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Recognizing the Liability of Social Hosts Who Knowingly Allow Intoxicated Guests to Drive: Limits to Socially Acceptable Behavior

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RECOGNIZING THE LIABILITY OF SOCIAL HOSTS WHO KNOWINGLY ALLOW INTOXICATED GUESTS TO DRIVE: LIMITS TO SOCIALLY ACCEPTABLE BEHAVIOR

INTRODUCTION

Of the 42,600 fatal automobile accidents that occurred in the United States in 1983, as many as sixty-five percent involved drinking drivers.[1] In the State of Washington, drinking drivers were involved in almost forty percent of fatal auto crashes in 1983.[2] Although the large incidence of drinking and driving has long been a concern of highway safety professionals, more recently public concern and outrage have focused on the problem of the drunken driver. The rise of grassroots organizations such as Mothers Against Drunk Driving (MADD), Students Against Drunk Driving (SADD), and Remove Intoxicated Drivers (RID) reflect this sharpened public attention.[3] At the national level, a presidential commission has made a number of recommendations aimed at curbing drinking and driving.[4] State governments, including the Washington State Legislature, have attempted to strengthen laws affecting drunken drivers.[5] These efforts,

1. NATIONAL TRANSPORTATION SAFETY BD., DEFICIENCIES IN ENFORCEMENT, JUDICIAL, AND TREATMENT PROGRAMS RELATED TO REPEAT OFFENDER DRUNK DRIVERS 2 (adopted September 18, 1984) [hereinafter cited as NTSB SAFETY STUDY]; *see also* PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (Nov. 1983) [hereinafter PRES. COMM'N REPORT]. Over the past ten years, 250,000 Americans have died in alcohol related crashes. Economic loss due to drunken driving is estimated to be $21 billion annually. *Id.*

2. WASHINGTON TRAFFIC SAFETY COMM'N, DATA SUMMARY AND ANALYSIS OF 1983 TRAFFIC COLLISIONS 11–17 (1983).

3. NTSB SAFETY STUDY, *supra* note 1, at 2. The press has begun to focus attention on the damage caused by the drinking driver and the possible causes of and cures for the problem. *See, e.g., Motorist in Fatal Crash Has a History of Drunken Driving*, Seattle Post-Intelligencer, Nov. 30, 1984, at A1, col. 1.

4. *See* PRES. COMM'N REPORT, *supra* note 1, at 14–17. The Presidential Commission's recommendations include use of judicially approved roadblocks, enactment of civil liability acts, and the creation of other programs to provide assistance to victims of intoxicated drivers.

5. Declaring that "previous attempts to curtail the incidence of drinking and driving have been ... inadequate," the Washington State Legislature in 1983 passed a series of measures aimed at insuring "swift and certain punishment for those who drink and drive." E.S.H.B. 289, 48th Leg., 1983 Reg. Sess., 1983 Washington Laws 758. The legislature increased the time that those who drive while intoxicated or refuse to submit to breathalyzer tests will be denied the privilege of driving. Enforcement mechanisms include revoking existing driver's licenses and denying driver's licenses to those who have not yet qualified for a license. WASH. REV. CODE §§ 46.61.515(5), 46.20.610(1) (Supp. 1984). The legislature also established the crimes of vehicular homicide and vehicular assault. *Id.* §§ 46.61.520, 46.61.522. In 1984 the legislature enacted a measure to provide funds to local police and courts to assist in enforcing new drunken driving laws. S.H.B. 1582, 48th Leg., 1984 Reg. Sess., 1984 Washington Laws 530. Washington law also imposes jail sentences on those convicted of driving while intoxicated. *See* WASH. REV. CODE § 46.61.515(1)–(2) (Supp. 1984); *see also Spellman to Get Tough on Drunk Driving*, Seattle Times, Nov. 26, 1984, at D1, col. 4 (final ed.) *But see Jewett Says Law on Drunken*

however, have focused primarily on deterrence and punishment of the drinking driver, rather than on compensating those injured by drunken drivers.[6]

Gradually, courts have joined these efforts to alleviate the harm caused by the intoxicated driver. A few courts have recognized an action in tort against those who contribute to drunken driving by serving intoxicating liquor. These courts have acted, in part, to relieve victims of the costs of drunken driving and to distribute the costs among those responsible for its occurrence.

Washington courts should recognize the liability of a negligent social purveyor of alcoholic beverages. Courts need not be constrained from recognizing a common law cause of action because of competing social interests or legislative inaction. Washington courts should rule that a social host who has served a guest alcohol to the point of obvious intoxication has the duty to take reasonable steps to prevent the guest from operating a motor vehicle. While courts may and should extend liability via common law, supplementary legislative action is also desirable.

I. BACKGROUND

A. Commercial Vendors

Many states have enacted civil liability or "dram shop" acts. These statutes allow an injured third party to recover damages from a liquor vendor for injuries inflicted by a customer whom the vendor had served past the point of obvious intoxication.[7] In the absence of a dram shop act, some courts have extended liability to vendors of intoxicants under common law negligence principles.[8] Other courts, however, have refused to extend

Drivers is a Crime, Seattle Times/Seattle Post-Intelligencer, Dec. 9, 1984, at A4, col. 3 (deferred prosecution law allows drunken drivers to escape prison).

6. At the national level, the recommendations put forth by the NTSB include use of on-the-spot preliminary breath test devices, increased training of judges regarding alcohol issues, and preclusion of the reduction of an alcohol-related charge to a nonalcohol-related charge. *See* NTSB SAFETY STUDY, *supra* note 1, at 46–47. An incentive grant program aimed at stimulating alcohol traffic safety programs at the state level also focused primarily on deterring and penalizing drunken drivers. *See* 23 U.S.C. § 408 (1982). *But see* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 364 (1984) (to be codified at 11 U.S.C. § 523(a)(9)); S. REP. NO. 65, 98th Cong., 1st Sess. 43–44 (1983). The 1984 amendments to the Bankruptcy Act include a provision that prevents debts incurred as a result of an act of drunken driving to be discharged in bankruptcy—the express purpose of this provision is to deter drunken driving and to protect victims of the drunken driver.

7. *See, e.g.*, MINN. STAT. ANN. § 340.95 (West Supp. 1984); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984).

