SOCIAL HOST LIABILITY — A FRESH APPROACH

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1. Introduction

Since the landmark decision in *Menow v. Jordan House Ltd.*,[1] the potential liability of taverns and other commercial hosts for alcohol-related injuries has been well established. In the 30-plus years since that decision, however, social hosts have received a free pass in cases where their involvement in the intoxication that led to the injury has been real and significant. The purpose of this article is to suggest a new approach to the consideration of the liability of social hosts, one that promotes the policy considerations essential to this type of claim and, at the same time, accords with basic principles of law.

2. Paucity of Cases

While numerous Canadian courts have held that social hosts owe a duty of care both to their guests and to users of the road,[2] there appear to be no cases to date in which liability has been imposed,[3] although the courts have been careful to note that social hosts are not immune from liability, "particularly when it is shown that a social host knew that an intoxicated guest was going to drive a car and did nothing to protect innocent third parties".[4] The liability of social hosts has been described

* All of McCague Peacock Borlack McInnis & Lloyd LLP.

1. [1974] S.C.R. 239, 38 D.L.R. (3d) 105.
2. Those cases are listed in *Childs v. Desormeaux* (2004), 71 O.R. (3d) 195 at para. 30, 239 D.L.R. (4th) 61, 187 O.A.C. 111 (C.A.).
3. *Childs, ibid.,* at para. 31; *Stevenson v. Clearview Riverside Resort,* [2000] O.J. No. 4863 (QL) at para. 18, 101 A.C.W.S. (3d) 1212 (S.C.J.); *Broadfoot (Litigation Guardian of) v. Ontario (Minister of Transportation and Communication)* (1997), 32 O.R. (3d) 361 at para. 5, 25 M.V.R. (3d) 224 (Gen. Div.).
4. *Childs, ibid.,* at paras. 10, 76 and 90. See also *Calliou Estate v. Calliou Estate* (2002), 99 Alta. L.R. (3d) 390 at para. 50, [2002] 3 W.W.R. 655, 306 A.R. 322

as a "controversial and unsettled question",[5] although the prevailing view is reflected in the comment that liability would be imposed only where the conduct of the social host is "sufficiently egregious".[6]

3. Duty of Care

The test for determining whether or not there is a duty of care is the modified two-stage *Anns* test.[7] That general test has been applied in commercial host,[8] social host,[9] and related claims[10].[11]

> At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized . . . Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances . . .
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> If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

The close and direct relationship referred to as "proximity" is sometimes described by the term "special relationship"[12] and emphasis has

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(Q.B.); *Wince (Guardian ad Litem of) v. Ball* (1996), 40 Alta. L.R. (3d) 66 at para. 21, 136 D.L.R. (4th) 104, [1996] 8 W.W.R. 28 (Q.B.).

5. *Prevost (Committee of) v. Vetter* (2002), 100 B.C.L.R. (3d) 44 at para. 27, 210 D.L.R. (4th) 649, 271 W.A.C. 56 *sub nom. Prevost v. Vetter* (C.A.).
6. *Haggarty v. Desmarais* (2000), 5 C.C.L.T. (3d) 38 at para. 3, 12 M.V.R. (4th) 79 (B.C.S.C.).
7. *Hercules Managements Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 at paras. 20-21, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80.
8. *Stewart v. Pettie* (1995), 121 D.L.R. (4th) 222 at para. 24, [1995] 1 S.C.R. 131, [1995] 3 W.W.R. 1.
9. *Childs, supra,* footnote 2, at paras. 17-18.
10. *John v. Flynn* (2001), 54 O.R. (3d) 774 at para. 30, 201 D.L.R. (4th) 500, 148 O.A.C. 148 (C.A.), leave to appeal to S.C.C. refused 210 D.L.R. (4th) vi.
11. *Edwards v. Law Society of Upper Canada,* [2001] 3 S.C.R. 562 at paras. 9 and 10, 206 D.L.R. (4th) 211, 153 O.A.C. 388.
12. *Stewart v. Pettie, supra,* footnote 8, at para. 47; *Childs, supra,* footnote 2, at para. 51; *Stevenson v. Clearview Riverside Resort, supra,* footnote 3, at para. 24.

been placed on the requirement that it be just and fair to impose a duty of care and, where the duty has been breached with resulting injury, liability on the defendant.[13] "[I]n considering whether it is just and fair to hold the defendant liable, tort law is not simply intended to make persons accountable for their wrongful conduct by compensating the victim but is also intended to promote the welfare of society by preventing accidents and spreading loss."[14]

The first stage of the test contains two components: foreseeable harm and proximity. Foreseeable harm is not sufficient *per se*,[15] and the proximity component incorporates policy considerations,[16] including justice and fairness. If a *prima facie* duty is found to be present under the first stage, residual policy considerations are weighed in the second stage. The test, ". . . no matter how it is phrased, conceals a balancing of interests. The quest for the right balance is in reality a quest for prudent policy."[17] It is noteworthy that at the second stage the onus falls on the defendants to show why they, as the persons who negligently caused the loss, should be able to avoid liability.[18]

4. Foreseeability of Drunk Driving or of Harm?

The authorities generally have required evidence establishing reason for the host to believe that the person who consumed the alcohol was likely to operate a vehicle while still impaired.[19] Thus, the element of foreseeability was not established where the host was entitled to believe that some person other than the person who had been drinking would be driving.[20] In an earlier article on this subject, Professor Elizabeth Adjin-Tettey remarked "Therefore, there can be no liability when it was not foreseeable that the guest would drive."[21]

That, in our view, is the wrong approach. The issue of foreseeability should be directed at the foreseeable possibility of harm and not at the

13. *Cooper v. Hobart,* [2001] 3 S.C.R. 537 at para. 34, 206 D.L.R. (4th) 193, [2002] 1 W.W.R. 221; *Childs, ibid.,* at paras. 20, 21 and 25; *Davis v. Radcliffe,* [1990] 1 W.L.R. 821 at p. 827 (P.C.).
14. *Childs, ibid.,* at para. 25.
15. *Cooper v. Hobart, supra,* footnote 13, at para. 21.
16. *Ibid.,* at para. 25.
17. *Ibid.,* at para. 29.
18. *Childs, supra,* footnote 2, at para. 24.
19. *Stewart v. Pettie, supra,* footnote 8, at para. 51; *Prevost (Committee of) v. Vetter, supra,* footnote 5, at para. 18; *Stevenson v. Clearview Riverside Resort, supra,* footnote 3, at para. 34.
20. *Stewart v. Pettie, ibid.,* at paras. 54-55; *Wince (Guardian ad Litem of) v. Ball, supra,* footnote 4, at paras. 23-25.
21. E. Adjin-Tettey, "Social Host Liability: A Logical Extension of Commercial Host Liability?" (2002), 65 Sask. L. Rev. 515 at p. 536.

manner in which such harm might eventuate. The question should be: Was it foreseeable that harm or injury might occur as a consequence of impairment due to excessive drinking? and not: Was it foreseeable that the person who had been drinking would drive while still impaired and thereby cause harm or injury?

It is not necessary that the defendant foresee the "precise concatenation of events"; it is enough to fix liability if the defendant could foresee in a general way the class or character of injury that ultimately occurred.[22] The following comments are applicable:

> This accident was caused by a known source of danger, but caused in a way which could not have been foreseen, and, in my judgment, that affords no defence.[23]
>
> When an accident is of a different type and kind from anything that a defender could have foreseen he is not liable for it.[24]
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> [A] wider risk [than that anticipated] would also fall within the scope of the council's duty unless it was different in kind from that which should have been foreseen (like the fire and pollution risks in *The Wagon Mound No. 1*) and either wholly unforeseeable (as the fire risk was assumed to be in *The Wagon Mound No. 1*) or so remote that it could be "brushed aside as far-fetched".[25]

The same point is made in the statement "The test for determining remoteness is foreseeability of the possibility of the type of harm that occurs."[26]

Foreseeability is an objective test. The question is what "a reasonable [person] of ordinary intelligence and experience so acting would have in contemplation".[27] Persons who are intoxicated do not act normally.[28] The likelihood of inappropriate and negligent conduct on their part is far greater than it would be for sober individuals. In particular, the possibility of driving while still intoxicated has sadly been shown to be

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22. *R. v. Cote* (1974), 51 D.L.R. (3d) 244 at p. 252, [1976] 1 S.C.R. 595, 3 N.R. 341; *Hughes v. Lord Advocate* [1963] A.C. 837 at p. 853 (H.L.).
23. *Hughes v. Lord Advocate, ibid.,* at p. 847.
24. *Ibid.,* at p. 857.
25. *Jolley v. Sutton London Borough Council,* [2000] 1 W.L.R. 1082 at p. 1093 (H.L.) (original emphasis).
26. *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 at para. 24, 215 D.L.R. (4th) 193, 162 O.A.C. 186 *sub nom. Hunt v. Sutton Group Incentive Realty Inc.* (C.A.).
27. *Gilchrist v. A. & R. Farms Ltd.,* [1966] S.C.R. 122 at para. 6, 54 D.L.R. (2d) 707, 54 W.W.R. 595, quoting from *Glasgow Corporation. v. Muir,* [1943] A.C. 448 (H.L.).
28. "[T]he law recognizes that there may be circumstances where by reason of drunkenness or other factors foreseeably likely to affect an adult's appreciation of danger, he may act in a childish or reckless fashion": *Jebson v Ministry of Defence,* [2000] 1 W.L.R. 2055 at para. 28 (C.A.).

