University of Dayton Law Review

Volume 14 | Number 2 Article 8

1-1-1989

Tort Law: Social Host Liability for the Negligent Acts of Intoxicated Minors

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CASENOTES

TORT LAW: SOCIAL HOST LIABILITY FOR THE NEGLIGENT ACTS OF INTOXICATED MINORS—*Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 526 N.E.2d 798 (1988).

I. INTRODUCTION

Few areas of tort law are as unsettled today as the liability of social hosts for the negligent acts of their intoxicated guests.[1] At common law a cause of action did not lie against a social host who furnished liquor to a person who became intoxicated and subsequently caused injury to a third party.[2] Some courts have abrogated this general rule in favor of sweeping social host liability premised upon common law negligence principles.[3] Other courts have been unwilling to abandon the broad rule of non-liability of social hosts in the absence of a statutory violation.[4] Courts, however, have been less reluctant to extend liability to social hosts when the intoxicated guest is a minor.[5]

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1. *See generally* Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. REV. 561 (1980); Heard, *The Liability of Purveyors of Alcoholic Beverages for Torts of Intoxicated Consumers*, 47 MONT. L. REV. 495 (1986); Special Project, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058 (1985); Comment, *The Liability of Social Hosts for Their Intoxicated Guests' Automobile Accidents - An Extension of the Law*, 18 AKRON L. REV. 473 (1985)[hereinafter Comment, *Social Hosts*]; Comment, *Third Party Liability for Drunken Driving: When "One for the Road Becomes One for the Courts,"* 29 VILL. L. REV. 1119 (1984); Note, *Social Host Liability: Am I My Brother's Keeper?*, 21 NEW ENG. L. REV. 351 (1985–86); Note, *Social Host Liability for Guests Who Drink and Drive: A Closer Look at the Benefits and the Burdens*, 27 WM. & MARY L. REV. 583 (1986).

2. For a detailed history of the common law immunity of social hosts, see Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983).

3. *See* Ely v. Murphy, 207 Conn. 88, 95, 540 A.2d 54, 58 (1988) (minor's consumption of alcohol is not an intervening cause insulating a social host from liability based on common law negligence principles); Kelly v. Gwinnell, 96 N.J. 538, 548, 476 A.2d 1219, 1230 (1984) (imposing social host liability purely on common law negligence grounds) (superceded by statute).

4. *See* Walker v. Key, 101 N.M. 631, 636, 686 P.2d 973, 978 (1984) (violation of statute prohibiting delivery of alcohol to minor by social host is negligence per se). *But see* United Serv. Auto. Ass'n v. Butler, 359 So. 2d 498, 500 (Fla. 1978) (statute prohibiting selling, giving or serving alcohol to minors does not create a cause of action against social host for injuries sustained by one injured as a result of host's dispensing alcohol to minor).

5. *See, e.g.*, Montgomery v. Orr, 130 Misc. 2d 807, 812–13, 498 N.Y.S.2d 968, 973 (1986) (immunity of social host for serving alcohol to an adult guest does not apply to minors because hosts can more readily refuse to serve alcohol to a minor than to an adult guest); Langle v.

The Ohio Supreme Court has consistently expressed its reluctance to extend the liability of social hosts for the negligent acts of those to whom they serve intoxicating liquors where there is no duty imposed by statute.[6] The court has declined to impose liability upon social hosts based upon any common law duty owed by hosts to their guests or third parties.[7]

The Ohio Supreme Court's reluctance to impose sweeping social host liability was reiterated in *Mitseff v. Wheeler*,[8] wherein the court predicated the liability of a social host for the negligent acts of an intoxicated minor solely upon the violation of a criminal statute prohibiting the furnishing of intoxicating liquors to minors.[9] While the statute at issue in *Mitseff* does not provide any civil remedy,[10] the court, without explanation, found such a remedy implicit in the statute.[11] While the *Mitseff* decision imposes liability upon social hosts only where a statute has been violated, it may have broader implications, namely the deterioration of common law social host immunity for the negligent acts of intoxicated guests.[12]

This casenote will review the developments that have led to the deterioration of common law social host immunity for the negligent acts of their intoxicated minor guests. This casenote will also review the resulting approaches to the expansion of social host liability,[13] and the historical development of social host liability in Ohio. Finally, the effect the *Mitseff* decision is likely to have on social host liability in Ohio also will be explored.

Kurkul, 146 Vt. 513, 521, 510 A.2d 1301, 1306 (1986) (court refused to impose social host liability where the intoxicated person was not a minor or when the person served was not visibly intoxicated and the host was not able to reasonably foresee that the guest would be driving an automobile).

6. Settlemyer v. Wilmington Veterans Post, 11 Ohio St. 3d 123, 127, 464 N.E.2d 521, 524 (1984); Mason v. Roberts, 33 Ohio St. 2d 29, 33, 294 N.E.2d 884, 887 (1973).

7. *See* cases cited *supra* note 6.