8. *See, e.g.*, Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Jardine v. Upper Darby Lodge No. 1973, 413 Pa. 626, 198 A.2d 550 (1964); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

liability to vendors in the absence of civil liability legislation.[9]

B. Social Hosts

In a few states, courts have construed dram shop statutes to be broad enough to include liability for a social host, as well as a commercial purveyor.[10] In the absence of dram shop legislation, other courts have been willing to rely on common law negligence principles to hold a social host liable to a third party for injuries inflicted by an intoxicated guest.[11] Many of the courts extending liability have limited their holdings to situations where the intoxicated guest is a minor or is developmentally disabled.[12]

Three jurisdictions, however, have held a host liable for negligence, even if the guest served is a competent adult. The Oregon Supreme Court in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity,*[13] was the first court to recognize the liability of the social purveyor, without regard to the age of the intoxicated guest.[14] The California Supreme Court extended liability several years later,[15] only to be overruled by the state legislature.[16]

9. *See, e.g.*, Hamm v. Carson City Nugget, Inc., 450 P.2d 358 (Nev. 1969); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976).

10. *See, e.g.*, Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972); Ross v. Ross, 294 Minn. 115, 200 N.W.2d 150 (1972). Other courts, however, have refused to interpret dram shop acts to include liability for a social host. *See, e.g.*, Miller v. Owens-Illinois Glass Co., 48 Ill. App. 412, 199 N.E.2d 300 (1964); LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967).

In Minnesota, where the courts construed the dram shop statute to extend liability to a social purveyor, the legislature responded by abrogating the extension. After the ruling in *Ross v. Ross*, the Minnesota dram shop act was amended to limit liability to those who sell alcohol, rather than include those who give alcohol to intoxicated persons. MINN. STAT. ANN. § 340.95 (West Supp. 1984); *see* Cole v. City of Spring Lake Park, 314 N.W.2d 836, 840 (Minn. 1982). For an example of a dram shop act that does not limit coverage to commercial purveyors, see IOWA CODE ANN. § 123.92 (West Supp. 1984) (cause of action exists against licensee or permittee who serves alcohol to a person to the point of intoxication).

11. *See, e.g.*, Cantor v. Anderson, 126 Cal. App. 3d 1241, 178 Cal. Rptr. 540 (1982); Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 699, 145 Cal. Rptr. 534 (1978); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971).

12. *See, e.g.*, Cantor v. Anderson, 126 Cal. App. at 132, 178 Cal. Rptr. at 546 (developmentally disabled individual); Brattain v. Heron, 309 N.E.2d at 157 (minor); Thaut v. Finley, 213 N.W.2d at 822 (minor); Linn v. Rand, 365 A.2d at 17 (minor).

13. 258 Or. 632, 485 P.2d 18 (1971).

14. The court stated that a host has the duty to deny guests further access to alcohol when:

> the host has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things—such persons could include those already severely intoxicated, those whose behavior the host knows will be unusually affected by alcohol. Also included might be young people, if their ages were such that they could be expected by virtue of their youth alone or in connection with other circumstances to behave in a dangerous fashion under the influence of alcohol.

Wiener, 485 P.2d at 21.

15. *Coulter*, 21 Cal. 3d at 152, 577 P.2d at 674, 145 Cal. Rptr. at 538–39.

16. CAL. CIVIL CODE § 1714 (West Supp. 1984).

Most recently, in *Kelly v. Gwinnell*,[17] New Jersey recognized the liability of a social host.[18] The court in *Kelly* held that when a host provides liquor directly to a social guest, continues to do so even beyond the point at which the host knows the guest is intoxicated, and does this knowing that the guest will soon operate a motor vehicle, that host is liable for the foreseeable consequences to third parties that result from the guest's drunken driving.[19]

B. Washington Law

Until 1955 an injured party could bring a civil action in Washington against a purveyor of liquor under the state dram shop act.[20] The legislature, however, repealed the dram shop act in 1955.[21] Subsequent to repeal of the statute, the Washington Supreme Court in *Halvorson v. Birchfield Boiler Co.*[22] followed the common law rule that no liability exists for those who serve alcoholic beverages. The court held that the only exception to the rule of nonliability was for purveyors who furnish alcohol to a guest or customer who is in such a state of helplessness or debauchery as to be deprived of responsibility for his or her behavior. The court also ruled that it is not per se negligent to sell or give alcohol in violation of a law other than a civil liability act.[23]

In *Halvorson,* an employer was sued by an individual injured in an automobile accident caused by an employee who had left a company party while under the influence of alcohol.[24] The court stated that the law recognizes no relation of proximate cause between a vendor or donor of liquor and a tort committed by a buyer or recipient intoxicated by the liquor.[25] Liability, the court concluded, should be extended beyond the narrow common law exception only at the behest of the legislature.[26]

The four dissenting justices in *Halvorson* argued that the legislature did not destroy common law rights of recovery when it repealed Washington's

17. 96 N.J. 538, 476 A.2d 1219 (1984).

18. In *Kelly* a social host served liquor to his guest beyond the point of obvious intoxication. The host then accompanied the guest to his car, talked with him, and watched him drive away. The guest subsequently became involved in a serious car accident in which the plaintiff was injured. *Id.*

19. *Id.* at 1230. For a case applying *Kelly* to a social host in a business setting, see Davis v. Sam Goody, Inc., 195 N.J. Super. 423, 480 A.2d 212 (App. Div. 1984).

20. WASH. REV. CODE § 4.24.100 (1962).

21. H.B. 540, 34th Leg., 1955 Reg. Sess., 1955 Washington Laws 1538.

22. 76 Wn. 2d 759, 458 P.2d 897 (1969).

23. *Id.* at 762, 458 P.2d at 899 (citing 30 AM. JUR. INTOXICATING LIQUORS § 521 (1958)).

24. *Id.* at 760, 458 P.2d at 897.

25. *Id.* at 763, 458 P.2d at 899.

26. *Id.* at 765, 458 P.2d at 900.

dram shop act.[27] They sought to attach common law liability to social hosts when the social gathering is for business purposes.[28]

Washington courts subsequently applied the *Halvorson* ruling to exempt commercial vendors of alcohol from liability to third parties.[29] Post-*Halvorson* courts also refused to recognize the liability of social hosts who furnish alcohol to a minor, although serving the minor guest violates state law.[30] For a time, the cases following *Halvorson* retained the view that drinking, not serving, alcohol was the proximate cause of injuries caused by intoxicated guests and patrons.[31]

In *Wilson v. Steinbach*[32] a minor was killed in an automobile accident after consuming liquor at a party. The court once again refused to extend liability to social hosts, ruling that the guest was not obviously intoxicated. The court held that "obvious intoxication" should be judged by the way the guest appears to those around him or her, not by what a blood test may subsequently reveal.[33] The *Wilson* court purported to reaffirm the common law standard of nonliability for furnishing intoxicants to able-bodied persons and its exception as originally set out in *Halvorson*. The court, however, altered the exception to nonliability. According to the *Wilson* court, liability can arise for serving persons who are 1) in a state of helplessness, 2) obviously intoxicated, or 3) in a special relationship to the furnisher of the intoxicants.[34] The court again stated that an extension of common law liability to social hosts should come from the legislature.[35]

