common Law Negligence Principles

Courts initially were reluctant to impose liability on vendors if the state had no dramshop statute.⁷⁸ In *Holmes v. Circo*⁷⁹ a tavern owner served an intoxicated patron who subsequently injured the plaintiff while negligently operating his car.⁸⁰ The Supreme Court of Nebraska held that absent specific legislation, a tavern owner cannot be held liable for a third party's injuries caused by an intoxicated patron to whom the tavern owner had served alcohol.⁸¹ The court stated that due to public policy considerations associated with the imposition of liability on vendors, only the legislature should make such a decision.⁸²

Courts occasionally imposed liability on vendors in the absence of a dramshop act if the vendor's conduct was more culpable than mere negligence.⁸³ In *Ewing v. Cloverleaf Bowl*⁸⁴ plaintiff brought a wrongful death action against a vendor for willful misconduct.⁸⁵ The vendor

78. See, e.g., *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969) (tavern owner who sold liquor to an intoxicated person was not liable under common law negligence in the absence of a statute).

79. 196 Neb. 496, 244 N.W.2d 65 (1976).

80. *Id.* at 497, 244 N.W.2d at 66.

81. *Id.* at 505, 244 N.W.2d at 70.

82. *Id.* The court stated that the legislature could make a thorough investigation on the issue, hold hearings, debate the relevant policy considerations, and then draft statutes to adequately meet the public's needs. *Id.* See also *Henry Grady Hotel Co. v. Sturgis*, 70 Ga. App. 379, 28 S.E.2d 329 (1943) (no liability at common law for furnishing money to intoxicated person for the purpose of purchasing liquor); *Ruth v. Benvenuti*, 114 Ill. App. 3d 404, 449 N.E.2d 209 (1983) (dramshop act is the exclusive remedy against vendors; no common law cause of action exists based on tavern keeper's willful misconduct); *Tsarnas v. Jones & Laughlin Steel Corp.*, 488 Pa. 513, 523, 412 A.2d 1094, 1099 (1980) (social policies are to be addressed by the legislature, not the courts).

83. See, e.g., *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978) (vendor liability exists for willful misconduct in serving alcohol to intoxicated young adult).

84. *Id.*

85. The court defined willful misconduct as the "intentional doing of something . . .

served alcohol to a patron whom he knew recently turned twenty-one.⁸⁶ The court held defendant vendor liable for willful misconduct because he was aware of the patron's lack of drinking experience, knew of the customer's continued drinking, and disregarded tavern owners' practices.⁸⁷

Courts have become more willing under the developing common law to impose liability on liquor licensees for negligent conduct,⁸⁸ establishing a duty of liquor licensees to take reasonable precautions to prevent intoxicated customers from injuring third parties.⁸⁹ *Waynick v. Chicago's Last Department Store*⁹⁰ was the first case to dispense with the dramshop approach and find liability using common law negligence principles.⁹¹ In *Waynick*, defendants, an Illinois tavern owner and a liquor retailer, sold and furnished liquor to intoxicated patrons who then killed plaintiff's decedent in an automobile collision.⁹² The Seventh Circuit found the defendants liable for plaintiff's injuries⁹³ under a negligence cause of action.⁹⁴ The court focused on the concept of

with knowledge, express or implied, that serious injury is a probable . . . result, or the intentional doing of an act with a wanton and reckless disregard of its consequences." *Id.* at 402, 572 P.2d at 1161, 143 Cal. Rptr. at 20 (quoting *Williams v. Carr*, 68 Cal. 2d 579, 584, 440 P.2d 505, 509, 68 Cal. Rptr. 305, 309 (1968)).

86. *Id.* at 397, 572 P.2d at 1157, 143 Cal. Rptr. at 15.

87. *Id.* at 403-04, 572 P.2d at 1162-63, 143 Cal. Rptr. at 20-21.

88. Note, *supra* note 18, at 813. For a discussion of the state of Washington's consideration of vendor liability under the common law, see Comment, *Recognizing the Liability of Social Hosts Who Knowingly Allow Intoxicated Guests to Drive: Limits to Socially Acceptable Behavior*, 60 WASH. L. REV. 389 (1985).

89. Note, *supra* note 18, at 813. The duty arises because of the special relationship between the tavern owner and patron. *Id.* See *supra* notes 25-28 and accompanying text (discusses origin of vendor duty).

90. 269 F.2d 322 (7th Cir. 1959). For a discussion of *Waynick*, see Note, *An Examination of the Duty Concept: Has It Evolved In Otis Engineering v. Clark?*, 36 BAYLOR L. REV. 375, 411 (1984).

