Imposition of Liability on Social Hosts in Drunk Driving Cases: A Judicial Response Mandated by Principles of Common Law and Common Sense

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COMMENTS

IMPOSITION OF LIABILITY ON SOCIAL HOSTS IN DRUNK DRIVING CASES: A JUDICIAL RESPONSE MANDATED BY PRINCIPLES OF COMMON LAW AND COMMON SENSE

I. INTRODUCTION

During the past few years "the courts joined the legislatures in earnest in the 5-year old crackdown on drunken driving." Indeed, the crisis on the nation's highways resulting from the dangerous mix of alcohol and driving has given rise to various responses by the courts. In June 1984, the United States Supreme Court unanimously held that the police need not preserve for the defense a sample of a suspect's breath. A growing number of jurisdictions are holding civil drunken-driving defendants liable for punitive as well as compensatory damages. Some courts have held bartenders vicariously liable for accidents caused by drunken customers, even in the absence of state "dram shop" laws.

The Wisconsin Supreme Court has not ignored this trend. In 1984, the court reversed years of precedent to impose liability on bartenders for serving minors who become intoxicated and cause injury. Less than a year later, the court extended liability to the next logical degree by recognizing a negligence cause of action against social hosts who furnish alcoholic beverages to minors.

The New Jersey Supreme Court went even further, in fact further than any other state high court, by extending liability

to social hosts for injuries resulting from the negligent driving of their intoxicated adult guests. Although no other court has followed New Jersey's lead, a number of courts, in addition to Wisconsin, have imposed vicarious liability on social hosts for third-party injuries resulting from alcohol-related automobile accidents involving their minor guests.

Social host liability is considered an extension of the vicarious civil liability imposed on tavernkeepers for injuries arising out of negligent acts of their intoxicated customers. To extend liability to tavernkeepers, courts have relied on essentially two theories: liability based on state dram shop acts and liability based on negligence per se for violations of state liquor control laws. Those courts that have extended liability to social hosts in drunk-driving cases similarly rely on state dram shop acts and the theory of negligence per se.

8. Despite the lack of case law precedent for the Kelly decision on social host liability, Oregon and New Mexico have statutes which appear to codify the same rule. See OR. REV. STAT. § 30.955 (1983); N.M. STAT. ANN. § 41-11-1(E) (1978 & Supp. 1985); see also infra notes 71-74 & 97 and accompanying text.
10. The phrase "social host liability" or similar terms will be used throughout this Comment to refer, in an abbreviated manner, to the rule that a host who serves liquor to a social guest, knowing that the guest is intoxicated and will thereafter be operating a motor vehicle, is civilly liable in damages for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the guest when such negligence is caused by the guest's intoxication. Furthermore, unless otherwise indicated, "social host liability" will refer to liability imposed on a social host for serving a guest alcoholic beverages, without regard for the character of the guest (adult, minor, or otherwise).
12. State dram shop acts typically provide a civil cause of action to persons injured by an intoxicated person against the person selling the liquor which caused the intoxication. See, e.g., Liquor Control Act § 6-21, ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd 1985).
14. See cases cited infra notes 24-46 and accompanying text.
15. See cases cited infra notes 55-69 and accompanying text.
Extension of liability to social hosts has been justified by application of principles of common-law negligence as well.\textsuperscript{16}

In Section II the theoretical underpinnings of social host liability will be discussed. In Section III it will be asserted that the principles of common-law negligence provide the most appropriate theoretical framework on which to base imposition of liability on social hosts for injuries of third-party victims. Finally, in Section IV it will be argued that application of Wisconsin common law principles of negligence points clearly to the imposition of social host liability.

\section*{II. Theoretical Bases of Liability}

The scope of this Comment is limited to the legal issues arising out of the following typical fact situation: Guest is invited to a gathering at Social Host's home. Guest comes to the party and becomes intoxicated by the alcoholic beverages served by Social Host. Guest drives away from the party in a negligent manner and is involved in a collision in which Third Party is injured.\textsuperscript{17} Can Social Host be held liable for Third

\begin{itemize}
\item \footnotesize{16. \textit{See} cases cited \textit{infra} notes 71-78 and accompanying text.}
\item \footnotesize{17. While it is true that not all cases involve automobile accidents, many do. Furthermore, it is not always Third Party who seeks damages from Social Host; Guest can seek recovery from Social Host for injuries sustained in an automobile accident on the way home from Social Host's party. Except for issues of contributory negligence and apportionment of responsibility for the injuries sustained by Guest, consideration of social host liability is similar whether the plaintiff is a guest or a third party. However, this Comment directly analyzes only the latter. For further discussion of considerations peculiar to a plaintiff-guest, see Note, \textit{Commercial and Social Host Liability for Dispensing Alcoholic Beverages}, 16 \textit{Willamette L.J.} 191, 201, 204 (1979).}
\end{itemize}

In fact, the issue of whether a social host is liable for injuries to a plaintiff-guest remains controversial despite recognition of a cause of action against social hosts by third-party plaintiffs. In Michigan, for example, the courts have permitted a civil cause of action against social hosts for negligent furnishing of alcohol to minor guests by innocent third parties injured by the intoxicated minor. \textit{See}, \textit{e.g.}, Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820, \textit{modifying}, 47 Mich. App. 542, 209 N.W.2d 695 (1973); Lover v. Sampson, 44 Mich. App. 173, 205 N.W.2d 69 (1972). However, two different panels of the Michigan Court of Appeals have arrived at different conclusions respecting social host liability to their minor guests. In Longstreth v. Fitzgibbon, 125 Mich. App. 261, 335 N.W.2d 677 (1983), one panel of the Michigan Court of Appeals held that a minor imbibor \textit{may} maintain a claim against a social host for negligently furnishing alcohol to him or her. However, a different panel of the same court disagreed on this point in Klotz v. Persenaire, 138 Mich. App. 638, 360 N.W.2d 255 (1984).