Justice Utter, in a concurring opinion, agreed that "obvious intoxication" should be judged by a subjective standard. Since the guest in *Wilson* did not meet this standard, he voted to deny recovery. However, he agreed with the four dissenting justices in *Halvorson* that a common law right of recovery existed against a social host.[36]

Shortly after the *Wilson* decision, the court held that a commercial vendor of liquor could be liable for the wrongful death of a minor-patron who had died in a car accident after becoming obviously intoxicated at the vendor's lounge.[37] The court in *Young v. Caravan Corp.* denied the vendor's motion for summary judgment, holding that sufficient evidence existed to

27. *Id.* at 766, 458 P.2d at 901 (Finley, J., dissenting).
28. *Id.* at 771, 458 P.2d at 903–04.
29. *See* Shelby v. Keck, 85 Wn. 2d 911, 541 P.2d 365 (1975).
30. Hulse v. Driver, 11 Wn. App. 509, 524 P.2d 255 (1974).
31. *See, e.g.*, Shelby v. Keck, 85 Wn. 2d at 916, 541 P.2d at 369.
32. 98 Wn. 2d 434, 656 P.2d 1030 (1982).
33. *Id.* at 438–39, 656 P.2d at 1033.
34. *Id.* at 438, 656 P.2d at 1032.
35. *Id.* at 441–42, 656 P.2d at 1034.
36. *Id.* at 442–43, 656 P.2d at 1034–35 (Utter, J., concurring).
37. Young v. Caravan Corp., 99 Wn. 2d 655, 660, 663 P.2d 834, 837 (1983).

prove that the guest was obviously intoxicated. The court also ruled that serving alcohol to a minor was a violation of state statute, constituting negligence per se.[38] The latter ruling is directly contrary to the *Halvorson* holding, although the court did not expressly overrule *Halvorson*.[39]

In light of *Young*, the Washington court of appeals recently refused to dismiss an action brought by a third party against the host of a company party.[40] The host allegedly served alcohol to an adult guest to the point of obvious intoxication. The intoxicated guest became involved in an auto accident in which the plaintiff was seriously injured. In refusing to dismiss the action, the court of appeals relied on the fact that, under *Wilson* and *Young*, serving alcohol to an obviously intoxicated individual is an exception to the rule of nonliability for the purveyors of liquor.[41]

II. ANALYSIS

A. Washington Courts' Competence to Extend Liability to Social Hosts

The fundamental purpose of tort law is to place the losses arising from social activities on blameworthy rather than innocent parties.[42] Tort law also seeks to discourage unreasonable activities.[43] In order to fulfill its purpose, tort law must constantly evolve to keep pace with changing societal norms and concerns. The reform of tort law is an area that warrants special judicial attention and action, especially since many actions in tort involve judicially created common law.[44] In addition, legislatures seldom reevaluate tort law on a consistent basis.[45]

Courts would promote the objectives of tort law by recognizing a cause of action against a negligent social purveyor of liquor. Common law tort liability would allocate the costs of drunken driving to blameworthy hosts

38. *Id.* at 660, 663 P.2d at 837.

39. *See* Halligan v. Pupo, 37 Wn. App. 84, 89, 678 P.2d 1295, 1298 (1984). The *Young* court also failed to expressly overrule other cases in which the court had previously refused to extend common law liability to purveyors of liquor on facts similar to those in *Young*. *See, e.g.*, Hulse v. Driver, 11 Wn. App. 509, 524 P.2d 255 (1974).

40. *Halligan*, 37 Wn. App. at 88, 678 P.2d at 1298. *Halligan* is scheduled for the remanded trial on November 5, 1985. Telephone interview with Jack Rosenow, attorney for respondent Frank Pupo (Oct. 6, 1984).

41. *Halligan*, 37 Wn. App. at 90, 678 P.2d at 1299 (Johnson, J., concurring).

42. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 6 (5th Ed. 1984); *see* Friend v. Cove Methodist Church, 65 Wn. 2d 174, 177, 396 P.2d 546, 549 (1964).

43. W. PROSSER & W. KEETON, *supra* note 42, § 4, at 25–26.

44. *See* Ueland v. Pengo Hydra-Pull Corp., 103 Wn. 2d 131, 136, 691 P.2d 190, 193 (1984) (courts responsible for the upkeep of the common law to meet evolving standards of justice); Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1 (1983)[hereinafter Peck, *Judicial Creativity*]; Peck, *The Role of Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963) [hereinafter Peck, *The Role of Courts*].

45. Peck, *The Role of Courts*, *supra* note 44, at 290–91.

rather than the victims of the intoxicated driver.[46] Social host liability could also prevent unreasonable behavior by social hosts that contributes to the drinking driver problem.[47] In Washington, the rules concerning liability for those contributing to drinking and driving are court-created. The courts should reevaluate these rules in light of the change in social attitudes toward drunken driving.[48]

In fulfilling the objectives of tort law, courts often must extend liability in the face of competing social considerations. When courts allocate the costs of drunken driving to a blameworthy social host, for example, they risk unduly interfering with social relationships by forcing the host to reasonably oversee the serving of liquor and to take steps to prevent intoxicated guests from driving while drunk.[49] This type of social interference may diminish the enjoyment, relaxation, and camaraderie of social gatherings where alcohol is served.[50]

Washington courts have made the difficult decision in other contexts to intrude into relationships and organizations that historically had been considered outside the bounds of state interference. For example, the supreme court has abrogated the long favored doctrines of interspousal[51] and parent-child[52] tort immunity, as well as tort immunity for charitable and religious organizations.[53] The court acted because the need to relieve victims of the cost of injury and the need to discourage unreasonable behavior outweighed the absolute sanctity of intrafamily relationships and favored organizations.[54] Similarly, the need to relieve drunken driving victims of their cost of injury outweighs the inconveniences and social

46. *See* Kelly v. Gwinnell, 476 A.2d at 1224 n.9.

47. *Id.* at 1226; Comment, *One More For the Road: Civil Liability of Licensees and Social Hosts For Furnishing Alcoholic Beverages to Minors*, 59 B.U.L. REV. 725, 728–29 (1979).

48. *Kelly*, 476 A.2d at 1229; *see also* PRES. COMM'N REPORT, *supra* note 1, at 1–2.

49. *Kelly*, 476 A.2d at 1229; *see also* DeMoulin & Whitcomb, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED'N OF INS. COUNS. Q. 349, 351 (1977) (authors question whether social host can control the conduct of guests).

50. *Kelly*, 476 A.2d at 1229.

