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SOCIAL HOST'S LIABILITY: NO MORE "ONE FOR THE ROAD" IN NEW JERSEY

Kelly v. Gwinnell
96 N.J. 538, 476 A.2d 1219 (1984).

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INTRODUCTION

The New Jersey judiciary has devised a new weapon to be utilized in the war against drunk driving.[1] That weapon is a new negligence cause of action that will impose liability in certain circumstances on a social host for the negligent acts of intoxicated adult guests who leave the host's home for the highways. Prior to 1984, a New Jersey social host was subject to liability only when an intoxicated minor guest left the premises and injured himself or a third party.[2] Although the view that a social host is liable for the negligent acts of an intoxicated minor guest is a position advanced in several jurisdictions,[3] the Supreme Court of New Jersey currently stands alone in its imposition of liability for the negligence of an intoxicated adult guest.

The unique factual setting of *Kelly v. Gwinnell*[4] provided an opportunity for the New Jersey Supreme Court to impose liability where immunity had previously existed. The court held that a social host is liable for injuries suffered by a third party because of the negligent operation of a motor vehicle by an adult guest if the negligence is caused by the intoxication. Furthermore, the new rule only applies when a host furnishes a

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1. It is indeed a war. For example, in 1982, Congress passed 23 U.S.C. § 408 (1982) inspiring states to increase their efforts to eliminate drunk driving; $25 million in 1983 and $50 million for each of the next two years was set aside by the new law as grant money to fund programs aimed at curbing the drunk driving problem. Quade, *War on Drunk Driving: 25,000 Lives at Stake*, 68 A.B.A. J. 1551 (1982).

2. Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976). A New Jersey appellate court held that a social host could be held liable for an intoxicated minor's negligent acts which caused injury to an innocent third party after the social host had furnished excessive amounts of intoxicating liquor to the minor, knowing the minor was about to drive on the public highways.

3. Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), *rev'd on reh'g*, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983).

4. 96 N.J. 538, 476 A.2d 1219 (1984).

guest with intoxicating liquor knowing the guest is intoxicated and will soon drive.[5]

Although the New Jersey court decision is contrary to the law of every other jurisdiction in the nation on this issue,[6] this analysis will demonstrate that the court made a logical extension of common-law negligence principles applied in previous cases to slightly different fact patterns. The dissent's overemphasis on the need for the judiciary to defer decision on this issue to the legislature will also be discussed. Finally, the impact of the court's decision on the lethal combination of driving and drinking in New Jersey will be examined.

HISTORICAL BACKGROUND

The courts have utilized two different theories to impose liability on persons supplying alcoholic beverages.[7] One set of courts impose liability based on their state's Dram Shop Acts. These statutes allow any person who has been injured by the service or sale of alcohol to recover limited damages from the seller.[8] No showing of negligence is required to recover against the vendor since the statutory theory of recovery is usually strict liability.[9] Some statutes specifically state that they apply only to

5. 96 N.J. at 548, 476 A.2d at 1224.

6. The appellate division in its opinion of the case at bar pointed out, "Our research has failed to disclose any jurisdiction in the United States that allows the precise cause of action urged by appellant." Kelly v. Gwinnell, 190 N.J. Super. 320, 323, 463 A.2d 387, 389 (1983).

7. For a detailed discussion of these theories and the breakdown of the various states' positions, see Annot., 97 A.L.R. 3rd 528 (1980).

8. *See* ALA. CODE tit. 6, § 5-71 (1975); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1958); GA. CODE ANN. § 105-1205 (1968); ILL. ANN. STAT. ch. 43 § 135 (Smith-Hurd Supp. 1979); IOWA CODE ANN. § 123.92 (West Supp. 1979-80); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS ANN. § 436.22 (1978); MINN. STAT. ANN. § 340.95 (West Supp. 1980); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1973); R.I. GEN. LAWS §§ 3-11-1, 3-11-2 (1956); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1979-80); WYO. STAT. § 12-5-502 (1977). The limitations of the statutory liability vary from state to state. Illinois, for example, allows recovery from a commercial supplier up to $20,000 for loss of support and $15,000 for injury to person or property. ILL. REV. STAT. ch. 43, § 135 (1983).

9. Dram Shop Acts constitute a form of strict liability, but there are definite requirements which must be met before the plaintiff is allowed to recover. For example, under some statutes, the injured party may have to show that the licensee made an illegal sale at the time the cause of action arose. Other statutes require a showing of some connection between the fact of intoxication and the injury. McGough, *Dram Shop Acts*, PROCEEDINGS OF A.B.A. SECTION OF INS. NEGLIGENCE & COMPENSATION L. 448 (1966-67). In Illinois, to maintain an action to recover damages under the Dram Shop Act, a plaintiff must demonstrate the following:

1) He has been injured (or plaintiff's decedent has been killed) by an intoxicated person;

2) The defendant's sale or furnishing of liquor caused the intoxication of that person; and,

3) The action was brought within one year of the date the injury or death occurred.

