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A LOOK AT SOCIAL HOST AND DRAM SHOP LIABILITY FROM PRE-GAME TAILGATING TO POST-GAME BARHOPPING

I. INTRODUCTION

Alcohol has become inextricably tied to sports. Alcohol can be seen in sponsorship deals—as the official beer of an entire league, such as Coors and the National Football League; as the official beer of a part of a field, such as the Bud Light Bleachers at Wrigley Field; and in advertisements in and around the stadium, court, rink, or field, such as the Budweiser rooftop on Waveland Avenue and the Miller Lite billboard on Sheffield Avenue in Chicago. The consumption of alcohol has become as much a part of the game as the action taking place between the two teams. This notion is especially true when there is an altercation in the stands, where many fans' attention moves away from the game and onto the few individuals who have become drunk and disorderly. We are also reminded of the connection between alcohol and sports when someone is injured by an intoxicated individual who has attended a sporting contest. The question to be asked is who should be held responsible when this type of incident occurs.

This discussion will review social host and dram shop liability as it applies to tailgaters, concessionaires, teams, and leagues. Part II provides definitions of critical terms used throughout the discussion. Part III reviews the common law approach to the imposition of liability upon commercial distributors of alcohol. Part IV explains the development of social host and dram shop liability and state legislatures' reactions to the imposition of either. Part V reviews the liability of tailgaters, concessionaires, teams, and leagues in two cases, one from Pennsylvania and one from New Jersey. Part VI provides a discussion of what characteristics define someone who is visibly intoxicated. Part VII illustrates what the outcome of *Verni v. Stevens*¹ would have been under a set of presumed circumstances. Finally, Part VIII illustrates what the outcome of *Verni* would have been under the same set of presumed circumstances in a number of other jurisdictions.

1. *Verni v. Stevens*, 903 A.2d 475 (N.J. Super. Ct. App. Div. 2006).

II. DEFINITIONS

Black's Law Dictionary defines dram shop liability as “[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer. Claims based on a similar type of liability have been brought against private citizens for personal injury caused by an intoxicated social guest.”² There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.³

A social host “is a person or entity that provides free alcoholic beverages”⁴ to social guests. In other words, a social host is an individual who gratuitously furnishes alcohol to a guest who has been invited to enter or remain on another person’s property for private entertainment. A social guest is sometimes referred to as a licensee or “one who has permission to enter or use another’s premises, but only for one’s own purposes and not for the occupier’s benefit.”⁵ In order to avoid confusion, for purposes of this discussion a “licensee” or “licensed alcoholic beverage server” shall mean a person who is licensed to sell alcoholic beverages or who has been issued a permit to sell alcoholic beverages and not to refer to a social guest.

A stadium, team, or league is not a social host because fans are considered invitees. An invitee is “a person who has an express or implied invitation to enter or use another’s premises, such as a business visitor or a member of the public to whom the premises are held open.”⁶ Stadiums, in the context of dram shop liability, are analogous to bars in that the public is invited to come watch a game and, if they so choose, to pay for and consume alcohol. Also, stadium owners, whether a team or private individual, are not considered the social hosts of tailgaters because the stadium does not provide free alcoholic beverages for the tailgaters.

2. BLACK’S LAW DICTIONARY 419 (8th ed. 2005).

3. RESTATEMENT (SECOND) OF TORTS §315 (2000).

4. *Hinebaugh v. Pa. Snowseekers Snowmobile Club*, 63 Pa. D. & C. 4th 140, 151 (2003).

5. BLACK’S LAW DICTIONARY 765 (8th ed. 2005).

6. BLACK’S LAW DICTIONARY 687 (8th ed. 2005).

III. COMMON LAW

There are two types of actionable negligence: common law and statutory.

Common-law actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to the other.⁷

At common law, “the personal representative of a deceased person” could not maintain an action “for loss or damage resulting from his death” against a furnisher of alcohol, due to the then well settled rule that “a right of action based on a tort or injury to the person, died with the person injured.”⁸

In *King v. Henkie*,⁹ Susan King, the widow and administratrix of James King, brought an action against Benjamin Henkie, the owner of a bar, and two of his employees.¹⁰ Although the owner and employees saw that James King was “in a helpless state of intoxication” and knew he was “a man of known intemperate habits” they furnished to him “a large quantity of intoxicating liquors which he drank, and which caused [his death] before he left [the bar].”¹¹ According to Alabama law, it was a misdemeanor for a retailer to sell liquor to an intoxicated person of known intemperate habits.¹² The Supreme Court of Alabama held that the death was not proximately caused by the wrongful act of the sale of intoxicating liquor but, instead, by James King’s own act of drinking it after it was sold to him.¹³ The court first looked to the statute under which the action was brought which stated:

[W]hen the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within two years thereafter, *if the former could have maintained an action against the latter for the same act or omission, had it failed to produce death, and may recover such sum as the jury deem just.*¹⁴

7. *Pratt v. Daly*, 104 P.2d 147, 148 (Ariz. 1940) (citing *Salt River Valley W.U. Ass’n v. Compton*, 8 P.2d 249 (Ariz. 1932)).

8. *King v. Henkie*, 80 Ala. 505 (1886).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *King*, 80 Ala. at 505; Code, 1876, §2641

The purpose of the statute was to correct the well-settled common law rule previously noted by allowing a right of action “only in cases where the deceased himself, if the injury had not resulted in his death, might have sustained a recovery.”¹⁵ The court reasoned that it must necessarily follow that “where the negligence of the person killed has contributed proximately to the fatal injury, no action can be maintained by his personal representative . . . because the deceased himself would not have been entitled to recover had the injury not proved fatal.”¹⁶ The court found that the sale of alcohol was merely a secondary or intervening cause, and the drinking of the liquor, which was an act of James King, was the proximate cause of the fatal result.¹⁷ Stated another way, voluntary consumption of alcohol acted as a superseding cause thereby relieving the server of any liability.

The common law rule was fully settled that “if an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some *intervening cause*, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote.”¹⁸ Because the consumption of alcohol, rather than the furnishing of alcohol, was viewed as the proximate cause, at common law, a third party injured by an intoxicated person would also be unable to maintain an action against a furnisher of alcohol.

Several exceptions to the common law rule included imposing liability upon licensed distributors who sold intoxicating liquors to customers who lack control over their consumption, whose spouses warned distributors not to give them alcohol, or who were induced to drink when their ‘mental facilities [were] suspended by intoxication.’¹⁹

In sum, the line of reasoning followed in common law negligence actions was (a) that selling intoxicating liquor was a lawful act and, therefore, could not in itself be negligence, and (b) if the sale were unlawful, it was merely a secondary cause that could not cause harm unless the liquor was consumed by the purchaser.²⁰

15. *King*, 80 Ala. at 505

16. *Id.*

17. *Id.*

18. *Id.*

19. *Vesely v. Sager*, 486 P.2d 151, 155 n.3 (Cal. 1971).