all too likely an occurrence.[29] When that happens, there is a "high correlation between drunkenness and motor vehicle accidents".[30] "[T]he greater the risk the more tentative must be the assumption that others will conduct themselves with reasonable care."[31] The possibility of an intoxicated person driving while impaired is no less foreseeable than the possibility of a child alighting from a bus and darting in front of it into the path of a following vehicle,[32] or the possibility of a child climbing a tree and coming into contact with a live power line.[33] It is far more foreseeable than the complicated and unlikely series of events that led to the injury in *Hughes v. Lord Advocate*.[34] "Unfortunately, tortious . . . action by a third party is often 'the very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant."[35]

When there is actual or constructive knowledge that a person has been drinking to excess, the possibility of his or her driving while still impaired cannot be viewed as other than foreseeable, and in fact the court in *Stewart v. Pettie* so held[36] before ultimately finding that, in the circumstances of that case, the defendant was entitled to believe that the person who had been drinking would not be driving.[37]

Adopting the approach of a distinguished judge and author, drunk driving is a type of event that tends to recur. It is not a "freakish or bizarre" incident that might be described as a "fluke". "For such recurring situations, we can and should develop stable legal rules."[38]

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29. A curious, and in our view incorrect, comment was made in *Stewart v. Pettie, supra,* footnote 8 (at para. 35, original emphasis)*:* "I fail to see how the mere fact that an individual is over-imbibing can lead, by itself, to *any* risk of harm to third parties." Almost immediately before that statement (at para. 33) was the remark that it clearly ought to be in the reasonable contemplation of commercial vendors of alcohol that carelessness on their part might cause injury to users of the highway.
30. *Childs, supra,* footnote 2, at para. 51.
31. *Gellie v. Naylor* (1986), 55 O.R. (2d) 400 at p. 402, 28 D.L.R. (4th) 762, 15 O.A.C. 129 (C.A.), quoting Fleming, *The Law of Torts,* 6th ed. (Law Book Co. Ltd., 1983).
32. *Carvell v. Lai* (1988), 29 B.C.L.R. (2d) 71 at para. 22 (C.A.).
33. *Amos v. New Brunswick Electric Power Commission* (1976), 70 D.L.R. (3d) 741, [1977] 1 S.C.R. 500, 13 N.B.R. (2d) 307.
34. *Supra,* footnote 22. The manner in which the accident occurred there is described at pp. 845-46.
35. *Home Office v Dorset Yacht Co. Ltd.,* [1970] A.C. 1004 at p. 1030. (H.L.)
36. *Supra,* footnote 8, at paras. 28-30. *Stewart* was a commercial host case, but there is no difference on the issue of foreseeability between commercial and social host situations.
37. *Ibid.,* at paras. 54-55.
38. Linden, *Canadian Tort Law,* 7th ed. (Markham, Butterworths Canada Ltd., 2001), pp. 339-40.

The risk of a person driving while still impaired is a kind of risk that is entirely foreseeable. If foreseeability of the intoxicated person driving while impaired is a necessary element of liability, then there should be a rebuttable presumption of foreseeability. That was the approach in effect taken in *Stewart v. Pettie*, although in our view the foreseeability of the type of harm that ultimately occurred should have been a sufficient basis for satisfaction of the foreseeability criterion.

There have been instances where the injury was the result of conduct other than driving. In each of those cases, the harm came to the intoxicated person, rather than to a third person, and the conduct leading to the injury was found not to be foreseeable.[39]

Having created a foreseeable risk of injury through the supply of alcohol, or having facilitated the creation of that risk, such as through the furnishing of premises and the occasion for a "BYOB" party,[40] a social host should be liable for the consequences of the materialization of the risk unless the "accident is of a different type and kind from anything that [the host] could have foreseen".[41] Apart from that, the manner (and the foreseeability of the manner) in which that materialization occurs should be irrelevant. Employing the classic language of tort law the host has, by his or her conduct, caused or contributed to the creation of an unreasonable risk of harm leading to a foreseeable type of injury and must bear the consequences.[42] There is no justification for a special exemption from the general rule that it is only the type of harm, and not the manner in which it occurs, that must be foreseeable. At a minimum, the host's onus of rebutting the presumption of foreseeability of driving while still impaired should not be an easy burden to satisfy.

5. Proximity — Established Categories

The courts have recognized seven general categories of proximity, the first of which is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property.[43] The foreseeability of harm to users of the road (and others too) from a state

39. *Alchimowicz v. Schram* (1999), 49 M.P.L.R. (2d) 299 at para. 4, 116 O.A.C. 287 (C.A.), leave to appeal to S.C.C. refused 133 O.A.C. 198*n*: plaintiff dove off dock railing into lake; *Stevenson v. Clearview Riverside Resort, supra*, footnote 3, at paras. 38-39: plaintiff dove from wooden structure into a river; *Fitkin (Litigation Administrator of) v. Latimer* (1997), 35 O.R. (3d) 464 at para. 6, 102 O.A.C. 82 *sub nom*. *Fitkin Estate v. Latimer* (C.A.): plaintiff climbed safety railing and fell into a swimming pool.
40. The issue of liability for a BYOB ("bring your own booze") party will be considered later in this article.
41. See footnote 24.
42. The further necessary element of proximity is discussed below.
43. *Cooper v. Hobart, supra,* footnote 13, at para. 36.

of impairment caused by the excessive consumption of alcohol is equally foreseeable whether that impairment occurs in a commercial or a social setting. In both situations the host's act, whether it involves the sale or the gratuitous supply of alcohol, or the provision of the venue and occasion for the consumption of alcohol, falls within that established first category. It is therefore our view that the conclusion in *Childs* that the imposition of liability on a social host to users of the road would involve the recognition of a new duty of care is incorrect.[44]

6. Proximity — Analogous Categories

Alternatively, where the situation does not come within one of the established categories, the starting point in the analysis of the proximity issue is the question whether there are analogous categories of cases in which proximity has previously been recognized.[45] There should be little argument with the proposition that the category of social host is analogous to the category of commercial host. There are, of course, real and significant differences between the two, but the differences are better characterized as differences in detail rather than in context and substance, and those differences do not detract from the analogous nature of the two categories. The differences are no greater than, for example, those between a claim for negligent misrepresentation and a claim made by a person against a credit reporting agency where the commercial/profit element is present in the latter but not the former. Those were held to be analogous categories with the result that the element of proximity was present in the latter situation.[46]

The major differences are that commercial hosts serve alcohol for profit and the relationship between the host and the drinker is contractual. The relationship between the social host and the guest is informal and lacks any profit motive. The expectations of the host and drinker differ widely in the two settings. These and other differences are listed in the *Childs* decision.[47] The first matter of note with regard to those differences is that they are entirely irrelevant in so far as the ultimate victim is concerned where that victim is a person other than the drinker. As stated by Professor Adjin-Tettey, the emphasis on profitability as a distinguishing feature is misplaced.[48] She quotes another author, Professor L.N. Klar, who states that there should be "nothing inherently special about profiting from an activity" and that profit has

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44. *Childs, supra,* footnote 2, at para. 33.
45. *Cooper v. Hobart, supra,* footnote 13, at para. 41. See also footnote 11.
46. *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 at para. 31, 224 D.L.R. (4th) 419, 169 O.A.C. 201, *sub nom. Haskett v. Transunion of Canada Inc.* (C.A.).
47. *Supra,* footnote 2, at para. 33.
48. "Social Host Liability", *supra,* footnote 21, at p. 517.

not made a difference on the issue of liability for other activities.[49] As indicated by Professor Adjin-Tettey, the risk of harm is the same whether the host is a commercial vendor or a social host.[50]

One of the differences that merits special comment is the presence of legislation governing the duties of a commercial host and the absence of such legislation applicable to social hosts. Should the courts then leave the matter of social host liability for resolution by the legislature, rather than deal with the issue on a case-by-case basis?[51] Given the analogous nature of the two categories, and the leisurely pace at which legislative bodies generally act (as shown by their failure to deal with the issue to date), there is no reason to forego the opportunity for further development of the common law, particularly where the change would be incremental in nature. That, in fact, is what was done in regard to the commercial host claim in *Stewart v. Pettie*, where there was no legislation applicable to commercial hosts in Alberta, the province from which the case originated.[52] In *Childs*, Weiler J.A. said: "In the end, I am not persuaded by the trial judge's conclusion that legislation would necessarily be required before imposing liability on a social host."[53] The legislature of course retains the power to alter any rules established by the common law.[54]

There are other categories of cases where a duty of care in regard to alcohol-related claims has been found to exist and which similarly are analogous to the social host situation: employer and employee;[55] quasi-paternalistic relationship between minister and person living both at minister's home and in halfway house;[56] adult and teenager friend.[57] In another case, however, it was held that there was no duty of care owed by one hockey team to another to whom the former supplied beer at the latter's expense.[58]

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49. *Ibid.,* at p. 522, quoting from L.N. Klar, *The Role of Fault and Policy in Negligence Law* (1996), 35 Alta. L. Rev. 24.
50. *Ibid.,* at p. 522.
51. *Childs, supra,* footnote 2, at para. 86.
52. *Stewart v. Pettie, supra,* footnote 8, at para. 46. In *Edwards v. Law Society, supra*, footnote 11, the statement was made (at para. 9, emphasis added): "Factors giving rise to proximity must be grounded in the governing statute *when there is one*".
53. *Supra,* footnote 2, at para. 89.
54. As has been done, or at least attempted, in many states in the United States through so-called dram shop legislation: see section 15, *post*.
55. *Jacobsen v. Nike Canada Ltd*. (1996), 133 D.L.R. (4th) 377, [1996] 6 W.W.R. 488, 19 B.C.L.R. (3d) 63 (S.C.); *Rice v. Chan Estate* (1998), 62 B.C.L.R. (3d) 113 at paras. 61-63 (S.C.).
56. *Monteith v. Hunter* (2001), 8 C.C.L.T. (3d) 268 at paras. 21-30 (Ont. S.C.J.).
57. *Dryden (Litigation Guardian of) v. Campbell Estate,* [2001] O.J. No. 829 (QL), 11 M.V.R. (4th) 247 (S.C.J.).
58. *Calliou Estate, supra,* footnote 4, at paras. 38-44.

