# NEW JERSEY'S ALCOHOL SERVER LEGISLATION

## *I. Introduction*

On January 29, 1984, Linda Deluca went to the home of her friend Sharon Peet where she was served alcoholic beverages.[1] After consuming several drinks,[2] Deluca volunteered to drive Peet to a nearby store.[3] Although the weather conditions were favorable and the road well-lighted, Deluca struck and fatally injured a pedestrian.[4] A breathalyzer test indicated that Deluca's blood alcohol content was .21%.[5]

This fact pattern illustrates one of the many catastrophes resulting from drunk driving. Indeed, in 1985, 57,844 of the 158,224,000 licensed drivers in the United States were involved in fatal accidents;[6] 19,174 of those fatalities were alcohol related.[7] In an attempt to reduce the incidents of drunk driving, many courts and legislatures throughout the country have imposed civil liability on alcohol servers.[8]

Recently, the New Jersey Legislature has entered the contro-

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1 State v. Deluca, 108 N.J. 98, 100, 527 A.2d 1355, 1356 (1987).

2 *Id.* at 101, 527 A.2d at 1356 (the defendant was administered a breathalyzer test which revealed a blood alcohol content of .21%).

3 *Id.* at 100, 527 A.2d at 1356.

4 *Id.*

5 *Id.* A person is legally intoxicated in New Jersey when his blood alcohol content exceeds .10%. *See* N.J. STAT. ANN. § 39:4-50(a) (West 1973 & Supp. 1988).

6 *See* STATISTICAL ABSTRACT OF THE UNITED STATES 590 (107th ed. 1987).

7 *Id.* In addition, it is estimated that alcohol is a contributing factor in approximately 2,000,000 motor vehicle accidents each year resulting in a societal cost of $21 to $24 billion. *See* Comment, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403 (1988) (citing PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (1983)). Closely related to the personal tragedies associated with drunk driving, liquor liability insurance premiums in New Jersey have skyrocketed thereby adversely affecting the state's restaurant and commercial alcohol server's business. *See Public Hearing Before New Jersey Assembly Law, Public Safety and Corrections Comm. on Liquor Liability*, 202d Leg. 2d Sess. 34-36 (1986) (testimony of Frank Pombo, chairman of New Jersey Insurance Committee) [hereinafter *Public Hearings*].

8 *See* Special Project, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058, 1061-62 (1985) [hereinafter Special Project]; NAT'L ALCOHOLIC BEVERAGE CONTROL ASS'N, ALCOHOL SERVER LIABILITY: A COMPILATION OF DRAM SHOP AND RELATED STATUTES AND JUDICIAL RULINGS (7th ed. 1987) [hereinafter COMPILATION].

versial forum of alcohol server liability by enacting the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act (the Act).[9] The Act defines the civil liability of licensed alcohol servers for the negligent service of alcoholic beverages.[10] In addition, Senate Bill 1152 imposes a similar liability on the social host.[11]

The New Jersey legislative response to the issue of alcohol server liability came after forty years of landmark judicial decisions which created and consistently expanded the right of intoxicated guests and injured third parties to recover from alcohol servers.[12] Upon an examination of the common law's development of third-party rights, it is apparent that a legislative response in this field was expected.

## *II. Common Law Background*

The law pertaining to alcohol server liability in New Jersey finds its genesis in the case of *Rappaport v. Nichols*[13] and culminates with the landmark decision of *Kelly v. Gwinnell*.[14] In *Rappaport*, the New Jersey Supreme Court held tavern owners liable for the injuries caused to innocent third persons as a result of the tavernkeeper's negligent service of alcohol to minors and intoxicated guests.[15] In that case, Robert Nichols, a minor, became

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9 N.J. STAT. ANN. §§ 2A:22A-1 to -7 (West 1987).

10 *Id.* § 2A:22A-6. Note that the Act defines "Licensed alcoholic beverage server" as "a person who is licensed to sell alcoholic beverages pursuant to [N.J. STAT. ANN.] 33:1-1 et seq. or who has been issued a permit to sell alcoholic beverages by the Division of Alcoholic Beverage Control in the Department of Law and Public Safety[.]" *Id.* § 2A:22A-3. Note also, that as used in the Act

> "Alcoholic beverage" means a fluid, or a solid capable of being converted into a fluid, suitable for human consumption and having an alcoholic content of more than one-half of 1% by volume. The term shall include alcohol, beer, lager beer, ale, porter, naturally fermented wine, treated wine, blended wine, fortified wine, sparkling wine, distilled liquors, blended distilled liquors and any brewed, fermented or distilled liquors fit for use for beverage purposes, or any mixture of them.

*Id.*

11 N.J. STAT. ANN. §§ 2A:15-5.5 to -5.8 (West Supp. 1988).

12 *See infra* notes 13-59 and accompanying text. For a further discussion of New Jersey's common law development, see Note, *Social Host Held Liable for Serving Liquor to Intoxicated Guest Who Causes Auto Accident Injuring Third Party*, 15 SETON HALL L. REV. 616 (1985).

13 31 N.J. 188, 156 A.2d 1 (1959).

14 96 N.J. 538, 476 A.2d 1219 (1984).

15 *Rappaport*, 31 N.J. at 205, 156 A.2d at 10.

intoxicated at four Newark, New Jersey bars.[16] Upon leaving the fourth establishment, Nichols carelessly operated his mother's automobile, causing it to collide with the automobile operated by Arthur Rappaport.[17] Mr. Rappaport was killed in the collision and the administratrix of his estate instituted suit against Nichols, his mother, and the four tavern owners.[18] The trial court granted the defendant's motion for summary judgment.[19]

The New Jersey Supreme Court certified the matter on its own motion[20] and reversed the trial court's holding, concluding that a tavern owner could be held liable to a third party who was injured as a result of the tavern owner's negligent service of alcohol to minors and intoxicated patrons.[21] In reversing the trial court's decision, Justice Jacobs relied on the regulations of the Division of Alcohol Beverage Control which prohibited the serving of alcoholic beverages to minors and those "actually or apparently intoxicated."[22] The court interpreted the scope of these restrictions broadly and stated that the regulations "were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well."[23] Hence, the court concluded that a tavern owner could be found liable for the injuries sustained to a third party by the tavern owner's negligent service of alcohol to a patron, when the owner knows or has reason to believe that the patron is a minor or intoxicated.[24]