91. Note, *supra* note 90, at 411.

92. 269 F.2d 322, 323, 324 (7th Cir. 1959) (Illinois dramshop act did not apply because the injury occurred in Michigan; consequently, the court examined the case under common law negligence principles, recognizing that if no common law cause of action existed, the plaintiff would be without a remedy).

93. *Id.* at 326. The Seventh Circuit found that every person has a general duty to use ordinary care to avoid injury to others by any agency set in operation by him. *Id.* at 325. The court found that defendants breached their duty by selling liquor to two drunken men. *Id.*

94. The elements of negligence are: duty, breach of duty, proximate cause, and injury. W. KEETON, *supra* note 19, at 158-59.

proximate cause,⁹⁵ which traditionally had been defined in this context as the consumption of alcohol. Expanding the meaning of this element of negligence, the court concluded that the serving or selling of alcohol could also constitute proximate cause.⁹⁶ Making vendors liable under these principles was justified, the court reasoned, in order to protect the public from injuries incurred as a result of a vendor's sale of liquor to an intoxicated person.⁹⁷

After the Seventh Circuit's decision in *Waynick*, the New Jersey Supreme Court also examined a vendor's liability for injuries following the service of alcohol.⁹⁸ In *Rappaport v. Nichols*⁹⁹ four different tavern owners served alcohol to an intoxicated minor.¹⁰⁰ The minor later caused an automobile accident that killed plaintiff's decedent.¹⁰¹ The court found that in serving alcohol to an intoxicated minor, the vendor had violated the State Beverage Control Act.¹⁰² The court held further that the vendor's actions presented a clear and foreseeable risk to the traveling public,¹⁰³ warranting the imposition of liability under common law negligence principles.¹⁰⁴ To determine which party should properly bear the duty of care under a negligence theory, the *Rappaport* court used a balancing test.¹⁰⁵ Upon weighing the risk of serving an intoxicated minor, the relationship between the minor and the vendor, and the public interest in imposing vendor liability,¹⁰⁶ the court imposed a duty on the tavern owner to protect the public safety.¹⁰⁷ The creation of this duty, similar to the result reached in the

95. See *supra* notes 17-19 and accompanying text.

96. 269 F.2d at 326.

97. *Id.*

98. *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959).

99. *Id.*

100. *Id.* at 192, 156 A.2d at 3. An adult paid for Nichols' drinks, but according to the plaintiffs, the defendants were aware of Nichols' age and intoxication. *Id.*

101. *Id.*

102. The New Jersey Beverage Control Act states: "No licensee shall permit any minor to be served or consume any beverages." N.J. STAT. ANN. § 33:1-77 (West 1958) (the same regulation contains a provision against service to or consumption by any person actively or apparently intoxicated).

103. 31 N.J. at 201, 156 A.2d at 8.

104. *Id.*

105. *Id.* at 292-03, 156 A.2d at 8-9. The court stated that the balancing of conflicting interests and policy considerations is a vital process in molding and applying common law principles of negligence. *Id.*

106. *Id.*

107. *Id.*

Seventh Circuit, effectively modifies the traditional common law theory of proximate cause.¹⁰⁸ Under this new theory, furnishing alcohol to an intoxicated minor constitutes the proximate cause of any resulting injury inflicted on a third party.¹⁰⁹

A majority of jurisdictions do not limit liability to the serving of alcohol to minors and now extend liability to vendors under common law negligence principles for serving any intoxicated person.¹¹⁰ In *On-tiveros v. Borak*¹¹¹ the Supreme Court of Arizona abolished the common law vendor immunity doctrine and held a tavern owner liable for third party injuries sustained after the owner had served alcohol to an intoxicated person.¹¹² The court found that a tavern owner owes a duty to exercise reasonable care to protect all individuals whom tavern owner's patrons may injure.¹¹³ According to the court, the duty arises because a reasonable man would recognize that serving alcohol to an

108. See *supra* notes 17-19 and accompanying text (discusses traditional theory of proximate cause).

109. *Rappaport*, 31 N.J. at 203-04, 156 A.2d at 9. For further discussion of *Rappaport* and its effect on New Jersey and other jurisdictions, see Note, *supra* note 90, at 411-12 (*Rappaport* began the New Jersey trend toward imposing vendor and social host liability); Note, *supra* note 18, at 815-23 (explains each element of negligence required under *Rappaport*). For a discussion of the evolution of the new proximate cause theory, see Note, *supra* note 18, at 823; Comment, *supra* note 32, at 173. (in jurisdictions recognizing a common law tort action against the supplier, furnishing alcohol is considered the proximate cause of an injury).