The statement was made in *Childs* that "[s]ocial host liability is not simply an extension of commercial host liability" because of the significant differences between the two situations.[59] We respectfully disagree and adopt the opinion of Professor Adjin-Tettey that "Social host liability is a logical extension of commercial host liability, brings the law in line with negligence law generally, and encourages socially responsible behaviour on the part of social hosts".[60]

7. Proximity — Is It Just and Fair to Impose Liability on Social Hosts?

Drunk driving has been described as a "social evil",[61] "an evil and a serious danger",[62] and a "menace"[63] that has led to "carnage" on the roads.[64] The *Childs* case is just one of many tragic examples: the vehicle driven by the impaired driver crossed the centre line and collided head-on with an oncoming vehicle, killing one passenger, paralyzing another and seriously injuring all of the other passengers in both cars.[65] "There is no question that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective."[66] So great is the importance of coping with this problem that limits placed on the Charter right to retain and instruct counsel, and to be informed of that right, have been held justifiable.[67]

Deterrence is one of the major functions of tort law.[68] "One of the primary purposes of negligence law is to enforce reasonable standards of conduct so as to prevent the creation of reasonably foreseeable risks. In this way, tort law serves as a disincentive to risk-creating behaviour."[69] Thus, "Proof that drunk driving would be deterred by the imposition of a duty of care on social hosts would be an important factor weighing

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59. *Supra,* footnote 2, at para. 33.
60. "Social Host Liability", *supra,* footnote 21, at p. 515. She also states: "Concerns about the consequences of drunk driving and collective security support the elimination of the artificial distinction between commercial and social hosts and demand socially responsible behaviour on the part of all hosts." (at p. 532).
61. *R. v. Orbanski,* [2005] S.C.J. No. 37 (QL) at para. 3.
62. *Ibid.,* at para. 71.
63. *Ibid.,* at para. 25.
64. *Ibid.,* at paras. 1 and 55.
65. *Childs, supra,* footnote 2, at para. 13.
66. *R. v Orbanski, supra,* footnote 61, at para. 55.
67. *Ibid.*
68. *Kendall v. Fontaine,* [1995] B.C.W.L.D. 2006 at para. 28 (S.C.): "By imposing liability negligence law seeks to eliminate or at least reduce the frequency of accidents and, in the positive sense to educate and to promote responsible values and conduct."
69. *Stewart v. Pettie, supra,* footnote 8, at para. 49.

in favour of its imposition."[70] As a matter of common sense, the imposition of liability clearly would have a deterrent effect, and in the *Childs* case there was evidence led to that effect.[71]

It was said in *Childs* that the availability of insurance is a consideration with respect to how onerous a burden the imposition of liability on a social host would be.[72] Reference has also been made to the unreliability of insurance as a source of compensation.[73] Neither of those matters should be considered a factor on the issue whether liability should be imposed. If insurance to cover that type of risk is not currently available, it will become available when a market for that product comes into being. As to unreliability of insurance as a source of compensation, that goes to the matter of enforcement of a judgment, not the issue of liability.

Another matter raised as a consideration is contained in the statement that "Before imposing a new duty of care on a social host, the court must be in a position to define for social hosts how that duty can be discharged. In so doing, the court sets boundaries and delineates a risk zone for the imposition of liability in negligence."[74] We respectfully disagree with that view.

The court cannot precisely define how the duty of care owed by a social host can be discharged any more than it can define the "reasonable person" and "reasonable care" standards that apply generally in the law of tort, nor define what constitutes an "unreasonable risk of harm" in a manner that would apply in all situations. Other formulations of the duty of care are not to place another person in a position where it is foreseeable that that person could suffer injury,[75] or to act in accordance with a reasonable standard of conduct so as not to create a reasonably foreseeable risk.[76] These are all broad expressions that do not lend themselves to any rigid definition as to how the duty can be discharged.[77]

> Conduct is negligent if it creates an unreasonable risk of harm . . . In measuring whether the hazard is an unreasonable one, the court balances the danger created by the defendant's conduct, on the one hand, and the

70. *Childs, supra,* footnote 2, at para. 82. See also para. 24.
71. *Ibid.,* at para. 88.
72. *Ibid.,* at para. 79.
73. "Social Host Liability"*, supra,* footnote 21, at p. 530.
74. *Childs, supra,* footnote 2, at para. 84.
75. *Crocker v. Sundance Northwest Resorts Ltd.,* [1988] 1 S.C.R. 1186 at para. 20, 51 D.L.R. (4th) 321, 29 O.A.C. 1.
76. *Stewart v. Pettie, supra,* footnote 8, at para. 50.
77. Linden, *Canadian Tort Law, supra,* footnote 38, at p. 120. See also *Kendall v. Fontaine, supra,* footnote 68, at para. 31.

> utility of that conduct, on the other hand. If the hazard outweighs the social value of the activity, liability is imposed; if it does not, the defendant is exonerated.

As the hazard posed by an impaired person far outweighs the social value of consumption of alcohol, and more particularly the excessive consumption of alcohol, the duty in broad terms — because each case will depend on its own facts — is to avoid the excessive supply of alcohol (with even one drink being excessive if that is sufficient to cause impairment and the host has actual or constructive knowledge of earlier consumption) or, in the case of a BYOB party, to deny entry to the premises of any excessive amount of alcohol and to set and enforce rules regarding the amount of alcohol consumption by each guest. While these are stringent obligations, they are justified by the scope and severity of the foreseeable harm that might otherwise result.

Just as use of a vehicle on the highway is not a fundamental value,[78] neither is excessive consumption of alcohol, whether in a commercial or social setting. As a matter of policy, the deterrence of such excessive consumption must have priority over the social value of hospitality in the form of serving excessive amounts of alcohol or furnishing the premises and the occasion for its consumption. Impairment creates an unreasonable risk of serious, even catastrophic, harm, so that the latter may be said to be "an irrelevant consideration to weigh in the scale".[79]

The appropriate response to the question whether it is just and fair to impose liability on social hosts is that it would be unjust and unfair to deny compensation in circumstances where the host has played a role in the creation of an unreasonable risk of harm, and to ignore the deterrent effect of such imposition of liability.

8. The Second Stage of the Anns Test

At this stage residual policy considerations are considered. The focus here is the effect of recognizing a duty of care on other legal obligations, the legal system and society generally.[80] For reasons already stated, there is no basis for "negativing the imposition of a duty of care"[81] on the ground of these residual policy considerations. Rather than supporting the exclusion of a duty of care, these considerations speak strongly in favour of a duty that would have a deterrent effect on the "menace" posed by intoxicated individuals.

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78. *R. v. Orbanski, supra,* footnote 61, at para. 24.
79. *Carvell v. Lai, supra,* footnote 32, at para. 32.
80. *Cooper v. Hobart, supra,* footnote 13, at para. 37.
81. *Ibid.,* at para. 30.

9. Standard of Care — Generally

It is important to distinguish between duty and standard of care. Duty of care turns on the relationship between the parties, while standard of care involves the question of what conduct is required to satisfy the duty.[82] "By definition, the standard of care is dependent on context . . . [I]t is relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures."[83]

In addition, "the law in all cases exacts a degree of care commensurate with the risk created".[84] Thus, those who erect electric lines carrying heavy charges "are bound to exercise the greatest possible care and to use every possible precaution"[85] and in some situations, such as those encompassed by the rule in *Rylands v. Fletcher*, strict liability is imposed.[86] A recent example of the imposition of strict liability involved in injuries caused by a dangerous wild animal.[87] Given the nature of the risk posed by an impaired person behind the wheel of a car, one that may legitimately be described as a "risk of calamity",[88] the standard of care required of both commercial and social hosts should be set very high indeed.

10. Standard of Care — The Current Approach

In addition to the requirement discussed above regarding foreseeability that the impaired person would likely be driving while still impaired, the courts have required actual or constructive knowledge on the part of the host that the person was in fact impaired.

The need for knowledge of impairment is reflected in the following comments:[89]

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82. *Stewart v. Pettie, supra,* footnote 8, at para. 32.
83. *Crocker v. Sundance Northwest Resorts Ltd., supra,* footnote 75, at para. 24. See also *Ingles v. Tutkaluk Construction Ltd.* (2000), 183 D.L.R. (4th) 193 at para. 20, [2000] 1 S.C.R. 298, 130 O.A.C. 201; *Dziwenka v. Alberta* (1971), 25 D.L.R. (3d) 12 at p. 22, [1972] S.C.R. 419, [1972] 1 W.W.R. 350.
84. *Dziwenka, ibid.,* at p. 22.
85. *Amos v. New Brunswick Electric Power Commission, supra,* footnote 33, at p. 743.
86. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (H.L.) See Linden, *Canadian Tort Law, supra,* footnote 38, at pp. 495-500.
87. *Cowles v. Balac,* [2005] O.J. No. 229 (QL), 29 C.C.L.T. (3d) 284, 19 C.C.L.I. (4th) 242 (S.C.J.).
88. The description employed in *Crocker v. Sundance Northwest Resorts Ltd., supra,* footnote 75, at para. 23.
89. See also *Broadfoot v. Ontario, supra,* footnote 3, at para. 7; *Prevost (Committee of) v. Vetter, supra,* footnote 5, at para. 22; *Haggarty v. Desmarais, supra,* footnote 6, at para. 4.