Moreover, this Comment similarly does not address the considerations surrounding the notion of attaching tort liability to an employer for providing intoxicants to a visibly
Party's injury? If so, on what theoretical foundations does Social Host's liability rest?

A. Liability Arising Out of State Dram Shop Acts

Common law traditionally afforded no civil remedies for injuries caused by intoxication. The common law rule is based on a narrow conception of proximate cause: For an ordinary able-bodied person, it is the consumption of the alcohol, not the furnishing of it, which is the proximate cause of any subsequent accident. With the exception of the jurisdictions noted in this Comment, all jurisdictions still adhere to this common law rule of immunity in drunk-driving cases with respect to social hosts.

In order to provide a civil remedy where the common law did not, many state legislatures enacted civil damages acts or dram shop acts. These legislative acts affirmatively create civil liability against the seller or provider of alcoholic beverages for injuries resulting from the imbibers's intoxication. Some jurisdictions which have enacted dram shop acts have enacted acts which are facially broad enough to impose liability on social hosts. A typical example is the Illinois dram shop act: "Every person who is injured in person or property..."
by any intoxicated person, has a right of action in his or her own name, severally or jointly, against any person who by selling or giving alcoholic liquor, causes the intoxication of such person.”

Surprisingly, such a broadly drafted dram shop act does not give rise to social host liability. The law is consistently construed narrowly to exclude the social host.

Consider also New York’s controlling dram shop act. Like the Illinois statute, the New York dram shop act incorporates broad language. New York courts have uniformly excluded social hosts from the scope of the dram shop act even though the act refers to persons who “give away” alcohol. One New York court set forth the following dubious explanation for the act’s limited application: “Although the words ‘give away’ are included, the plain purpose of this statutory language was to include within the ambit of the sanctions those instances


25. In Illinois, a series of decisions consistently refused to enlarge, by judicial interpretation, the scope of the state dram shop act. One Illinois appellate court stated: [T]he Dram Shop Act was intended to regulate the business of selling, distributing, manufacturing and wholesaling alcoholic liquors for profit. In other words, it was to regulate those in the business, not the social drinker or the social drinking of a group. . . . We interpret the word “giving” as applicable only to one engaged in the liquor business.


where the proprietor of a licensed establishment . . . provides the customer with the traditional 'drink on the house.'

Until 1980, Minnesota had a similarly broad-scoped dram shop act which ostensibly imposed civil liability on social hosts as well as commercial providers of alcohol. The Minnesota Supreme Court applied the act at face value and permitted extension of liability to social hosts as well as to commercial vendors in the case of *Ross v. Ross*. Based on an examination of the statutory language, the court concluded that "the legislature intended to create a new cause of action against every violator whether in the liquor business or not."

The *Ross* court apparently arrived at an erroneous conclusion about legislative intent. Shortly after the *Ross* decision was issued, the Minnesota legislature limited the language of the state dram shop act. A simple legislative deletion of the word "giving" resulted in both a dram shop act which clearly applies only to the seller of intoxicants and an affirmative disapproval of the *Ross* decision.

Considering the type of treatment afforded to broadly drafted dram shop acts by the courts and legislatures, it is not surprising that more narrowly drafted dram shop acts are strictly construed to impose civil liability only on liquor ven-

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29. MINN. STAT. ANN. § 340.95 (West 1972).
30. 294 Minn. 115, 200 N.W.2d 149 (1972).
31. *Id.* at 121, 200 N.W.2d at 152-53 (construing MINN. STAT. ANN. § 340.95 (West 1972)).
32. See MINN. STAT. ANN. § 340.95 (West Supp. 1985). A similar legislative reaction occurred in Iowa. In Williams v. Klemesrud, 197 N.W.2d 614, 615 (Iowa 1972), the Iowa Supreme Court recognized a claim against a non-commercial provider of alcohol based on Iowa's broad-formed dram shop act. See IOWA CODE ANN. § 129.2 (West 1949). The Iowa legislature subsequently repealed the broad-formed dram shop act in 1972 and created in its place an act which limits dram shop recovery to instances involving the sale or giving of alcohol by "licensees or permittees." IOWA CODE ANN. § 123.92 (West Supp. 1984-85).
dors and not on social hosts. In narrowly drafted dram shop acts, where the legislature imposes liability only on liquor vendors, legislative intent is to maintain the common law social host immunity and preempt judicial interpretation on the issue. Chief Justice Wilentz, writing for the majority in Kelly v. Gwinnell, admitted that the existence of a dram shop act, which by its very terms excludes the gratuitous provider of alcohol, "constitutes a substantial argument against expansion of the legislatively-mandated liability."

Legislative preemption is perhaps the justification most frequently cited by the courts for refusing to extend liability to social hosts. Other courts defer to their respective legislatures in another way. The argument is often asserted, by courts unwilling to extend liability to social hosts, that such a fundamental change in the law is best left to the legislature. In Holmes v. Circo, the Nebraska Supreme Court explained the underlying reasons for this type of legislative deference:

We agree . . . that, in the final analysis, the controlling considerations are public policy and whether the court or the Legislature should declare it. We believe that the decision should be left to the Legislature. The Legislature may hold hearings, debate the relevant policy considerations, weigh the testimony, and, in the event it determines a change in the law is necessary or desirable, it can then draft statutes which

33. See, e.g., IOWA CODE ANN. § 123.92 (West Supp. 1984-85). No court in a state which has a restrictive dram shop act has extended such an act to apply to social hosts without legislative interference. See infra notes 34-36 and accompanying text.

34. Legislative preemption was the rationale employed by the following decisions in refusing to impose liability on a social host when a narrowly drafted dram shop act was in effect. 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).


36. Id. at 1227.


39. 196 Neb. 496, 244 N.W.2d 65 (1976).
would most adequately meet the needs of the public in general, while balancing the interest of specific sectors. The Nebraska high court's statement is a typical example of judicial deference to legislative bodies on particularly controversial public policy issues. The courts, however, are not required to refrain from addressing and resolving thorny public policy issues. The courts, as well as the legislature, are qualified to create dram shop liability. Each law-making body, however, should utilize the law-making theories appropriate to their institution. Historically, the treatment of social host liability based on extension or overbroad interpretation of state dram shop acts has been unfavorable. This indicates that dram shop acts do not provide the appropriate theoretical bases on which to judicially impose social host liability.