51. Freehe v. Freehe, 81 Wn. 2d 183, 500 P.2d 771 (1972).

52. Merrick v. Sutterlin, 93 Wn. 2d 411, 610 P.2d 891 (1980); *see also* Borst v. Borst, 41 Wn. 2d 642, 251 P.2d 149 (1952). In *Borst*, the policy considerations used to justify the immunity doctrine were rejected, including the argument that allowing an action would undermine parental authority and destroy family tranquility. *Id.* at 647, 251 P.2d at 153. The *Merrick* court approved this analysis. 93 Wn. 2d at 413, 610 P.2d at 892.

53. Friend v. Cove Methodist Church, Inc., 65 Wn. 2d 174, 396 P.2d 546 (1964) (abrogating tort immunity with respect to both charitable and religious organizations).

54. *See* Merrick v. Sutterlin, 93 Wn. 2d at 413, 610 P.2d at 892–93; Freehe v. Freehe, 81 Wn. 2d at 192, 500 P.2d at 777.

dislocation caused by state intrusion in social gatherings and relationships.[55] Social host liability may also benefit society by keeping many intoxicated drivers off the roads.[56]

The process of allocating the risk of loss to blameworthy parties may also force courts to make troublesome decisions about the reasonableness of conduct or injury. If courts recognize social host liability, they will often have to make difficult judgments about whether a social host has acted reasonably under the circumstances.[57]

Washington courts have extended liability in instances where determining the reasonableness of actions or injury was difficult. For example, the courts have recognized a cause of action for negligent infliction of emotional distress.[58] They did so despite earlier reservations that such an extension might result in unlimited liability[59] because of the difficulty in determining the reasonableness of injury.[60] The courts acted, however, upon recognizing that serious psychological damage might go uncompensated in

55. *Kelly*, 476 A.2d at 1229.

56. While the *Kelly* court extended liability primarily to compensate the victims of drunken driving, the court pointed out that the decision would also tend to deter drunken driving. Extending liability, however, did not depend on the effectiveness of deterrence. *See* Kelly v. Gwinnell, 476 A.2d at 1226. For the law to deter behavior the law must become known to the general public. In light of the large amount of publicity given to judicial and legislative treatment of the drunken driving problem it is likely that recognition of social host liability would become known to the general public. *See, e.g., supra* note 3; *Expensive Pour: Beware of Drunken Guests*, TIME 73 (March 4, 1985) (reporting on settlement in Kelly v. Gwinnell). Some commentators have suggested that extending liability to social hosts will increase total deterrence. *See* Note, *Torts—California Finds a Social Host Can Be Liable To Third Parties For Intoxicated Guests' Negligent Acts*—Coulter v. Superior Court of San Mateo County, 12 CREIGHTON L. REV. 945, 970 (1979). Other commentators, however, argue that extending liability will have no significant deterrent effect. *See* Comment, *Beyond the Dram Shop Act: Imposition of Common Law Liability on Purveyors of Liquor*, 63 IOWA L. REV. 1282, 1303 (1978).

57. *See, e.g.*, Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Kelly v. Gwinnell, 476 A.2d at 1231 (Garibaldi, J., dissenting); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (1975).

58. *See* Hunsley v. Giard, 87 Wn. 2d 424, 435–36, 553 P.2d 1102–03 (1976). Owing to the general concern that recognizing such a cause of action would lead to unrestricted liability, the *Hunsley* court set out three requirements a plaintiff must meet to recover damages for negligent infliction of emotional distress: (1) the injury must be reaonably foreseeable at the time of the negligent act; (2) the reaction must be reasonable under the circumstances; and (3) the distress must be manifested by objective symptoms. *See also* Merrick v. Sutterlin, 93 Wn. 2d 411, 416, 610 P.2d 891, 893 (1980) (court agrees to abrogate parental tort immunity; limits its holding by stating that other parental torts would be considered on a case-by-case basis); Borst v. Borst, 41 Wn. 2d 642, 651–52, 251 P.2d 148, 154 (1952) (the fact that abrogating parent-child tort immunity will force courts to face "difficult cases" is not a reason to deny recovery).

59. In initially rejecting a claim for negligent infliction of emotional distress, the Washington court relied on the reasoning of Tobin v. Grossman, 24 N.Y.S.2d 609, 249 N.E.2d 419 (1969). *See* Grimsby v. Samson, 85 Wn. 2d 52, 56–57, 530 P.2d 291, 293–94 (1975). In *Tobin*, the court stated that if it allowed recovery for negligent infliction of emotional distress, limited only by foreseeability, the principle could not and would not remain confined and the result would be unlimited liability. *Tobin*, 249 N.E.2d at 424.

60. *See supra* note 58.

the absence of a cause of action.[61] Similarly, courts should act to assist victims of drunken driving who might go uncompensated in the absence of a negligence action against social purveyors of alcohol.[62]

Washington courts have continually balked at recognizing the liability of social purveyors of alcohol, preferring instead to defer to the legislature.[63] Courts argue that the legislature should be allowed to exercise its superior capacity to collect information and hold hearings before liability is extended.[64] However, the information that is pertinent to the question of whether judicial action should be taken against a social host is available to the judiciary. Information concerning the magnitude of the drunken driver problem, the impact of the problem on innocent persons, and the extent of public outcry against continued tolerance of intoxicated drivers is legion in government publications and the press.[65] Evidence of the insurance ramifications for the social host,[66] as well as general analysis of the pros and cons of extending liability are available in legal periodicals.[67]

Moreover, the common law rule of nonliability for liquor purveyors and its exceptions are court-created.[68] Courts, therefore, are competent to provide a cause of action against a social host under common law negligence principles,[69] unless the legislature has dictated otherwise.[70] The

61. *Id.*

62. Kelly v. Gwinnell, 476 A.2d at 1226.

63. *See* Wilson v. Steinbach, 98 Wn. 2d at 441–42, 656 P.2d at 1034.

64. Kelly v. Gwinnell, 476 A.2d at 1235 (Garibaldi, J., dissenting). *But see* Peck, *Judicial Creativity, supra* note 44, at 8; Peck, *The Role of Courts, supra* note 44, at 275–77. Peck notes that legislative committees seldom fulfill the idealized notion of airing competing policy factors and performing thorough investigation. When committee hearings are held, it is likely that the purpose is to discover the amount of support for, and the strength of the opposition against a certain bill and not to accumulate information to use in formulating legislation.

65. *See* Kelly v. Gwinnell, 476 A.2d at 1222; *see also* NTSB SAFETY STUDY, *supra* note 1, at 2; PRES. COMM'N REPORT, *supra* note 1, at 1–2.

66. *See Kelly* 476 A.2d at 1225. A survey of several large insurance carriers in Washington indicates that if a social host were to be held liable, the liability would be covered by a standard homeowner's or renter's insurance policy. Telephone interviews with insurance company representatives (notes of telephone interviews and letters of verification on file at the *Washington Law Review*). Evidence from other states indicates that additional liability coverage would not be exceedingly costly: $55 per year for $1,000,000 of additional coverage in Minnesota and $7 per year for an additional $300,000 of liability coverage in North Dakota. Note, *Extension of the Dram Shop Act: New Found Liability For the Social Host*, 49 N.D.L. REV. 67, 81 n.74 (1972).