> [M]ost importantly, the trial judge did not find that the social hosts knew that Desormeaux was impaired when he drove away from the party.[90]
>
> Where there is a social host, there is no liability if the host had no knowledge of intoxication of his guest and that he would be operating a motor vehicle . . . Where the host has personal knowledge of the drinking habits of his guest and has knowledge that his guest is intoxicated, he has a duty of care . . . [T]he thread running through both the commercial host and the social host cases . . . is a knowledge of a state of intoxication on the part of the guest who drives and injures himself or a third party.[91]
>
> Even if the facts of the case disclosed a special relationship creating a potential duty of care, there can be no breach of that duty unless alcohol is supplied when there is clear evidence of obvious impairment. Serving alcohol alone will not create a duty of care. A duty of care requires that a host must serve alcohol to a guest whom he or she knows is impaired.[92]
>
> In short, I can find no evidence of visible intoxication which Dixon either saw or should have seen. I conclude that Baker may well have been one of those remarkable people with a high blood-alcohol reading who would not show apparent obvious signs of impairment and intoxication. Moreover, the positive duty owed by a tavern owner to protect patrons and others from the dangers of intoxication does not arise in this case, where there was no evidence of obvious or apparent signs of intoxication. To hold otherwise would be placing too high a standard of care on the Legion.[93]

Professor Adjin-Tettey summarized the law as it presently stands with the following remarks:[94]

> Even when a host supplies alcohol, a duty of care does not necessarily arise from the quantity of alcohol consumed. Rather, it is the degree of impairment that guests exhibit and the likelihood of harm to guests and others that constitute the basis of a legal duty on the defendant. Thus, reasonable foreseeability of injury cannot be established solely based on a guest's blood alcohol level at the time of the accident. As Quinn J. pointed out in *Broadfoot*, social hosts do not have the benefit of a guest's blood alcohol reading. This is consistent with the fact that people have varying degrees of tolerance to alcohol consumption. Therefore, the basis of a duty should remain observable signs of impairment and failure to avoid a foreseeable risk of injury. Emphasis on evidence of impairment ensures that social host liability arises only when the guest appears intoxicated, regardless of how much alcohol the guest consumes either prior to

90. *Childs, supra,* footnote 2, at para. 7.
91. *Calliou Estate, supra*, footnote 4, at paras. 35 and 39.
92. *Stevenson v. Clearview Riverside Resort, supra,* footnote 3, at para. 28.
93. *Skinner v. Baker Estate* (1991), 34 M.V.R. (2d) 157 at para. 33, 8 C.C.L.I. (2d) 154, [1992] I.L.R. ¶1-2809 *sub nom. Skinner v. Goldapple* (Ont. Ct. (Gen. Div.)).
94. "Social Host Liability", *supra,* footnote 21, at pp. 535-36.

> or while at the host's social event. Additionally, it allays some of the concerns about the chilling effects on social relations by reaffirming that the mere consumption of alcohol at a social gathering is not sufficient to impose liability. This is a principled position since social hosts might not be able to monitor the consumption patterns of their guests.

There is not always, however, a requirement for visible signs of intoxication or impairment. There can be constructive knowledge of impairment where the host knows the amount of alcohol that has been consumed. The absence of visible symptoms of intoxication in those cases is not a defence,[95] although in one decision knowledge of the amount consumed apparently was not sufficient: reference was also made to a requirement that the host have reason to suspect that the guest is intoxicated.[96] It is unclear whether that was intended to apply only in those situations where the amount consumed was below the level where intoxication would normally be present, or whether it was intended to apply also in those cases where a great deal of alcohol has been consumed but the guest simply does not exhibit signs of the impairment that would be expected having regard to the amount consumed. Furthermore, unlike the case of a commercial host where there is a statutory obligation to monitor the patron's consumption of alcohol, a social host apparently has no such obligation with regard to his or her guests, particularly when the host has no reason to believe that the guest will later be driving.[97]

The exception to the rule regarding the need for visible signs of intoxication or impairment does not apply where the host does not know the amount of alcohol that has been consumed,[98] even if the host is aware of the person's history of drinking, prior convictions for impaired driving, the fact that he must have exhibited signs of impairment that the host did not see, and the fact that two passengers in the car in which the person left were visibly intoxicated.[99] Similarly, the exception was found not to apply where the intoxicated person's wife did not consider him to be impaired.[100]

Another exception to the rule is that visible signs of intoxication or impairment are not necessary where the defendant has intentionally

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95. *Stewart v. Pettie, supra,* footnote 8, at para. 52; *Jacobsen v. Nike Canada Ltd., supra,* footnote 55, at para. 49.
96. *Calliou Estate, supra,* footnote 4, at para. 35.
97. *Childs, supra,* footnote 2, at paras. 55-56.
98. *Ibid.,* at para. 7.
99. *Ibid.,* at paras. 37-39 and 63-65.
100. *Broadfoot v. Ontario, supra,* footnote 3, at paras. 7-8. The statement was made (at para. 7): "The issue however is not the quantity of alcohol consumed but the degree of impairment."

structured the environment in such a way as to make it impossible to know whether intervention is necessary, because the unforeseeability of the risk is the direct result of the way the serving environment was structured.[101] That principle was established in a commercial host case, although it has also been applied in an employer-employee case.[102]

Even where there is actual or constructive knowledge of impairment, or where the lack of knowledge is due to the manner in which the environment has been structured, there remains another defence available to the host. The host's duty is limited to taking reasonable steps to prevent the impaired person from driving, such as calling a taxi for the guest, arranging a ride with a sober driver, or offering to put the guest up for the night at the host's home. As indicated in one decision, "The question then raised is . . . what more the host could have legally done or should have done."[103] As a last resort, there appears to be an obligation to call the police,[104] although that may apply only to commercial hosts.[105] Where the host is reasonably entitled to believe that the impaired person will be leaving in the care of a sober person, the host has no obligation to do anything, even if it is a commercial host.[106]

Professor Adjin-Tettey states[107]

> [A] *prima facie* duty of care should be recognized where it clearly ought to be in the reasonable contemplation of a host that failure to take preventive steps might cause injury to their guest or others . . . Focus on failure to act in the face of foreseeable risk of harm ensures that the basis of a duty remains the host's knowledge (both actual and constructive) of the patron's inebriated state and the risk of harm to him- or herself and others arising therefrom.

Where the relationship is that of employer-employee, the obligation goes beyond taking steps to prevent the impaired person from driving. The employer has an obligation not to introduce into the workplace conditions that would foreseeably place the employee at risk, such as supplying alcohol to the employee and failing to monitor his consumption.[108]

The reluctance to impose a positive duty to act, such as a duty to monitor consumption of alcohol (where there is no statutory duty to

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101. *Stewart v. Pettie, supra,* footnote 8, at para. 56.
102. *Jacobsen v. Nike Canada Ltd., supra,* footnote 55, at paras. 50-51.
103. *Haggarty v. Desmarais, supra,* footnote 6, at para. 4(d).
104. *Crocker v Sundance Northwest Resorts Ltd., supra,* footnote 75, at para. 25, citing *Menow v. Jordan House Ltd.*, *supra*, footnote 1.
105. *Childs, supra,* footnote 2, at para. 85.
106. *Stewart v. Pettie, supra,* footnote 8, at paras. 53-55.
107. "Social Host Liability", *supra*, footnote 21, at pp. 521 and 524.
108. *Jacobsen v. Nike Canada Ltd., supra,* footnote 55, at paras. 53-55.

do so) or a duty to take steps to prevent an impaired person from driving, is founded in the historic distinction between misfeasance (negligent conduct) and nonfeasance (the failure to take positive steps to protect others from harm).[109] While Canadian courts have become "increasingly willing to expand the number and kind of special relationships to which a positive duty to act attaches",[110] Major J. said: "I do, however, have difficulty accepting the proposition that the mere existence of this 'special relationship' [referring to the relationship between a commercial host and users of the highways], without more, permits the imposition of a positive obligation to act."[111]

11. Criticisms of the Current Approach

A host, whether commercial or social, who supplies alcohol that results either independently or in combination with earlier consumption in the impairment of a patron or guest, has caused or contributed to the creation of an unreasonable risk of harm both to the impaired person and to others, and particularly to users of the highway. A standard of care that focuses on actual or constructive knowledge of the impairment and on steps taken to prevent the intoxicated person from driving while still impaired, places the cart before the horse. The focus should be on the creation of the unreasonable risk of harm and not on after-the-fact conduct that seeks to manage the risk that the host has helped to create.

Professor Adjin-Tettey's summary of the current state of the law includes the comment that it is the degree of impairment that guests exhibit and the likelihood of harm to guests and others that constitute the basis of a legal duty on the defendant, and that social hosts do not have the benefit of a guest's blood alcohol reading.[112] It is, however, precisely because social hosts are sometimes unable to recognize the impairment that they have helped to create that negligence law should be geared to prevent the impairment, rather than to rely on the haphazard ability to recognize it after it has occurred. Similarly, the ability to avoid liability merely by showing that reasonable steps were taken to prevent the impaired person from driving is not nearly as effective an injury-prevention measure as the imposition of liability for playing a role in causing the impairment in the first place, nor does it accord appropriate weight to the negligent conduct in contributing to the creation of an unreasonable risk of harm.