B. Liability Arising Out of Negligence Per Se

There are other, more appropriate means of establishing social host liability if dram shop legislation does not. Some jurisdictions, at least with respect to minors, have established vicarious social host liability arising out of liquor control statutes. All states and the District of Columbia have enacted liquor control statutes which regulate the distribution of alcoholic beverages. Some states have enacted dram shop acts which give rise to civil liability upon violation. The recent decisions of Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985); Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984), indicate on the part of the Wisconsin Supreme Court its ability and authority to promulgate rules of liquor liability.

40. Id. at 505, 244 N.W.2d at 70.
41. In Wisconsin, for example, the supreme court has decided many significant issues without prior legislative study. See, e.g., Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984) (adoption of a theory of "risk contribution liability" to permit DES daughters to recover for injuries without identifying the particular producer or marketer responsible for her injuries); Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, 335 N.W.2d 578 (1983) (adoption of the "discovery" rule). As the Kelly majority noted, if the legislature differs, it can "remedy" the situation by promulgating its own law. See Kelly, 96 N.J. at __, 476 A.2d at 1227-28. See also cases cited supra notes 34-36 and accompanying text.
42. Indeed, many courts have already judicially created dram shop liability. See cases cited supra note 4. The recent decisions of Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985); Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984), indicate on the part of the Wisconsin Supreme Court its ability and authority to promulgate rules of liquor liability.
43. These statutes are variously referred to as "liquor control statutes," "alcoholic beverage control acts," and "intoxicating liquor acts." For ease of discussion, this Comment will refer to these acts as "liquor control statutes" which give rise to civil liability upon violation. Liquor control statutes are to be distinguished from dram shop acts which give rise to civil liability upon violation.
44. ALA. CODE § 28-3A (Supp 1985); ALASKA STAT. § 04.16 (1984); ARIZ. REV. STAT. ANN. §§ 4-241, 4-244 (Supp. 1985); ARK. STAT. ANN. § 48-529 (1977); CAL. BUS. & PROF. CODE §§ 25602, 25658 (West 1985); COLO. REV. STAT. § 12-47-128
cohol to high risk persons, typically "minors" or "obviously intoxicated persons." Violation of these laws is usually treated as a criminal misdemeanor offense. However, under certain circumstances, violation of a criminal statute gives rise to a civil action predicated on the theory of negligence per se.


45. All states prohibit the sale and giving of alcoholic beverages to minors, but the age of majority differs among jurisdictions. Reference throughout this Comment to "minors" means under the legal drinking age, whatever that age may be.

46. Most states prohibit the sale and giving of alcoholic beverages to "intoxicated persons," "habitual drunkards," or "obviously intoxicated" persons. This Comment will refer to this group collectively as "obviously intoxicated persons."

47. See, e.g., Wis. Stat. § 125.07 (1983-84).

Certain conditions must be demonstrated before the theory of negligence per se warrants the gleaning of a tort duty from a legislative enactment:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.\(^49\)

If, indeed, a statute meets the necessary conditions giving rise to a duty under tort law, mere violation of the statute gives rise to a breach under tort law.\(^50\)

Since 1959, a number of state courts, relying on the theory of negligence per se, have recognized a cause of action against tavernkeepers for injuries caused by intoxicated customers served in violation of state liquor control statutes.\(^51\) In the landmark decision of *Rappaport v. Nichols*,\(^52\) the New Jersey Supreme Court imposed liability on a tavernkeeper for injuries to a third party resulting from service of alcoholic beverages by the tavernkeeper to a minor, in violation of New Jersey's liquor control statute. The court reasoned that the basis for

\(^{49}\) Restatement (Second) of Torts § 286 (1965).

\(^{50}\) See, e.g., Osborne v. McMasters, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889). However, a social host can defend against civil liability under the theory of negligence per se by availing itself of all the defenses provided by the pertinent criminal statute. The availability of statutory defenses is discussed in *Rappaport v. Nichols*, 31 N.J. 188, __, 156 A.2d 1, 9 (1959). At common law there are additional defenses to a claim of negligence per se:

- [V]iolation is excused when
  - (a) the violation is reasonable because of the actor's incapacity;
  - (b) he neither knows nor should know of the occasion for compliance;
  - (c) he is unable after reasonable diligence or care to comply;
  - (d) he is confronted by an emergency not due to his own misconduct;
  - (e) compliance would involve a greater risk of harm to the actor or to others.

Restatement (Second) of Torts § 288A (1965).

\(^{51}\) *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959), was the first case to recognize a cause of action against a tavernkeeper selling alcoholic beverages to a minor. A number of courts have followed the New Jersey lead on this rule. See, e.g., Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).

\(^{52}\) 31 N.J. 188, 156 A.2d 1 (1959).
finding a tort duty owed by the tavernowner to the third party is "that these broadly expressed [statutory] restrictions were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well." The same rationale can be applied to argue that negligence per se is an appropriate vehicle for extending liability to social hosts as well as to tavernkeepers.

For the theory of negligence per se to give rise to social host liability, as well as tavernkeeper liability, a number of conditions must be met. First, it must be demonstrated that the social host has violated the controlling liquor control statute. Second, it must be established that the controlling liquor control statute was enacted by the legislature with intent to protect a class of persons inclusive of third-party victims of drunk-driving cases. Finally, it must be shown that the risk of injuries to third-party victims is the same risk intended by the legislature to be prevented by enactment of the liquor control statute.

Indeed, a number of jurisdictions have applied the theory of negligence per se in this way. Courts in these jurisdictions have discerned an identity of purpose between the controlling liquor control act and imposition of liability of social hosts and have, therefore, imposed liability on social hosts.