8. 38 Ohio St. 3d 112, 526 N.E.2d 798 (1988).

9. *Id.* at 114, 526 N.E.2d at 800.

10. *See* OHIO REV. CODE ANN. §4301.69 (Anderson 1987).

11. *Mitseff*, 38 Ohio St. 3d at 113, 526 N.E.2d at 799. Similar criminal statutes in other states have also been the vehicle for imposing liability upon social hosts for the subsequent negligent acts of minors to whom the hosts have furnished intoxicating beverages. *See* GA. CODE ANN. § 3-3-23(a)(1) (1982); MICH. COMP. LAWS ANN. § 750.141a (West 1968).

12. *See generally* Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976).

13. This casenote will not address the liability of dram shop operators. A dram shop is defined as "a drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon." BLACK'S LAW DICTIONARY 444 (5th ed. 1979). *See generally supra* note 1.

II. FACTS AND HOLDING

Mitseff v. Wheeler[14] was an action brought by the decedent's spouse seeking damages for himself as surviving spouse, and for the wrongful death of Kathryn Mitseff.[15] The defendants were Douglas R. Wheeler and William G. Jones (d.b.a. Reedurban Tavern).[16] Wheeler furnished four bottles of beer to Jennifer Johnson, who Wheeler knew to be seventeen years of age.[17] At the time, the legal age at which a person could consume beer in the State of Ohio was nineteen.[18] Upon leaving Wheeler's residence, Johnson was served more alcohol at the Reedurban Tavern.[19] Johnson departed the tavern and was involved in an accident in which Kathryn Mitseff was killed.[20]

The plaintiff in *Mitseff* alleged that the defendants knowingly served alcohol to Johnson, a minor.[21] The plaintiff further alleged that Johnson's consumption of alcohol "caused her to become intoxicated, which, in turn, caused her to act in such a manner as to create an unreasonable risk of harm to third persons."[22] Finally, the plaintiff alleged that the negligence of the defendants in furnishing intoxicating beverages to Johnson was the proximate cause of Kathryn Mitseff's death.[23] The case was first tried before the Court of Common Pleas for Stark County, Ohio.[24] The common pleas court granted Wheeler's motion for summary judgment, without providing any reason for its decision.[25] Wheeler based his motion upon the assertions that (1) a social host who furnishes intoxicating beverages to guests is not liable to a third party for injuries caused by the guest after leaving the host's premises, and (2) the record was void of any evidence that the decedent's injuries were proximately caused by Wheeler's negligence.[26] The Court of Appeals for Stark County affirmed the lower court's decision without providing any interpretation of social host liability in Ohio. Instead, the appeals court determined that summary judgment was properly granted by the lower court because the plaintiff had not introduced

14. 38 Ohio St. 3d 112, 526 N.E.2d 798 (1988).
15. *Id.* at 112, 526 N.E.2d at 799.
16. *Id.* The issue of Jones' liability was not presented to the court in this appeal. *Id.* at 113, 526 N.E.2d at 799.
17. *Id.* at 112, 526 N.E.2d at 798–99.
18. *Id.* at 112, 526 N.E.2d at 799.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 112, 526 N.E.2d at 798.

any evidence to demonstrate that the minor's negligence had caused the fatal accident.[27] The court of appeals certified the record of the case to the Ohio Supreme Court for review.[28] The supreme court reversed both the court of appeals and the trial court decisions.[29] The court held that section 4301.69 of the Ohio Revised Code,[30] which precludes the sale or furnishing of beer or intoxicating liquor to a person under the age of nineteen, creates both a duty that social hosts refrain from furnishing alcohol to minors,[31] and a resulting civil cause of action.

III. BACKGROUND

A. Historical Development: Common Law Rule of Non-Liability

At common law no cause of action existed against one who furnished alcohol to an individual who subsequently became intoxicated and, as a result of that voluntary intoxication, injured a third party.[32] The rationale behind the common law rule is that the proximate cause of the injury is the consumption of intoxicating liquor, rather than the furnishing of the liquor.[33] Thus, the common law rule provides no remedy for an injured person against a social host.[34] While the common law rule of absolute immunity of social hosts is rather harsh and incongruent with the trend of expanding tort liability, the rule continues to

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27. *Id.* at 113, 526 N.E.2d at 799.

28. *Id.*

29. On the summary judgment issue, the *Mitseff* court held that by filing an affidavit in opposition to defendant's motion for summary judgment, "[plaintiff] effectively raised a triable issue of fact not susceptible to summary judgment." *Id.* at 116, 526 N.E.2d at 802.

30. OHIO REV. CODE ANN. § 4301.69 (Anderson 1987). At the time of the accident in the *Mitseff* case, §4301.69 of the Ohio Revised Code stated, in pertinent part:

> No person shall sell intoxicating liquor to a person under the age of twenty-one years or sell beer to a person under the age of nineteen, or buy intoxicating liquor for, or furnish it to, a person under the age of twenty-one years, or buy beer for or furnish it to a person under the age of nineteen, unless given by a physician in the regular line of his practice, or by a parent or legal guardian.