20. *Pratt v. Daly*, 104 P.2d 147, 148 (Ariz. 1940).

IV. LEGISLATIVE REACTIONS TO SOCIAL HOST LIABILITY AND
DRAM SHOP LIABILITY

The common law rule has been substantially abrogated in many states by statutes specifically imposing civil liability upon a furnisher of intoxicating liquor under specified circumstances.

Most courts imposing liability on social hosts have not relied on the dram shop statutes, but rather have applied principles of common law negligence. In the very few states in which courts have found a duty on the part of a social host to a person hurt by the drinker, the legislatures have quickly reinstated either complete immunity or granted the social host very strong protection.

Two states that used their dram shop acts as the basis for imposing social host liability were Iowa and Minnesota. Both states later abrogated their decisions that imposed liability against social hosts.

A. Iowa

In *Williams v. Klemesrud*,²¹ Richard Klemesrud purchased a pint of vodka for his underage friend, Robert Neis.²² Klemesrud was not a licensee for sale of intoxicating liquor or beer.²³ Neis consumed the liquor, became intoxicated, and was involved in a collision with Vern and Marjorie Williams.²⁴ On the night of the accident, the relevant statute²⁵ provided:

Every . . . person who shall be injured in person or property by any intoxicated person . . . shall have a right of action . . . against any person who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages.²⁶

Neis fell into the category, “any person.”²⁷ The Iowa legislature, subsequent to the accident, enacted a new Liquor and Beer Control Act that specifically repealed chapter 129 of the Iowa Code and went into effect on January 1, 1972.²⁸ Therefore, the Court applied the

21. *Williams v. Klemesrud*, 197 N.W. 2d 614 (Iowa 1972).

22. *Id.* at 615

23. *Id.*

24. *Id.*

25. IOWA CODE §129.2 (1966).

26. *Williams*, 197 N.W.2d at 615.

27. *Id.*

28. *Id.* at 616 (the legislature in 1971 in the Liquor and Beer Control Act expressly repealed both sections 129.2 and 123.95).

state dram shop act in *Williams* but noted that, due to the 1972 legislation, its holding would be inapplicable to future cases.²⁹

The next major case on the subject to come out of Iowa was *Clark v. Mincks*.³⁰ William and Larry Mincks (“the Mincks”) hosted a party on October 1, 1982 that continued into the early hours of October 2.³¹ One of the guests, to whom they gave beer or other intoxicants when she was intoxicated, was Nancy Mincks.³² Nancy drank “over ten twelve-ounce cups of beer” at the party.³³ At around midnight Nancy and another guest decided to take some of the children into town to a tavern that had video games.³⁴ Nancy drove one of the vans to the tavern and was involved in an accident on the way.³⁵ Nancy and a child, Michelle Clark, were killed.³⁶ Nancy’s blood-alcohol level, at the time of the wreck, was .222.³⁷

The parents of Michelle Clark sued the Mincks under a common law claim of negligence arising from violation of a statute.³⁸ Section 123.49(1)³⁹ stated: “No person shall sell, dispense, or give to any intoxicated person, or one simulating intoxication, any alcoholic liquor or beer.”⁴⁰ The Supreme Court of Iowa held that the 1972 Act did not preempt common law liability. The court held the Mincks liable for the actions of an intoxicated adult guest’s decision to drive drunk.⁴¹

The Iowa legislature responded to the Court’s decision by amending §123.49⁴², which made it a criminal offense to provide alcoholic beverages to intoxicated persons. The legislature declared that a non-licensee is not civilly liable to third parties injured by the consumer of the beverages even if they violate the statute. The statute now states:

1. A person shall not sell, dispense, or give to an intoxicated person, or one simulating intoxication, any alcoholic liquor, wine, or beer.

29. *Id.* at 616 (“In discussing this legislative action obviously aimed at restricting dram shop liability to licensees and permittees only, we said in *Williams*, 197 N.W.2d at 616, ‘it is apparent that cases such as this [i.e., attempting to impose dram shop liability on one who is neither a licensee or permittee] will not arise in the future.’” *Clark v. Mincks*, 364 N.W.2d 226, 233 (Iowa 1985) (McGivern J., dissenting in part and concurring in part)).

30. *Clark v. Mincks*, 364 N.W.2d 226 (Iowa 1985).

31. *Id.* at 227.

32. *Id.*

33. *Id.* at 228.

34. *Id.*

35. *Id.*

36. *Clark*, 364 N.W.2d at 228.

37. *Id.*

38. *Id.*

39. IOWA CODE §123.49(1) (1983).

40. *Id.* (emphasis added).

41. *Id.* at 231.

42. IOWA CODE §123.49 (1987).

- a. A person other than a person required to hold a license or permit . . . is not civilly liable to an injured person or the estate of a person for injuries inflicted on that person as a result of intoxication by the consumer of the alcoholic beverage, wine, or beer.
- b. [T]he holding of *Clark v. Mincks*, 362 N.W.2d 226 (Iowa 1985) is abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, wine, or beer rather than the serving of alcoholic beverages, wine, or beer as the proximate cause of injury inflicted upon another by an intoxicated person.⁴³

B. Minnesota

Minnesota adopted its Dram Shop Act or Civil Damage Act in 1911.⁴⁴ At the time of its adoption Minnesota's Dram Shop Act⁴⁵ provided:

Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against *any person* who, by *illegally selling, bartering or giving* intoxicating liquors, caused the intoxication of such person, for all damages sustained;⁴⁶

Two classic examples of a host dispensing liquor illegally are “private individuals who invite guests of all ages to wedding receptions and employers who act as hosts at company picnics.”⁴⁷

The 1911 Dram Shop Act was applied in *Ross v. Ross*.⁴⁸ Delmar Ross and Joel Johnson purchased liquor for Delmar's brother, Rodney Ross, who was only 19 years old.⁴⁹ Rodney became intoxicated and drove his car off the road resulting in his death.⁵⁰ An action was brought under Minnesota Statute 340.95, popularly known as the Dramshop Act or Civil Damages act on behalf of Rodney's infant son and by Rodney's parents.⁵¹

The Minnesota Supreme Court started its analysis by stating that the Act had never been applied to permit recovery against an individual not in the business of dispensing liquor.⁵² The Court, therefore, reviewed the legislative intent of the Act and concluded that the legis-

43. IOWA CODE ANN. §123.49 (West 2006).

44. *Ross v. Ross*, 200 N.W.2d 149, 151 (Minn. 1972).

45. MINN. STAT. §340.95 (1911).

46. MINN. STAT. §340.95 (1911) (emphasis added).

47. *Ross*, 200 N.W.2d at 151.

48. *Id.* at 149.

49. *Id.* at 150.