In addition, the recovery under the Dram Shop Act is limited to $20,000 for loss of support and $15,000 for injury to person or property. ILL. REV. STAT. ch. 43, § 135 (1983).

commercial suppliers of alcoholic beverages[10] while others have been applied only to commercial suppliers by way of judicial interpretation.[11] No jurisdiction presently allows recovery against a social host on a strict liability theory under a state's Dram Shop Act.[12]

The second theory that courts utilize to impose liability for the injuries caused by an intoxicated person is a common-law negligence theory.[13] Within this category, some courts have held that violation of a statutory duty not to sell liquor to certain persons[14] can be used as evidence of negligence which the jury may accept or reject as it determines.[15]

New Jersy has no Dram Shop Act; a common-law negligence theory has been employed by the courts there to impose liability on persons furnishing alcoholic beverages.[16] The New Jersey courts first faced this issue in 1959 in *Rappaport v. Nichols*,[17] a case in which an intoxicated minor left the defendant's tavern and was involved in an accident in which the plaintiff's husband was killed. Holding that a tavern owner would be liable where an injury was foreseeable, the New Jersey Supreme Court declared:

10. For example, the Iowa Dram Shop Act limits recovery to instances involving the sale or giving of alcohol by licensees or permitees. IOWA CODE ANN. § 123.92 (West Supp. 1979-80).

11. For example, Illinois courts have uniformly construed the statute as applying only to commercial suppliers of alcoholic beverages. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Cunningham v. Brown, 22 Ill. 2d 23, 174 N.E.2d 153 (1961); Lowe v. Rubin, 98 Ill. App. 3d 496, 424 N.E.2d 710 (1981); Thompson v. Trickle, 114 Ill. App. 3d 930, 449 N.E.2d 910 (1983).

12. *See* Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L.J. 561 (1980).

13. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151 (1971). This is a more recent application of negligence principles. Conversely:

> At (early) common law, and apart from statute, no redress exists against persons selling, giving, or furnishing intoxicating liquor . . . whether on the theory that the dispensing of the liquor constitutes a direct wrong or constitutes actionable negligence . . . this rule is based on the theory that the proximate cause of the injury is the act of the purchaser in drinking the liquor and not the act of the vendor in selling it. 48 C.J.S. *Intoxicating Liquors* § 430. *Accord* 45 AM. JUR. 2d *Intoxicating Liquors* § 554.

The jurisdictions which impose liability through their Dram Shop Acts still adhere to this view. Thompson v. Trickle, 114 Ill. App. 3d 930, 931, 449 N.E.2d 910, 912 (1983). A discussion of cases implementing civil liability in other jurisdictions can be found in Keenen, *Liquor Law Liability in California*, 14 SANTA CLARA L. REV. 46 (1974).

14. The District of Columbia and all states have promulgated liquor control statutes which prohibit the sale and distribution of liquor to minors or obviously intoxicated persons. Violation of such a law is usually a criminal misdemeanor offense. *See* Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L.J. 561, 569 (1980).

15. In general, the use of a violation of a statute as evidence of negligence is a minority view. The majority of courts have held that if a statute is determined to be the standard of conduct to which the defendant should be held, than an unexcused violation is conclusive on the issue of negligence and the jury must be so instructed by the court. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 200-01 (4th ed. 1971) [hereinafter cited as PROSSER].

16. Kelly v. Gwinnell, 190 N.J. Super. 320, 322-23, 463 A.2d 387, 389 (1983).

17. 31 N.J. 188, 156 A.2d 1 (1959).

> Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor.[18]

In *Soronen v. Olde Milford Inn, Inc.*,[19] the court confronted the issue of a tavern keeper's liability to an intoxicated customer who fell on the premises and died. The New Jersey Supreme Court imposed civil liability on the tavern keeper for damages resulting from his negligent service of alcoholic beverages to the visibly intoxicated customer.[20] Further, the court noted that this liability did not impose an undue burden because "the tavern keeper may readily protect himself by the exercise of reasonable care."[21]

In 1976, the appellate division of the New Jersey judiciary extended the common-law duty to a social host in limited situations in *Linn v. Rand*.[22] There, the court held that a social host who serves alcoholic beverages to an obviously intoxicated minor knowing that the minor will thereafter drive may be liable for a third party's injuries inflicted because of the minor's subsequent drunk driving.[23] Other jurisdictions have recognized this common-law tort action against a social host and have likewise limited liability to situations where intoxicants have been served to a minor,[24] but liability of the social host has stopped there.[25] Social host liability in New Jersey has gone one step further.