67. *See, e.g.*, Graham, *Liability of the Social Host for Injuries Caused By the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. REV. 561 (1980); Comment, *Beyond the Dram Shop Act: Imposition of Common Law Liability on Purveyors of Alcohol*, 63 IOWA L. REV. 1282 (1978); Comment, *supra* note 47, at 725; Comment, *Social Host Liability For Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L. J. 95 (1978); Note, *Social Host Liability for Furnishing Liquor—Finding a Basis for Recovery in Kentucky*, 3 N.KY. L. REV. 229 (1976).

68. *See Halvorson*, 76 Wn. 2d at 761–63, 458 P.2d at 898–99 (common law duty announced by the court takes place of repealed dram shop act).

69. *See* Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18, 21

Washington State Legislature has not precluded a common law right of recovery against social purveyors of alcohol.[71] A court that unduly defers to the legislature does not act without consequence—deference may force an innocent victim to shoulder the costs of his or her injury.[72]

B. *Washington Courts Have Been Moving Toward an Extension of Liability to Social Hosts*

Since the repeal of Washington's dram shop act in 1955 and the *Halvorson* decision, which restricted common law tort liability with respect to purveyors of intoxicants, case law and popular sentiment have moved toward extending liability. While purporting to follow the *Halvorson* line of cases, the court has opened the door for the extension of liability by its rulings in *Wilson v. Steinbach* and *Young v. Caravan Corp.*

The exceptions to nonliability for purveyors of alcohol as reformulated in *Wilson* and *Young* are now broad enough, on their face, to encompass actions against social hosts who serve alcohol to either minor or adult

n.2. The court in *Wiener* stated that Oregon's repealed dram shop act was never intended by the legislature to be the only source of recovery, especially since the act only provided a remedy for a limited class of plaintiffs. *Id.* When courts extend common law liability they risk legislative backlash. *See* Peck, *The Role of the Courts, supra* note 44, at 294–95. In 1978 the California legislature responded to the court's extension of liability by passing legislation that exempted social purveyors from liability for the torts of their intoxicated guests. *See supra* notes 15 & 16. More recently in Oregon, however, the legislature passed a statute that provides a cause of action against social hosts that is stricter than the court's original extension of common law liability. *See infra* note 112.

70. Freehe v. Freehe, 81 Wn. 2d at 189, 500 P.2d at 775 (interspousal immunity); Friend v. Cove Methodist Church, Inc., 65 Wn. 2d at 178, 396 P.2d at 549 (charitable and religious organizations); Borst v. Borst, 41 Wn. 2d at 657, 251 P.2d at 156–57 (parent-child). In *Freehe* the court rejected the argument that it should defer to the legislature on the issue of abrogating interspousal tort immunity. The court stated that the argument to defer ignored the fact that the rule was not made or sanctioned by the legislature, but rather was one that depended for its origins and continued viability upon common law. 81 Wn. 2d at 189, 500 P.2d at 775. The true role of the legislature is to restrict liability if it chooses to do so. Where the proposal is to open the doors of the courts, rather than close them, the courts are quite competent to act for themselves. *Borst*, 41 Wn. 2d at 657, 251 P.2d at 156–57.

71. The repeal of Washington's dram shop act should not be read as legislative intent to deny all common law rights of recovery against those who purvey alcohol. When the legislature abrogates a common law right of recovery it does so explicitly. *Halvorson*, 76 Wn. 2d at 766, 458 P.2d at 901 (Finley, J., dissenting). *See, e.g.*, WASH. REV. CODE § 51.04.010 (Supp. 1984) (common law system governing the remedy for workmen against employers for industrial injuries specifically overruled). Lack of action on the part of the legislature should not be construed as tacit approval of the status quo. *See* Peck, *Judicial Creativity, supra* note 44, at 8–9; Peck, *The Role of the Courts, supra* note 44, at 285 & 290–91 (legislatures do not make a constant reevaluation of tort law, and victims' lobbies, if they exist at all, are ineffective in forcing reforms of tort law). The 1983 amendments to Washington's drunken driving laws were apparently not intended to be the exclusive method of dealing with the problem of the intoxicated driver. *See* 1983 Washington Laws 758 (the legislature does not intend to discourage or deter courts from directing or providing treatment for problem drinkers, so long as such treatment does not supplant legislative sanctions).

72. *See* Kelly v. Gwinnell, 476 A.2d at 1226.

guests.[73] The exceptions apply not only to commercial vendors but to anyone "furnish[ing] intoxicants to [an] able-bodied person."[74] Moreover, the exceptions to nonliability refer to serving intoxicants to "persons" in a state of helplessness, "persons" obviously intoxicated, and "persons" in a special relationship to the furnisher of the intoxicants.[75] The exceptions do not apply exclusively to minors or any other subset of "persons."

The court in *Young* also veered away from the concept of proximate cause that had been applied since *Halvorson*. In *Halvorson*, the court held that the law recognizes no relation of proximate cause between the sale or giving of liquor, and the injury caused by a person who becomes intoxicated by the liquor.[76] Contrary to this reasoning, the court in *Young* held that a purveyor can be guilty of negligence for the act of serving alcohol.[77]

By reformulating the exceptions to nonliability to include social purveyors of alcohol and by tacitly recognizing that serving intoxicants can be the proximate cause of an injury, the court has cleared the path for extending liability to negligent social hosts. Taking this step would be a constructive and a timely reform of Washington common law.

III. PROPOSED COMMON LAW CAUSE OF ACTION FOR WASHINGTON

This Comment proposes a cause of action against social hosts, stated in terms of the traditional elements of the law of negligence. This cause of action differs from the action extended by the New Jersey Supreme Court in *Kelly v. Gwinnell* and is a departure from the standard exceptions to common law liability set out in *Young*. Instead, this Comment proposes that the courts recognize that a social host has a duty to take reasonable steps to prevent an intoxicated guest from operating a motor vehicle if: 1) the host

73. Halligan v. Pupo, 37 Wn. App. at 88, 678 P.2d at 1298.

74. Young v. Caravan Corp., 99 Wn. 2d 655, 658, 663 P.2d 834, 836 (1983); Wilson v. Steinbach, 98 Wn. 2d 434, 438, 656 P.2d 1030, 1032 (1982).