110. Comment, *supra* note 88, at 390 (discusses the present state of the law regarding common law liability of commercial vendors). For examples of courts imposing liability under common law negligence principles, see *Nazareno v. Urie*, 638 P.2d 671 (Alaska 1981) (bartender owes a duty to act with reasonable care when dispensing alcohol); *Ono v. Appelgate*, 612 P.2d 533 (Haw. 1980) (absent a dramshop act, an injured plaintiff can recover from a tavern owner who served alcohol to an intoxicated person); *Jardine v. Upper Darby Lodge No. 1973*, 413 Pa. 626, 198 A.2d 550 (1964) (tavern owner's service of alcohol to an intoxicated patron was the proximate cause of pedestrian plaintiff's injuries).

Fourteen jurisdictions still adhere to the common law rule of non-liability. See, e.g., *DeLoach v. Mayer Elec. Supply Co.*, 378 So. 2d 733 (Alaska 1979) (absent a sale, no liability exists under Alaska's dram shop act); *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965) (no tavern owner liability for serving liquor to intoxicated minor adult).

111. 136 Ariz. 500, 667 P.2d 200 (1983) (en banc).

112. *Id.* at 513, 667 P.2d at 213. The tavern owner sold 30 beers to the patron throughout the afternoon and evening. *Id.* at 503, 667 P.2d at 203. The patron left the bar and was involved in a car accident, injuring the plaintiff. *Id.* The police officer gave the patron a breathalyzer test, which had a reading of 0.33%, considerably greater than the reading required for legal intoxication. *Id.*

113. *Id.* at 511, 667 P.2d at 211.

intoxicated person creates an unreasonable risk of harm to others.¹¹⁴ *Ontiveros* typifies the law in most jurisdictions—a vendor is liable for serving alcohol to a visibly intoxicated customer who later drives while intoxicated and injures a third party.¹¹⁵

2. Extending Liability to Social Hosts under Common Law Negligence Principles

Until recently, courts consistently refused to hold social hosts liable under common law negligence principles.¹¹⁶ In *Chastain v. Litton Systems*¹¹⁷ the defendant held a Christmas party and gratuitously served alcohol to its employees.¹¹⁸ One employee became intoxicated; later he drove a vehicle and collided with another car, fatally injuring a woman.¹¹⁹ The Fourth Circuit held that it would not impose liability because the defendant was a social host.¹²⁰ The majority relied on North Carolina common law, which precludes social host liability.¹²¹

Other courts, however, apply common law negligence principles to impose liability on social hosts.¹²² Some of these courts hold that be-

114. *Id.* at 508, 667 P.2d at 208.

115. Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D.L. REV. 445, 471 (1983) (discusses vendor liability arising out of common law negligence principles).

116. See, e.g., *Chastain v. Litton Systems, Inc.*, 694 F.2d 957 (4th Cir.), *cert. denied*, 462 U.S. 1106 (1982); *Klein v. Raysinger*, 504 Pa. 141, 470 A.2d 507 (1983).

117. 694 F.2d 957 (4th Cir.), *cert. denied*, 462 U.S. 1106 (1982).

118. *Id.* at 959.

119. *Id.*

120. *Id.* at 960. The court stated that if Litton was not a social host, the North Carolina law of torts should determine liability. *Id.*

121. *Id.* See also *Klein v. Raysinger*, 504 Pa. 141, 470 A.2d 507 (1983) (social host who serves alcoholic beverages to adult guests is not liable under common law negligence principles for injuries and damages sustained as a result of a subsequent car collision involving the intoxicated guest). For a discussion of social host immunity under *Raysinger*, see Note, *supra* note 7, at 1121.