18. 31 N.J. 188, 201, 156 A.2d 1, 8 (1959).

19. 46 N.J. 582, 218 A.2d 630 (1966).

20. *Id.* at 592, 218 A.2d at 636.

21. *Id.* at 594, 218 A.2d at 637.

22. 140 N.J. Super. 212, 356 A.2d 15 (1976). For an interesting discussion that emphasizes the differences between the licensee and social host as a rationale for upholding social host immunity, see Note, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?*, 1979 PAC. L.J. 95 (1979).

23. 140 N.J. Super. at 219, 356 A.2d at 19.

24. Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983); Burke v. Superior Court, 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1980); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973).

25. Courts in other jurisdictions have held that a social host can be liable for the negligent acts of his intoxicated adult guests, but the decisions have been abrogated or limited by later legislative action. For example, in Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971), the court imposed liability on the social host, but eight years later the legislature passed a new law requiring a showing that the cause of action was limited to those situations when the social host gave alcoholic beverages to a visibly intoxicated guest. In Coulter v. Superior Court of San Mateo, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), the California Supreme Court held a social host liable for the foreseeable harm which resulted from the negligent service of intoxicants to an adult. In 1978, the California legislature insulated the social host from liability by enacting a statute specifically providing for a cause of action for service of alcohol against licensees. 1978 CAL. STAT. ch. 930, § 1. For a discussion of the California Supreme Court's decision upholding the constitutionality of this statute, see Note, *The Constitutionality of Civil Nonliability of Vendors and Social Hosts Serving Alcohol to Intoxicated Persons: Cory v. Shierloh*, 9 PEPPERDINE L. REV. 784 (1982).

Kelly v. Gwinnell

FACTS OF THE CASE

Marie Kelly, plaintiff, was injured as a result of a head-on collision between her auto and an auto driven by Donald Gwinnell, defendant. Immediately prior to the collision, Gwinnell had been a guest at the home of Joseph Zak. Gwinnell spent an hour or two at the Zak home during which time, according to his testimony, he had two drinks, each with one shot of liquor.[26] When Gwinnell left the Zak home, Zak accompanied Gwinnell to his car and watched as he drove away. About 25 minutes later, Zak learned that Gwinnell had been involved in a head-on collision with plaintiff Kelly.[27]

Plaintiff Kelly first filed suit against Gwinnell and his employer,[28] but later amended her complaint to include Mr. and Mrs. Zak as defendants. The Zaks moved for summary judgment based on their contention that as a matter of law a host is not liable for the negligence of an adult guest who has become intoxicated while at the host's home. The trial court granted their motion.[29] The appellate division affirmed,[30] holding that a social host who furnishes alcoholic beverages to an adult is not liable for damages resulting from the latter's intoxication.[31] The appellate division based its decision on the status of social host liability in other jurisdictions as well as in New Jersey. In these prior cases, courts found a social host liable only when an intoxicated *minor* had caused the injuries to a third party. No jurisdiction's current law imposed liability on a social host for the negligent acts of an intoxicated *adult*.[32]

REASONING OF THE COURT

The issue decided by the New Jersey Supreme Court was "whether a social host who enables an adult guest at his home to become drunk is liable to the victim of an automobile accident caused by the drunken driving of the guest."[33] The court answered yes, stating that if a host

26. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219, 1220 (1984).

27. *Id.*

28. Gwinnell's employer, Paragon Corporation, was included as a defendant because the corporation was the owner of the vehicle Gwinnell was driving. 96 N.J. 538, 541-42, 476 A.2d 1219, 1220 (1984).

29. *Id.*, 476 A.2d at 1220-21.

30. Although plaintiff's claim against Gwinnell and his employer were not yet decided pursuant to NEW JERSEY RULE 4:42-2, the trial court, presumably in order to allow an immediate appeal, entered final judgment in favor of Zak.

31. Kelly v. Gwinnell, 190 N.J. Super. 320, 326, 463 A.2d 387, 390-91 (1983).

32. *Id.* at 322-23, 463 A.2d at 389.