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109. *Crocker v Sundance Northwest Resorts Ltd., supra,* footnote 75, at para. 17; *Haggarty v. Desmarais, supra,* footnote 6, at para. 11.
110. *Crocker, ibid.,* at para. 17.
111. *Stewart v. Pettie, supra,* footnote 8, at para. 48.
112. See footnote 94.

Just as the aim of screening drivers for impairment is to screen them at the road stop and not at the scene of an accident,[113] the aim of negligence law should be to prevent intoxication, not try to manage its consequences. Negligence law should "provide a mechanism for combating the continuing danger presented by the drinking driver" in the same way as does roadside screening by police officers.[114] The comment that[115]

> Emphasis on evidence of impairment ensures that social host liability arises only when the guest appears intoxicated, regardless of how much alcohol the guest consumes either prior to or while at the host's social event. Additionally it allays some of the concerns about the chilling effects on social relations by reaffirming that the mere consumption of alcohol at a social gathering is not sufficient to impose liability.

places the interests of the host and of social relations in priority to the interest of reducing the occurrence of catastrophic injuries and the interests of innocent victims. As stated above, the consequences of intoxication, and particularly of impaired driving, are so widespread and severe that every reasonable effort should be made to discourage by means of a disincentive both impaired driving and intoxication generally. One way of doing so is to apply the normal rules of negligence law: a person who has caused or contributed to the creation of an unreasonable risk of harm should be held liable where a foreseeable type of harm materializes. By the time impairment has occurred, an unreasonable risk of harm has vested. Everything subsequent to that is after-the-fact conduct that should not, generally speaking, provide a defence to a claim arising from the negligent conduct in contributing to the creation of that unreasonable risk of harm.

The concern about imposition of a positive duty to act is misplaced. A host's liability should be based on the excessive supply of alcohol or, in the case of a BYOB party, on furnishing the occasion and the venue for the consumption of alcohol to the point of impairment. In each instance, the liability would be based on misfeasance, not nonfeasance. There would be no imposition of a positive duty to act because the liability would not be based on any failure to recognize impairment and to take steps to prevent the impaired person from driving; the liability would be founded on the host's preceding positive acts.

12. BYOB Parties

Just as a social host who supplies alcohol to guests may be considered to be one level below that of a commercial host, the position of the social host at a BYOB party is one further level removed from that of

113. *R. v. Orbanski, supra,* footnote 61, at para. 26.
114. *Ibid.,* at para. 27.
115. See quotation at footnote 94.

the commercial host. Not only does the BYOB host not have a profit motive or a contractual relationship with the guest, he or she does not supply or serve the alcohol. This type of host merely provides the venue and the occasion for the consumption of alcohol that is brought by the guests themselves. These distinguishing features were found in *Childs* to be sufficient to bar any duty of care.[116]

The following statements were made in *Childs*:

> [T]here was no reason for the social hosts to think that their guests were relying on them to control their alcohol consumption.[117]
>
> In serving a person alcohol to the point of intoxication while knowing that the person is likely to drive afterwards, the host contributes to the risk of the guest committing a tort against the plaintiff. The host places the guest and users of the highway in a potentially hazardous position and is an active participant in creating the danger of an accident due to intoxication . . . Here, the social hosts were not in this sense active participants in creating the danger to users of the highway.[118]
>
> [T]he common law does not make one person liable for the conduct of a second person simply because the second person occasions damage to a third party that is reasonably foreseeable. The person sought to be held liable must be implicated in the creation of the risk . . . I cannot accept the proposition that that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road for monitoring the alcohol consumed by guests, even when the guests include a known drinker . . . It would not be just and fair in the circumstances to impose a duty of care.[119]

It is our view that a BYOB host should be considered to be a sufficiently active participant in the factual matrix leading to the impairment that liability based on the host's involvement in the creation of an unreasonable risk of harm is warranted. The following analogous comment, made in the context of the issue of vicarious liability, is apt: "Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires."[120] Contrary to the view expressed in *Childs*, we believe that it

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116. *Supra,* footnote 2, at paras. 69-70 and 73-75.
117. *Childs, ibid*., at para. 69.
118. *Ibid*., at para. 74.
119. *Ibid*., at para. 75.
120. *Blackwater v. Plint*, [2005] SCC 58, released October 21, 2005, at para. 20. Another analogous comment, also made in the context of the issue of vicarious liability, is: "The test for determining the sufficiency of the connection must 'not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability — fair and efficient compensation

would not be just and fair to excuse a BYOB host from liability for the foreseeable and grave risk of harm associated with the impairment of a guest when the host has directly or impliedly encouraged the consumption of alcohol and has facilitated the creation of that impairment. Both stages of the *Anns* test are satisfied. The policy considerations that are important elements of that test are particularly supportive of the imposition of a duty of care, notwithstanding the level of removal of BYOB hosts from commercial hosts. The inconvenience and social impact of an obligation to refuse to permit guests to bring along to the party excessive amounts of alcohol and to monitor the consumption by each guest pales in comparison to the potentially devastating consequences of impairment.

In one of the early social host cases, a high school graduation party at which 20 or 30 young people were expected to attend was "crashed" by others who heard about the party, with the result that there were approximately 200 young people present, many of whom had previously been drinking and brought their own alcohol to the party. The hosts made all of them welcome because it was a small community and most of those present knew each other. In declining to find the hosts liable for the injuries sustained in a post-party alcohol-related car accident, Gould J. said: "It would have been totally impractical for [the hosts] to have tried to prevent about 200 unexpected celebrating guests from drinking their own liquor, or *a fortiori* to have sorted out the 17-year-olds from those a year or two older and prevented the former from drinking the liquor they had brought to the party."[121] While that is certainly a reasonable point, it fails to deal with the underlying question whether the hosts could, and if so should, have denied entry to the party of a group so large that it would be impossible to control or monitor their behaviour (although causation, as referred to below, may still have been a live issue in the circumstances of the case). The *Baumeister* situation appears to have been a variation of that where visible signs of intoxication are not necessary where the host has intentionally structured the environment in such a way as to make it impossible to know whether intervention is necessary.[122]

13. Defences

There is no basis for liability where the host had no involvement in the impaired person's consumption of alcohol, either because that

for wrong and deterrence' ": *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, S.C.C., released October 28, 2005, at para. 40.

121. *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382 at para. 15, 38 C.C.L.T. 1 (S.C.).

122. See footnote 101.

consumption had taken place before the person arrived at the host's premises,[123] or because the consumption occurred prior to reporting for work and during work breaks, contrary to the employer's work rules and without the employer's knowledge.[124] Liability may also be precluded on grounds of causation,[125] including the defence of intervening cause.[126]

14. The U.K. View

The volume of alcohol-related cases in the United Kingdom is far less than that in Canada.[127] "[T]he development in English law of a set of principles of liability in respect of the intoxicated has taken place at a fairly restrained pace, particularly by comparison with other commonwealth jurisdictions."[128] Moreover, to date there have been no cases in the United Kingdom that have considered the duty of care owed by alcohol providers (either commercial or social) to persons other than the intoxicated guest. Thus, unlike their Canadian and American counterparts, English judges to date have not had to face the question of the duty of care owed to third party users of the road.

As a general principle, it can be said that the English courts are reluctant to impose alcohol-related liability on anyone other than the intoxicated individual unless it can be established that the defendant in some manner assumed responsibility for the intoxicated individual.[129] Moreover, throughout the relatively limited body of jurisprudence, there is echoed the sentiment that adults are expected to take responsibility for their own alcohol consumption and cannot look to third parties to bear the risk.[130] This, of course, is even more restrictive than the current Canadian approach, and one with which we respectfully disagree.

(1) Duty of Care

There is an emphasis on the elements of fairness, justice and reasonableness as the basis for the existence of a duty of care in those cases where the defendant has failed to take positive steps to prevent loss to

123. *Fitkin v. Latimer, supra,* footnote 39.
124. *John v. Flynn, supra,* footnote 11.
125. *Stewart v. Pettie, supra,* footnote 8, at paras. 66-68; *Wince (Guardian ad Litem of) v. Ball, supra,* footnote 4, at paras. 23-25. See also *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc., supra,* footnote 26, at paras. 23-51.
126. *Calliou Estate, supra,* footnote 4, at paras. 47 and 51.
127. E. Chamberlain, "Alcohol Provider Liability in Canada and the United Kingdom: Legal and Cultural Influences" (2004), 33 Comm. L. World Rev. 103 at p. 116.
128. C. McIvor, "Liability in Respect of the Intoxicated" (2001), 60 Camb. L.J. 109 at p. 127.
129. "Alcohol Provider Liability", *supra,* footnote 127, at p. 117.
130. *Ibid.,* at p. 117.

the plaintiff (often referred to as pure omissions cases).[131] Alcohol-provider liability cases are traditionally viewed as pure omissions cases, as it is typically alleged that the host failed to take affirmative steps to protect or prevent the intoxicated person from suffering injury.[132] It is not surprising, therefore, that the U.K. courts have imposed the requirement that there be some form of assumption of responsibility before finding a duty of care, as this is consistent with their more narrow approach to duty of care generally.[133] What constitutes an assumption of responsibility will be examined more fully below.