50. *Id.*

51. *Id.*

52. *Id.*

lature intended to “create a new cause of action against every violator whether in the liquor business or not.”⁵³ It looked to the plain language of the statute which, as drafted, created a cause of action against “any person” who illegally sold or gave intoxicating liquors to another person causing intoxication which resulted in damage to a third party.⁵⁴ The Court found it significant that as far back as 1882 it had construed the words “any person” so as not to restrict prosecutions for liquor violations to those in the business.⁵⁵ Finally, the Court noted that because the act only applied to illegal transactions, “it is not unreasonable to assume that the legislature intended to include persons other than the licensed vendors.”⁵⁶

The Court then stated that “[i]t may well be that the legislature in light of our present holding will amend the Civil Damages Act to permit one who is not in the liquor business to assert the defense of due care.”⁵⁷ The legislature, in fact, went even further. In 1977, five years after the holding in *Ross*, it abrogated that decision by amending Minnesota’s dram shop act so that it no longer applied to social hosts.⁵⁸ The legislature removed the words “or giving” from the list of prohibited activities involving alcohol.⁵⁹

*Holmquist v. Miller*⁶⁰ was a consolidation of three cases involving actions brought against social hosts for damages resulting from automobile accidents caused by minors’ intoxication.⁶¹ The Minnesota Supreme Court reviewed the history of Minnesota’s Civil Damages Act and held that “a social host is not liable in a common-law action for negligently serving alcohol to a minor In Minnesota, the field is preempted by the Civil Damages Act.”⁶² Thus, since 1985 only commercial vendors of alcohol can be prosecuted for liquor violations under the Minnesota Civil Damages Act.

The current statute provides:

A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person’s own name for all dam-

53. *Ross*, 200 N.W.2d at 152-53.

54. *Id.* at 151.

55. *Id.*

56. *Id.* at 153.

57. *Id.* at 152.

58. *Holmquist v. Miller*, 367 N.W.2d 468, 470 (Minn. 1985).

59. *Id.* at 470.

60. *Holmquist v. Miller*, 367 N.W. 2d 468 (Minn. 1985).

61. *Id.* at 469-70.

62. *Id.* at 472.

ages sustained against a person who caused the intoxication of that person by *illegally selling* alcoholic beverages. . . .⁶³

C. California

“Before 1971, California case law had uniformly held that one who furnished alcoholic beverages to another person was not liable for damages resulting from the latter’s intoxication.”⁶⁴ In that year, the Supreme Court of California decided *Vesely v. Sager*.⁶⁵ Miles Vesely, an injured motorist, brought an action against William Sager, individually and doing business as the Buckhorn Lodge, and others.⁶⁶ Sager owned and operated the Buckhorn Lodge, described as a roadhouse, and was in the business of selling alcoholic beverages.⁶⁷ On April 8, 1968, beginning at about 10 p.m. and ending at 5:15 a.m., past the normal closing time of 2 a.m., Sager served or permitted James O’Connell, the driver of the vehicle which collided with Vesely’s automobile, to be served “large quantities of alcoholic beverages.”⁶⁸ After leaving the bar, O’Connell drove down a steep, winding, and narrow mountain road, veered into the opposite lane, and collided with Vesely’s vehicle.⁶⁹

The Court was persuaded by the reasoning of the cases that had abandoned the common law rule and held that civil liability may be imposed upon a vendor of alcoholic beverages for providing alcoholic drinks to a customer who, as a result of intoxication, injures a third person.⁷⁰ The Court concluded, “it is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person.”⁷¹

The Court also declared that a duty of care was imposed upon Sager by Business and Professions Code section 25602⁷², which provided: “Every person who sells, furnishes, [or] gives . . . any alcoholic beverage . . . to any obviously intoxicated person is guilty of a misdemeanor.”⁷³ The court explained that the Alcoholic Beverage Control Act of 1935, of which section 25602 was a part, was adopted for the

63. MINN. STAT. ANN. §340A.801(1) (West 2006) (emphasis added).

64. *Coulter v. Superior Court*, 21 Cal. 3d 144, 149 (1978).

65. *Vesely v. Sager*, 486 P.2d 151 (Cal. 1971).

66. *Id.* at 154.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 158, 160-61.

71. *Vesely*, 486 P.2d at 159.

72. CAL. BUS. & PROF. CODE §25602 (West 1935).

73. *Vesely*, 486 P.2d at 159.

“purpose of protecting members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor”⁷⁴ and, therefore, a presumption of negligence arises whenever its provisions are violated.

Although the Court in *Vesely* expressly reserved the issue of whether a “noncommercial furnisher of alcoholic beverages may be subject to civil liability under section 25602,”⁷⁵ that issue was presented in *Coulter v. Superior Court*.⁷⁶ In 1978, the Supreme Court of California became the first to impose liability on a social host for harm caused by an intoxicated adult guest. James Coulter was injured when the car in which he was a passenger collided with a roadway abutment.⁷⁷ Williams, who had become intoxicated at a party in her apartment complex, drove the car.⁷⁸ Coulter and his wife sued the owner and operator of the apartment complex as well as the apartment manager, alleging that they had negligently and carelessly served “extremely large quantities” of alcoholic beverages to Williams, they knew she was becoming intoxicated, they knew or should have known she often drank to excess, and they knew she planned to drive, exposing third parties to foreseeable harm.⁷⁹

The Court held that “a social host who furnishes alcoholic beverages to an obviously intoxicated person, under circumstances which create a reasonably foreseeable risk of harm to others, may be held legally accountable to those third persons who are injured when that harm occurs.”⁸⁰ The Court reasoned that host liability stemmed both from violation of statute,⁸¹ making it a misdemeanor to serve alcohol to an obviously intoxicated person,⁸² and from the creation of a reasonably foreseeable risk of injury to others.⁸³ The Court reviewed the plain language of the statute and found that section 25602 is not limited by its terms to persons who furnish liquor to others for profit.⁸⁴ The Court found that although its placement in the Business and Profession Code might suggest the statute applied only to commercial vendors, the term “every person” referred on its face to both commercial and noncommercial suppliers of alcoholic beverages and, there-

74. *Id.*

75. *Id.* at 153.

76. *Coulter v. Superior Court*, 21 Cal. 3d 144 (Cal. 1978).

77. *Id.* at 147.

78. *Id.* at 148.

79. *Id.*

80. *Id.* at 147.

81. CAL. BUS. & PROF. CODE §25602 (West 1935).

82. *Coulter*, 21 Cal. 3d at 149.

83. *Id.* at 153.

84. *Id.* at 149.

fore, section 25602 applied to commercial vendors and social hosts alike.⁸⁵

Shortly after the decision in *Coulter*, the California Legislature amended §25602 of the California Business and Professions Code, reinstating the common law rule that the consumption, not the serving, of alcoholic beverages was the proximate cause of harm caused by an intoxicated person. The current provision provides:

(a) Every person who sells, furnishes, [or] gives . . . any alcoholic beverage . . . to any obviously intoxicated person is guilty of a misdemeanor.