75. *See Young*, 99 Wn. 2d at 658, 663 P.2d at 836; *Wilson*, 98 Wn. 2d at 438, 656 P.2d at 1032. A court of appeals case subsequent to *Young* held that *Young* is not limited to situations in which a commercial vendor serves alcohol to a minor since the *Young* court did not specifically place any limitation on its holding. Halligan v. Pupo, 37 Wn. App. at 89, 678 P.2d at 1298–99; *see* Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974) (where the court explicitly limited its holding to the serving of alcohol to minors).

76. *Halvorson*, 76 Wn. 2d at 763, 458 P.2d at 889.

77. The court in *Young* did not explicitly overrule the definition of proximate cause that had been applied by the court since *Halvorson*. *Young*, 99 Wn. 2d at 660, 663 P.2d at 837. However, in order to find a purveyor of alcohol liable for injuries caused by the intoxication related to the service of alcohol, the court must be holding that the serving, not merely the consuming, of alcohol is a proximate cause of the injury. *See Halligan*, 37 Wn. App. at 89, 678 P.2d at 1298; *see also* Shelby v. Keck, 85 Wn. 2d at 916, 541 P.2d at 369.

has served alcohol to the guest to the point of obvious intoxication; 2) the host knows or should know that the guest is obviously intoxicated; and 3) the host knows or should know that the intoxicated guest will be operating a motor vehicle.

A. Duty

Under certain circumstances a social host should have a duty to take actions to prevent an intoxicated guest from driving. The duty to act is based on the fact that, by introducing alcohol into a social setting, the host produces a situation of potential risk for the public and the intoxicated guest. Where one produces a situation of risk, even by innocent behavior,[78] he or she has a duty to take action to ensure that the risk does not become actual harm.[79]

The duty to act does not arise until the host has "served" the guest alcohol to, or past, the point of obvious intoxication. Some courts have taken a restrictive view of what it means to serve alcohol to a patron or guest. The New Jersey court in *Kelly* limited its holding to instances where the host directly serves alcohol to the guest.[80] A recent Washington court of appeals decision set out a less restrictive standard than *Kelly,* stating that "[t]he relevant inquiry is who had authority to deny further service of alcohol when intoxication became apparent."[81] Other courts have applied an even broader definition of activity that would be considered serving alcohol.[82]

A broad definition of behavior constituting "serving" intoxicants is the most appropriate. The "risky" behavior that a host is undertaking is the act of introducing alcohol into a situation where people are liable to consume to the point of intoxication and then operate a motor vehicle. The host creates

78. One who produces a hazard need not be negligent for the duty of care to arise. Zylka v. Leikvoll, 274 Minn. 435, 144 N.W.2d 358, 367 (1966); *See* W. PROSSER & W. KEETON, *supra* note 42 § 56, at 377; RESTATEMENT (SECOND) OF TORTS § 321 (1965); *see also* Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961) (defendant driver innocently hit and killed a cow on the roadway; driver then under a duty to use reasonable care to remove the animal from the highway, give warning, or otherwise protect other drivers); Hollinbeck v. Downey, 261 Minn. 481, 113 N.W.2d 9, 12–13 (1962) (golfer who hooked golf shot had duty to call warning); Chandler v. Forsyth Royal Crown Bottling Co., 257 N.C. 245, 125 S.E.2d 584, 587 (1962) (bottles fell from truck and shattered on road; driver had duty to remove glass from road).

79. *See supra* note 78; *see also* Hutchinson v. Dickie, 162 F.2d 103, 106 (6th Cir.), *cert. denied,* 332 U.S. 830 (1947) (host had duty to take reasonable steps to rescue guest who had fallen overboard while attending a social gathering on the host's cruiser); Tubbs v. Argus, 140 Ind. App. 695, 225 N.E.2d 841, 842–43 (1967).

80. Kelly v. Gwinnell, 476 A.2d at 1230.

81. Halligan v. Pupo, 37 Wn. App. at 89, 678 P.2d at 1298.

82. In Peterson v. Jack Donelson Sales Co., 4 Ill. App. 792, 281 N.E.2d 753, 756 (1972), the court ruled that a beer distributor had served alcohol when it provided a large amount of beer, ice, and cups for a labor union gathering, even though the distributor was not physically present to dispense the liquor.

this risk whether he or she introduces alcohol into the situation directly, by providing alcohol for each guest, or indirectly, by inviting the guests to bring their own alcoholic beverages. A host who intends to introduce alcohol into a social gathering should not escape responsibility merely by asking others to provide the alcohol.[83] However, a guest who brings alcohol to a gathering at the host's residence without the invitation or consent of the host has not been "served" by the host.

The social host must serve a guest alcohol to or past the point of intoxication before a duty attaches. The court in *Kelly* stated that a host is liable who continues to serve alcohol to a guest *beyond the point* at which the guest is obviously intoxicated.[84] A large portion of the danger created by serving alcohol, however, occurs by serving a person *to the point* of intoxication, not merely by serving beyond that point. A person's capacity to control a motor vehicle is often dangerously diminished before obvious intoxication.[85] A court that recognizes a duty of care when the host serves a guest to the point of obvious intoxication, therefore, better addresses the danger associated with purveying alcohol than did the *Kelly* court.[86]

The social host's duty to act arises only when the host knows or reasonably should know that a guest is intoxicated and that the intoxicated guest is preparing to operate a motor vehicle. The knowledge requirement gives the host notice of when he or she has the obligation to take action.[87] The dissent in *Kelly* protested that a social host could become intoxicated and thus avoid knowledge of a guest's intoxication.[88] To avoid such a result, a constructive knowledge standard should supplement the basic knowledge requirement. If a host reasonably should know that a guest is intoxicated and about to operate a motor vehicle, the host will be liable even if he or she lacks actual knowledge.

To establish knowledge of the guest's intoxication, the court in *Kelly* relied solely on post-accident evidence of the guest's blood-alcohol content.[89] Washington courts, however, have consistently ruled that a person's

83. *See* Comment, *California Liquor Liability: Who's To Pay the Costs?*, 15 CAL. W.L. REV. 490, 520 (1980). The Comment suggests that previous attempts to extend liability left a loophole since a social host is liable only when he or she "serves" alcohol.

84. *Kelly*, 476 A.2d at 1230.

85. *See* Comment, *supra* note 46, at 735–36.

86. *See* Coulter v. Superior Court, 21 Cal. 3d 144, 156, 577 P.2d 669, 676, 145 Cal. Rptr. 534, 541 (1978) (Mosk, J., concurring). The plaintiff would be compelled to prove that the alcohol served by the social host produced the original intoxication, and that any additional alcohol served to an obviously intoxicated guest increased or prolonged the existing state of intoxication. *See also* IOWA CODE ANN. § 123.92 (West Supp. 1984) (cause of action exists against licensee or permittee who serves a person alcohol to the point of intoxication).

87. Comment, *supra* note 47, at 735.

88. *Kelly*, 476 A.2d at 1234 (Garibaldi, J., dissenting).