Nearly seven years later, the New Jersey Supreme Court decided *Soronen v. Olde Milford Inn, Inc.*[25] In that case, the court, relying on *Rappaport*, held that an intoxicated guest who fractured his skull on the defendant tavern owner's premises and later died, had a cause of action against the tavern owner if the guest was visibly intoxicated when he was served alcoholic bever-

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16 *Id.* at 192, 156 A.2d at 3.
17 *Id.*
18 *Id.*
19 *Id.* at 193, 156 A.2d at 3.
20 *Id.* at 191, 156 A.2d at 3.
21 *Id.* at 205, 156 A.2d at 10.
22 *Id.* at 202, 156 A.2d at 8.
23 *Id.*
24 *Id.* at 205, 156 A.2d at 10.
25 46 N.J. 582, 218 A.2d 630 (1966).

ages.[26] Concluding that a tavern owner could be liable to an intoxicated guest,[27] the supreme court nonetheless remanded the case to the trial court to establish whether the vendor knew that Mr. Soronen was intoxicated.[28]

The *Soronen* court also refused to allow the tavern owner the defense of contributory negligence.[29] In subscribing to the views set forth in the appellate division's decision, the supreme court adopted the appellate division's position that such a defense would relegate the tavern owner's duty to a meaningless stature.[30]

The scope of alcohol server liability was further considered by New Jersey courts in *Anslinger v. Martinsville Inn, Inc.*[31] In that case, the appellate division refused to extend server liability to a business enterprise for the fatal injury caused to a guest who attended a business affair at which alcohol was served.[32] In refusing to extend *Rappaport*, the court opined that such an extension for a "*quasi*-business" event would "lea[d] into extremely difficult questions of deciding what is business and what is social."[33]

Alcohol server liability with regard to the social host has its New Jersey common law roots in the case of *Linn v. Rand*,[34] where the appellate division held that a social host who served drinks to a minor could be held liable under *Rappaport* and its progeny for the subsequent foreseeable actions of the intoxicated child-guest.[35] In *Linn*, it was charged that Lucy Rand, a minor, was provided alcohol by Thomas Nacnodovitz.[36] After leaving Nacnodovitz's home, Rand negligently drove her vehicle striking Glenn Linn.[37] Suit was instituted on behalf of Linn by his guardian *ad litem* against Nacnodovitz for negligently "serving an excessive amount of alcoholic beverages" to the minor who was a

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26 *Id.* at 584, 586-87, 218 A.2d at 631-33.
27 *Id.* at 594-95, 218 A.2d at 637.
28 *Id.*
29 *Id.* at 592, 218 A.2d at 636.
30 *Id.* at 589, 218 A.2d at 634.
31 121 N.J. Super. 525, 298 A.2d 84 (App. Div. 1972).
32 *Id.* at 534, 298 A.2d at 88.
33 *Id.*
34 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976).
35 *Id.* at 215-17, 356 A.2d at 17-18.
36 *Id.* at 214, 356 A.2d at 16.
37 *Id.*

social guest at his home.[38] The trial court, however, refused to recognize Nacnodovitz's duty as a social host and granted defendant's motion for summary judgment.[39] In reversing the trial court's decision the appellate division held that a social host can be subject to the same liability as tavern owners and operators "under the forward-looking and far-reaching philosophy expressed in *Rappaport*,"[40] and that "in view of the important and novel issues outlined herein, the record was wholly inadequate for a decision on the merits by the summary judgment route."[41]

Ultimately, the court recognized that the plaintiff "may have a heavier burden of proof to carry when his suit is against a social host,"[42] and established the circumstances whereby a third party who was injured by an intoxicated minor could recover from a social host.[43] First, a plaintiff must prove that alcohol was actually served to the minor.[44] Second, the social host must be cognizant of the minor's age and his intention to drive a car.[45] Next, the host must nevertheless serve the minor alcohol "to the degree that [the minor is] unfit to drive."[46] Finally, it must be "reasonably foreseeable that [the minor] might injure [himself] or others," and that the injury was a proximate result of the social host's negligence.[47]

As mentioned previously, the New Jersey common law pinnacle for social host liability was reached in the landmark decision of *Kelly v. Gwinnell*.[48] In *Kelly*, the New Jersey Supreme Court held:

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

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38 *Id.*
39 *Id.* at 214-15, 356 A.2d at 16-17.
40 *Id.* at 216, 356 A.2d at 17-18.
41 *Id.* at 220, 356 A.2d at 19-20.
42 *Id.* at 217, 356 A.2d at 18.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 96 N.J. 538, 476 A.2d 1219 (1984).

intoxication.[49]

Donald Gwinnell drove Joseph Zak to his house[50] where both men began drinking.[51] Zak, his wife, and Gwinnell claimed that he had consumed only two or three drinks.[52] Gwinnell left the house and proceeded to drive away, all in the presence of Zak.[53] Shortly thereafter, Gwinnell was involved in a head-on collision with an automobile operated by Marie Kelly.[54]

Writing for the majority, Chief Justice Wilentz reasoned that the imposition of a duty on the social host to prevent foreseeable risks to guests was essentially a value judgment.[55] He opined that a sharpened public interest in combating the evils of drunken driving and past New Jersey court decisions supported the imposition of such a duty on social hosts.[56]

The court indicated that its imposition of a duty on the defendant would serve a dual purpose in that it would tend to deter drunk driving[57] and assist the court in achieving the goal of providing fair compensation to victims who are injured by drunk drivers.[58] Ultimately, the court concluded that the judiciary could properly impose such a duty on the defendant in the absence of legislative action,[59] because "the scope of duty in negligence cases has traditionally been a function of the judiciary."[60]

In a dissenting opinion, Justice Garibaldi recognized "the almost limitless implications of the majority's decision,"[61] and con-

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49 *Id.* at 548, 476 A.2d at 1224. Note, however, that a New Jersey Superior Court decision two years prior to *Kelly* intimated that a similar duty on the part of social hosts may be mandated by prior common law pronouncements when it denied a social host's motion for summary judgment. *See* Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (Law Div. 1982) (citing Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976); Coulter v. Superior Ct., 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978)).