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

(c) [T]he holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153), *Bernhard v. Harrah's Club* (16 Cal. 3d 313) and *Coulter v. Superior Court* (21 Cal. 3d 144) [are] abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.⁸⁶

D. New Jersey

The New Jersey Supreme Court's decision in *Kelly v. Gwinnell*⁸⁷ was the first in which a state Supreme Court imposed social host liability for injuries caused by an intoxicated adult guest that the state legislature did not subsequently overrule. Donald Gwinnell and Joseph Zak, spent an hour or two drinking after Gwinnell had driven Zak home.⁸⁸ During that time there was a dispute over whether Gwinnell consumed no more than three drinks of scotch on the rocks or as many as thirteen.⁸⁹ On his way home, Gwinnell was involved in a head-on collision with an automobile operated by plaintiff, Marie Kelly, who was seriously injured.⁹⁰ Gwinnell's blood alcohol concentration was 0.286 percent shortly after the accident.⁹¹ Kelly sued Gwinnell, who then brought a third party action against his hosts, the

85. *Id.* at 150.

86. CAL. BUS. & PROF. CODE §25602 (West 2007).

87. *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984).

88. *Id.* at 1220.

89. *Id.*

90. *Id.*

91. *Id.*

Zaks.⁹² Kelly subsequently filed an amended complaint directly suing the Zaks.⁹³

In reversing the trial court's grant of summary judgment for the defendant hosts, the Supreme Court expanded liability from persons engaged in the liquor business to include social hosts.⁹⁴ The New Jersey Supreme Court held "only that where the social host *directly* serves the guest and continues to do so even after the guest is visibly intoxicated, knowing that the guest will soon be driving home, the social host may be liable for the consequences of the resulting drunken driving."⁹⁵ Therefore, the court made a narrow holding that was limited to the situation in which a host directly serves a guest⁹⁶ and did not include situations such as "a party where many guests congregate," a party where guests serve each other, a party where the host is occupied "with other responsibilities and therefore unable to attend to the matter of serving liquor, or a "drunken host."⁹⁷

The Court began its decision by noting that New Jersey did not have a dram shop act imposing liability on the provider of alcoholic beverages and that, up to that point, decisional law had imposed liability on such licensees and to a social host only where the guest was a minor.⁹⁸ The court then reasoned that liability "proceeds from a duty of care that accompanies control of the liquor supply," not from the derivation of profit from serving liquor, and, therefore, provided that "the provider [of alcohol] has a duty to the public not to create foreseeable, unreasonable risks by this activity."⁹⁹

In the 1984 session of the New Jersey Legislature, bills were introduced "to overturn *Kelly*, to immunize nonlicensees for civil liability for serving alcohol, and to limit the extent to which licensees may be held liable"; the bills failed to survive.¹⁰⁰ In 1987, New Jersey enacted the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act,¹⁰¹ commonly known as the dram shop law. Section 2A:22A-4 now provides: "This act shall be the exclusive remedy for personal injury or property damage resulting from the negligent service of alco-

92. *Id.*

93. *Kelly*, 476 A.2d at 1220.

94. *Id.* at 1223.

95. *Id.* at 1228 (emphasis added).

96. *Id.*

97. *Id.*

98. *Id.* at 1221.

99. *Kelly*, 476 A.2d at 1224.

100. Sharon E. Conaway, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 413 n.67 (1988).

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

holic beverages by a licensed alcoholic beverage server. . . .”¹⁰² Section 2A:22A-5 now provides:

- a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:
 - (1) The server is deemed negligent pursuant to subsection b. of this section; and
 - (2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and
 - (3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.
- b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor.¹⁰³

V. THE LIABILITY OF TAILGATERS, CONCESSIONAIRES, TEAMS, AND LEAGUES

A professional team or sports league is rarely brought to trial, largely because the team or league settles claims out of court for fear of a large damages award. Two cases that named a professional football team and the National Football League (“NFL”) as defendants were *Brandjord v. Hopper*¹⁰⁴ and *Verni v. Stevens*,¹⁰⁵ out of Pennsylvania and New Jersey, respectively. Not surprisingly, in both cases the team and the NFL settled.

A. Pennsylvania

In *Brandjord*, Michael Brandjord suffered serious personal injuries while he attempted to cross 11th Street on foot and was struck by a van operated by James Punch.¹⁰⁶ Punch, together with Thomas Hopper, William Campbell, and Charles Costello, attended a Philadelphia Eagles game at Veterans Stadium against the Dallas Cowboys.¹⁰⁷ They arrived at the stadium at approximately 11:30 a.m. and tailgated during the ninety minutes prior to the game, at which time they consumed several twelve-ounce beers.¹⁰⁸ During the game, the group sat

102. N.J. STAT. ANN. §2A:22A-4 (West 2007).

103. N.J. STAT. ANN. §2A:22A-5 (West 2007).

104. *Brandjord v. Hopper*, 688 A.2d 721 (Pa. Super. Ct. 1997).

105. *Verni v. Stevens*, 903 A.2d 475 (N.J. Super. Ct. App. Div. 2006).

106. *Brandjord*, 688 A.2d at 722.

107. *Id.*

108. *Id.*

in the same general area but Punch was not within the sight of any of the others.¹⁰⁹ The game ended at approximately 4:00 p.m. but due to the large crowds and traffic delays the group decided to engage in post-game tailgating.¹¹⁰ At around 6:00 p.m., after traffic had subsided, Punch began to drive home.¹¹¹ At this time there was no indication that Punch was intoxicated.¹¹² At the same time Punch pulled his van onto 11th Street, Brandjord was crossing 11th street on foot, and was struck by the van.¹¹³

Brandjord and his wife filed suit against the three passengers in the van as well as the City of Philadelphia, the Philadelphia Eagles, the Philadelphia Parking Authority, Ogden Food Service Corp., and Punch.¹¹⁴ The Philadelphia Eagles had either settled or been dismissed, along with some other defendants, and, therefore, this appeal involved only two passengers, Campbell and Costello.¹¹⁵ Brandjord's claim was that the passengers' purchase and consumption of alcoholic beverages jointly with Punch before the game were sufficient to establish liability under section 876 of the Restatement (Second) of Torts.¹¹⁶ Section 876, in relevant part, provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . ." ¹¹⁷ The Comment to §876(b) states, in part: "If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act. . . ." ¹¹⁸

The court held that "[a] passenger does not owe a duty to a third-person where the driver of the vehicle is intoxicated, particularly when passengers and the driver merely participate in the joint procurement and ingestion of alcohol . . ." ¹¹⁹ The court found that there was no substantial assistance on the part of Costello and Campbell because there was no evidence that they "pressured, coerced, or induced Punch to drink at any time during the course of the day" and they had

109. *Id.*

110. *Id.*

111. *Id.*

112. *Brandjord*, 688 A.2d at 722.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 723.