122. See *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (court imposed liability on social host apartment manager who served liquor to an intoxicated guest who then was involved in a one car accident, in which the plaintiff passenger was injured); *infra* notes 133-45 and accompanying text (discusses *Coulter*); see also *Kelly v. Gwinnel*, 190 N.J. Super. 320, 463 A.2d 387 (1983) (social host liable for serving friend alcohol; friend drove home and caused a car accident, injuring plaintiff), *rev'd*, 96 N.J. 538, 476 A.2d 1219 (1984); *infra* notes 146-64 and accompanying text (discusses *Kelly*); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971) (fraternity liable as social host for allowing members to serve an intoxicated minor who injured the plaintiff while driving home); *infra* notes 126-31 and accompanying text (discusses *Wiener*). *But see*

cause the dramshop statutes provide for but do not fully implement common law liability, the law in this area is a proper subject for judicial reform.¹²³ Consequently, these courts attempt to effectuate these principles by extending common law negligence to cover social hosts.¹²⁴ They have had limited lasting success, however, in eroding the traditional common law rule.¹²⁵

The first case to hold a social host liable under ordinary negligence principles was *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*.¹²⁶ In *Wiener* college fraternity members served beer to an intoxicated minor.¹²⁷ While driving home, the minor injured the plaintiff.¹²⁸ The court recognized a cause of action against the fraternity under ordinary negligence principles,¹²⁹ holding that the fraternity had a duty to not serve alcohol to a visibly intoxicated guest.¹³⁰ Recognizing the novelty and possible future impact of its decision, the court stated that social host liability should be determined on a case-by-case basis.¹³¹ For this reason, the court expressly limited its holding to social hosts who serve alcohol to an obviously intoxicated minor.¹³²

The California Supreme Court took a similar position in *Coulter v. Superior Court of San Mateo County*.¹³³ In *Coulter* an apartment

Kowal v. Hofner, 181 Conn. 355, 436 A.2d 1 (1980) (no common law liability for social hosts).

123. See, e.g., *Buchanan v. Merger Enterprise, Inc.*, 463 So. 2d 121, 127 (Ala. 1985).

124. *Id.* The *Buchanan* court held the vendor liable under common law negligence principles for serving alcohol to an intoxicated patron who drove an automobile and killed plaintiff's decedent. *Id.* at 124.

125. The California legislature, in response to *Coulter*, enacted a statute that abrogated *Coulter's* social host liability. See *infra* note 143. The New Jersey legislature also introduced a bill that precludes social host liability by abrogating *Kelly*. See *infra* note 187.

126. 258 Or. 632, 485 P.2d 18 (1971). In *Wiener* the defendant fraternity held a party for members of the fraternity and their guests. *Id.* at 636, 485 P.2d at 20.

127. *Id.* at 637, 485 P.2d at 20.

128. *Id.*

129. The issue before the court was whether a cause of action existed against the fraternity for negligently serving liquor to an intoxicated minor. *Id.* at 643, 485 P.2d at 23.

130. *Id.*

131. *Id.* at 639, 485 P.2d at 21. In 1979, the Oregon legislature enacted a statute permitting a plaintiff to sue a private host who serves alcohol to a visibly intoxicated guest. ORE. REV. STAT. § 30.995 (1984).

132. 258 Or. 643, 485 P.2d at 23.

133. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

owner and manager served alcohol to a group of tenants in the apartment complex.¹³⁴ One guest became intoxicated and later, while driving under the influence, injured a passenger.¹³⁵ The passenger sued under both statutory and common law negligence principles.¹³⁶ The court interpreted the California statute that prohibits the sale or furnishing of alcohol to an intoxicated person to include social hosts.¹³⁷ Under this statutory provision the court found the social host liable for serving alcohol to the intoxicated guest.¹³⁸

The *Coulter* court also analyzed the case under common law negligence principles¹³⁹ and articulated a fundamental California common law principle: a person owes a duty of reasonable care to another if a risk of harm is foreseeable.¹⁴⁰ The court found that defendants, knowing that the guest intended to drive, could reasonably foresee a third party injury resulting from serving alcohol to the intoxicated guest.¹⁴¹ The defendants breached their duty by continuing to serve alcohol to the obviously intoxicated guest.¹⁴² The court held that social hosts and other noncommercial alcohol providers are liable under common law negligence principles if they serve alcohol to obviously intoxicated guests who pose a reasonably foreseeable risk of harm to third persons.¹⁴³ The court balanced the strong public policy against drunk driving with the burden imposed on noncommercial suppliers,¹⁴⁴ finding in favor of social host liability because intoxicated drivers seriously threaten the lives of the public.¹⁴⁵

134. *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536.

135. *Id.*

136. *Id.* at 151, 577 P.2d at 672, 145 Cal. Rptr. at 537.

137. *Id.* The relevant section of the California Business and Professions Code reads: "Every person who sells, furnishes, gives or causes to be sold, furnished or given away, any alcoholic beverage to . . . any obviously intoxicated person is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25602 (West Supp. 1985). The court found that "every person" applies to both commercial and non-commercial suppliers of alcoholic beverages. 21 Cal. 3d at 151, 577 P.2d at 672, 145 Cal. Rptr. at 537.