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

51 *Id.*

52 *Id.* Despite these accounts, Gwinnell's blood-alcohol content was measured at .286%, or the equivalent of *13* drinks. *Id.*

53 *Id.*

54 *Id.*

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

56 *Id.* at 544-48, 476 A.2d at 1222-25.

57 *Id.* at 551, 476 A.2d at 1226.

58 *Id.*

59 *Id.* at 552-59, 476 A.2d at 1226-29.

60 *Id.* at 552, 476 A.2d at 1226.

61 *Id.* at 560, 476 A.2d at 1230 (Garibaldi, J., dissenting).

cluded that "the Legislature is better equipped to effectuate the goals of reducing injuries from drunken driving and protecting the interests of the injured . . . ."[62] In addition, Justice Garibaldi noted that judicial attempts in other states to establish a cause of action against a social host "have been abrogated or restricted by subsequent legislative action."[63] Accordingly, Justice Garibaldi concluded that she would support the imposition by the legislature of social host liability similar to that imposed by the majority provided "that legislative decision . . . was reached after a thorough investigation of its impact on average citizens of New Jersey."[64]

## *III. The New Jersey Legislative Response*

### A. *Licensed Server Legislation*

The New Jersey Licensed Alcoholic Beverage Server Fair Liability Act[65] represents New Jersey's first Dram Shop[66] legislation in over fifty years.[67] Introduced by Assemblyman Shusted as Assembly Bill 2264, the Act survived over one and one-half years of intense legislative activity.[68] While the effect of this legislation may decrease the number of drunk drivers on the road by defining a licensed server's standard of care, this is not the Act's expressed intent.

The Act specifically notes that its provisions "may result in the improvement of the alcoholic beverage liability insurance

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62 *Id.*

63 *Id.* at 561, 476 A.2d at 1231 (Garibaldi, J., dissenting).

64 *Id.* at 570, 476 A.2d at 1236 (Garibaldi, J., dissenting).

65 N.J. STAT. ANN. §§ 2A:22A-1 to -7 (West 1987).

66 Dram Shop acts are statutes "which impose liability on the seller of intoxicating liquors . . ., when a third party is injured as a result of the intoxication of the buyer where the sale has caused or contributed to such intoxication." BLACK'S LAW DICTIONARY 444 (5th ed. 1979). The first Dram Shop act was enacted in Wisconsin in 1849. *See* COMPILATION, *supra* note 8, at 3. The constitutionality of Dram Shop acts was upheld by the United States Supreme Court in Bartemeyer v. Iowa, 85 U.S. 129 (1873). *See also* Special Project, *supra* note 8.

67 In 1921, as a result of a national prohibition, New Jersey enacted a Dram Shop act entitled the "Prohibition Enforcement Act." *See* 1921 N.J. Laws ch. 103, at 184. The law was repealed 13 years later and replaced with the Alcohol Beverage Control Act. *See* 1934 N.J. Laws ch. 32, at 104; 1933 N.J. Laws ch. 436, at 1180. *See also* Special Project, *supra* note 8.

68 Several other bills were introduced which also attempted to either limit or predict a licensed server's liability. *See* A.864 (introduced 1985); A.1679 (introduced 1986); A.1876 (introduced 1986); A.2209 (introduced 1986); A.2211 (introduced 1986); A.347 (introduced 1984).

market in [the] State."[69] Essentially, the Act recognizes the difficulty that licensed alcoholic beverage servers face when attempting to secure liability insurance for their businesses.[70] Drastic increases in the price of liability insurance made it difficult for licensed servers to secure liability insurance.[71] Indeed, it was not uncommon for some licensed servers to face annual premium increases of more than 600% for liquor liability insurance.[72] Representatives from the insurance industry attributed these sharp premium increases to the rise in property damage and personal injury awards rendered against licensed servers.[73]

The Act attempts to predict the incidence of liability, "[i]n order to make it economically feasible for insurance companies to provide [liquor liability insurance] coverage . . . ."[74] In addition, the Act is "designed to protect the rights of persons who suffer loss as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server . . . ."[75]

To achieve these public policy objectives, the Act attempts "to encourage the development and implementation of risk reduction techniques" by defining the parameters in which a licensed alcoholic beverage vendor can be found civilly liable for the negligent service of alcoholic beverages.[76] The Act represents the exclusive *civil* remedy for persons injured or property damaged as the result of "the negligent service of alcoholic beverages by a licensed alcoholic beverage server."[77] Recovery is conditioned on the injured party's satisfaction of a three prong negligence test.[78]

First, a licensed alcoholic beverage server must have provided alcohol to a "visibly intoxicated"[79] person or minor "under circumstances where the server knew, or reasonably should have

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69 N.J. STAT. ANN. § 2A:22A-2 (West 1987).
70 *Id.*
71 *See supra* note 7 and accompanying text.
72 *Id.*
73 *Id.*
74 N.J. STAT. ANN. § 2A:22A-2 (West 1987).
75 *Id.*
76 *Id.*
77 *Id. See also id.* § 2A:22A-4.
78 *Id.* § 2A:22A-5(a)-(b).
79 "Visibly intoxicated" is defined as "a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication." *Id.* § 2A:22A-3.

known, that the person served was a minor."[80] Secondly, the resulting injury or damage must have been "proximately caused by the negligent service of alcoholic beverages."[81] Finally, "[t]he injury or damage [must have been] a foreseeable consequence of the negligent service of alcoholic beverages."[82]

In response to the liability insurance crisis facing licensed alcoholic beverage servers,[83] the early drafts of the Act sought to limit the alcoholic beverage server's liability by prohibiting an intoxicated person from suing for injuries or damage sustained as a result of his own actions and prohibiting a passenger in a car operated by an intoxicated person from suing a licensed server.[84] Upon the recommendation of Governor Kean,[85] these provisions were eliminated from the legislation finally enacted by the General Assembly.[86] Alternatively, the doctrine of comparative negligence[87] and the elimination of the doctrine of joint and several liability[88] were recommended by the Governor in an attempt to limit the licensee's liability to potential claimants.[89]

The Act, as adopted, allows for the application of comparative negligence principles in an action brought by a patron against a licensee.[90] This provision is contrary to case law which denied the application of comparative negligence in a suit brought by an injured passenger against the tavern owners who

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80 *Id.* § 2A:22A-5(b). "Minor" is defined as "a person under the legal age to purchase and consume alcoholic beverages according to P.L. 1972, c. 81 (C. 9:17B-1 et seq.)." *Id.* § 2A:22A-3.