(2) Case Law

An early English decision is *Munro v. Porthkerry Park Holiday Estates Ltd.*,[134] where it was held that the sale of a large quantity of intoxicating liquor did not in itself impose a duty to take care of the customer. The duty would exist only where the defendant knew that the plaintiff was so intoxicated as to be incapable of caring for himself, and the absence of any immediate hazards or the presence of companions would be sufficient to absolve the defendant from any obligation to take further steps. Moreover, the defendant was entitled to assume that the customer would regulate his own consumption and would not consume liquor in such quantity as to become incapable of caring for himself.

Drawing from these principles, it was held in another decision that no duty of care arose until the defendant assumed responsibility for the condition of the intoxicated person. As stated by Beldam L.J.:[135]

> I can see no reason why it should not be fair, just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink. No one is better placed to judge the amount that he can safely consume or to exercise control in his own interest as well as in the interest of others. To dilute self-responsibility and to blame one adult for another's lack of self-control is neither just nor reasonable and in the development of the law of negligence an increment too far.

However, in putting the deceased into a bunk after he collapsed, the defendants in that case assumed responsibility for him and thereafter placed themselves under a continuing duty to exercise reasonable care for his safety.

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131. J.F. Keeler, "The Proximity of Past and Future: Australian and British Approaches to Analyzing the Duty of Care" (1989-90), 12 Adel. L. Rev. 93 at p. 103.
132. "Alcohol Provider Liability", *supra*, footnote 127, at p. 123.
133. *Ibid*.
134. Summarized at (1984), 81 L.S.G. 1368 (Q.B).
135. *Barrett v. Ministry of Defence* [1995] 1 W.L.R. 1217 at p. 1225 (C.A.).

In another decision, the court considered the duty of care owed by a taxi driver to an intoxicated passenger.[136] Although not a situation involving a provider of alcohol, it was held that the taxi driver did not owe an intoxicated fare any greater duty than that which he owed to a sober passenger — a duty to carry him safely during his journey and to set him down safely. The court reiterated the general principle that individuals are responsible for their own actions when it comes to consumption of alcohol, and that a duty of care would only be owed where a passenger had reached a state of intoxication such that he was incapable of taking responsibility for his own safety.[137] Jones J. cited as an example a situation where an individual intending to become intoxicated pre-ordered a taxi to take him home safely at the end of the evening. In those circumstances a duty would arise because there would be an express or implied assumption of added responsibility by the driver.[138]

In another decision emphasis was similarly placed on the view that a commercial host would ordinarily expect his customers to regulate their own consumption of alcohol and that the existence of a duty of care could arise only where the defendant had assumed responsibility for the plaintiff's safety, and that service of alcohol to a visibly intoxicated person did not, in itself, amount to such an assumption.[139] Significantly, Carswell L.C.J. considered and rejected the Canadian authorities on commercial host liability and expressly stated that he felt that they imposed an unreasonable burden.[140]

In another decision, the plaintiff was a soldier who fell from an army lorry while intoxicated.[141] The defendant had organized the outing for the soldiers and had arranged for the transportation. It was accepted that the defendant owed a duty of care to the plaintiff as a carrier. The issue before the court was whether this duty extended to impose an additional obligation to supervise the drunken soldiers while they were riding on the back of the truck. It was held that although ordinarily an adult could not rely on his drunkenness to impose a duty on others to take special care for his safety, this was not an invariable rule. Moreover, this rule did not apply on the facts of this case because the defendant had assumed responsibility for the intoxicated person by providing transport for the evening out. In these circumstances, the

136. *Griffiths v. Brown,* [1999] P.I.Q.R. 131 (Q.B.), summarized in "Alcohol Provider Liability", *supra,* footnote 127, at p. 120.
137. "Alcohol Provider Liability*", ibid*., at p. 120.
138. *Ibid*., at p. 120.
139. *Joy v. Newell (t/a The Copper Room),* [2000] N.I. 91, at p. 102 (C.A.).
140. *Ibid*., at p. 102.
141. *Jebson v. Ministry of Defence,* [2000] 1 W.L.R. 2055 (C.A.).

defendant owed a duty of care to ensure that the plaintiff was reasonably safe while in the back of the truck. At the conclusion of the judgment, Potter L.J. made the following comments:[142]

> I accept that an adult is generally to be treated as appreciative of the dangers created by his own actions and thus is likely to be held responsible for those actions when pursuing a dangerous course of conduct. Nonetheless, the law recognizes that there may be circumstances where by reason of drunkenness or other factors foreseeably likely to affect an adult's appreciation of danger, he may act in a childish or reckless fashion, and that in appropriate circumstances there may exist a duty on others to make allowance for those actions and to take precautions for the perpetrator's safety. I consider this to be just such a case . . .

In another case, the plaintiff went on a package holiday organized by the defendant tour company.[143] At a dinner event at which wine was provided the plaintiff was seated at the end of a long table such that he could not get up without disturbing the other guests. While in a state of intoxication, the plaintiff walked across the table and injured himself when he collided with a rotating fan. The following comments were made:[144]

> In my view, the key to the assessment of the degree of contributory negligence in this case is Airtours' conduct in exposing Mr. Brannan to a risk which it could easily have avoided and in a party setting for which it was responsible. It organized a crowded, noisy party evening, in which it was plainly foreseeable that party-goers might drink a bit too much and lose some of their normal inhibitions and close attention to their own safety.

It has been suggested that the decisions in *Jebson* and *Brannan* might signal a trend toward a judicial expansion in the U.K. of the duty of care in the context of alcohol-related liability.[145] The emphasis in the U.K. decisions on responsibility for one's own alcohol consumption should, in our view, be directed at the issue of contributory negligence in the case of a claim by the intoxicated person, or apportionment of liability in the case of a claim by an injured third party; it should not provide a complete defence. In addition, there should be no requirement for assumption by the host of responsibility for the person whose impairment the host helped to create.

15. American Law

The general common law rule in the United States is that it is not a tort either to sell or to provide intoxicating liquor to an ordinary able-bodied person, and no cause of action lies against a host for those injured

142. *Ibid.,* at para. 28.
143. *Brannan v. Airtours plc,* [1999] E.W.J. No. 141 (C.A.).
144. *Ibid.,* at para. 19.
145. "Alcohol Provider Liability", *supra,* footnote 127, at p. 120.

by the negligence of a person to whom liquor has been furnished. The reason usually given for this rule is that the proximate cause of the injury is the consumption of liquor, not the furnishing of it.[146]

(1) Minors

While the common law rule addresses the furnishing of liquor to able-bodied persons, recovery has also been denied to persons injured by minors to whom alcoholic beverages have been provided,[147] although in other cases liability has been imposed on common law principles in such situations.[148] In some cases, liability has been imposed on the basis of statutes forbidding the furnishing of alcohol to a minor,[149] but courts considering such statutes in other jurisdictions have found that they were designed to protect minors from the vice of drinking alcoholic beverages, not to protect third parties from the conduct of inebriated minors, and have held that these statutes do not create a civil cause of action against a social host in favour of an injured third party.[150]

Some states have enacted civil damages or "dram shop" legislation, which gives a right of action against the person selling or furnishing the liquor that caused the intoxication.[151] Nonetheless, most courts have interpreted such statutes not to provide a cause of action against a social host for injuries sustained by a third party as a result of the

146. "Social Host Liability", 62 A.L.R. 4th 16; 45 Am Jurisprudence 2d, Intoxicating Liquors §553.

147. For example: *Gariup Constr. Co. v. Foster*, 519 NE 2d 1224 (Ind. 1988); *Cox v. Malcolm*, 60 Wash App. 894, 808 P 2d 758 (1991); *Martin v. Watts*, 508 So 2d 1136 (Ala. 1987); *Bankston v. Brennan,* 507 So 2d 1385, 12 FlW 243 (Fla. 1987).

148. For example: *Rangel v. Parkhurst*, 64 Conn. App. 372, 779 A 2d 1277 (2001); *Cravens v. Inman*, 223 Ill App 3d 1059, 166 Ill Dec 409, 586 NE 2d 367 (1st Dist. 1991); *Charles v. Seigfried*, 251 Ill App 3d 1059, 191 Ill Dec 431, 623 NE 2d 1021(3d Dist. 1993), appeal granted 155 Ill 2d 562, 198 Ill Dec 541, 633 NE 2d 3 and revd 165 Ill 2d 482, 209 Ill Dec 226, 651 NE 2d 154, ALR 5th 2599, rehearing denied (May 30, 1995); *Fullmer v. Tague*, 500 NW 2d 432 (Iowa 1993).

149. For example: *Estate of Hernandez by Hernandez-Wheeler v. Arizona Bd. of Regents,* 177 Ariz 244, 866 P 2d 1330, 156 Ariz Adv Rep 43 (1994); *Knoell v. Cerkvenik-Anderson Travel, Inc.*, 185 Ariz. 546, 917 P 2d 689 (1996); *Sagadin v. Ripper,* 175 Cal App 3d 1141, 221 Cal Rptr 675 (3d Dist. 1985); *Sutter v. Hutchings*, 254 Ga 194, 327 SE 2d 716 (1985).

150. For example: *Chokwak v. Worley,* 912 P 2d 1248 (Alaska 1996); *Bass v. Pratt,* 177 Cal App 3d 129, 222 Cal Rptr 723 (1st Dist. 1986); *Forrest v. Lorrigan*, 833 P 2d 873 (Col. App. 1992); *United Services Auto. Assoc. v. Butler,* 359 So 2d 498 (Fla. App. D4 1978); *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 NE 2d 968, 135 Ed. Law Rep. 0143 (Ind. 1999).