138. *Id.* at 153, 577 P.2d at 673, 145 Cal. Rptr. at 538.

139. *Id.*

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

141. *Id.* The court found that a reasonably receptive host could foresee the danger of ultimate harm as well as a bartender.

142. *Id.*

143. *Id.*

144. *Id.* at 155, 577 P.2d at 675, 145 Cal. Rptr. at 540.

145. *Id.* The California legislature subsequently abrogated *Coulter* when it enacted a statute that precludes social host liability through a mandate that the proximate cause

*Kelly v. Gwinnel*¹⁴⁶ provides the most complete discussion of social host liability. In *Kelly* the Supreme Court of New Jersey followed the *Coulter* rationale and recognized a cause of action against a social host.¹⁴⁷ The defendant in *Kelly* invited a friend to his home and served a few drinks.¹⁴⁸ Shortly after finishing the drinks, the friend left the defendant's home and caused a head-on collision, injuring the plaintiff.¹⁴⁹ The court held that a social host who serves alcohol to an adult guest is liable under common law negligence for injuries to third persons caused by the guest's drunk driving, if the host knew the guest would soon be driving while intoxicated.¹⁵⁰

The court first considered whether the defendant owed the plaintiff a duty of reasonable care.¹⁵¹ The court applied the *Rappaport* balancing test¹⁵² and found that imposing a duty on social hosts is fair and consistent with policy.¹⁵³ Because the defendant had failed to reasonably oversee the serving of liquor to his guest, the court further held that the

of a third party's injuries sustained from the acts of an intoxicated person is the consumption, rather than the furnishing, of alcohol. CAL. CIV. CODE § 1714(b) (West Supp. 1985).

New Jersey took a similar approach in *Figuly v. Knoll*, 185 N.J. Super. 477, 449 A.2d 564 (1982). In *Figuly* the court recognized a cause of action against a social host under common law negligence principles. *Id.* at 478, 449 A.2d at 565. The defendant held a party on rented premises where he resided. *Id.* at 479, 449 A.2d at 564. One guest was served 12 mixed drinks over a five hour period and became visibly intoxicated. *Id.* The guest left the party and was involved in a car accident, injuring the plaintiff. *Id.* at 478, 449 A.2d at 564. The court denied the defendant's motion for summary judgment and held that a social host who furnishes alcohol to an obviously intoxicated person under circumstances that create a reasonably foreseeable risk of harm to others may be held legally responsible to third persons who are injured. *Id.*

146. 196 N.J. 538, 476 A.2d 1219 (1984).

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

148. *Id.* at 544, 476 A.2d at 1220. After the accident, the friend was given a blood test that indicated a blood alcohol concentration of 0.286%. *Id.* A person who drives with a blood alcohol concentration of 0.10% or more violates N.J. STAT. ANN. § 39:4-5 (West 1983). At trial, plaintiff's expert testified that the blood test revealed that the friend had consumed the equivalent of 13 drinks. *Id.*

149. *Id.*

150. *Id.* at 548, 476 A.2d at 1224-25.

151. *Id.* at 546, 476 A.2d at 1222.

152. See *supra* notes 99-109 and accompanying text.

153. 196 N.J. at 544, 476 A.2d at 1222. In balancing the various factors on the issue of liability, the court considered the thousands of deaths drunk drivers cause each year, the fact that liquor licensees are prohibited from serving intoxicated adults, and the legislative imposition of criminal sanctions against drunk drivers. *Id.*

defendant breached his duty.¹⁵⁴ The court abandoned the traditional proximate cause rule¹⁵⁵ and found that serving alcohol was the proximate cause of the plaintiff's injury.¹⁵⁶ The court based its decision on two rationales. First, people injured as a result of drunk driving should be fairly compensated.¹⁵⁷ Second, imposing social host liability deters drunk driving.¹⁵⁸ In the court's opinion, social host liability will encourage hosts to take greater care when serving alcohol at social gatherings.¹⁵⁹

Judge Gibraldi's dissent strongly disagreed with the majority's rationale.¹⁶⁰ Gibraldi focused on the importance of judicial deference to the legislature,¹⁶¹ stating that the legislature is better equipped to effectuate the goals of reducing drunk driving and protecting the interests of injured parties without placing such a grave burden on the average citizen.¹⁶² The dissent also criticized the majority for ignoring the differences between vendors and social hosts.¹⁶³ Gibraldi asserted that the majority failed to recognize the average citizen's ignorance in determining whether a guest is intoxicated and hosts' inability to spread

154. *Id.* See also Special Project, *supra* note 4, at 1109-10 (host may serve guest up to the point of intoxication without breaching his duty to reasonably oversee the service of liquor to his guest).