81 *Id.* § 2A:22A-5(a)(2).

82 *Id.* § 2A:22A-5(a)(3).

83 New Jersey's licensed servers faced catastrophic liability insurance premiums. While the cause of these increases is disputed, the effect of these increases has seen many licensed servers' insurance premiums skyrocket in amounts of 700% in one year. *See Public Hearings, supra* note 7, at 39.

84 *See* Assembly Committee Substitute for A.2264 adopted May 8, 1986.

85 Governor's Recommended Amendment to A.2264 (Jan. 22, 1987).

86 *See* N.J. STAT. ANN. §§ 2A:22A-1 to -7 (West 1987).

87 The doctrine of comparative negligence generally reduces the amount of a plaintiff's recovery to represent the proportion of his fault. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 473 (5th ed. 1984). New Jersey has adopted the "aggregate approach" to comparative negligence which provides that a plaintiff may recover damages if his negligence is equal to or less than the combined negligence of all defendants. N.J. STAT. ANN. § 2A:15-5.1 (West 1987 & Supp. 1988).

88 *See* N.J. STAT. ANN. § 2A:53A-3 (West 1987).

89 *See supra* note 85.

90 N.J. STAT. ANN. § 2A:22A-6(a) (West 1987).

served the minor driver of the automobile in which the plaintiff was a willful passenger.[91] Judicial opinions, however, did allow comparative negligence principles to apply in actions by third parties against licensees.[92] Due to the inequitable allocation of losses resulting from the inconsistent application of comparative negligence by the courts, the Act adopted the Governor's recommendation and requires that comparative negligence principles apply in all instances.[93]

In addition, the Act eliminates the doctrine of joint and several liability in all actions brought against licensed alcoholic beverage servers.[94] By relieving licensees of the uncertain consequences resulting from the doctrine of joint and several liability, the Act holds licensees liable for no more than their percentage share of negligence.[95]

Finally, in an attempt to predict the liability insurance market more accurately, the Act contains a section which explains the role of the Department of Insurance in monitoring the insurance market.[96] Under the Act, the Department of Insurance is required to:

> gather information and statistics on the number of insurers including surplus lines insurers, issuing alcoholic beverage insurance policies, the number of policies issued, the premiums for such policies, the number of civil actions filed in accordance with the provisions of [the] act, the amounts of damages awarded in civil actions or the amounts of settlements, and any other information deemed necessary in order to determine the effect of [the] act on the alcoholic beverage liability insurance market.[97]

In addition, the Department of Insurance must issue an initial report based on its findings to the Governor and the legislature within two years following the effective date of the Act.[98] The Department of Insurance must issue a final report one year following the release

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91 *See* Aliulis v. Tunnel Hill Corp., 59 N.J. 508, 284 A.2d 180 (1971).

92 *See* Buckley v. Estate of Pirolo, 101 N.J. 68, 500 A.2d 703 (1985).

93 N.J. STAT. ANN. § 2A:22A-6(a) (West 1987); *see also supra* note 85.

94 *Id.* § 2A:22A-6(b).

95 *Id.*; *see also supra* note 85.

96 *Id.* § 2A:22A-7.

97 *Id.*

98 *Id.*

of its initial findings.[99]

The consumption of alcohol is not an activity solely undertaken in taverns and nightclubs. Conversely, most drinking takes place in more informal settings. Because judicial opinions have imposed expansive liability on social hosts,[100] the New Jersey Legislature has passed legislation which imposes liability on the social host which is similar to the liability imposed on the licensed alcoholic beverage server under the Act.[101]

### B. *Social Host Legislation*

The social host legislation represents an intense and bipartisan response to the New Jersey Supreme Court's landmark decision in *Kelly v. Gwinnell*.[102] Public fear about the potential expansion of the *Kelly* doctrine existed[103] despite contrary indications by the courts.[104] Reacting to this public fear, as well as to the urging of the supreme court in *Kelly*,[105] the legislature[106] passed a comprehensive social host liability law.[107]

The social host legislation specifically provides that a social

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99 *Id.*

100 *See* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976).

101 N.J. STAT. ANN. §§ 2A:15-5.5 to -5.8 (West Supp. 1988).

102 96 N.J. 538, 476 A.2d 1219 (1984).

103 *See Public Hearings*, *supra* note 7.

104 Cases decided after *Kelly* have narrowly applied the *Kelly* court's specific holding. *See* Jensen v. Schooley's Mountain Inn, Inc., 216 N.J. Super. 79, 522 A.2d 1043 (App. Div. 1987) (tavern owner not liable when visibly intoxicated patron left tavern, climbed tree and fell into river bank sustaining fatal injuries); Griesenbeck v. Walker, 199 N.J. Super. 132, 488 A.2d 1038 (App. Div. 1985)(social host not liable when intoxicated guest drove home, left vehicle and negligently started a fire in home causing fatal injuries); Gibson v. Foakes, 212 N.J. Super. 709, 515 A.2d 1314 (Law Div. 1986)(social host not liable when guest brought brandy to host's home, mixed it with nonalcoholic beverages provided by host and later was involved in auto accident).

105 *Kelly*, 96 N.J. at 570, 476 A.2d at 1235 (Garibaldi, J., dissenting). The dissent indicated that the legislature would be the appropriate branch to impose any liability on a social host. *Id.* Accordingly, Justice Garibaldi wrote: "I do not propose to fashion a legislative solution. That is for the Legislature. I merely wish to point out that the Legislature has a variety of alternatives to this Court's imposition of unlimited liability on every New Jersey adult." *Id.*

106 For a detailed discussion of the legislative history of the Social Host Liability Bill, see Special Project, *supra* note 8, at 1115 n.418.