89. *Id.* at 1220 (majority opinion). The court found obvious intoxication by relying on expert

sobriety must be judged by the way the person appeared to those present, not by what a blood test may subsequently reveal.[90] The Washington test is appropriate. To impose liability upon a finding, through subsequent scientific testing, that the guest was legally intoxicated is problematic since the host would not have sufficient notice, at the time, that a duty to act existed.[91]

The social host owes a duty both to the general public and to an intoxicated guest to take reasonable steps to prevent the intoxicated guest from driving. The court in *Kelly v. Gwinnell* limited recovery to injured third parties.[92] A claim by the intoxicated guest, however, should be allowed as well. When a guest has been served alcohol to the point of obvious intoxication, the host has produced a risk to the potential detriment of the guest.[93] Once the host creates the risk, even by a nonculpable act such as serving alcohol, the host has the duty to take reaonable steps to prevent the risk from becoming actual harm.[94]

Allowing a guest to recover against a host will not relieve the intoxicated guest of responsibility for the guest's own actions, as some courts and commentators fear.[95] Washington's comparative fault statute prevents a plaintiff from recovering damages for the injury attributable to the plaintiff's own conduct.[96] The guest can recover from the host only to the extent of the host's fault.[97]

B. Standard of Care

The social host's duty should be limited to taking "reasonable steps" to prevent an intoxicated guest from operating a motor vehicle. The *Kelly*

testimony. The expert testified that the guest's blood alcohol concentration was 0.286 subsequent to the accident. From this reading the expert concluded that the guest had consumed the equivalent of thirteen drinks, must have been showing unmistakable signs of intoxication, and in fact was severely intoxicated while at the host's residence.

90. Wilson v. Steinbach, 98 Wn. 2d at438–39, 656 P.2d at 1033; *see also* Young v. Caravan Corp., 99 Wn. 2d at 659, 663 P.2d at 837; Dickinson v. Edwards, 37 Wn. App. 834, 839, 682 P.2d at 971, 973 (1984).

91. Comment, *supra* note 47, at 735. Although the blood-alcohol content of a guest is not conclusive proof of obvious intoxication it may be used as evidence of obvious intoxication. *See* Note, Kelly v. Gwinnell: *The Social Host and His Visibly Intoxicated Guest: Joint Liability for Injuries to Third Parties and Proper Evidentiary Tests*, 60 NOTRE DAME L. REV. 191, 212-14 (1984).

92. *Kelly*, 476 A.2d at 1230.

93. *See* Comment, *supra* note 47, at 735–38.

94. *See supra* notes 78 & 79 and accompanying text.

95. *See* Comment, *Beyond the Dram Shop Act: Imposition of Common Law Liability on Purveyors of Liquor*, 63 IOWA L. REV. 1282, 1296 (1978).

96. Under Washington's comparative fault statute an injured party can obtain a judgment against either the guest or the social host. WASH. REV. CODE § 4.22.005 (Supp. 1984).

97. If a judgment is obtained against the host, the host can seek contribution based on the comparative fault of the intoxicated guest. WASH. REV. CODE § 4.22.040 (Supp. 1984).

decision does not seem to place limitations of reasonableness on the host's duty to act.[98] The requirement of reasonable steps will vary according to the circumstances. The host has a duty to make a good faith effort to prevent an intoxicated guest from driving.[99] In no case should a host be expected to perform acts that might endanger his or her physical well-being.[100] Hosts who fail to act solely because they fear that doing so may result in social embarassment should not be excused from taking reasonable steps.

The requirement of "reasonable steps" will, however, place a greater burden of action on those purveyors of alcohol who have the resources and manpower to keep an intoxicated guest or patron off the road. Commercial vendors or business organizations that serve alcohol at large social functions can reasonably hire "bouncers," provide alternative means of transportation for intoxicated persons, or provide facilities for intoxicated individuals to "sleep it off."[101] Moreover, from the standpoint of social pressure, it is easier for agents of liquor establishments or agents of those hosting large gatherings to restrain intoxicated persons. A greater standard of care is also appropriate for these purveyors since they are likely to profit from the overconsumption of intoxicating beverages.[102]

The relative lack of expertise of a social purveyor in detecting intoxication is not a reason to grant the purveyor absolute immunity.[103] The social host should be judged by the degree of expertise that he or she possesses. As one commentator notes, the issue "is not whether social hosts should *always* or even *generally* be liable. It is whether all persons should be immune . . . as a matter of law, simply because they do not own a bar or a

98. The court in *Kelly* held that where a host provides liquor directly to a social guest beyond the point of intoxication and does this knowing that the guest will soon be operating a motor vehicle, the host is liable as a joint tortfeasor for injuries to third parties that result from the guest's drunken driving. 476 A.2d at 1230. The court did not discuss possible defenses to liability.

99. *See* Connolly v. Nicollet Hotel, 254 Minn. 373, 95 N.W.2d 657, 664 (1959). In *Connolly,* guests attending a convention at the defendant's hotel began to menace the surrounding community. The court ruled that the defendant had the duty to take reasonable steps to control the guests. *See also* DeMoulin & Whitcomb, *supra* note 49, at 357 (host's liability should depend on the reasonableness of the host's conduct).

100. *See Kelly,* 476 A.2d at 1234 (Garibaldi, J., dissenting). The dissent in *Kelly* protested that to hold the social host liable would force him or her to grapple with beligerent drunks who would not take kindly to being denied another drink or restrained from driving home. *Id.* Generally, where tort law recognizes a duty that obligates a person to "act," the person so obligated is not under a duty to risk life or limb. *See, e.g.,* VT. STAT. ANN. tit. 12, § 519 (1983) (Vermont statute creating a duty to rescue limits the duty to instances where the rescuer is not endangered or imperiled).

101. *See Kelly,* 476 A.2d at 1234 (Garibaldi, J., dissenting). *See generally,* Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?* 10 PAC. L.J. 95, 105–06 (1978).

102. *See* Graham, *supra* note 67, at 574; *see also* Runge v. Watts, 180 Mont. 91, 589 P.2d 145, 147 (1979) (the pecuniary motives of those selling alcohol need to be tempered).

103. The dissent in *Kelly* argued that a commercial vendor's expertise in detecting intoxication is a reason not to extend liability to social purveyors. *Kelly,* 476 A.2d at 1233 (Garibaldi, J., dissenting); *see also,* Graham, *supra* note 67, at 566.

liquor store."[104] A court should rely on a purveyor's relative expertise to impose a greater burden of care on the purveyor that is better able to "know" of a person's intoxication.