Applying the theory of negligence per se, the Wisconsin Supreme Court recognized a cause of action against social hosts for serving minors. The court reasoned that violation of the state liquor control statute violated a standard of care set forth by the legislature. "What is negligence in most cases presents a jury question. In liquor cases that involve minors the statute supplies the standard of what is negligence, the selling or furnishing of alcoholic beverages . . . ." Consider also the case of Congini v. Portersville Valve Co. In that case, the Supreme Court of Pennsylvania held that the governing liquor control act regulating the service of alcoholic beverages

53. Id. at ___, 156 A.2d at 8.
54. See supra note 49.
56. Id. at 268, 366 N.W.2d at 861.
to minors protected "both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age."^{58}

Negligence per se is not always an appropriate vehicle for the extension of liability to social hosts. If the purposes of a state's liquor control statute are not consistent with the purposes of imposition of civil liability on a social host, negligence per se is not the proper theoretical basis on which to base social host liability. In *Linn v. Rand*,^{59} the New Jersey Supreme Court misapplied the theory of negligence per se to extend civil liability to social hosts who served minors. The *Linn* court applied the theory of negligence per se even though the terms of the state's liquor control act prohibited solely "licensees" from dispensing alcoholic beverages to minors.\(^{60}\) Therefore, under the controlling New Jersey liquor control act, furnishing alcoholic beverages to minors by *unlicensed* social hosts constitutes no statutory violation. Without demonstrating a statutory violation, the first condition for application of the theory of negligence per se is not met. Without a violation, there is no deviation from a legislatively established standard of care.\(^{61}\) New Jersey's clear statutory language regarding licensees cannot be ignored as it was by the *Linn* court when it reasoned that "[i]t 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."\(^{62}\)

The California Supreme Court similarly misinterpreted legislative intent to extend liability to social hosts in driving cases. In *Coulter v. Superior Court*,\(^{63}\) the California Supreme Court held that Section 25602 of the Business and Professional Code, which provided criminal misdemeanor penalties for furnishing alcoholic beverages to an obviously intoxicated person, created a common-law duty owed by a so-

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58. *Id.* at __, 470 A.2d at 518.
61. As noted, the theory of negligence per se establishes a duty arising out of a legislative enactment. Without a violation of the pertinent legislative enactment, there is no violation of the resulting duty. *See supra* note 54 and accompanying text.
63. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).
Social host to a third party injured by an obviously intoxicated guest. The court stated that its holding was consistent with "broad legislative policies and may well further induce social hosts to take those reasonable preventive measures calculated to reduce the risk of alcohol-related accidents." 64

However, the legislature apparently did not agree that the purposes of its liquor control act would properly be furthered by extension of civil liability to social hosts. Shortly after the Coulter decision, Section 25602 was amended expressly to abrogate the Coulter holding. 65 Thus, despite case law to the contrary in California, legislative indications are clear that liquor control statutes are not intended to create a common-law tort duty for social hosts.

In Wisconsin the state legislature recently reacted to judicial creation of civil liability in drunk driving cases. In No-

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64. Id. at 152, 577 P.2d at 673, 145 Cal. Rptr. at 538.

65. The California legislature amended the pertinent California statute such that the consumption, and not the serving, of the alcohol was to be the proximate cause of injuries inflicted on another by an intoxicated person. CAL. BUS. & PROF. CODE § 25602 (West Supp. 1985) as amended provides:

(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313), and Coulter v. Superior Court (21 Cal. 3d 144), be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

The constitutionality of the legislature's amendment was challenged and upheld in Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal Rptr. 500 (1981). The Cory opinion provides a very interesting example of reluctant deference on the part of the judiciary to legislative mandate. According to the court, it is only "[w]ith effort, [that] a reasonable basis for the 1978 amendments may be found." Id. at 441, 629 P.2d at 14, 174 Cal. Rptr. at 506.

It should be noted that the California Supreme Court is unwilling to extend the immunity promulgated by the legislature beyond its terms. In Blake v. Moore, 162 Cal. App. 3d 700, 208 Cal. Rptr. 703 (1984), the California court refused to extend the Cory holding and statutory authority immunizing a social host for liability for injuries arising out of the host's furnishing of alcohol in a similar situation: negligent entrustment of an automobile to an intoxicated person. See id. at —, 208 Cal. Rptr. at 706.
November 1985, a bill was passed to provide immunity for persons who sell or give away alcoholic beverages. The new legislation does not apply to persons who dispense alcohol to minors. The legislative response precludes extension of liability in drunk driving cases. The legislature appears to be warning the court not to engage in further activism on the issue.

The legislative responses in California and Wisconsin, and the clear overreaching by the New Jersey court in *Linn*, indicate that negligence per se is not always an appropriate theory on which to base social host liability. Thus, while no one can fault the underlying goals motivating courts to extend liability to social hosts on the basis of negligence per se, reliance on an assumption of legislative intent to accomplish this goal may be unfounded.

The legal fiction of negligence per se need not be employed to justify creation of a duty owed by a social host to the innocent victims of their intoxicated guests. Such a duty rises out of critical public policy considerations. Public policy considerations bring to mind principles of common-law negligence.

Indeed, as the discussion below will demonstrate, application of common law negligence gives rise to a cause of action against social hosts for third-party injuries apart from either state dram shop acts or alcoholic beverage control laws.

**C. Liability Arising out of Principles of Common Law Negligence**

The Oregon Supreme Court has recognized a cause of action against social hosts in drunk driving cases based on principles of common-law negligence. In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, the Oregon court

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66. 1985 Wis. Laws 47.
67. Id. at § 4.
68. Common law negligence requires a value judgment based on public policy analysis of whether an actor owes an injured party a duty of reasonable care. See *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, reh'g denied, 249 N.Y. 511, 164 N.E. 564 (1928); see also infra text accompanying notes 85-89.
69. 258 Or. 632, 485 P.2d 18 (1971). This case involved an action for injuries allegedly resulting from alcohol being served to a minor guest. The social setting was a fraternity party held at a ranch about ten miles from a college campus. The injured plaintiff sued the owners and operators of the ranch and the person who supplied the alcohol to the party as well as the fraternity. The court held that the plaintiff validly
declined to impose liability on a social host based on the state's liquor control statute reasoning "that the design of ORS 471.410(2) was to protect minors from the vice of drinking alcoholic beverages; it was not the purpose of the statute to protect third persons from injury resulting from the conduct of inebriated minors. . . ."