33. Kelly v. Gwinnell, 96 N.J. 538, 540-41, 476 A.2d 1219, 1220 (1984).

serves liquor to an adult social guest knowing the guest is intoxicated and will thereafter be driving, then the social host is liable to third parties for injuries suffered as a result of the negligent operation of a motor vehicle by the adult guest when that negligence is caused by intoxication.[34]

Indicating its adherence to traditional principles of common-law negligence[35] as a basis for liability, the court began its reasoning by applying those principles to the instant case. The court pointed out that Zak continued furnishing drinks to Gwinnell even though he was severely intoxicated and that Zak knew that Gwinnell would later drive. Therefore, Zak had failed to conform to a standard of ordinary care by creating an unreasonable risk that Gwinnell would drive while intoxicated and not be able to operate his auto properly. The risk that Gwinnell would be unable to drive his car properly was clearly foreseeable, as was the risk of a resulting injury to a third party traveling the same highway as Gwinnell. Because the forseeable result occurred, the only element of negligence left to establish was whether the social host had a duty to prevent the risk.[36]

To impose a duty on the social host, the court noted it would have to make a value judgment based on broad public policy that required an inquiry into: 1) the relationship of the parties; 2) the nature of the risk; and 3) the public interest in the proposed solution. Concerning this three-step inquiry, the court enumerated the following responses to justify the imposition of a duty on the social host:

> In a society where thousands of deaths are caused each year by drunken drivers, [footnote omitted] where the damage caused by such deaths is regarded increasingly as intolerable, where liquor licensees are prohibited from serving intoxicated adults, and where long-standing criminal sanctions against drunken driving have recently been significantly strengthened . . . the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy.[37]

34. *Id.* at 548, 476 A.2d at 1224.

35. A negligence cause of action is made up of the following traditional elements:

1) A duty, or obligation imposed by the law, requiring the actor to conform to a definite standard of conduct, for the protection of others against unreasonable risks.

2) A failure on the actor's part to conform to the standard required.

3) A reasonably close casual connection between the conduct and the resulting injury. This is what is commonly referred to as "legal cause," or proximate cause.

4) Actual loss or damage resulting to the interests of another. PROSSER, *supra* note 15, at 143.

36. 96 N.J. at 544, 476 A.2d at 1222. The question of whether a duty exists has always been the cornerstone of negligence principles.

> The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to a person who seeks to make him liable for his negligence. *** A man is entitled to be as negligent as he pleases toward the whole world if he owes no duty to them. Lord Esher, in Le Lievre v. Gould, 1 Q.B. 491, 497 (1893).

37. 96 N.J. at 544-45, 476 A.2d at 1222. In 1982, there were an estimated 25,000 alcohol-

To further support this expansion of the duty, the court focused on the evolution of common-law liability imposed by their past decisions on those who furnish alcoholic beverages. They discussed *Rappaport v. Nichols*,[38] in which the court held a licensee liable for a customer's negligent operation of an automobile. In *Rappaport*, the court first examined a New Jersey statute prohibiting a licensee's sale of liquor to minors or visibly intoxicated persons. Inferring a legislative intent to protect members of the general public, the court concluded that a licensee owed a duty to the general public to protect them from any intoxicated customers who posed a risk on the highways.[39] The next step was *Soronen v. Olde Milford Inn, Inc.*,[40] in which a tavern keeper was held liable for the death of a patron on his premises whom he had served to a point of extreme intoxication. The *Soronen* court enlarged the *Rappaport* rule by pointing out that the licensee's duty extended to the intoxicated customer as well as the general public.[41] Finally, the appellate division expanded the liability of a social host to include the negligent acts of an intoxicated minor guest in *Linn v. Rand*.[42] Extending the *Rappaport* reasoning to the facts of its case, the *Linn* court found the negligent social hosts liable because: "It makes little sense to say that the licensee in *Rappaport* is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed."[43]

After noting with approval the *Linn* court's enlargement of liability to include the imposition of a duty on a social host for the acts of intoxicated minors, the *Kelly* court found the same duty of care should be imposed on the social host in the instant case because it is simply a "duty of care that accompanies control of the liquor supply."[44] In defining this duty the *Kelly* court stated, "the provider has a duty to the public not to create forseeable, unreasonable risks by this activity."[45]

involved fatalities. National Highway Traffic Safety Administration, U.S. Department of Transportation, *Alcohol in Fatal Accidents for Various Driver Age Groups*, 1984.

38. 31 N.J. 188, 156 A.2d 1 (1959).

39. *Id.* at 202, 156 A.2d at 8. Even as early as 1959, the *Rappaport* court recognized drunk driving was an issue:

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent. *Id.*

40. 46 N.J. 582, 218 A.2d 630 (1966).

41. *Id.* at 587, 218 A.2d at 633.

42. 140 N.J. Super. 212, 356 A.2d 15 (1976).

43. *Id.* at 217, 356 A.2d at 18.

44. 96 N.J. at 548, 476 A.2d at 1224.

45. *Id.*

Beyond this purely legal support for its decision, the *Kelly* court expounded that the balancing of policy considerations on this issue also led to the conclusion that liability was correctly imposed upon the social host. The *Kelly* court emphasized that the overall societal concern[46] with the tragic effects that drunk drivers have caused on our highways outweighed any potential inference with traditional standards of social behavior that might arise due to the court's decision.