117. RESTATEMENT (SECOND) OF TORTS §876 (2000).

118. RESTATEMENT (SECOND) OF TORTS §876 cmt. b (2000).

119. *Brandjord*, 688 A.2d at 723.

not “furnish[ed] . . . alcohol for Punch’s consumption while Punch was driving.”¹²⁰

The court looked to the controlling case of *Welc v. Porter*¹²¹ which concluded that “where a passenger and driver purchased a large quantity of beer, consumed it together, and were subsequently involved in an automobile accident” substantial assistance was not found.¹²² The court also noted that Punch, Campbell, and Costello were all adults and Pennsylvania had never held an adult liable for serving alcohol to another adult, thereby rejecting social host liability.¹²³ The court reiterated that, with regard to social hosts, the common law view in Pennsylvania is that “‘in the case of an ordinary able bodied man it is the consumption of alcohol, rather than the furnishing of the alcohol, which is the proximate cause of any subsequent occurrence,’”¹²⁴ and “‘there can be no liability on the part of a social host who serves alcoholic beverages to his or her adult guests.’”¹²⁵

Therefore, in Pennsylvania, even if tailgaters are seen as social hosts, which is unclear because the court never explicitly ruled on this issue and because it would be difficult to determine which individual or group was hosting, they are not liable for injuries caused by one of their “guests” to a third party.

Pennsylvania also follows the common law, under most conditions, with regard to licensed vendors. This can be seen in the current Pennsylvania Dram Shop Act that provides:

It shall be unlawful—

- (1) Furnishing liquor or malt or brewed beverages to certain persons. For any licensee . . . or *any other person*, to sell, furnish or give any liquor or malt or brewed beverages . . . to any person *visibly intoxicated, or to any minor*: Provided further, That notwithstanding any other provision of law, no cause of action will exist against a licensee . . . for selling, furnishing or giving any liquor or malt or brewed beverages . . . to any insane person, any habitual drunkard or person of known intemperate habits unless the person sold, furnished or given alcohol is *visibly intoxicated or is a minor*.¹²⁶

120. *Id.* at 725.

121. *Welc v. Porter*, 675 A.2d 334 (Pa. Super. Ct. 1996).

122. *Brandjord*, 688 A.2d at 725.

123. *Id.* at 726; see *Klein v. Raysinger*, 470 A.2d 507, 510 (Pa. 1983) (explicitly rejecting social host liability).

124. *Id.* at 726; see *Klein*, 470 A.2d at 510.

125. *Hinebaugh v. Pa. Snowseekers Snowmobile Club*, 63 Pa. D. & C. 4th 140, 151 (2003); see *Klein*, 470 A.2d at 511.

126. 47 PA. CONS. STAT. ANN. §4-493(1) (West 2006) (emphasis added).

The statute provides, in essence, that the common law rule applies unless the licensed vendor sells alcohol to a visibly intoxicated person or a minor. "The statutory prohibition of said section 4-493(1) is not limited to a 'licensee' as the words 'any other person' include non-licensees of the Pennsylvania Liquor Control Board."¹²⁷

B. New Jersey

The most recent and interesting case, due to the large damages award at the trial level and its subsequent reversal, is *Verni v. Stevens*.¹²⁸ In *Verni*, the plaintiffs Antonia Verni and Fazila Verni were severely injured when a car driven by defendant Daniel Lanzaro collided with their car.¹²⁹ Antonia was two years old at the time of the accident; Fazila was her mother.¹³⁰ Lanzaro was intoxicated at the time of the collision.¹³¹

On October 24, 1999, at approximately 11:00 a.m., Lanzaro and Michael Holder arrived at Giants Stadium to attend a football game.¹³² The two men tailgated before the game and entered the stadium at approximately 12:30 p.m. for the 1:00 p.m. start.¹³³ Lanzaro and Holder did not sit together because Lanzaro had purchased his ticket from a scalper.¹³⁴ The next time that Holder saw Lanzaro was just before halftime, at approximately 2:30 p.m.¹³⁵ The two men left the stadium sometime around the beginning of the third quarter.¹³⁶ They continued drinking after the game at two bars, Shakers and The Gallery.¹³⁷

"Returning home from a family outing to pick up pumpkins for Halloween, Ronald Verni, accompanied by his wife Fazila and their two-year-old daughter Antonia, passed through Hasbrouck Heights, about five minutes from Giants Stadium."¹³⁸ At approximately 5:47 p.m., shortly after leaving a restaurant, Lanzaro "swerved across the

127. *Hinebaugh*, 63 Pa. D. & C. 4th at 146; see *Commonwealth v. Randall*, 133 A.2d 276 (Pa. Super. Ct. 1957).

128. *Verni v. Stevens*, 903 A.2d 475 (N.J. Super. Ct. App. Div. 2006).

129. *Verni*, 903 A.2d at 483-84.

130. *Id.* at 484.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Verni*, 903 A.2d at 485.

136. *Id.* at 486.

137. *Id.*

138. Richard M. Southall & Linda A. Sharp, *The National Football League and Its 'Culture of Intoxication: A Negligent Marketing Analysis of Verni v. Lanzaro*, 16 J. LEGAL ASPECTS SPORT 121, 122 (2006).

lane of traffic” and struck the car driven by Ronald Verni.¹³⁹ Officer Corey Lange arrived on the scene and noted that Lanzaro appeared to be intoxicated.¹⁴⁰ A test taken at 6:25 p.m. revealed that Lanzaro had a blood-alcohol concentration of .266 percent.¹⁴¹ The results of the accident were that Antonia was left a quadriplegic and her mother, Fazila, “went into a coma, needed reconstructive surgery on her face and had a rod inserted into her leg.”¹⁴²

Antonia, by her guardian ad litem, and Fazila filed a complaint seeking compensatory and punitive damages against Lanzaro, Ronald Verni, the New Jersey Sports & Exposition Authority, Giants Stadium, the New York Giants, the NFL, Aramark and/or Aramark, Inc.; Shakers and The Gallery; and Michael Holder.¹⁴³ The beverage server defendants, at the time of trial, were identified as Harry M. Stevens, Inc. of New Jersey (HMS), the owner of the stadium liquor license and the concession contract, and Aramark Services Management, Inc. (ASM), who employed the beer servers.¹⁴⁴ The New York Giants and the NFL settled out of court before the case went to trial for \$701,250.¹⁴⁵ “Due to settlements and orders granting summary judgment, the remaining defendants at the time of trial were HMS, ASM and Shakers.”¹⁴⁶

At trial, Lanzaro admitted to drinking two or three twelve-ounce beers at the tailgate¹⁴⁷ and two or more sixteen-ounce light beers during the first half.¹⁴⁸ When Lanzaro met Holder at halftime he was carrying six sixteen-ounce beers and appeared intoxicated to his brother and sister-in-law.¹⁴⁹ Lanzaro maintained that he only drank one or two of those beers but that shortly afterwards he smoked marijuana.¹⁵⁰ After leaving the game Lanzaro drank a beer before going to Shakers and The Gallery, where he admitted to drinking only two beers.¹⁵¹ At trial, “a jury found that Lanzaro had been served beer at Giants Stadium when he was visibly intoxicated” and that “Lanzaro and the Aramark defendants were equally responsible for the injuries

139. *Verni*, 903 A.2d at 486.