However, as the court continued, under common-law tort principles "[t]here might be circumstances in which the host would have a duty to deny his guest further access to alcohol."

Recently, the New Jersey Supreme Court extended liability to social hosts on the basis of common-law negligence principles. In *Kelly v. Gwinnell*, noting that New Jersey has no dram shop act imposing civil liability on providers of alcohol, the court nevertheless recognized a cause of action against social hosts on the basis of common-law negligence principles. Indeed, the court stated that conventional negligence analysis stated a claim only against the fraternity. With respect to the other defendants, it was held that they lacked sufficient control over "direct dispensation of the alcohol at the party." *Id.* at __, 485 P.2d at 22.

Imposing the duty of reasonable care on the fraternity, however, resulted in liability according to the Oregon court. "The premises were rented to the fraternity, and the fraternity gave the party; the fraternity, not the owners of the land, should bear the responsibility for activities of guests who were negligently allowed to become intoxicated." *Id.* The rule set forth by the court appears to apply regardless of the guest's age. *See id.* at __, 485 P.2d at 21.

*Wiener*, 258 Or. at __, 485 P.2d at 21.

A short epilogue to *Wiener* is in order. Eight years after the Oregon Supreme Court's decision, the Oregon Legislature enacted OR. REV. STAT. § 30.955 (1981). This statutory provision limits a cause of action against a social host to provide for damages only when the host "has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated." Thus, the legislature decided that the circumstances under which a social host has a duty to deny a guest further alcohol are when a guest is "visibly intoxicated." *Cf. Wiener*, 258 Or. at __, 485 P.2d at 22.

In the *Kelly* case, an adult guest, Donald Gwinnell, spent an hour or two at the home of Joseph Zak where he was served multiple drinks of scotch and was subsequently accompanied to his car and permitted to drive. The social host, Zak, telephoned Gwinnell's home about 25 minutes later to make sure Gwinnell had arrived home without incident. Mrs. Gwinnell answered and informed Zak that his guest had been involved in a head-on collision with Marie Kelly, who, as a result, was seriously injured. *Id.* at __, 476 A.2d at 1220.

Armed with the high court's ruling, Kelly went back to the trial court to recover damages. Her attorney provided the court with evidence that Gwinnell had imbibed the equivalent of 13 shots of scotch during his visit. Before any witnesses could testify on behalf of Gwinnell, the insurance companies settled. Kelly received $172,000. Of the total recovery, the host's insurer will pay $72,000. *See Expensive Pour*, *Time*, Mar. 4, 1985, at 73.
"points strongly" in the direction of social host liability. The Kelly court identified the usual elements of a cause of action for negligence: "an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable."

The holdings of the Wiener and Kelly courts are not unwarranted abrogations of the common-law immunity for social providers of alcoholic beverages. As it will be argued in the next section, the application of common law to the type of case at issue in this Comment clearly suggests extension of liability to social hosts.

III. THE COMMON LAW FRAMEWORK

A. Proximate Cause

The common-law immunity for social hosts and other providers of alcoholic beverages is based on the idea that it is the consumption of the liquor, not the furnishing of it, that is the proximate cause of any consequent injury. In Kelly v. Gwinnell, the New Jersey Supreme Court did not recognize the proximate cause element as an obstacle to social host liability. The court merely assumed the presence of the requisite degree of causation between a social host's furnishing of alcoholic beverages and injuries subsequently caused by the intoxicated guest's drunk driving.

Thus, to impose liability on social hosts in drunk driving cases, a determination must be made that the furnishing of alcohol sufficiently constitutes a proximate cause of subsequent injuries. Jurisdictions that have abrogated the common-law immunity afforded tavernkeepers and social hosts serving minors apparently no longer consider proximate cause

74. Id. at __, 476 A.2d at 1221.
75. Id. at __, 476 A.2d at 1222.
76. See supra notes 18 & 19 and accompanying text.
78. Id. at __, 476 A.2d at 1222. The court simply stated that "[t]he usual elements of a cause of action for negligence are clearly present. . . ." Id. Included among these clearly present usual elements is that "a risk resulted in an injury. . . ." Id. (emphasis supplied).
a legitimate obstacle to the imposition of liability.\textsuperscript{79} Indeed, it makes little sense to deny a proximate cause relationship between the social host’s service of alcoholic beverages to an adult guest but to declare its existence when the guest is a minor or when the provider is a tavernkeeper.\textsuperscript{80} In fact, the reasoning employed by most courts in refusing to extend liability to social hosts is that public policy and legislative preemption,\textsuperscript{81} not proximate cause considerations, warrant their decisions.

\textbf{B. Public Policy}

In the absence of proximate cause considerations, the question of whether or not to extend liability to social hosts boils down to a question of public policy. Most courts employ public policy analysis as a preliminary matter to determine whether or not a duty of care exists.\textsuperscript{82} In these jurisdictions, determining whether a duty exists is in essence a “value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care.”\textsuperscript{83}

With respect to the imposition of liability on social hosts, the New Jersey Supreme Court opined that “imposition of a duty is both consistent with and supportive of a social goal—the reduction of drunken driving—that is practically unanimously accepted by society.”\textsuperscript{84} In a society where thousands of deaths and millions of dollars of property damage are

\begin{itemize}
\item \textsuperscript{79} See, e.g., Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985) (liability imposed on social host for negligently furnishing alcohol to minor); Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984) (liability imposed on a commercial vendor of liquor for illegally furnishing alcohol to a minor); Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983) (liability imposed on a social host for illegally furnishing alcohol to a minor).
\item \textsuperscript{80} When discussing social host liability, alleging a dispositive difference with respect to proximate cause is the kind of “straw-man argument” Chief Justice Hallows refers to in his dissent in Garcia v. Hargrove, 46 Wis. 2d 724, 739, 176 N.W.2d 566, 573 (1970) (Hallows, J., dissenting).
\item \textsuperscript{81} For a discussion of legislative preemption see \textit{supra} note 34 and accompanying text.
\item \textsuperscript{83} \textit{Id.} at \_\_\_, 476 A.2d at 1222.
\item \textsuperscript{84} \textit{Id.}
caused each year by drunken driving,\textsuperscript{85} and where criminal sanctions against drunken driving are being significantly strengthened nationwide,\textsuperscript{86} imposition of a duty of reasonable care on social hosts is consistent with prevailing public policy considerations.