107 N.J. STAT. ANN. §§ 2A:15-5.5 to -5.8 (West Supp. 1988).

host[108] will be held liable when he "willfully and knowingly" provides alcoholic beverages to a visibly intoxicated person[109] in the social host's presence or to a visibly intoxicated person "under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another . . . ."[110] In addition, a social host must serve "alcoholic beverages to the visibly intoxicated person under circumstances which created an unreasonable risk of foreseeable harm to the life and property of another [with the social host failing] to exercise reasonable care and diligence to avoid the foreseeable risk . . . ."[111] Finally, the injury must arise "out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host."[112]

To determine a social host's liability, the social host legislation provides for objective standards based on the blood alcohol content of the intoxicated person.[113] If the individual's blood alcohol content is less than .10%, there is an irrebuttable presumption "that the person tested was not visibly intoxicated in the social host's presence and that the social host did not provide alcoholic beverages to the person under circumstances which manifested reckless disregard of the consequences as affecting the life or property of another . . . ."[114] However, a rebuttable presumption exists when the intoxicated person's blood alcohol level is between .10% and .15%.[115]

The social host legislation also contains a provision which exempts the social host from liability "to a person who has at-

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108 As used in the Bill, "social host" is defined as:

> a person who, by expressed or implied invitation, invites another person onto an unlicensed premises for purposes of hospitality and who is not the holder of a liquor license for the premises and is not required to hold a liquor license for the premises under Title 33 of the Revised Statutes, and who legally provides alcoholic beverages to another person who has attained the legal age to purchase and consume alcoholic beverages.

*Id.* § 2A:15-5.5.

109 "Visibly intoxicated" is defined as a "state of intoxication accompanied by a perceptible act or series of actions which present clear signs of intoxication." *Id.*

110 *Id.* § 2A:15-5.6(b)(1).

111 *Id.* § 2A:15-5.6(b)(2).

112 *Id.* § 2A:15-5.6(b)(3).

113 *Id.* § 2A:15-5.6(c).

114 *Id.*

115 *Id.*

tained the legal age to purchase and consume alcoholic beverages [and who has suffered damages] as a result of the social host's negligent provision of alcoholic beverages to that person."[116] In essence, this section is intended to prohibit any adult who becomes intoxicated through the negligent service of alcoholic beverages by the social host, and who subsequently injures himself, from instituting suit against the social host.[117]

Similar to the Act, the social host legislation attempts to limit an alcohol server's potential liability by including a provision which incorporates the doctrine of comparative negligence and a section eliminating the doctrine of joint and several liability.[118] The comparative negligence section requires the trier of fact to consider the intoxicated person's own negligence and to "allocate a percentage of negligence to that person."[119] Additionally, the social host legislation rejects the doctrine of joint and several liability and provides that a "social host . . . shall be responsible for no more than that percentage share of the damages which is equal to the percentage of negligence attributable to [him] . . . ."[120]

## *IV. Alcohol Server Liability—Other Jurisdictions*

Upon examination of the national status of alcohol server liability, it is evident that courts and legislatures are beginning to recognize the liability of the social host for the negligent service of alcohol.[121] At the time of this writing, several states have recognized, either statutorily or judicially, the potential liability of a social host for the negligent service of alcoholic beverages.[122]

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116 *Id.* § 2A:15-5.7.

117 *See generally* Governor's Recommended Amendment to S.1152 and S.545 (Nov. 9, 1987).

118 N.J. STAT. ANN. § 2A:15-5.8 (West Supp. 1988).

119 *Id.* § 2A:15-5.2(b).

120 *Id.* § 2A:15-5.8.

121 *See infra* notes 127, 140-41 and accompanying text.

122 The following states have statutes which either expressly impose liability on social hosts for the negligent or reckless service of alcoholic beverages, *or can be broadly interpreted to impose such liability*: Alabama, ALA. CODE §§ 6-5-70, -71 (1975); Colorado, COLO. REV. STAT. § 12-46-112.5(4)(I) (Supp. 1987); Idaho, IDAHO CODE § 23-808(3)(a), (b) (Supp. 1987); Maine, ME. REV. STAT. ANN. tit. 28-A, §§ 2506, -2507 (West Supp. 1988); Mississippi, MISS. CODE ANN. § 67-3-73(3) (Supp. 1987); Montana, MONT. CODE ANN. § 27-1-710(3)(a)-(c) (1988); New Jersey, N.J. STAT. ANN. §§ 2A:15-5.5 to -5.8 (West Supp. 1988); Utah, UTAH CODE ANN. § 32A-14-

Nonetheless, jurisdictions are still more reluctant to impose a duty on social hosts than on licensed servers.[123]

A. *Licensed Server Liability*

Currently, a majority of states have statutorily expressed a desire to impose some form of liability upon commercial servers for the negligent provision of alcoholic beverages.[124] Several of these states have either recognized a common law liability for commercial servers of alcoholic beverages in conjunction with

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1(a)-(d) (Supp. 1986); Vermont, VT. STAT. ANN. tit. 7, § 501(a)(1)-(4) (Supp. 1987); Wisconsin, WIS. STAT. ANN. § 125.035(1)-(5) (West Supp. 1987). However, one commentator has suggested that courts are unlikely to impose liability upon social hosts based on broadly worded Dram Shop statutes. *See* Comment, *supra* note 7, at 409.

Additionally, the following states have judicial opinions which imposed liability on the social host for the negligent or reckless service of alcoholic beverages: Georgia, Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985); Indiana, Davis v. Stinson, 508 N.E.2d 65 (Ind. Ct. App. 1987); Massachusetts, McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 496 N.E.2d 144 (1986); Michigan, Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985); New Jersey, Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Pennsylvania, Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983), but see Burkhart v. Brockway Glass Co., 352 Pa. Super. 204, 507 A.2d 844 (Pa. Super. Ct. 1986) (social hosts will not be held civilly liable for furnishing alcoholic beverages to their guests provided the guests are competent, adult individuals); Washington, Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295 (1984); Wisconsin, Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985).