140. *Id.*

141. *Id.*

142. Southall, *supra* note 137, at 122.

143. *Verni*, 903 A.2d at 484.

144. *Id.*

145. *Id.* at 502.

146. *Id.* at 484.

147. *Id.*

148. *Id.* at 485.

149. *Verni*, 903 A.2d at 485.

150. *Id.*

151. *Id.* at 486.

caused by the collision.”¹⁵² The jury awarded compensatory damages in the amount of \$53,950,000 and punitive damages in the amount of \$65,000,000, to Antonia, and they awarded compensatory damages in the amount of \$6,500,000 and punitive damages in the amount of \$10,000,000, to Fazila.¹⁵³

The trial judge ruled that ASM was an agent of HMS and that the Beverage Server Act governed its liability.¹⁵⁴ Thus, the jury had already heard evidence about “the drinking environment [at the stadium], the negligent supervision of employees and the inadequate training of employees.”¹⁵⁵ The Beverage Server Act provides the exclusive remedy for dram shop causes of action¹⁵⁶ and narrowly defines negligence as the service of alcohol to a visibly intoxicated person.¹⁵⁷ “Therefore, negligence is not definable by reference to regulations or standards governing dispensers of alcoholic beverages or holders of liquor licenses.”¹⁵⁸ “The character of the place of dispensation is also inadmissible because it is irrelevant to the central issue.”¹⁵⁹ There was no evidence that visibly intoxicated people had been served alcohol by the authorized beer sellers at the stadium.¹⁶⁰ Therefore, the Appellate Division held that the error caused prejudice because the jury could not evaluate the evidence in a dispassionate manner, reversed the trial court, and ordered a new trial.¹⁶¹

VI. WHAT CONSTITUTES VISIBLY INTOXICATED?

There are two important questions that must be considered when discussing visible intoxication. First, what set of characteristics defines someone who is visibly intoxicated? Second, how will proof that a concessionaire sold alcohol to someone who was visibly intoxicated come to life? These questions will be considered in turn.

The dram shop acts in both Pennsylvania and New Jersey state that it shall be unlawful for a licensed alcoholic beverage server to serve a visibly intoxicated person. But what characteristics define someone who is visibly intoxicated? Is it only those characteristics visible to the

152. *Id.* at 484.

153. *Id.*

154. *Id.* at 490.

155. *Verni*, 903 A.2d at 491.

156. N.J. STAT. ANN. §2A:22A-4 (West 2007).

157. N.J. STAT. ANN. §2A:22A-5 (West 2007).

158. *Verni*, 903 A.2d at 491; see *Fisch v. Bellshot*, 135 N.J. 374, 383 (1994).

159. *Verni*, 903 A.2d at 491; see *Truchan v. Sayreville Bar and Rest., Inc.*, 323 N.J. Super. 40, 51-52 (App. Div. 1999).

160. *Verni*, 903 A.2d at 491.

161. *Id.* at 490, 494

naked eye or are auditory and olfactory characteristics part of the definition? As a start, the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act defines visibly intoxicated as a “state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication.”¹⁶² A perceptible act would imply that it could be visible, auditory, or olfactory, however, because the defined term is visibly intoxicated it is questionable whether it was meant to include anything besides visible signs of intoxication. The next step is to look to the case law.

In *Verni v. Stevens*, a number of witnesses testified that Lanzaro appeared intoxicated, but every witness came to that conclusion based on their own perception of Lanzaro’s behavior. Lanzaro testified that he was “drunk” by the end of the first quarter and “shit-faced” by just before halftime.¹⁶³ He also testified that he had been served while visibly intoxicated at other games he had attended at Giants stadium and had, in fact, never been refused service.¹⁶⁴ Holder also testified that he had been served while visibly intoxicated at Giants stadium.¹⁶⁵ The testimony by Lanzaro is unhelpful, however, because he can not view his outward appearance when ordering beers and, therefore, can not testify to whether he was visibly intoxicated. At best, Lanzaro can give a subjective account of how drunk he believed himself to be.

George Lanzaro, his brother, and Lisa Lanzaro, his sister-in-law, met Lanzaro in the spiral by Gate D at halftime.¹⁶⁶ George claimed that Lanzaro appeared intoxicated because he had “‘a blank stare look,’ was animated, loud, and had ‘a very slight sway.’”¹⁶⁷ These characteristics are visible and audible. Lisa also claimed that Lanzaro appeared intoxicated because he “was slurring his words, using rapid hand movements while talking, ‘his eyes were drunk. . .like floating eyeballs,’ and he ‘cupped’ his cigarette.”¹⁶⁸ Again, these characteristics are visible and audible.

Another witness was Officer Corey Lange, who was at the scene of the accident. Lange testified that Lanzaro appeared to be intoxicated because he was “swaying, his eyes were bloodshot, his hand movements were fumbling and slow, his face was flushed, and there was a ‘strong odor’ of alcohol on his breath.”¹⁶⁹ These characteristics are

162. N.J. STAT. ANN. §2A:22A-3 (West 2007).

163. *Verni*, 903 A.2d at 485.

164. *Id.* at 486.

165. *Id.*

166. *Id.* at 485.

167. *Id.*

168. *Id.*

169. *Verni*, 903 A.2d at 486.

visible and olfactory. The testimony by Officer Lange is unhelpful, however, because he is viewing Lanzaro after the accident, long after he left the game where concessionaires could serve him and shortly after he left the bars where others served him or where he brought his own alcohol.

The other witnesses that spoke to visible intoxication were two of the plaintiffs' expert witnesses. Fred DelMarva testified that the Training for Intervention Procedure for Servers ("TIPS") program teaches alcohol servers how to spot behavioral cues of intoxicated persons but did not specify what those behavioral cues were.¹⁷⁰ Dr. Richard Saferstein, however, testified that signs of visible intoxication would include "poor body gait, inability to stand and walk properly, poor muscular coordination, slow and unsteady hand movement, and 'perhaps but not necessarily slurred speech and . . . being boisterous and loud.'"¹⁷¹ These characteristics, although mostly visible, include auditory signs as well.

There is no written decision from the Superior Court trial so it is difficult to say with certainty what characteristics the jury used to determine whether Lanzaro was served while visibly intoxicated. The punitive damage award, at the trial level, was assessed "based on the jury's belief that Aramark had sold beer at Giants' Stadium to a visibly drunken Lanzaro."¹⁷² It is likely that juries will consider all the testimony given by witnesses together, without separating the visible, auditory, and olfactory signs perceived by witnesses and, therefore, juries will consider auditory and olfactory signs to determine whether a person was visibly intoxicated when served.

The more difficult question may be how to prove that a concessionaire served alcohol to a person who was visibly intoxicated. The beer server jobs were usually filled by senior, experienced union members.¹⁷³ Even though experienced members fill these positions there are a number of factors that make it difficult to show that a beer server served a visibly intoxicated individual. First, as noted above, Fred DelMarva discussed that alcohol servers who are TIPS-trained can spot behavioral cues of intoxicated patrons. Only 59% of beer servers and 21% of cashiers, however, at the stadium were TIPS certified.¹⁷⁴ This means that there are many beer servers without the benefit of training, on how to better spot behavioral cues that indicate

170. *Id.*

171. *Id.* at 487.