\section{C. Flexibility}

Although public policy factors mandate the extension of liability to social hosts in drunk-driving cases,\textsuperscript{87} public policy factors do not mandate imposition of such liability on the basis of common-law negligence. Social host liability in drunk driving cases has been predicated on state dram shop acts and the theory of negligence per se, as well as common-law principles of negligence. Common law, however, is the most appropriate theory on which to base social host liability because it provides for flexibility.

If social host liability is predicated on a state dram shop act or the theory of negligence per se, a social host may be held civilly liable for even a technical statutory violation.\textsuperscript{88} On the other hand, social host liability predicated on a theory of common-law negligence renders a social host liable only for a breach of a duty of reasonable care.

A duty of reasonable care at common law is flexible. It simply requires a social host to act reasonably under the circumstances. By requiring only what is reasonable under the circumstances, the social host duty is not under a more onerous burden than the similar common-law duty imposed on tavernkeepers in a number of jurisdictions.\textsuperscript{89}

\textsuperscript{85} See DeMoulin \& Whitcomb, \textit{Social Host's Liability in Furnishing Alcoholic Beverages}, 27 \textit{Fed'n Ins. Couns. Q.} 349 (1977); see also \textit{Kelly}, 96 N.J. at --, 476 A.2d at 1222, n.3.

\textsuperscript{86} See, e.g., \textit{Wis. Stat.} § 940.25 (1983-84) (imposes criminal liability for injuries caused while driving under the influence of alcohol). The legislature itself indicated that it intended, by passage of this statute, and other stiff criminal statutory penalties for drunk driving, "to provide penalties sufficient to deter the operation of motor vehicles by persons who are intoxicated." 1981 \textit{Wis. Laws} 20, § 205.1(13)(b).

\textsuperscript{87} See \textit{supra} text accompanying notes 80-84.

\textsuperscript{88} See \textit{supra} note 50 and accompanying text.

\textsuperscript{89} Beginning with \textit{Rappaport v. Nichols}, 31 N.J. 188, --, 156 A.2d 1, 8 (1959), service by a tavernkeeper of obviously intoxicated patrons has been recognized by some courts as conduct not reasonably prudent under the circumstances. Thus, a tavernkeeper's duty is to prevent obviously intoxicated persons from drinking more and driving away.
While a social host may lack the tavernkeeper's expertise and knowledge for detection of intoxication, common-law negligence imposes a duty on social hosts merely to prevent the obviously intoxicated or minor guest from driving home.\textsuperscript{90} Imposing liability based on common law does not compel a social host to police his guests.\textsuperscript{91} The ordinary standard of reasonable care simply requires a social host to use reasonable care to prevent a guest from driving in an intoxicated condition. Arguably, a host has greater means to accomplish this objective than does a commercial liquor vendor. Like a vendor, a host can refuse service to a guest, although this is not a very attractive alternative for a hospitable host. The social host, however, has other options. For example, a social host may satisfy a reasonable standard of care by suggesting that an intoxicated guest spend the night or by arranging to have a sober guest accompany an intoxicated guest home. Again, by imposing the common-law negligence standard of reasonable care, a social host is not required to do any more than that which is reasonable under the circumstances.

The foregoing discussion attempts to demonstrate the viability and desirability of imposition of social host liability based on principles of common-law negligence. Only four states have extended liability to social hosts for negligent ser-

\textsuperscript{90} Justice Garibaldi, dissenting from the Kelly opinion, argues that a social host, lacking a tavernkeeper's expertise, cannot easily detect intoxication. See Kelly, 96 N.J. at \_, 476 A.2d at 1233-34 (Garibaldi, J., dissenting). By way of rebuttal, it must be emphasized that a social host, under principles of common-law negligence, is only liable for failing to exercise reasonable care, \textit{given all the facts and circumstances}, to prevent an intoxicated person from drinking and then driving. If the circumstances do not permit the social host to determine whether or not the guest is intoxicated, service of alcoholic beverages by the social host is not a breach of a duty of reasonable care.

\textsuperscript{91} Although the duty of reasonable care does not compel policing of guests, certainly one way of meeting the standard of care imposed on social hosts by application of common-law negligence principles is to police guests. The Kelly majority rationalized this unappealing idea as follows:

While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which the alcohol is served . . . we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values. \textit{Id.} at \_, 476 A.2d at 1224.
vice of alcoholic beverages to adult guests. It will be seen in
the following section that similar liability could have, and
should have, been imposed by the Wisconsin courts on the
basis of Wisconsin negligence law.

IV. WISCONSIN COMMON-LAW NEGLIGENCE PRINCIPLES
AND SOCIAL HOST LIABILITY

Wisconsin common-law negligence precepts are particu-
larly well suited to justify extension of liability to social hosts.
First, the cause element of common-law negligence is no
longer predicated on the concept of proximate causation, but
on the concept of substantial factor. Second, in the absence
of proximate cause problems, the controlling consideration of
Wisconsin common-law negligence is public policy. Apply-

92. Indiana: Ashlock v. Norris, _, Ind. App. _, 475 N.E.2d 1167 (1985); Iowa:
Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985); New Jersey: Kelly v. Gwinnell, 96 N.J.
538, 476 A.2d 1219 (1984); Oregon: Wiener v. Gamma Phi Chapter of Alpha Tau
Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971). In addition to these four states,
New Mexico may be a social host liability jurisdiction. Although there is no interpre-
tive case law yet, New Mexico recently enacted a statute which appears to impose civil
liability on social hosts. See N.M. STAT. ANN. § 44-11-11(E) (Supp. 1985).