155. See *supra* notes 17-19 and accompanying text.

156. 196 N.J. 544, 476 A.2d at 1221-22.

157. *Id.* at 551, 476 A.2d at 1226. For a critical discussion of the *Kelly* court's rationale, see Note, *supra* note 1, at 616; see also Comment, *supra* note 70, at 98 (discusses the impact *Kelly* could have on the majority rule of social host immunity).

158. 196 N.J. at 551, 476 A.2d at 1226.

159. *Id.*

160. *Id.* at 560, 476 A.2d at 1230.

161. *Id.* Gibraldi argued that the majority's decision was based on little knowledge or concern for the possible negative consequences of its decision. *Id.* at 565, 476 A.2d at 1232.

162. *Id.* at 569, 476 A.2d at 1234. Gibraldi listed four possible solutions the legislature may consider:

- (1) Funding a remedy for injured parties with contributions from parties most responsible for the harm caused, the intoxicated motorist;
- (2) Hold the Social host secondarily liable by requiring judgment against the drunk driver as a prerequisite to suit against the host;
- (3) Limiting the amount that could be recovered from a social host; and
- (4) Requiring a finding of wanton and reckless conduct before holding a social host liable.

196 N.J. at 569-70, 476 A.2d at 1235. See Special Project, *supra* note 4, at 1113 (discusses *Kelly* dissent).

163. *Id.* at 564, 476 A.2d at 1232.

liability costs among their guests.¹⁶⁴

3. Analysis

Legislatures and courts are attacking the concept of social host liability under common law negligence principles.¹⁶⁵ Traditional causation theory¹⁶⁶ must be expanded to accommodate social host liability. To hold a social host liable requires finding that, but for the social host's furnishing liquor to an intoxicated person, the third party would not have been injured. A fundamental flaw exists in this theory.¹⁶⁷ The guest's consumption is voluntary.¹⁶⁸ The individual will become intoxicated regardless of how or from whom he obtains the liquor. The social host merely provides alcohol that the drunken individual would obtain elsewhere. Despite the social hosts's act of furnishing liquor, the "consumer" would still create the same risk of injury to the third party. The social hosts' act is, therefore, not the "actual" cause of the injury.

Additionally, furnishing liquor is not the proximate cause of the resulting injury. A drunk guest's voluntary decision to consume liquor to the point of intoxication and thereafter drive an automobile are intervening acts. These acts supercede a social host's offering of liquor because the social host cannot reasonably foresee that the guest will become intoxicated, drive his car, and injure a third party. Thus, the social host's act cannot fairly be considered the legal cause of the injury. The guest who voluntarily becomes intoxicated and assumes the risk of driving a car is the negligent if not reckless party. Full blame for the injuries belongs on the drunk driver.¹⁶⁹

164. *Id.* at 565, 476 A.2d at 1233-34.

165. *See supra* note 125 (California and New Jersey legislatures' negative response to social host liability). For examples of courts' refusal to impose social host liability, see *Kowal v. Hofner*, 181 Conn. 355, 436 A.2d 1 (1980); *Miller v. Moran*, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); *Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982).

166. *See supra* notes 17-19 and accompanying text. *See also supra* notes 99-109 and accompanying text (discusses the shift in theories).

167. *See supra* notes 92-109, 155-59 and accompanying texts (discuss the theory of proximate cause under social host liability).

168. A voluntary act is unimpelled by another's influence; such acts are the result of free choice. BLACK'S LAW DICTIONARY 1413 (5th ed. 1979).

169. For further criticism of social host liability under common law negligence principles, see Note, *supra* note 1, at 634 (social host liability is too burdensome for the average citizen).

One goal of the tort system is to properly attribute fault for drunk driving accidents.¹⁷⁰ This goal is not achieved unless the party at fault, the drunk driver, is held fully accountable. Social host liability impedes efforts to reach this goal because it allows drunk drivers to share liability with social hosts. Drunkenness does not relieve automobile drivers of their duty of ordinary care.¹⁷¹ Yet, stretching negligence law to hold social hosts liable achieves this exact effect.

The tort system is also designed to deter negligent and intentional misconduct.¹⁷² Making social hosts liable will not advance this objective. Rather, social host liability will only encourage drunk driving because guests know they can pass off their liability to the host who served the liquor.