172. Southall & Sharp, *supra* note 138, at 123.

173. *Verni*, 903 A.2d at 489.

174. *Id.* at 486.

intoxication, who must instead rely only on their past experience. Another factor is one brought up by Herbert Moskowitz, one of the defendants' experts. Moskowitz criticized TIPS training explaining that the program "worked very effectively in a situation where you have continual intermittent contacts with the individual drinking and you can observe them over long periods and. . . observe how much they're drinking."¹⁷⁵ It is much more difficult for a beer server to spot visible intoxication in the small window of time they interact with a customer if they have not been interacting with that individual over the course of the game, and because of the large number of individuals that a beer server serves it is difficult for them to remember all their customers, even if they have interacted with them on more than one occasion. Another factor is that the fans may purchase beer from more than one vendor in more than one location.

In *Verni v. Stevens*, Lanzaro testified to purchasing beer from a number of unidentified individuals operating either a concession stand¹⁷⁶ or portable beer cart.¹⁷⁷ Also, all the beer servers working near Spiral D had no recollection of serving Lanzaro and claimed that they had not served or observed service to visibly intoxicated fans.¹⁷⁸ Because no one can remember who served them or whom they served it is almost impossible for plaintiffs to prove that a beer server served a visibly intoxicated person. This is evidenced by the fact that "[p]laintiffs produced no witnesses that actually observed Lanzaro purchasing beer at the stadium on the date of the accident, nor did they submit any internal reports that showed sales to visibly intoxicated persons on that date."¹⁷⁹

The appellate court noted that specificity was lacking in *Verni* because "the witnesses did not describe which beer servers had served the patrons, how many patrons had been served, in which area of the stadium the patrons had been served, and whether the patrons exhibited signs of visible intoxication at the time of the purchase or appeared sober during the brief transaction."¹⁸⁰ The appellate court also noted that "evidence of drunken attendees is inadmissible because it does not account for the possibility that patrons may have consumed the alcohol off premises, before the game at a tailgate event, or that the alcohol was purchased by a sober patron who supplied it to an

175. *Id.* at 488.

176. *Id.* at 485.

177. *Id.*

178. *Id.*

179. *Verni*, 903 A.2d at 485.

180. *Id.* at 493-94.

intoxicated patron.”¹⁸¹ The court did note, however, that evidence of habit or routine practice is admissible to support an inference that on a specific occasion a person acted in conformity with that habit, but character evidence is inadmissible.¹⁸² If this is the standard used by the courts of New Jersey and Pennsylvania, it makes it difficult to prove that a concessionaire at a major professional sporting event served a visibly intoxicated person and allows the owner of the stadium liquor license either complete immunity or very strong protection.

VII. WHAT WOULD HAVE BEEN THE OUTCOME OF *VERNI V. STEVENS* UNDER A SET OF PRESUMED CIRCUMSTANCES?

What would the outcome have been in *Verni* if we assume that there were no procedural deficiencies, that all the parties were still part of the suit at the time of trial, that Giants stadium was not owned by the New York Giants, and that Lanzaro was legally intoxicated but not visibly intoxicated? The parties of interest for this discussion are Michael Holder (“tailgater”), the concessionaire, the New York Giants, and the NFL.

The New Jersey Licensed Alcoholic Beverage Server Fair Liability Act provides the exclusive remedy for dram shop causes of action.¹⁸³ Does this mean that common law claims are foreclosed by the Act? In *Truchan v. Sayreville Bar and Rest., Inc.*¹⁸⁴ the court held that all common law claims that “arose out of, and were related to, the negligent service of alcoholic beverages” are barred by the exclusivity provisions of the Act.¹⁸⁵ *Truchan*, however, dealt with common law claims brought against a licensed alcoholic beverage server. This means that a common law claim of negligence may still be brought against a social host. Three elements must be shown to establish a cause of action in negligence: a duty of care owed by the defendant to the plaintiff, a breach of that duty, and resulting harm to the plaintiff, caused by the breach.

The next question would be whether the tailgater could be seen as a social host. There is no decision in New Jersey on this issue but in other jurisdictions it has been held that individuals who merely participate in the procurement and ingestion of alcoholic beverages do

181. *Id.* at 492.

182. *Id.* at 493-94.

183. N.J. STAT. ANN. §2A:22A-4 (West 2007).

184. *Truchan v. Sayrevill Bar and Rest., Inc.*, 731 A.2d 1218 (N.J. Super. Ct. App. Div. 1999).

185. *Id.* at 1225.

not owe a duty of care.¹⁸⁶ In other words, individuals that buy a case of beer together and drink it in the parking lot before going to the game are not responsible for the actions of their fellow tailgaters. Also, it is difficult to say that any one individual acts as the host of a tailgate party and, therefore, should be liable for the actions of every other individual that may have taken a beer from a case that individual bought. Therefore, it is unlikely that Holder would have been liable as a social host.

HMS, the owner of the liquor license, was a subsidiary of Aramark Corporation.¹⁸⁷ HMS leased its employees from ASM, a union shop and another Aramark Corporation subsidiary.¹⁸⁸ The Beverage Server Act provides the exclusive remedy against the concessionaire because HMS is a licensed alcoholic beverage server. For the purpose of this discussion, it is not important to discuss the issue of piercing the corporate veil and whether the parent corporation could be liable for the actions of both HMS and ASM. Under the assumed circumstances, the concessionaire would not be liable because Lanzaro was not visibly intoxicated. Had he been visibly intoxicated, the concessionaire would be liable and the corporate veil issue would be ripe.

With regard to the NFL and the Giants, the Vernis claimed that they “had the authority to control the actions of others (including concessionaires) in the . . . distribution of alcohol at Giants Stadium” not that they “actually provided or served alcohol to Lanzaro.”¹⁸⁹ The trial court found that “the NFL had a duty to the Vernis to exercise reasonable care in regulating the sale and the consumption of alcoholic beverages at Giants Stadium.”¹⁹⁰ That court reasoned that “based on the NFL’s involvement in league-wide alcohol policies and stadium parking-lot security . . . the NFL had ‘negligently failed to exercise their authority to control the consumption of alcohol and the use of illicit drugs at Giants Stadium and in the stadium parking lots.’”¹⁹¹ That court noted, however, that, in general “ . . . when a person engages another to perform a contract, the person retaining the contractor is not liable for the negligent actions of the contractor.”¹⁹² It cited *Mavrikidis v. Petullo*, which outlines certain exceptions: “(a) where the principal retains control of the manner and means of the work; (b) where the principal engages an incompetent

186. *Brandjord v. Hopper*, 688 A.2d 721, 723 (Pa. Super. Ct. 1997).