Only the New Jersey and Oregon case rules are based on common law. The Indiana
and Iowa rulings are interpretations of state statutes governing the dispensation of li-
quor to intoxicated persons.

Wisconsin has recognized social host liability in cases involving minor guests. See
Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985). For a list of additional
cases in which a cause of action against a social host has been recognized when the
social host served intoxicants to a minor, see cases cited supra note 9.

93. The Wisconsin Supreme Court imposed liability on social hosts for serving mi-
nor guests in Koback, 123 Wis. 2d 259, 366 N.W.2d 857. This ruling was based on the
theory of negligence per se as a result of the court's interpretation of statutes regulating
the dispensation of alcohol to minors. Id. at 266-67, 366 N.W.2d at 860-61. However,
the court seemed to recognize that providing alcohol to minors could entail negligent
conduct not proscribed by the statutes. "In liquor cases that involve minors the statute
supplies the standard of what is negligence, the selling or furnishing of alcoholic bever-
ages _ although there may be other acts of negligence that could also lead to liability.
Id. at 268, 366 N.W.2d at 861 (emphasis supplied).

The court did not explain what these other acts of actionable negligence might be.
This language does, however, indicate that the court recognized that common-law prin-
ciples of negligence, as well as negligence per se, can give rise to social host liability.

94. For a history of the Wisconsin high court's view of the cause element of a
negligence action, see A.E. Inv. Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214
N.W.2d 764 (1974); Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55
N.W.2d 29 (1952); Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).

95. Public policy analysis controls Wisconsin negligence law because it constitutes
the basis for the court's ultimate determination of liability. "If the jury does determine
that there was negligence, and that such negligence was a substantial factor in produc-
ing factors identified by the Wisconsin Supreme Court as indicative of public policy, imposition of social host liability is warranted.

A. Proximate Cause v. Substantial Factor

Beginning with the landmark case of Osborne v. Montgomery, the Wisconsin Supreme Court has consistently concluded that the negligence cause element is not grounded in the narrow concept of proximate cause, but in the broad notion of substantial factor. In other words, foreseeability has been completely removed from the concept of causation.

The common-law immunity afforded social host and commercial providers of alcoholic beverages was based on the notion of proximate cause. The Wisconsin Supreme Court recognized the fatal flaw in the common-law immunity rationale in Garcia v. Hargrove. The court concluded that “although cases still follow the rule of non-liability, they are of little persuasion in this state when predicated on the ‘proximate cause’ of plaintiff’s injuries being the consumption and not the sale of intoxicants.” In cases subsequent to Garcia, the supreme court has deemed proximate cause arguments against imposing liability on the provider of alcoholic beverages irrelevant.

Since Garcia, the Wisconsin Supreme Court has tacitly assumed the presence of a substantial factor connection between the provider of the alcoholic beverage and the resulting damages. Thus, the question of whether or not to extend liabil-
ity to commercial providers of alcoholic beverages turned wholly on issues of public policy.\textsuperscript{103}

\textbf{B. Public Policy}

The Wisconsin Supreme Court has identified certain public policy factors to be applied in determining the ultimate existence of a cause of action sounding in negligence. These factors include whether:

(1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.\textsuperscript{104}

Application of several of these public policy factors fully supports a rule imposing civil liability on social hosts for injuries caused by the drunk driving of their intoxicated guests.

1. Is the Injury Too Remote from the Negligence or, in Retrospect, Is It Highly Extraordinary that the Negligence Brought About the Harm?

As Justice Day reasoned in his dissenting opinion in \textit{Olsen v. Copeland},\textsuperscript{105} "[t]o call remote the link between a fatal auto-
mobile accident and the serving of alcohol to an intoxicated person is to ignore reality.\textsuperscript{106} The reality is indeed frightening. In 1977, in Wisconsin alone, among 422 drivers killed in automobile accidents who were also tested for blood alcohol content, "221 of those drivers were legally intoxicated with blood alcohol levels of .10 or above."\textsuperscript{107}

Statistics indicate that when minors are the intoxicated drivers resulting injuries are even more likely. Forty-two percent of all fatal alcohol-related crashes involve sixteen to twenty-four year olds, who make up only twenty percent of licensed drivers.\textsuperscript{108} Traffic fatalities are the leading cause of death among teenagers.\textsuperscript{109} The current national movement to raise the drinking age reflects awareness of this grim situation.\textsuperscript{110} In light of these disturbing statistics, the frequently asserted argument that injuries resulting from the furnishing of alcohol are too remote, or the result too extraordinary, is dubious, at best.

2. Is the Injury Wholly out of Proportion to the Negligence?

An additional concern with respect to the imposition of liability on social hosts is that it imposes a burden on tortfeasors which is disproportionate to their negligence. This problem is ameliorated by application of comparative negligence principles. Under the modern theory of comparative negligence,\textsuperscript{111} proportional negligence may be allocated to joint tortfeasors. An innocent victim in Wisconsin, for example, may recover against any tortfeasor, drunk-driver guest or social host. Then, under theories of contribution, the joint tortfeasors will allocate between themselves the loss in propor-

\begin{thebibliography}{111}
\bibitem{106} Id. at 497, 280 N.W.2d at 184 (Day, J., dissenting).
\bibitem{107} See id.
\bibitem{108} See id.
\bibitem{110} For a discussion of the current trend to raise the drinking age, see Florio, Raise it to 21 and Find the Courage, 70 A.B.A. J., April 1984, at 18.
\end{thebibliography}
tion to the contribution of their fault. Thus, the proportion of negligence can be reasonably tailored in comparative negligence jurisdictions like Wisconsin.