151. 45 Am Jurisprudence 2d, Intoxicating Liquors §561.

negligence of an intoxicated minor,[152] although other courts have held that a civil damages statute can impose liability upon a social host.[153] Likewise, courts have refused to impose liability upon a host for ordering a minor guest to leave a party while intoxicated,[154] or for failing to supervise the conduct of the host's minor offspring.[155]

A related issue is the question what constitutes the furnishment of alcoholic beverages. It has been held that the mere purchase of alcoholic beverages is sufficient if the host permitted the alcohol to be dispensed to a minor.[156] Conversely, a host who did not purchase the alcoholic beverages consumed at his home by a minor guest was held not to be liable for injuries sustained by a third party.[157] In the same vein, parents have been held not to be liable where the minor consumed alcoholic beverages in their home that were provided either by the minor himself or by another guest.[158] However, a father who told

152. For example: *Liao v. Harry's Bar*, 574 So 2d 775 (Ala. 1990); *Bass v. Pratt*, 177 Cal App 3d 129, 222 Cal Rptr 723 (1st Dist. 1986); *Cantor v. Anderson,* 126 Cal App 3d 124, 178 Cal Rptr 540 (3d Dist. 1981); *De Bolt v. Kragen Auto Supply, Inc*. 182 Cal App 3d 269, 227 Cal Rptr 258 (4th Dist. 1986); *Bankston v. Brennan* 507 So 2d 1385, 12 FLW 243 (Fla. 1987).

153. *Martin v. Watts*, 508 So 2d 1136 (Ala. 1987); *Trainor v. Estate of Hansen*, 740 So. 2d 1201 (Fla. Dist. Ct. App. 2d Dist. 1999); *Williams v. Klemesrud,* 197 NW 2d 614, 64 ALR 3d 843 (Iowa 1972); *Lewis v. State*, 256 NW 2d 181, 95 ALR 3d 1221 (Iowa); *New Jersey v. Prudential Property & Cas Ins. Co*., 336 NJ Super 71, 763 A 2d 788 (App. Div. 2000); *Cole v. O'Tooles, Inc*. 222 App Div 2d 88, 643 NYS 2d 283 (4th Dept 1996).

154. *De Bolt v. Kragen Auto Supply, Inc*., 182 Cal App 3d 269, 227 Cal Rptr 258 (4th Dist. 1986).

155. *Langemann v. Davis*, 398 Mass 166, 495 NE 2d 847; *Christensen v. Parrish*, 82 Mich App 409, 266 NW 2d 826 (1978); *Reinert v. Dolezel,* 147 Mich App 149, 383 NW 2d 148 (1985); *Walker v. Kennedy*, 338 NW 2d 254 (Minn. 1983).

156. *Brattain v. Herron,* 159 Ind App 663, 309 NE 2d 150 (1974); *Rodriguez v. Solar of Michigan, Inc*., 191 Mich App 483, 478 NW 2d 914 (1991); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or 632, 485 OWD 18, 53 AlR 3d 1276 (1971); *Fassett v. Delta Kappa Epsilon* 807 F 2d 1150 (CA3 Pa. 1986).

157. For example: *Bennett v. Letterly*, 74 Cal App 3d 901 (4th Dist. 1977), 141 Cal Rptr 682; *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 NE 2d 968, 135 Ed. Law Rep. 1043 (Ind. 1999); *Spears v. Bradford*, 652 So 2d 628 (La. App. 1st Cir. 1995); *Bell v. Whitten*, 722 So 2d 1057 (La. Ct. App. 1st Cir. 1998); *O'Flynn v Powers*, 38 Mass App 936, 646 NE 2d 1091(1995).

158. *Martin v. Watts*, 508 So 2d 1136 (Ala. 1987); *Bowling v. Popp*, 536 NE 2d 511 (Ind. App. 1989); *Snyder v. Fish,* 539 NW 2d 197 (Iowa App. 1995); *Langemann v. Davis,* 398 Mass 166, 495 NE 2d 847 (1986); *Reinert v. Dolezel*, 47 Mich App 149, 383 NW 2d 148 (1985); *Walker v. Kennedy*, 338 NW 2d 254 (Minn. 1983); *Guercia v. Carter*, 712 NYS 2d 143 (App. Div. 2d Dep't 2000); *Daniel v. Reeder*, 16 SW 3d 491 (Tex. App. Beaumont 2000).

his son that if parental beer were used it would have to be replaced was found to have furnished beer to a minor.[159]

Knowledge on the part of the host that the minor to whom alcohol was served would be driving was a key factor in the imposition of liability in some cases,[160] although in one case it was held that it was not necessary for the host to know that the minor would be driving so long as it was foreseeable that he would be.[161]

In some states, contributory negligence is, or can be after a specified level, a complete defence,[162] but that has no effect on the right of an injured third party to recover against the social host.[163] In determining the host's liability, the principles of comparative negligence have been applied,[164] while elsewhere it was held that the host and guest were liable as joint tortfeasors.[165]

(2) Adult Guests

In the case of adult guests, courts in a number of jurisdictions have refused to impose liability upon the social host for injuries sustained by a third party as a result of the guest's negligence, citing the common law rule referred to above,[166] but others have not taken that approach.[167] Some courts have imposed liability on the basis of

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159. *Sagadin v. Ripper*, 175 Cal App 3d 1141, 221 Cal Rptr 675 (3d Dist. 1985); *Trainor v. Estate of Hansen*, 740 So 2d 1201 (Fla. Dist. Ct. App. 2d Dist. 1999); *O'Flynn v. Powers*, *supra,* footnote 157.
160. For example: *Sutter v. Hutchings*, 254 Ga 194, 327 SE 2d 716 (1985), on remand 174 Ga App 743, 332 SE 2d 175; *Cravens v. Inman*, *supra,* footnote 148; *Bowling v. Popp,* 536 NE 2d 511, §8[d] (Ind. App. 1989); *Linn v. Rand*, 140 NJ Super 212, 356 A 2d 15 (1976).
161. *Sagadin v. Ripper,* 175 Cal App 3d 1141, 221 Cal Rptr 675 (3d Dist. 1985).
162. 45 Am Jurisprudence 2d, Intoxicating Liquors §554.
163. *Runge v. Watts*, 180 Mont 91, 589 P 2d 145 (1979).
164. *Cravens v. Inman*, *supra,* footnote 148; *Koback v. Crook,* 123 Wis 2d 259, 366 NW 2d 857 (1985).
165. *Newsome v. Haffner*, 710 So 2d 184 (Fla. Dist. Ct. App. 1st Dist. 1998), review denied (Fla. Sept. 15, 1998); *Congini v. Portersville Valve Co*., 504 Pa 157, 470 A 2d 515 (1983); *Douglas v. Schwenk*, 330 Pa Super 392, 479 A 2d 608 (1984); *Kelly v. Gwinnell,* 96 NJ 538, 476 A 2d 1219 (1984).
166. For example: *Beeson v. Scoles Cadillac Corp*., 506 So 2d 999 (1987 Ala.); *Cantor v. Anderson* 126 Cal App 3d 124, 178 Cal Rptr 540 (1981 3d Dist.); *Murray v. United States* 382 F 2d 284 (CA9 Cal. 1967) (applying California law); *Kowal v. Hofher*, 181 Conn 355, 436 A 2d 1 (1980).
167. *Clendening v. Shipton* 149 Cal App 3d 191, 196 Cal Rptr 654 (4th Dist. 1983); *McGuiggan v. New England Tel. & Tel. Co.,* 398 Mass 152, 496 NE 2d 141 (1986); *Kelly v. Gwinnell*, *supra*, footnote 165; *Linn v. Rand,* 140 NJ Super 212, 356 A 2d 15 (1976); *Figuly v. Knoll,* 185 NJ Super 477, 449 A 2d 564 (1982); *Solberg v. Johnson*, Or 49\84, 760 P 2d 867 (1988); *Ferreira v. Strack*, 652 A 2d 965 (RI 1995).

statutes that make it a criminal offence to sell or furnish intoxicating beverages to an inebriated person,[168] but other courts have held that such statutes impose liability only upon commercial vendors of alcoholic beverages and provide no basis for imposing liability on a social host.[169] Moreover, it has been held that civil liability or dram shop statutes[170] do not impose liability upon the social host for the negligent acts of an intoxicated adult guest, nor does the failure to supervise and control the guests,[171] or even the host's conduct in assisting an impaired guest to an automobile and allowing the guest to drive.[172]

Courts have held that a social host could be subject to liability for direct negligence in the furnishing of intoxicants to an adult guest at a social function where the host was aware of the guest's intoxication,[173] particularly where the host knew or reasonably should have known that the guest would be operating a motor vehicle.[174] In one

168. *Coffman v. Kennedy*, 74 Cal App 3d 28, 141 Cal Rptr 267(1st Dist. 1977); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or 632, 485 P 2d 18, 53 ALR3d 1276 (1971); *Clendening v. Shipton*, 149 Cal App 3d 191, 196 Cal Rptr 654 (4th Dist. 1983); *Whelchel v. Laing Properties, Inc*., 1990 Ga App 182, 378 SE 2d 478 (1989); *Pirkle v. Hawley*, Ga App 371, 405 SE 2d 71 (1991); *Ashlock v. Norris,* 475 NE 2d 1167 (Ind. App. 1985); *Lopez v. Maez*, 98 NM 625, 651 P 2d 1269 (1982); *Solberg v. Johnson*, 306 Or 484, 760 P 2d 867 (1988).