In response to Judge Garibaldi's dissent that this liability is imposed on social hosts without any attention by the court to the effect it may have on the average citizen,[47] the majority replied that in the case at bar, the responsibility had been properly placed. The burden on the host to avoid the injury was not an undue burden. The social host also typically would have homeowner's insurance to protect the loss of his personal assets if recovery was allowed.[48]

Finally, the court faced the dominant contention of the dissent, a view shared by many other jurisdictions that have faced this issue, that the extension of liability is one uniquely within the purview of legislative determination.[49] The *Kelly* majority had a simple answer for the dissent: in New Jersey, the judiciary had historically been the sole lawmaking body on issues of the existence and scope of duty in negligence cases.[50] In addition, the courts' past decisions in this area had not been abrogated by any legislative enactments, signalling an affirmance by the legislature of the courts' past decisions.[51] The majority noted that the dissent's argument that the legislature was in a better position to collect and ex-

46. In the past two years, citizen groups such as Mothers Against Drunk Drivers (MADD) and Remove Intoxicated Drivers (RID) have founded chapters in more than 25 states. Quade, *War on Drunk Driving: 25,000 Lives at Stake*, 68 A.B.A. J. 1551 (1982).

47. 96 N.J. at 560, 476 A.2d at 1230.

48. *Id.* at 550, 476 A.2d at 1225.

49. The dissent lists the jurisdictions that have left this issue to legislative determination as follows: Kowal v. Hofher, 181 Conn. 355, 436 A.2d 1 (1980); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970); Cole v. City of Spring Lake Park, 315 N.W.2d 836 (Minn. 1982); Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Schirmer v. Yost, 60 A.D. 2d 789, 400 N.Y.S.2d 655 (1977); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976); Klein v. Raysinger, 470 A.2d 507 (Pa. 1983); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969). Ironically, the dissent approved of the appellate division's decision in *Linn*, in which the court held that there was no sound reason to impose liability on a licensee and not a social host. That case was, in effect, a judicial determination on an issue the dissent felt should be left to the legislature. 96 N.J. at 561, 476 A.2d at 1231.

50. 96 N.J. at 555, 476 A.2d at 1228.

51. More specifically, the majority emphasized, "In fact, the Legislature's passage of S. 1054, imposing criminal liability on anyone who purposely or knowingly serves alcoholic beverages to underage persons, indicates that body's approval of the position taken eight years earlier in *Linn*." 96 N.J. at 553, 476 A.2d at 1226.

amine data was true with regard to many current problems. However, the problem caused by drunk drivers on New Jersey highways[52] was an issue the majority considered to be one which required immediate action in the form of a decision targeted at deterring drinking and driving. In fact, in light of the stricter drunk driving laws recently enacted by the legislature,[53] the *Kelly* majority concluded that their decision carried out an implied legislative mandate.

ANALYSIS

The original common-law argument against imposing liability on the supplier of alcohol was that the consumption of alcohol was the proximate cause of the injury, not the actual service of the alcohol. This contention has only maintained its integrity in those states which provide an exclusive remedy through their Dram Shop Acts.[54] In the jurisdictions that recognize a common-law tort action against the supplier,[55] the furnishing of alcohol may be found to be the proximate cause of an injury, with the consumption, resulting intoxication, and injury-producing conduct being forseeable intervening causes.[56] Assuming the supplier owes a duty of ordinary care to a third party on the highway, he can be liable for his negligent service of alcohol to his intoxicated guest. As long as the supplier can reasonably foresee the guest's negligent driving, the guest's negligence will not be a superceding cause that extinguishes the host's liability for his negligent service.[57] The forseeability issue is not a difficult hurdle because a person is presumed to know what a reasonable person in the society knows, and a reasonable person could definitely foresee the possibility of an intoxicated person causing an auto accident.[58]

Since New Jersey does not have a Dram Shop Act, the courts have instead relied upon common-law negligence principles[59] to impose liability on a provider of alcohol.[60] In *Kelly v. Gwinnell*,[61] all of the elements

52. As evidence of the problem, consider that the total societal cost figure for all alcohol-related accidents in New Jersey in 1981 alone, including deaths, personal injuries and property damage, was $1,594,497,898.00. *New Jersey Division of Motor Vehicles Safety, Service, Integrity, A Report on the Accomplishments of the New Jersey Division of Motor Vehicles*, 45 (April 1, 1982 through March 31, 1983).

53. There has been a 40% increase in the number of drunk driving arrests in New Jersey since 1980. *Id.* at 47.

54. *See supra* note 8.

55. *See supra* note 13.