Perhaps the most significant problem with social host liability under common law negligence theory is the requirement that a social host must have actual knowledge that the guest is intoxicated.¹⁷³ This requirement was set forth in *Kelly v. Gwinnet*.¹⁷⁴ The *Kelly* court assumed, however, that the host had knowledge because of the guest's blood alcohol test results.¹⁷⁵ The court made this assumption despite the fact that no correlation exists between blood alcohol test results and a host's subjective knowledge.¹⁷⁶ Though objective tests attempt to measure a guest's intoxication level after an accident, they do not prove that the guest was visibly drunk.¹⁷⁷ Because of the dubious ac-

170. Comment, *supra* note 19, at 870.

171. W. KEETON, *supra* note 17, at 178. Courts uniformly hold that voluntary or negligent intoxication cannot serve as an excuse for acts that would otherwise be negligent. *Id.* One who becomes intoxicated is held thereafter to the same standard as if he were a sober person.

172. *Id.*

173. 196 N.J. 549, 476 A.2d at 1225.

174. *Id.* For a discussion of the *Kelly* rule, see Special Project, *supra* note 4, at 1105-09.

175. See *Kelly*, 196 N.J. 565, 476 A.2d at 1233.

176. Objective blood alcohol tests do not necessarily prove that the guest appeared to the host to be intoxicated. Note, *supra* note 1, at 634 (critical discussion of *Kelly*). Experts estimate that alcohol takes 20-30 minutes to reach its highest level in the blood stream. *Kelly*, 196 N.J. at 565-66, 476 A.2d at 1233. Thus, a blood alcohol concentration test showing intoxication after an accident may not mean that the guest was visibly intoxicated when he left the party. *Id.*

177. 196 N.J. at 566, 476 A.2d at 1233 (dissenting opinion, citing Perr, *Blood Alcohol Levels and Diminished Capacity*, 33 J. LEGAL MED. 28, 28-30 (April 1975)). Furthermore, studies indicate that blood alcohol tests do not accurately determine intoxication levels and should not be relied on for that purpose. *Id.*

curacy of blood alcohol tests and in light of the difficulty an untrained person has in determining whether another is intoxicated, social host liability places an unreasonable burden on a social host.

III. IMPACT AND RECOMMENDATION

One impact social host liability will have is to increase insurance costs,¹⁷⁸ perhaps to prohibitive levels. If homeowner's insurance does not cover social host liability, social hosts will be forced to obtain additional insurance to protect themselves in case of liability.¹⁷⁹ Potentially aggravating this problem is the possibility that added coverage may be too expensive or perhaps even unavailable.¹⁸⁰ Without the necessary insurance coverage and assuming that the social host cannot personally satisfy the liability judgment award,¹⁸¹ drunk driving accident victims may not be adequately compensated.¹⁸² Additionally, if insurance coverage is unavailable, social hosts may be forced to completely curtail their service of alcohol to avoid the risk of losing their assets.¹⁸³ Even if social hosts can obtain adequate liability insurance coverage, the cost of insurance will rise due to the increased risks this liability coverage poses for insurance companies. Insurance companies will pass the increased costs on to the public in the form of higher insurance premiums. The ultimate loser is the consumer who must pay the increased rates.

Social host liability creates uncertainty among hosts and guests. Neither the courts nor the legislatures have clearly outlined the specific behavior that gives rise to social host liability.¹⁸⁴ Two state legislatures responded to this uncertainty by directly addressing social host liability

178. See *Kelly*, 196 N.J. 564-65, 476 A.2d at 1232-33 (dissenting opinion attacked majority for ignoring the increased costs of social host liability insurance). See also Special Project, *supra* note 4, at 1113 (discusses insurance problems).

179. Special Project, *supra* note 4, at 1113.

180. *Id.*

181. Comment, *supra* note 19, at 870.

182. Special Project, *supra* note 4, at 1113. See also *Kelly*, 196 N.J. at 560, 476 A.2d at 1230 (dissenting opinion).

183. Comment, *supra* note 70, at 108.

184. *Kelly*, 196 N.J. at 567, 476 A.2d at 1234. One problem with this uncertainty is that affirmative defenses may not be available to the social host. First, a social host may assert the defenses of contributory negligence and assumption of the risk, for example, only if the plaintiff is the drunk driver. Contributory negligence is asserted when the plaintiff's conduct entitles him to bring an action. See W. KEETON, *supra* note 17, at 451. Contributory negligence is inappropriate if the plaintiff is not the drunk driver