169. *Jackson v. Cadillac Cowboy, Inc*. 337 Ark. 24, 986 SW 2d 410 (1999); *Fuhrman v. Total Petroleum, Inc*., 398 NW 2d 807 (1987 Iowa); *Ribbens v. Jawahir*, 175 Mich App 540, 438 NW 2d 252 (1988), appeal denied 432 Mich 905; *Boutwell v. Sullivan*, 469 So 2d 526 (Miss. 1985); *Componile v. Maybee*, 273 NJ Super 402, 641 A 2d 1143 (Law. Div. 1944); *Garren v. Cummings & McCrady, Inc*., 289 SC 348, 345 SE 2d 508 (App. 1986).

170. For example: *Beeson v. Scoles Cadillac Corp*. 506 So 2d 999 (Ala. 1987); *Jackson v. Azalea City Racing Club, Inc*. 553 So 2d 112 (Ala. 1989); *Andre v. Ingram,* 164 Cal App 3d 206, 210 Cal Rptr 150 (2d Dist. 1985); *Heldt v. Brei*, 118 Ill App 3d 798 (1st Dist. 1983).

171. *Biles v. Richter*, 206 Cal App 3d 325, 253 Cal Rptr 414 (3rd Dist. 1988), mod 206 Cal App 3d 598a (3rd Dist.); *Johnston v. KFC Nat Management Co*., 788 P 2d 159 (Hawaii 1990); *Heldt v. Brei,* 118 Ill App 3d 798 (1st Dist. 1983)*; D'Amico v. Christie,* 71 NY 2d 76, 62 ALR 4th 1 (1987); *Schirmer v. Yost,* 60 App Div 2d 789, 400 NYS 2d 655 (4th Dept. 1977); *McGlynn v. St. Andrew the Apostle Church*, 304 AD 2d 372, 761 NYS 2d 151 (1st Dep't. 2003).

172. *Ashlock v. Norris*, 475 NE 2d 1167 (Ind. App. 1985).

173. For example: *Murray v. United States*, 382 F 2d 284 (CA9 Cal. 1967); *Settlemyer v. Wilmington Veterans Post No. 49, American Legion, Inc*., 11 Ohio St. 3d 123, 11 Ohio BR 421, 464 NE 2d 521 (1984); *Whelchel v. Laing Properties, Inc*., 190 Ga App 182, 378 SE 2d 478 (1989).

174. For example: *Murray v. United States*, 382 F 2d 284 (CA9 Cal. 1967); *Klein v. Raysinger*, 504 Pa 141, 470 A 2d 507 (1983); *Garren v. Cummings & McCrady,*

case it was held that the provision of alcoholic beverages to an intoxicated adult guest constituted wanton and reckless conduct.[175] Liability was not imposed where the plaintiff failed to show that the host furnished or provided alcoholic beverages,[176] or where there was no evidence that the host knew or should have known that the guest was intoxicated when the last drink was served to him.[177]

A host has been held not to be the "furnisher" of the beverage where he neither purchased the alcoholic beverage nor exercised any control over it while it was on his premises.[178] Where the social host has furnished liquor to a guest, many factors may be considered in determining whether the host knew or should have known of the guest's intoxication, including what and how much the person was known to have consumed, the time involved, the person's behavior at the time, and the person's condition shortly after leaving.[179] Evidence of the guest's blood alcohol content at the time he left the host's home has, however, been found to be irrelevant, as it has no bearing on the guest's apparent condition at the time he took his last drink or on the question whether the host knew or should have known of the guest's intoxication at that time.[180]

In some cases the creation of a reasonably foreseeable risk of harm to others was the controlling factor,[181] although in others it was found that there was no foreseeability of an enhanced risk of injury to a third person.[182]

Inc. 289 SC 348, 345 SE 2d 508 (App. 1986); *Coulter v. Superior Court of San Mateo County*, 21 Cal 3d 144, 145 Cal Rptr 534, 577 P 2d 699 (1978).

175. *Kowal v. Hofher*, 181 Conn 355, 436 A 2d 1 (1980).

176. *Coulter v. Superior Court of San Mateo County*, 21 Cal 3d 144, 145 Cal Rptr 534, 577 P2d 669 (1978); *Burke v. Superior Court,* 129 Cal App 3d 570, 181 Cal Rptr 149 (4th Dist.); *Johnston v. KFC Nat. Management Co*., 788 P 2d 159 (Hawaii 1990); *Cremins v. Clancy,* 415 Mass 289, 612 NE 2d 1183 (1993); *Gibson v. Foakes*, 212 NJ Super 709, 515 A 2d 1314 (1986); *Kelly v. Gwinnell, supra*, footnote 165; *Farnham v. Inland Sea Resort Properties, Inc*., 824 A 2d 554 (Vt. 2003).

177. *Birnbrey, Minsk & Minsk, LLC v. Yirga*, 244 Ga. App. 726, 535 SE 2d 792 (2000); *Hodges v. Erickson*, 591 SE 2d 360 (Ga. Ct. App. 2003); *McGuiggan v. New England Tel. & Tel. Co.,* 398 Mass 152, 496 NE 2d 141 (1986); *Looby v. Local 13 Productions*, 751 A 2d 220 (Pa. Super Ct. 2000).

178. See *Bennett v. Letterly,* 74 Cal App 3d 901, 141 Cal Rptr 682 (4th Dist. 1977).

179. See *Ashlock v. Norris*, 475 NE 2d 1167 (Ind. App. 1985).

180. See *McGuiggan v. New England Tel. & Tel. Co*., *supra*, footnote 177.

181. *Coulter v. Superior Court of San Mateo County*, 21 Cal 3d 144, 145 Cal Rptr 534, 577 P 2d 699 (1978); *Clendening v. Shipton*, 149 Cal App 3d 191, 196 Cal Rptr 654 (4th Dist. 1983); *Kelly v. Gwinnell*, *supra*, footnote 165; *Figuly v. Knoll,* 185 NJ Super 477, 99 A 2d 564 (1982).

182. *Griesenbeck v. Walker*, 199 NJ Super 132, 488 A 2d 1038 (1985), cert. den. 101 NJ 264, 501 A 2d 932; *Kelly v. Gwinnell*, *ibid*.; *Blair v. Barker*, 698 NYS 2d 96

As indicated above, there is an American tradition of protection afforded to social hosts by a common law rule that those who furnish liquor to ordinary, able-bodied persons are not liable for injuries arising from their intoxication.[183] Arguments that have been made to counter that rule stress the considerable damage done by impaired driving and the increased strengthening of criminal sanctions, which indicate that the imposition of liability is consistent with and supportive of the accepted public goal to reduce drunken driving.[184] Some courts, however, have stated that any change in the common law rule should be made by the legislature.[185]

(3) Comments

The general common law rule applied in the United States is based on the rationale that the proximate cause of the injury is the consumption of alcohol, not its provision. That rationale allocates causal impact entirely to one cause and ignores the settled principle that most losses and injuries have more than a single cause. In a desire to shield social hosts from liability, many American courts have failed to apply the fundamental rule that a person who causes *or contributes to* the occurrence of an injury is liable for it.

16. Conclusion

The essence of a duty of care in the law of negligence is the obligation not to cause or contribute to the creation of an unreasonable risk of harm. An intoxicated person is an unreasonable risk moving about in human form. Experience has conclusively demonstrated that a real and substantial possibility of harm both to the impaired person and others, particularly users of the road, is reasonably foreseeable. There should be no requirement for foreseeability of the impaired person driving, but even with that requirement, there should be a rebuttable presumption of foreseeability. Having played a role in setting in train the creation of that unreasonable risk, a host, whether commercial or social, should not be entitled to raise the after-the-fact defences of inability to recognize the risk (in the form of the impairment caused by the alcohol), or of having taken reasonable but ultimately ineffective measures to manage the risk (in the form of steps taken to try to prevent

(App. Div. 3d Dep't. 1999).

183. "Third Party Liability for Drunken Driving: When 'One for the Road' Becomes One for the Courts" (1984), 29 Villanova L. Rev. 1119 at p. 1143.

184. See *Kelly v. Gwinnell*, *supra*, footnote 165.

185. See *Cartwright v. Hyatt Corp*., 460 F Supp 80 (1978, DC Dist. Col.), revd on other grounds as stated in *Norwood v. Marrocco,* 586 F Supp 101 (DC Dist. Col.), affd 251 App DC 2, 780 F 2d 110 (applying District of Columbia law), and

the impaired person from driving). As reflected in the aphorism "an ounce of prevention is worth a pound of cure", the focus should be on preventing the creation of the risk, not on attempts made to manage it.

While BYOB hosts occupy a level further removed from commercial hosts than social hosts who supply and serve alcohol to their guests, their encouragement, express or implied, of the consumption of alcohol, and their facilitation of the end result of impairment is an involvement sufficient to warrant the imposition of liability.

Social and BYOB hosts both fall within one of the established categories in which a duty of care has been recognized, or at a minimum are analogous to the category of commercial host, and the time has come for a different and more enlightened approach to the issue of liability for such hosts. The imposition of liability fully accords with established legal principles and would provide the "right balance" and constitute "prudent policy".[186] While the association of alcohol and social functions has deep roots, it is unfair and unjust to continue the social host's complete insulation from liability.[187]

The frequency and gravity of injuries caused by intoxicated persons, particularly in the context of drunk driving, requires a stern response from the civil as well as the criminal law. Those foreseeable consequences far outweigh any social value in serving, or permitting the consumption at the host's premises of, alcohol to the point of impairment. The deterrence provided by liability for damages is a measure that will, perhaps significantly, reduce this "social evil".

Boutwell v. Sullivan, 469 So 2d 526 (Miss. 1985).

186. See text at footnote 17.

187. The largest share of liability will, of course, almost certainly be placed upon the