56. Vesely v. Sager, 5 Cal. 3d 153, 164, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971).

57. Rappaport v. Nichols, 31 N.J. 188, 204-05, 156 A.2d 1, 10 (1959).

58. RESTATEMENT (SECOND) OF TORTS, § 483, comment b (1965).

59. *See supra* note 35.

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

61. 96 N.J. 538, 476 A.2d 1219 (1984).

of common-law negligence were present. The furnishing of alcohol to an obviously intoxicated guest by a host who knows that that guest will thereafter be driving creates a reasonably foreseeable risk of injury to those on the highway.[62] The host who furnishes the alcoholic beverages in such a situation has failed to exercise ordinary care. The danger of ultimate harm to an innocent pedestrian or driver is clearly foreseeable to the social host as he observes his guest weaving towards his car knowing that his intoxication will impair his ability to operate his auto properly.[63] The only element remaining to be established was the scope of the duty to be imposed on the social host.

Prior to the *Kelly* decision, the duty to protect the general public from intoxicated guests had extended to social hosts only in the situation where the guests were minors.[64] In the original 1959 New Jersey decision, the imposition of common-law liability on a licensee was based on the rationale that the licensee had a duty to protect the general public from acts of those customers whom the licensee negligently served past the point of intoxication. In *Linn*, the appellate division seized upon this reasoning to impose a duty on the social host who served alcohol to a minor guest.[65] The same wrongful conduct resulted in injuries to third persons in both cases. The duty of care to control the liquor supply is a duty that arose because of the need to protect the members of the general public from injury. The duty did not arise because the licensee profits from the service of liquor. Therefore, based upon prior precedent, the *Kelly* court properly extended the scope of the social host's duty to include the protection of the general public from the negligent acts of any person who consumes liquor on the host's premises.[66]

The *Kelly* court was careful to limit the holding of the case to only those situations nearly identical to the case at bar.[67] By limiting its hold-

62. Alcohol was involved in 47.5% of the deaths on New Jersey highways from 1978 to 1982. *New Jersey Division of Motor Vehicles, Safety, Service, Integrity, A Report on the Accomplishments of the New Jersey Division of Motor Vehicles*, 45 (April 1, 1982 through March 31, 1983).

63. For an average 180-pound male to register a blood alcohol content of .1 percent, the legal standard for intoxication, he need only consume five cans of beer within a 90-minute period. Quade, *Beer Packs More of a Punch Than You Think*, 68 A.B.A. J. 1553 (1982).

64. Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976). Since this was an appellate court decision, the New Jersey Supreme Court in *Kelly* was actually considering the issue of the scope of the social host's duty to police *all* guests' drinking on the host's premises. But the *Linn* case had already been relied on in Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (1982) to impose liability on a social host for furnishing alcohol to an obviously intoxicated person not a minor.

65. Although the *Linn* holding was limited to the situation where a minor guest had left the premises and injured a third party, the *Kelly* court pointed out that the duty imposed on the social host did not arise from the statute and regulation prohibiting sales of liquor to a minor since those laws did not apply to a social host. 96 N.J. 538, 546, 476 A.2d 1219, 1223 (1984).

66. *Id.* at 549, 476 A.2d at 1224.

67. *Id.* at 559, 476 A.2d at 1230.

ing, the court can avoid the "flood gates" argument of its critics.[68] It can consider whether the facts of each case satisfy the common-law negligence principles as clearly as those in the instant case and evaluate the circumstances of each case to decide whether there should be liability imposed on the social host.

The *Kelly* court, by limiting its holding to the circumstances of the case at bar, avoided the imposition of overall liability on social hosts for the acts of *any* intoxicated guest who leaves his premises.[69] The parameters of the decision do not include a social gathering where a host would have less ability to gauge and control his guests' consumption of alcohol. The social host is liable only if he provides intoxicating liquor to a guest knowing that guest is intoxicated and will soon drive. However, the general significance of the holding should have the effect of deterring at least some social hosts from allowing their guests to drink beyond their capacity.

Additionally, the possibility of fair compensation for the innocent third parties will be increased because of the simple addition of another defendant. Because courts recognize that homeowner's insurance is usually available to spread the cost of recovery, they favor imposing liability on a social host rather than the innocent third party. The cost of that homeowner's insurance may increase as a result of the expanded liability imposed in cases such as this, but it is customarily spread across the bulk of policyholders and therefore should not amount to a significant cost for any one insured. Even though homeowner's insurance may help to avoid any serious economic repercussions of a lawsuit, such as that in the instant case, the moral repercussions of such a suit should provide an additional deterrent effect.[70]

Both the majority and dissenting opinions addressed the dilemma of the proper role of the judiciary in the determination of the issue of social host liability. The *Kelly* court's expansion of common-law liability can

68. The *Kelly* court stated confidently "[o]ur ruling today will not cause a deluge of lawsuits or spawn an abundance of fraudulent and frivolous claims." 96 N.J. at 559, 476 A.2d at 1230 (1984). The reasons given are that the holding is limited to those situations where a host directly serves a guest and where the liability extends only to injuries caused by a guest's drunk driving. By emphasizing these requirements, plus the normal police investigations of accidents, most false claims will be weeded out.