123 *See infra* notes 124-28 and accompanying text.

124 ALA. CODE § 6-5-70 (1975); ALASKA STAT. § 04.21.020 (1986); ARIZ. REV. STAT. ANN. § 4-301 (West Supp. 1987); CAL. BUS. & PROF. CODE § 25602.1 (West 1988) (liability for negligent service to a minor); COLO. REV. STAT. §§ 12-46-112.5, 12-47-128.5, 13-21-103 (Supp. 1987); CONN. GEN. STAT. ANN. § 30-102 (West Supp. 1988); FLA. STAT. ANN. § 768.125 (West 1986); GA. CODE ANN. § 51-1-18 (1982); IDAHO CODE § 23-808 (Supp. 1987); ILL. ANN. STAT. ch. 43, para. 135, § 6-21 (Smith-Hurd 1987); IND. CODE ANN. § 7.1-5-10-15.5 (Burns Supp. 1987); IOWA CODE ANN. § 123.49 (West 1987); ME. REV. STAT. ANN. tit. 28-A, §§ 2501-2516 (West 1988); MICH. STAT. ANN. § 18.993 (Callaghan Supp. 1987); MINN. STAT. ANN. §§ 340A.801, 340A.802 (West Supp. 1988); MISS. CODE ANN. § 67-3-73 (Supp. 1987); MO. ANN. STAT. § 537.053 (Vernon 1988); MONT. CODE ANN. § 27-1-710 (1988); N.H. REV. STAT. ANN. §§ 507-F:1 to -F:8 (Supp. 1988); N.J. STAT. ANN. §§ 2A:22A-1 to -7 (West 1987); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1988); N.C. GEN. STAT. §§ 18B-120 to -128 (1983); OHIO REV. CODE ANN. §§ 4399.01, 4399.02, 4399.19 (Anderson 1982); OR. REV. STAT. ANN. § 30.950 (1983), but see OR. REV. STAT. ANN. § 30.960 (1983); PA. STAT. ANN. tit. 47 § 4-497 (Purdon 1969); R. I. GEN. LAWS §§ 3-14-1 to -15 (1987); TENN. CODE ANN. §§ 57-10-101, -102 (1987); UTAH CODE ANN. §§ 32A-14-1, -2 (1986); VT. STAT. ANN. tit. 7, § 501 (Supp. 1987); WIS. STAT. ANN. § 125.035 (West Supp. 1987); WYO. STAT. § 12-5-502 (1987).

the states' statutory liability or have not overruled the existing statute.[125] Conversely, some states have established liability on commercial servers of alcoholic beverages exclusively through their common law.[126] North Dakota, however, has not addressed the issue through its common law, nor does it presently have a Dram Shop statute in effect.[127] Finally, some jurisdictions refuse to impose liability on the commercial server of alcoholic beverages either by statute or through the common law.[128]

In some instances, the courts have expressly refused to impose common law liability on commercial servers of alcoholic beverages. For instance, Maryland does not have a Dram Shop statute which imposes liability on commercial servers of alcoholic beverages. In the absence of such a legislative declaration, the Maryland Court of Appeals in *Felder v. Butler*,[129] refused to impose common law liability on commercial servers of alcoholic beverages for their negligent service of alcoholic beverages.

In *Felder*, the defendant tavern owner negligently served alcoholic beverages to Cecilia Hawkins when she was visibly intoxicated.[130] Shortly after leaving the establishment, Hawkins was involved in a head-on collision with the plaintiff's automobile

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125 Arizona recognizes a common law liability in addition to a statutory liability, as do Colorado, Indiana, Mississippi, Montana, New Mexico, North Carolina, Oregon, Wisconsin, and Wyoming. *See* Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Kirby v. Flamingo Club, Inc., 532 P.2d 975 (Colo. App. 1974); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 1027 (1966); Munford, Inc. v. Peterson, 368 So.2d 213 (Miss. 1979); Nehring v. LaCounte, 712 P.2d 1329 (Mont. 1986); Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584 (1983); Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983); Sorenson v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); McClellan v. Tattenhoff, 666 P.2d 408 (Wyo. 1983).

126 *See* Ono v. Applegate, 62 Haw. 131, 612 P.2d 533 (1980); Michnik-Zilberman v. Gordon's Liquor, Inc., 14 Mass. App. Ct. 533, 440 N.E.2d 1297 (1982), *aff'd*, 390 Mass. 6, 453 N.E.2d 430 (1983); Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986); Christiansen v. Campbell, 285 S.C. 164, 328 S.E.2d 351 (S.C.Ct.App. 1985).

127 North Dakota's Dram Shop legislation was repealed in 1987.

128 At the time of this writing, the states which have refused to impose liability on commercial servers of alcoholic beverages either by statute or through judicial opinion include Arkansas, Delaware, Kansas, Louisiana, Maryland, Nebraska, Nevada, South Dakota, and Virginia. The District of Columbia has also refused to establish liability on the commercial server of alcoholic beverages.

129 292 Md. 174, 438 A.2d 494 (1981). *See also* Fisher v. O'Connor's, Inc., 53 Md. App. 338, 452 A.2d 1313 (1982).

130 *Felder*, 292 Md. at 175, 438 A.2d at 495.

causing serious injuries.[131] In refusing to extend liability to the commercial server, the court relied on one of its earlier common law decisions as well as the state's absence of a Dram Shop statute.[132]

Recognizing its power to modify common law rules in light of changing conditions, the Maryland court nevertheless concluded that the "declaration of public policy is normally the function of the legislative branch . . . ."[133] The court reasoned that legislative inaction was a clear sign that the legislature "did not intend to impose civil liability upon alcoholic beverage vendors for the tortious acts of their intoxicated customers."[134]

In a dissenting opinion, Judge Davidson acknowledged that the evolution of the common law, coupled with the adverse consequences associated with drunk driving, required the imposition of liability on commercial servers.[135] In addition, the dissent questioned the majority's conclusion that legislative inaction translates into a public policy decision to "[prohibit] civil damage actions against licensed vendors of intoxicating liquors for the tortious acts of minors or intoxicated patrons to whom they sell alcoholic beverages . . . ."[136]