under common law negligence principles. For example, the California legislature, responding to *Coulter*,¹⁸⁵ enacted a statute that precludes social host liability.¹⁸⁶ Similarly, the New Jersey legislature, responding to *Kelly*, introduced a bill expressly exempting social hosts from liability for serving alcohol to intoxicated guests.¹⁸⁷ Aside from California and New Jersey, however, only vague statutes and ambiguous court opinions address social host liability principles under common law negligence.¹⁸⁸ Consequently, social hosts have no clear means of regulating their behavior to avoid liability. This may lead to a drastic decrease in social gatherings until the legislatures or courts clearly define what is required of social hosts.

Society is justifiably concerned with the drunk driving problem.¹⁸⁹ Social host liability, however, is not the solution. Courts and legislatures must attack the source of the problem—people who voluntarily consume excessive amounts of alcohol.¹⁹⁰ One obvious solution is more strict drunk driving laws.¹⁹¹ Social host liability provides drunk

because the drunk driver, not the victim, is negligent under common law negligence principles.

Second, a defendant asserts the defense of assumption of the risk to bar a plaintiff's recovery. *W. KEETON, supra* note 17, at 487. He must show that the plaintiff knew the risk was present, understood its nature, and freely and voluntarily chose to participate. *Id.* As with contributory negligence, the difficulty with invoking assumption of the risk is that the injured plaintiff is not the negligent party. Courts differ as to whether assumption of the risk defense is available to the defendant. *See, e.g., Passini v. Decker*, 39 Conn. Supp. 20, 467 A.2d 442 (1983) (no assumption of the risk for defendant under dramshop act when tavern owner served liquor to an intoxicated patron who injured plaintiff in car accident). *But cf. Berge v. Harris*, 170 N.W.2d 621 (Iowa 1983) (defendant permitted to assert assumption of the risk because the plaintiff passenger knew the driver was intoxicated). For a discussion of potential affirmative defenses available to social hosts, see Note, *supra* note 16, at 1165 (addressed the difficulty a social host encounters when attempting to use affirmative defenses).

185. *See supra* notes 133-45 and accompanying text.

186. *See supra* note 143 (California's new statute precluding social host liability).

187. The New Jersey bill reads:

No person, other than a person licensed . . . to sell alcoholic beverages, who furnishes any alcoholic beverages to any person at or over the age at which a person is authorized to purchase and consume alcoholic beverages shall be civilly liable to any person or estate of any person for personal injuries or property damage, inflicted as a result of intoxication by the consumer of the alcoholic beverage.

A. 43, 201st Leg., 1st Sess., 1984 New Jersey Laws.

188. Note, *supra* note 1, at 634.

189. *See supra* notes 1-4 and accompanying text.

190. Note, *supra* note 1, at 634.

191. *Id.* at 637.

drivers with another means of avoiding full liability. Thus, no incentive to avoid driving while intoxicated exists. More strict drunk driving laws, such as a mandatory twenty-four hour jail sentence plus a one year driver's license suspension for the first offense, are more likely to deter such conduct.

IV. CONCLUSION

Vendor liability based on state dramshop legislation is justified because of the relationship between the vendor and customer, the vendor's ability to spread liability costs among customers, and vendor expertise in recognizing intoxicated persons.¹⁹² Similar reasons for creating a cause of action against social hosts do not exist. Social hosts should, therefore, not be held liable under dramshop statutes or common law negligence principles.¹⁹³ Legislative intent underlying dramshop acts and the goals of the tort system favor a social host immunity rule.¹⁹⁴ Strict drunk driving penalties more effectively attack the source of the drunk driving problem.¹⁹⁵ Increased penalties will better effectuate the tort system's goal of fairly compensating drunk driving victims, while also decreasing the number of victims through deterrence.

Social hosts cannot fairly be held responsible for monitoring the drinking activities of their guests. Because adults are expected to be accountable for their own actions, they must assume full responsibility for the consequences of their intoxication.

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192. See *supra* notes 23-38, 52-67 and accompanying texts.

193. *Kelly*, 196 N.J. at 568, 476 A.2d at 1234.

194. See *supra* notes 39-49, 171-72 and accompanying texts.

195. See, e.g., Comment, *Ohio Enacts Stringent Penalties to Deter Drunk Driving*, 9 U. DAYTON L. REV. 147 (1983) (Ohio's enactment of stricter drunk driving laws to solve the drunk driving problem).

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