69. *Id.* From the limitations explicitly set forth, this decision could not be used to impose liability on a social host who has not directly served the guest the alcohol which causes his intoxication.

70. The *Kelly* court optimistically outlined its opinion on the impact of the decision: "We believe the rule will make it more likely that hosts will take greater care in serving alcoholic beverages at social gatherings so as to avoid not only the moral responsibility but the economic liability that would occur if the guest were to injure someone as a result of his drunken driving." 96 N.J. 538, 543, 476 A.2d 1219, 1226 (1984).

only be viewed as a logical expansion of past decisions. Because New Jersey had never adopted a Dram Shop Act[71] to define the parameters of liability for those who furnish alcohol, the judiciary had taken the responsibility of providing redress to parties injured by negligent, intoxicated drivers. The New Jersey courts first found a licensee could be liable for injuries caused by the negligent acts of an intoxicated customer,[72] then they imposed liability on the licensee for injuries to the intoxicated customer himself.[73] Next, an appellate court held that a social host could be liable for the negligent acts of an intoxicated minor guest who left his premises by automobile and injured an innocent person.[74] The courts adjudicated these cases on pure common-law negligence principles. In the 25 year period between the *Rappaport* decision and the case at bar, the legislature never acted to abrogate or restrict the impact of any of the court's decisions.[75] Clearly, if the legislature had felt that the issue of imposing liability on the suppliers of alcohol was better suited for legislative determination, it would have taken action by passing a Dram Shop Act or some other statute on the subject.[76] Although silence and inactivity would not normally be considered indicative of positive approval in the context of judicial and legislative coexistence, 25 years of silence by the legislature is a strong indication to the judiciary that the legislature agrees with the courts' actions.

Related to the question of the proper role of the judiciary in determining the liability of a social host as a supplier of alcoholic beverages is the broader issue of the judicial branch's role as a policymaker on any issue. As the *Kelly* court pointed out, the court has decided several important issues without the benefit of prior legislative examinations.[77] For example, in *Immer v. Risko*,[78] the New Jersey Supreme Court abolished interspousal immunity in automobile negligence cases. In *France v. A.P.A. Transport Corp.*,[79] the same court held that there would no longer be parent-child immunity in automobile negligence cases. These decisions were made in the face of strong policy considerations both for and against the court's position, yet the decisions have been in effect for al-

71. *See supra* note 8 for a listing of states' statutory Dram Shop Acts.

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

73. Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966).

74. Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976).

75. Kelly v. Gwinnell, 96 N.J. 538, 555, 476 A.2d 1219, 1227 (1984).

76. *See supra* note 25 for a discussion of legislative actions overruling or limiting the imposition of liability on a social host.

77. 96 N.J. at 547, 476 A.2d at 1219.

78. 56 N.J. 482, 267 A.2d 481 (1970).

79. 56 N.J. 500, 267 A.2d 490 (1970).

most 15 years with no legislative alterations.[80]

No doubt, the ability to investigate certain societal problems in detail and then introduce statutory alternative solutions is an invaluable function of the legislature. However, the *Kelly* court properly perceived that there was no need for investigation into the problem of intoxicated drivers on New Jersey highways in light of all the information available on a topic so much in the public eye. The court had the benefit of a current survey conducted by the New Jersey Division of Motor Vehicles.[81] In response to the survey, the legislature had previously enacted stronger drunk driving laws purported to be "the toughest in the nation."[82] A national priority to eliminate drunk drivers on the nation's highways was acknowledged by the *Kelly* court as they also had available a report from the Presidential Commission on Drunk Driving.[83] These official statistics were supplemented by information provided by the communications media, which reports daily the details of highway accidents involving drunk drivers. The *Kelly* court's conclusion that the reduction of drunken driving[84] is a practically unanimously accepted social goal cannot be disputed. Further, the *Kelly* court's response to this growing dilemma properly came in the form of their decision imposing liability on the social host.

The *Kelly* court's holding will likely have its greatest impact in jurisdictions which base the imposition of liability for injuries caused by intoxicated persons solely on common-law negligence principles. Beyond this, the impact of the *Kelly* decision in jurisdictions having Dram Shop Acts should be minimal.[85] Viewed broadly, the very existence of a Dram Shop Act establishes a substantial argument against any expansion of liability. Since the legislature has already dealt so specifically with this subject, any *Kelly* type of judicial expansion would likely be considered an intrusion into the legislative domain.