Although the majority of jurisdictions do not follow Maryland's draconian approach they do, however, limit a commercial server's liability to some extent. Indeed, many jurisdictions which impose liability on commercial servers do so only if alcohol was served to a minor or to one obviously intoxicated. Moreover, the California Dram Shop Act has further circumscribed a commercial server's duty by imposing liability for the negligent service of alcohol if the patron was an "obviously intoxicated minor."[137]

### B. *Social Host Liability*

Legislation which can be interpreted as imposing some form of liability on a social host exists in some states. Also, some

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131 *Id.* at 175-76, 438 A.2d at 495.
132 *Id.* at 176-84, 438 A.2d at 495-500.
133 *Id.* at 183, 438 A.2d at 499.
134 *Id.* at 184, 438 A.2d at 499.
135 *Id.* at 186, 438 A.2d at 500-01 (Davidson, J., dissenting).
136 *Id.* at 186, 438 A.2d at 500 (Davidson, J., dissenting).
137 CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1988).

states impose some form of liability on social hosts through common law decisions. In several states and the District of Columbia, the question has been left open because there are no reported court decisions.[138] Finally, several jurisdictions have proscribed social host liability either by statute or by common law pronouncement.[139]

While recognizing the adverse consequences of drunk driving, many courts and legislatures nevertheless remain hesitant to impose liability upon a social host for the negligent service of alcoholic beverages. In *Bankston v. Brennan*,[140] for example, the Florida Supreme Court exempted social hosts from any form of liability for the negligent service of alcoholic beverages to social guests. Florida's Dram Shop statute, while appearing to apply to social hosts, has nonetheless been narrowly interpreted by the courts.[141] As a result, social hosts in Florida are immunized from liability for the injuries caused to third parties as a result of the social host's furnishing of alcoholic beverages to his guests.[142]

The Florida statute provides:

> A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person

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138 Alaska, Arkansas, Connecticut, District of Columbia, Hawaii, Kansas, Kentucky, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia and West Virginia.

139 Jurisdictions which explicitly refuse to recognize a social host's liability to an intoxicated adult include: Arizona, ARIZ. REV. STAT. ANN. § 4-301 (West Supp. 1987), Keckonen v. Robles, 146 Ariz. 268, 705 P.2d 945 (Ariz. App. 1985); California, Coulter v. Superior Ct., 21 Cal. 3d 144, 577 P.2d 669, 670, 145 Cal. Rptr. 534, 535 (1978); Florida, FLA. STAT. ANN. § 768.125 (West 1986), Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987); Illinois, Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Iowa, IOWA CODE ANN. § 123.49(1)(a) (West 1987), *modifying* Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985); Maryland, Kuykendall v. Top Notch Laminates Co., 70 Md. App. 244, 520 A.2d 1115 (1987); Minnesota, Cady v. Coleman, 315 N.W.2d 593 (Minn. 1982); Missouri, Harriman v. Smith, 697 S.W.2d 219 (Mo. Ct. App. 1985); Ohio, Settlemeyer v. Wilmington Veterans Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984); South Carolina, Garren v. Cummings & McCrady, Inc., 345 S.E.2d 508 (S.C.Ct.App. 1986); Wyoming, WYO. STAT. § 12-8-301(a) (1987).

140 507 So.2d 1385 (Fla. 1987).

141 *See id.*

142 *See id.*

> habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.[143]

The presence of the word "furnishes" in the statute implies that the legislation imposes liability upon social hosts. In *Bankston* however, the Florida Supreme Court clearly decided that this statute does not apply to social hosts and that there is no duty imposed on the social host under Florida's common law decisions.[144]

In *Bankston*, Brian Francis Brennan, a minor, attended a party given by the Ladikas family, where he was served and he consumed alcoholic beverages.[145] On his way home from the party, Brennan's automobile collided with the vehicle operated by Eddie Bankston.[146] Bankston, his wife Mary, and his daughter Lori, all suffered injuries as a result of the accident.[147]

The Bankstons instituted suit alleging that Florida law established a cause of action against negligent social hosts.[148] The trial court relied on two prior common law decisions which held "that no cause of action exists against a social host under the circumstances of this case," and dismissed the Bankston's claim for failure to state a cause of action.[149] The trial court's dismissal was subsequently affirmed by the district court of appeal.[150]

The Florida Supreme Court granted certification to decide whether there was "a cause of action against a social host and in favor of a person injured by an intoxicated minor who was served alcoholic beverages by the social host."[151] Writing for the majority, Justice Ehrlich noted that the legislature's presumed motivation in enacting the statute in question was its desire to limit the already existing liability of vendors.[152] Accordingly, the court opined that it would be illogical to interpret the statute broadly so as to create a new cause of action against social hosts when the statute was specifi-

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143 FLA. STAT. ANN. § 768.125 (West 1986).
144 *Bankston*, 507 So.2d at 1386.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.* at 1385.
152 *Id.* at 1386.

cally enacted to limit liability.[153]

As noted earlier, the Florida Supreme Court also refused to recognize a common law cause of action against social hosts.[154] The court recognized that the Florida Legislature has shown through its enactments "a desire to make decisions concerning the scope of civil liability in this area."[155] Accordingly, the court concluded that "when the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for [the] Court to defer to the legislative branch."[156] In fact, the Florida Supreme Court recognized that "of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus."[157]

In a dissenting opinion, Justice Adkins maintained that the plain language of the Florida statute requires the court to impose liability on "a social host who willfully and unlawfully serves alcoholic beverages to a minor . . . ."[158] The dissent recognized that "a social host who serves alcoholic beverages to a minor is a *person* who *furnishes* alcoholic beverages to a minor" within the prohibition of the statute.[159] (Emphasis in original). Justice Adkins also recognized that the Florida statutes contain numerous provisions making it a criminal offense to serve alcoholic beverages to a minor.[160] In conclusion, the dissent interpreted the statute in question as imposing liability on the social host in the same manner that the Florida statutes impose liability on tavern owners who illegally sell alcoholic beverages to minors.[161]

Florida's traditional approach to social host liability is followed by a number of states. States which impose liability on the social host for the negligent service of alcoholic beverages recognize a duty on the part of the social host only in limited contexts, while others limit the damages that can be collected from the social host.