C. *Proximate Cause*

The actions of a guest who drives while intoxicated are the cause-in-fact of the injuries to the victims of a drunken driving accident. However, if a host's conduct results in an injury that was reasonably foreseeable at the time of the conduct, the conduct is the proximate or legal cause of the injury.[105] The actual sequence of events need not be foreseeable. The harm that occurs need only fall within a general field of danger that should have been anticipated at the time of the defendant's conduct.[106] Courts have exempted social purveyors of liquor from liability by ruling that consuming, not serving, alcohol is the proximate cause of the injuries caused by an intoxicated guest.[107] These courts have held that serving alcohol was too remote from the injury to be its proximate cause.[108] Washington courts applied this conception of proximate cause in *Halvorson* and in several cases following *Halvorson*.[109]

Courts holding commercial or social purveyors liable for the torts of intoxicated consumers, however, have ruled that serving alcohol can be the proximate cause of an injury caused by the intoxicated consumer.[110] They reason that a purveyor produces a foreseeable risk by serving alcohol to an obviously intoxicated person when the host knows that the intoxicated person will soon operate a motor vehicle. This application of proximate cause was recently applied *sub silentio* by the Washington Supreme Court in *Young v. Caravan Corp.*[111]

Under the proposal in this Comment a host does not breach a duty by serving alcohol to a person, even beyond the point of obvious intoxication. Rather, the serving of alcohol creates a duty to take reasonable steps to

104. Comment, *The Torts of the Intoxicated: Who Should Be Liable?*, 15 COLUM. J.L. & SOC. PROBS. 33 (1979).

105. Eckerson v. Ford's Prairie School Dist. No. 11, 3 Wn. 2d 475, 484, 101 P.2d 345, 350 (1940).

106. McLeod v. Grant County School Dist., 42 Wn. 2d 316, 321, 255 P.2d 360, 363 (1953).

107. *See* Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566, 567 (1970); *see also* Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847, 852 (1966).

108. *Garcia*, 176 N.W.2d at 567.

109. *See, e.g.*, Hulse v. Driver, 11 Wn. App. 509, 512–13, 524 P.2d 255 (1974).

110. In holding a social host liable, the court in *Kelly v. Gwinnell* ruled that serving, as well as drinking, alcohol can be the proximate cause of an injury to a third party or an intoxicated guest. 476 A.2d at 1222. *See also* Elder v. Fisher, 217 N.E.2d at 852 (commercial purveyors); Jardine v. Upper Darby Lodge No. 1973, 413 Pa. 626, 198 A.2d 550, 552–53 (1964).

111. *See Young*, 99 Wn. 2d at 660, 663 P.2d at 837; *see also* Halligan v. Pupo, 37 Wn. App. at 89, 678 P.2d at 1298.

prevent an obviously intoxicated guest from driving. This conduct is more proximately related to the automobile accident caused by an intoxicated guest than the serving of alcohol. At the point where an obviously intoxicated person is about to drive an automobile, injury to other motorists and the intoxicated driver becomes reasonably, indeed alarmingly, foreseeable.

D. Supplementary Legislative Action

In addition to judicial remedies, the legislature is in an excellent position to develop creative mechanisms to deal with the victims and the culprits of drunken driving.[112]

The legislature could limt the liability of a social host by making the host secondarily liable, by requiring a finding of wanton or reckless conduct on the part of the host, or by limiting the amount of damages that may be recovered from a social host.[113] These proposals, however, ignore the fact that a host has acted negligently. A person who acts negligently generally is held fully responsible for that damage proximately caused by the negligent conduct.[114]

The legislature should, however, pass legislation to provide certainty of compensation to the victims of drunken driving. To ensure compensation for victims, a special fund should be established, financed by fines levied on those convicted of driving while under the influence of alcohol.[115] This fund could provide compensation where damage judgments are inadequate. It could also provide assistance to those injured by parties who are not found to be negligent under tort law.[116]

The legislature should also direct the traffic safety commission to provide information to social hosts so that hosts may learn how to effectively deal

112. The Oregon Supreme Court first extended common law negligence liability to the social host in *Wiener*. 485 P.2d at 21. More than ten years after *Wiener,* the legislature refined the liability of social hosts who purvey alcohol: "No private host is liable for damages incurred by an intoxicated guest unless the private host has served or provided alcoholic beverages to a social guest when such guest is visibly intoxicated." OR. REV. STAT. § 30.955 (1983). Although no cases have been brought under § 30.955, the court of appeals has intimated that the statute was enacted for the purpose of providing a new cause of action against social hosts. *See* Johnson v. Paige, 94 Or. App. 1177, 615 P.2d 1185, 1186 n.2 (1980). One commentator has argued that the measure passed by the legislature to extend liability to social hosts is ultimately less flexible than the original common law extension. *See* Graham, *supra* note 67, at 587–88.

113. *See* Kelly v. Gwinnell, 476 A.2d at 1235 (Garibaldi, J., dissenting); Comment, *supra* note 101, at 115–17.

114. *See Kelly,* 476 A.2d at 1221.

115. *See Kelly,* 476 A.2d at 1235 (Garibaldi, J., dissenting); Comment, *supra* note 83, at 526; Comment, *supra* note 101, at 115–17.

116. Financial assistance for victims of drunken driving is currently only available to those who are victims of vehicular homicide or assault. *See* WASH. REV. CODE § 7.68.035 (Supp. 1984).

with intoxicated guests and minimize the risk created by serving alcohol in a social setting.[117]

IV. CONCLUSION

Drunken driving is a tragic and costly problem. Federal and state officials are taking actions to penalize and deter those who drive while intoxicated. Although deterrence may prevent additional deaths and injuries, it does not compensate those who have already suffered bodily harm or property damage due to drunken driving.

Tort law must be reformed to compensate persons who have suffered injury due to the negligent conduct of social hosts. Serving alcohol is generally not negligent conduct. Tort doctrine, however, should recognize that a social host produces a situation of risk to the public by serving alcohol to a guest to the point of obvious intoxication, knowing that the intoxicated guest will be operating a motor vehicle. The courts should provide for tort recovery if the social host negligently fails to take reasonable steps to prevent the intoxicated guest from driving.

Society is becoming progressively less tolerant of drunken driving. We are realizing that social acceptance of driving while intoxicated has played a significant part in its proliferation. The time has come to recognize that those who purvey alcohol cannot simply look the other way when an intoxicated guest gets behind the steering wheel of an automobile. A social host's contribution to drunken driving can no longer be tolerated as socially acceptable behavior.

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117. *See Id.* § 43.59.140 (Supp. 1984) The Presidential Commission on Drunk Driving recommends that each state disseminate information to the public regarding the intoxicated driver problem. The information should encourage members of the general public to intervene in potential intoxicated driver situations and should teach the public how to successfully intervene to prevent drunken driving. The report recommends that the dissemination be coordinated by a single agency. *See* PRES. COMM'N REPORT, *supra* note 1, at 7–8.