The courts in several dram shop jurisdictions have faced the issue of social host liability. The courts have been asked to impose liability on the social host based on alternative theories. First, the social host could be found liable on the basis of common-law negligence under the assumption that the Dram Shop Act did not apply to a non-licensee and thus did not preclude common-law recovery. Conversely, liability could be im-

80. 96 N.J. at 557, 476 A.2d at 1229.
81. *Id.* at 551, n.11, 476 A.2d at 1226 n.11.
82. *Id.* at 545, 476 A.2d at 1222.
83. *Id.* at n.3.
84. *Id.* at 545, 476 A.2d at 1222.
85. Currently, sixteen jurisdictions have Dram Shop statutes. *See supra* note 8.

posed on the social host by interpreting the Dram Shop Act to include service of alcohol by non-licensees.[86]

Several jurisdictions having Dram Shop Acts have faced the issue of social host liability based on these alternative theories, and have unanimously rejected placing liability on social hosts.[87] The analysis utilized by the Illinois Supreme Court expressed the dominant rationale of these courts. The Illinois Supreme Court initially emphasized that the dram shop cause of action was purely a creature of statute[88] and that no common-law tort against a seller of intoxicating liquors existed in Illinois.[89] Using this foundation, the Illinois courts in 1981 held that no cause of action existed against a social host who provided liquor to an individual who later because of his intoxication caused damage to another.[90] Further, in that same year, the Illinois courts refused to expand the Dram Shop Act to apply to social hosts.[91] As a result, the alternative theories for recovery against a social host in a dram shop jurisdiction were rejected, and the social host was given immunity. In summary, the *Kelly* court holding would have no effect in these jurisdictions because the creation of the statutory cause of action precludes any recovery other than for those lawsuits brought under the terms of the statute.

CONCLUSION

The *Kelly* decision represents a significant departure from the formerly unanimous view that a social host could not be held liable for the negligent acts of his intoxicated adult guests. The New Jersey Supreme Court responded to the local and national problem of drunk driving by imposing liability on a social host who was a direct, active supplier of alcohol. By increasing the potential liability of the host, the court hoped to promote discretion and decrease the probability that a host will en-

86. Two state courts interpreted their state Dram Shop Acts to include the social host as a defendant. Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972). Presumably, as in the case of a commercial supplier as defendant, allowing a cause of action under the Dram Shop Act would preclude a suit against the social host based on common-law negligence principles. However, the state legislatures almost immediately nullify the courts' decisions to include a social host as a dram shop defendant. Therefore, it is difficult to predict the outcome of a common-law negligence suit in a jurisdiction that has a Dram Shop Act that applies to social hosts.

87. *See* Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLIAMETTE L.J. 561, 563 (1980).

88. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).

89. Cunningham v. Brown, 22 Ill. 2d 23, 174 N.E.2d 153 (1961); Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949); Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).

90. Lowe v. Rubin, 98 Ill. App. 3d 496, 424 N.E.2d 710 (1981).

91. Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981).

courage a guest to consume beyond his capacity.[92] Further, since the *Kelly* court held that the guest and host are liable as joint tortfeasors, innocent third parties who are injured as a result of the social host's negligent furnishing of alcohol will have a better chance of being fairly compensated.[93] Therefore, the plaintiff could sue either one or both the guest and host and recover a judgment against the single defendant he sued or both of them. Any right of contribution or indemnification between the two would require the trial court to consider the effect of the New Jersey Comparative Negligence Act.[94] This decision will likely only be followed by those jurisdictions without statutory theories of recovery such as Dram Shop Acts since the holding is grounded upon basic common-law negligence principles. For this decision to maintain its precedential value, the subsequent New Jersey courts' decisions must adhere to the *Kelly* court's explicit direction of imposing liability only when the facts of the case are similar to those in *Kelly*. In the long run, the positive impact of *Kelly* could be the revision of the social habits of the average citizen in New Jersey. In turn this could produce a decrease in the number of drunk drivers on the highways, making those highways safer for all citizens.

92. 96 N.J. at 552, 476 A.2d at 1226. *See also* Stanner, *Liability of a Social Host for Off Premises Negligence of Inebriate Guests*, 68 ILL. B.J. 396 (1980) for a discussion of the importance of these policy considerations.

93. 96 N.J. 538, 559, 476 A.2d 1219, 1230 (1984). The term refers to two or more persons jointly or severally liable in tort for the same injury to person or property. BLACK'S LAW DICTIONARY 434 (rev. 5th ed. 1979).

94. N.J. STAT. ANN. 2A:15-5.1-5.3 (West 1982).