For instance, under Mississippi law a social host is liable only if

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153 *Id.* at 1387.
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.* at 1388 (Adkins, J., dissenting).
159 *Id.*
160 *See id.* at 1389 (Adkins, J., dissenting).
161 *Id.* at 1388-89 (Adkins, J., dissenting).

he furnishes alcoholic beverages to a person who cannot lawfully consume such beverages.[162] Furthermore, in addition to the imposition of liability on the social host for the negligent furnishing of alcoholic beverages to a minor, the Idaho statute imposes liability on the social host if he knowingly serves alcoholic beverages to someone who is obviously intoxicated.[163] Finally, Colorado's statute expressly limits the amount of damages recoverable by a third party who is injured by someone intoxicated due to the negligent service of alcoholic beverages by a social host.[164]

Similarly, many of the states which impose liability on social hosts by judicial fiat also limit the contexts in which such liability applies.[165] In fact, with the exception of court decisions in Massachusetts,[166] Washington[167] and Vermont[168] no state court has rendered a decision similar to the New Jersey Supreme Court's decision in *Kelly v. Gwinnell*.[169]

## *V. Conclusion*

Alcohol server liability has received extensive national attention in recent years both statutorily and judicially. Accordingly, the New Jersey Legislature reacted by enacting two statutes which are intended to define a licensed alcoholic beverage server's liability and a social host's liability. While the historical antecedents of each law are unique, they are nonetheless similar in their intent to establish parameters whereby an alcoholic bev-

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162 MISS. CODE ANN. §§ 67-3-73, 67-1-83 (1972 & Supp. 1987).

163 IDAHO CODE § 23-808 (Supp. 1987).

164 *See* COLO. REV. STAT. § 12-46-112.5(4)(c) (Supp. 1987).

165 *See* Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985) (social host liability for negligent service of alcohol to *noticeably intoxicated minor*). *See also* Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983); Koback v. Crook, 123 Wisc. 2d 259, 366 N.W.2d 857 (1985).

166 *See* McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 496 N.E.2d 141 (1986).

167 *See* Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295 (1984).

168 *See* Langle v. Kurkul, 510 A.2d 1301 (Vt. 1986). For a further discussion of the *McGuiggan*, *Halligan* and *Langle* decisions, see Comment, *supra* note 7, at 416-18.

169 96 N.J. 538, 476 A.2d 1219 (1984). *But see* Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985), which was subsequently modified by IOWA CODE ANN. § 123.49(b) (West 1987) and Coulter v. Superior Ct., 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) which was subsequently modified by CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1988).

erage server can be held liable for injury and damages as a result of his negligent service of alcoholic beverages.

While the definition of negligence has traditionally been left to the courts in New Jersey, the legislature has the power to abrogate, amend and supplement by legislative enactment any judicial decision it believes is contrary to the public good. Both pieces of legislation enacted by the New Jersey Legislature were responses to a situation which was desperately in need of attention. By imposing definitive standards whereby an alcoholic beverage server can be found negligent, future tortfeasors can better predict any potential liability.

Perhaps the most important contribution coming from the legislation is the formulation of a definition of "visibly intoxicated." The social host legislation creates a presumption whereby an individual whose blood alcohol registers between .10% and .15% will be presumed not to have been served alcohol by the social host in a negligent manner.[170] The presumption can be rebutted, however, by signs that the individual was served alcohol when he was expressing a "perceptible act or series of actions which present clear signs of intoxication."[171]

The employment of objective standards along with the presumptions attendant to the visible intoxication standard ensures that social hosts will only be liable when alcohol is served to guests who manifest signs of intoxication at the *time of service*. Additionally, injured plaintiffs still have the benefit of introducing extrinsic evidence of an individual's actions indicating that he was visibly intoxicated.

Notwithstanding these legislative standards, the legislature's response has serious shortcomings. Generally, these insufficiencies adversely affect the rights of injured victims contrary to prior judicial decisions which allowed injured parties to fully recover from negligent alcoholic beverage servers.

Initially, by eliminating the doctrine of joint and several liability, the New Jersey legislation unfairly confines an injured victim's opportunity to fully recover for his injuries. While the doctrine of joint and several liability has obvious drawbacks, this theory should not be eliminated simply to control growing insur-

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170 N.J. STAT. ANN. § 2A:15-5.6(c)(2) (West Supp. 1988).
171 *See id.* § 2A:15-5.

ance premiums. Rather than carve an exception in tort law for specialized groups of tortfeasors at the expense of an innocent victim's recovery, a more insightful approach would be comprehensive tort reform measures focusing on accident reduction.[172]

Furthermore, the New Jersey legislation eliminates the theory of joint and several liability for social hosts. In *Kelly*, the New Jersey Supreme Court recognized that the social host has a duty to the public not to create foreseeable risks. At the foundation of the court's holding was the belief that when a social host breaches his duty, injured victims will receive full compensation for their injuries. With the elimination of joint and several liability an injured third party may possibly be denied full recovery from a negligent social host.

The current trend adopted by courts and legislatures nationally allows injured victims to recover damages from alcohol servers for injuries resulting from the negligent service of alcoholic beverages. It is ironic that New Jersey, the state which established the right of injured third parties to recover against negligent servers of alcoholic beverages over fifty years ago, has codified its common law in a manner that restricts the rights of injured victims for the purpose of controlling insurance premiums and in response to unsupported fears of expansive personal liability.

***Arnold L. Natali, Jr.***

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172 At least one commentator has suggested that traditional tort reform measures such as elimination of the doctrine of joint and several liability, elimination of the collateral source rule, and modification of substantive liability for certain situations will not by themselves solve the insurance crisis. *See* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521, 1587-88 (1987). Rather, Professor Priest states, "modern tort law must be reformed systematically: by a complete redefinition of liability standards to better achieve accident reduction and insurance." *Id.* at 1590. Further according to Priest, "[t]hese objectives cannot be achieved by tinkering with damage measures and by limited changes in liability standards for particularly sympathetic sets of defendants, such as governmental entities, dramshops or non-profit organizations." *Id.* at 1589-90.