3. Does Allowance of Recovery Place an Unreasonable Burden on the Social Host Tortfeasor?

Recognizing a cause of action against social hosts does not impose an unreasonable burden. Social hosts, like bartenders, can purchase homeowner’s insurance to protect themselves and spread the risk of liability among other homeowners. The standard homeowner policy does not exclude coverage for liability arising out of injuries caused by intoxicated guests. The standard motor vehicle exclusion, for instance, only excludes coverage for the “ownership, operation, maintenance or use, including loading and unloading of the automobile.”

4. Does Imposition of Social Host Liability Open a Field of Liability that Has No Just or Sensible Stopping Point?

It has been postulated that imposing liability based on common law has no sensible stopping point. Considering the serious problems caused by alcohol-related injuries, this is an incorrect view. The current crises on the highways has not been solved by the imposition of civil or criminal liability on the vendors of alcohol alone. Social host liability is the logical and reasonable extension of liability of commercial vendors recognized in most jurisdictions.

Moreover, the extension of liability to social hosts in alcohol-related accident cases is certainly based on motivations as

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112. In Wisconsin, joint tortfeasors allocate between themselves the damages in proportion to the contribution of their fault. See Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). A social host will only be liable for that proportion of the injury determined to be its fault.


compelling as the extension of liability to architects,\textsuperscript{115} accountants,\textsuperscript{116} or estate planning lawyers\textsuperscript{117} for causing injuries to third parties. Social host liability is similarly analogous to the liability traditionally imposed on owners of vehicles who lend their cars to persons they know to be intoxicated.\textsuperscript{118}

Thus, the public policy argument advanced by proponents of the common-law immunity for social hosts is not convincing. The Wisconsin public policy reasons consistently argued in support of not imposing liability despite a finding of negligence causing injury, are all rebuttable with respect to social host liability.

V. CONCLUSION

With \textit{Kelly v. Gwinnell},\textsuperscript{119} the New Jersey Supreme Court established a convincing precedent for the imposition of liability on social hosts in drunk-driving cases grounded on principles of common-law negligence.\textsuperscript{120} The \textit{Kelly} court declared that:

a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication.\textsuperscript{121}

Unlike prior extensions of liability to social hosts for damages caused by their intoxicated minor guests,\textsuperscript{122} or other dis-

\textsuperscript{115} See, e.g., A.E. Inv. Corp. v. Link Builders, 62 Wis. 2d 479, 214 N.W.2d 764 (1974).
\textsuperscript{117} See, e.g., Auric v. Continental Casualty Co., 111 Wis. 2d 507, 331 N.W.2d 325 (1983).
\textsuperscript{118} It is negligence to permit a person to use an automobile which is under the control of an actor, if the actor knows or should know that the person is likely to use the thing in such a manner as to create an unreasonable risk to others. See Bankert v. Threshmen's Mut. Ins. Co., 110 Wis. 2d 469, 475-76, 329 N.W.2d 150, 153 (1983); see also Harris v. Smith, 119 Ga. App. 306, 167 S.E.2d 198 (1969); \textit{Restatement (Second) of Torts} \textsection 308 (1965).
\textsuperscript{120} See id. at __, 476 A.2d at 1221.
\textsuperscript{121} \textit{Id.} at __, 476 A.2d at 1224.
abled guests, the Kelly court did not base liability on some perceived legislative mandate. Imposing social host liability on the basis of common law, the Kelly court recognized the inherent problems associated with justifying social host liability on legislatively imposed standards of care arising out of state dram shop acts or the theory of negligence per se. In the absence of a direct legislative mandate for imposition of social host liability, legislatures and courts have been reluctant to hold the social host liable for serving alcohol to guests. Perhaps the political repercussions of extending liability to social hosts prevent the legislatures from authorizing the extension of liability. The courts, however, are well equipped to impose social host liability.

Extension of liability to social hosts is properly grounded in common-law negligence as interpreted and applied by the courts. The issue of social host liability is an issue of common-law negligence. Theories of negligence are properly decided upon by the courts in the absence of direct legislative preemption of the field. The requisite elements of a negligence cause of action are present with respect to social host liability. Furthermore, public policy factors warrant a finding of social host liability. Finally, in Wisconsin, common-law negligence principles provide a particularly persuasive framework on which to base social host liability.


124. "Perceived legislative mandate" refers to judicial perception of legislative rules of law on civil liability in drunk driving cases.

125. Last session, a committee of the Wisconsin legislature drafted a state dram shop act modeled after Minn. Stat. Ann. § 340.95 (West Supp. 1985). Assembly Bill 371, of the 1983-84 Legislature, would have given persons injured by an intoxicated person the right to sue those who illegally sold, furnished, or gave away the alcoholic beverages which caused the intoxication. The bill never left its original committee. In fact, the author's name was withdrawn from the bill. Telephone interview with Richard Rowe, Wisconsin Legislative Reference Bureau (Oct. 24, 1984). Withdrawal of the author's name from the bill indicated to Richard Rowe that dram shop legislation "must not be popular in Wisconsin." Id.

126. Similarly, past deference to the legislature does not preclude adoption of a rule of negligence law by the courts. Cf. Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, 560, 335 N.W.2d 578, 582 (1983) (adapting the "discovery rule" in Wisconsin although the legislature had recently refused to do so).

127. See supra text accompanying notes 81-85.

128. See supra text accompanying notes 104-20.
Imposition of social host liability is a serious response to one of the most compelling problems of modern times. The gravity and frequency of injuries resulting from drunk driving demonstrates the need for the fair application of negligence law to extend liability to social hosts. Armed with the theoretical means to do so, the judiciary of this state has an obligation to deter drunk-driving accidents. Common sense requires, if nothing else, that social hosts should be encouraged to deter their guests from driving while intoxicated. Imposition of social host liability will encourage social hosts to do their part in reducing the ubiquitous drunk driving problem.

We are still our brothers keepers, and it would be a rare host at a social gathering who would knowingly give more liquor to an intoxicated friend when he knows his invitee must take care of himself on the highway and may potentially endanger other persons. Social justice and common sense require the social host to see within reason that his guests do not partake too much of his generosity.129

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