187. *Verni v. Stevens*, 903 A.2d 475, 490 n.2 (N.J. Super. Ct. App. Div. 2006).

188. *Id.*

189. *Southall & Sharp*, *supra* note 138 at 124.

190. *Id.*

191. *Id.* at 125.

192. *Id.* at 124.

contractor; or (c) where the activity contracted for constitutes a nuisance per se.”¹⁹³

The NFL is involved in league-wide alcohol policies, but league rules are decided by a majority of the owners. It is the owners who want alcohol to be served at games and, collectively, they are viewed as the NFL, but it is not the NFL that contracts another to provide alcohol service, it is the individual teams. Exceptions (a) and (b) give some guidance on this issue. A team, such as the Giants, does not control the manner and means of alcohol distribution. This is done by the entity that owns the stadium. In *Verni*, The New Jersey Sports & Exposition Authority consigned the sale of food and beverages within the stadium to HMS, the liquor license holder.¹⁹⁴ HMS and its parent corporation controlled the hiring, training, and supervising of its employees and, therefore, controlled the manner and means of the work. Evidence relating to the “wrongful hiring and supervision of [alcoholic beverage servers]” is barred by the holding in *Truchan*.¹⁹⁵ Therefore, if anyone could be held liable it would be the owner of the stadium or the concessionaire but not the team or league. However, the concessionaire would not be liable unless it served a visibly intoxicated person.

VIII. WHAT WOULD HAVE BEEN THE OUTCOME OF *VERNI V. STEVENS*, UNDER THE PRESUMED CIRCUMSTANCES, IN THE OTHER STATES REVIEWED?

What would the outcome be, in circumstances similar to the assumed facts above, in Iowa, Minnesota, California, and Pennsylvania, for an individual tailgater, a team, and the league?

In Iowa and Minnesota, the state legislatures abrogated decisions of their courts that held social hosts liable for injuries their guests caused to third parties. Now the dram shop acts in both states provide that a nonlicensee is not civilly liable to third parties injured by the consumer of the beverages even if they violate the statute. Only commercial vendors of alcohol can be prosecuted for liquor violations. The Iowa dram shop act explicitly states that when it comes to social hosts it will follow the old common law interpretation “finding the consumption of alcoholic beverages, wine, or beer rather than the serving of alcoholic beverages, wine, or beer as the proximate cause of injury inflicted upon another by an intoxicated person.”¹⁹⁶ Therefore, even

193. *Id.* at 125.

194. *Verni v. Stevens*, 903 A.2d 475, 490 n.2 (N.J. Super. Ct. App. Div. 2006).

195. *Id.* at 491.

196. IOWA CODE ANN. §123.49(1)(b) (West 2006).

if a tailgater could be seen as a social host, in the states of Iowa and Minnesota, the tailgater would not be liable for injuries caused to a third party by an individual who drank with the tailgater.

Both dram shop acts provide that a licensed alcohol beverage server may be held liable. If the team leased the stadium, the stadium did not have a liquor license, and the stadium contracted out the concession contract, then a third party that was injured by an intoxicated fan would have to bring an action against the concessionaire to recover damages. If the team owned the stadium, the stadium had a liquor license, and the employees worked for the Giants, then a third party injured by an intoxicated fan could bring an action against the Giants or a subsidiary of the Giants that controlled the staffing and operation of the concession stands. If the employees were leased from a subsidiary then the issue would become whether the corporate veil could be pierced under the laws of the state to hold the particular team liable. This would also be the issue regarding the league that the team was a part of. The issues would be whether the league's participation in league-wide alcohol policies means they failed to exercise their authority to control the consumption of alcohol, whether they recklessly disregarded the safety of third parties, and whether those reckless actions caused injuries to third parties.

In California and Pennsylvania the results would be much different. The dram shop act in California explicitly states that, with regard to both licensees and nonlicensees, the common law rule "finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person"¹⁹⁷ is to be followed. Therefore, in the state of California an individual who may be viewed as a social host—a tailgater—or a licensed alcoholic beverage server—a team or league—is not liable for damages caused by an intoxicated individual whom they served. The only liable party is the party who consumed the alcohol.

The Pennsylvania dram shop act also applies to both licensees and nonlicensees. Nonlicensees are included because the phrase "or any other person" is included in the dram shop act.¹⁹⁸ As discussed above, the court in *Klein v. Raysinger*¹⁹⁹ explicitly rejected social host liability.²⁰⁰ Therefore, a tailgater, if he can be viewed as a social host, is not liable for injuries to a third party caused by an intoxicated individual

197. CAL. BUS. & PROF. CODE §25602(c) (West 2007).

198. 47 PA. CONS. STAT. ANN. §4-493(1) (West 2006).

199. *Klein v. Raysinger*, 470 A.2d 507 (Pa. 1983).

200. *Id.* at 510-11.

attending his tailgate. The Pennsylvania dram shop act also applies to licensees. In Pennsylvania, a licensee will only be liable if he serves a visibly intoxicated person or a minor.²⁰¹ Therefore, if a team or league is viewed as the licensed alcoholic beverage server in Pennsylvania, they can be held liable only if they served a visibly intoxicated person or a minor and the visibly intoxicated person or minor subsequently causes injuries to a third party.

IX. CONCLUSION

In sum, the common law rule was that the consumption of alcoholic beverages rather than the serving of alcoholic beverages was the proximate cause of injuries inflicted upon another by an intoxicated person. It was not until the adoption of statutes specifically imposing civil liability upon a furnisher of intoxicating liquor under specified circumstances that anyone besides the intoxicated person could be held liable.

A number of states have imposed liability upon social hosts, but the state legislatures have quickly reinstated either complete immunity or granted the social host very strong protection. States have also imposed liability upon licensed alcoholic beverage servers, under their dram shop acts, but, once again, the state legislatures have either reinstated complete immunity, such as in California, or granted the servers strong protection through ambiguous language, such as the visibly intoxicated standard in both Pennsylvania and New Jersey. The visibly intoxicated standard is especially hard to prove because fans at sporting events only interact with servers for a short period of time and can buy alcohol from multiple areas all over the stadium. Because there are so many beer servers it is difficult for witnesses to identify which server served the intoxicated person and whether the server could identify the individual as visibly intoxicated during their short interaction, where conversation is minimal.

In all five states reviewed—Iowa, Minnesota, California, Pennsylvania, and New Jersey—a social host could not be held liable for injuries inflicted by the consumer of alcoholic beverages. In California, a claim brought against a commercial vendor would fail because California follows the common law rule for both social hosts and commercial vendors. In Pennsylvania and New Jersey, a claim brought against a commercial vendor has a limited chance of success because the plaintiff must prove that the person who inflicted their injuries was visibly intoxicated when served. Of the states reviewed, an individual

201. 47 PA. CONS. STAT. ANN. §4-493(1) (West 2006).

would have the best chance of success if they brought suit in Iowa or Minnesota, where there is not a visibly intoxicated standard.

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