Id.

31. *Mitseff*, 38 Ohio St. 3d at 114, 526 N.E.2d at 800.

32. *See, e.g.*, Klein v. Raysinger, 504 Pa. 141, 148, 470 A.2d 507, 510–11 (1983).

33. *See* Chastain v. Litton Sys., Inc., 527 F. Supp. 527, 530 (W.D.N.C. 1981) (social host not liable because proximate cause of injuries was the voluntary consumption of alcohol, not the furnishing thereof), *rev'd on other grounds*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); Walker v. Kennedy, 338 N.W.2d 254, 255 (Minn. 1983) (social host not liable for negligent acts of intoxicated minor guest since it was the minor's conduct, not the conduct of the host, that caused the injury); Yoscovitch v. Wasson, 98 Nev. 250, 251, 645 P.2d 975, 976 (1982) (proximate cause of injury is driver's consumption of liquor, rather than its sale). *But see* Powers v. Niagara Mohawk Power Corp., 132 Misc. 2d 123, 127, 503 N.Y.S.2d 516, 519 (1986) (seller of alcohol to minor not liable under common law negligence theory in that any duty under such a theory does not extend beyond the physical area where supervision and control may reasonably be exercised), *modified*, 129 A.D.2d 37, 516 N.Y.S.2d 811 (1987).

34. *See supra* note 33.

be accepted by some courts.[35]

In *Martin v. Watts*,[36] the Alabama Supreme Court unequivocally expressed its continued adherence to the common law rule of non-liability of social hosts for the negligent acts of their intoxicated guests. In *Martin*, two minors became intoxicated after being served alcohol at a Jaycees party and later skidded their vehicle into the path of the decedent's automobile.[37] The plaintiff brought an action against the individuals and against the organization who sponsored the party and which furnished the intoxicating liquor to the minors, alleging liability based upon the state's Dram Shop Act and common law negligence principles.[38] While the Alabama Supreme Court did impose liability on several of the defendants under the state's very broad Dram Shop Act,[39] the court held that a common law cause of action does not lie against social hosts.[40] Although the court in *Martin* had a statutory vehicle through which to impose liability on those furnishing alcohol to minors, it nonetheless refused to abolish the common law immunity of social hosts for the negligent acts of their intoxicated guests.[41]

A unique variation of the continued viability of the common law rule of absolute immunity of social hosts has been experienced in California. In the 1970's, a series of California Supreme Court decisions abrogated the common law rule that the consumption of intoxicating liquors, and not the furnishing thereof, was the proximate cause of injuries resulting from intoxication.[42] In 1978, responding to the court's

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35. *See* Wimmer v. Koenigseder, 108 Ill. 2d 435, 443, 484 N.E.2d 1088, 1093 (1985) (applying both Wisconsin and Illinois law, the Illinois Supreme Court held that neither state recognized common law liability for the negligent sale of alcohol); Holmquist v. Miller, 367 N.W.2d 468, 472 (Minn. 1985) (social host not liable to an injured third party in a common law action for negligently serving alcohol to minor); Childress v. Sams, 736 S.W.2d 48, 50 (Mo. 1987) (minor social host not liable on common law negligence grounds for negligent acts of minor guests to whom host furnished liquor).

36. 508 So. 2d 1136 (Ala. 1987).

37. *Id.* at 1138.

38. *Id.* at 1136.

39. ALA. CODE § 6-5-71(a) (1975). The Alabama Dram Shop Act provides, in pertinent part:

> Every . . . person who shall be injured in person, property or means of support by an intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving or otherwise dispensing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.

Id.

40. *Martin*, 508 So. 2d at 1141.

41. *Id.* at 1141.

42. *See* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (superceded by statute); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (superceded by statute), *cert. denied*, 429 U.S. 859 (1976); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (superceded by statute).

sweeping extension of social host liability in California, the California legislature passed a statute which specifically contradicted the cases which imposed liability on social hosts.[43] The statute essentially reinstated the common law rule that the consumption of alcohol is the proximate cause of injuries resulting from intoxication, and therefore, social hosts are not liable for the negligent acts of their intoxicated guests.[44]

Even when upholding the common law rule of non-liability, a number of courts have expressed concern that the common law rule is an anachronism in modern tort law.[45] Some courts that have articulated doubts as to the continued application of the common law rule have nonetheless adhered to it, arguing that it is the province of the legislature to abrogate the rule.[46] In *Bankston v. Brennan*,[47] the Florida

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43. *See* CAL. BUS. & PROF. CODE § 25602 (West 1985). Section 25602 states, in pertinent part:

> (a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor. (b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, 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) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernard v. Harrah's Club (16 Cal. 3d 313) and Coulter v. Super. Court (21 Cal. 3d 144) be 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.

Id.

44. For a detailed discussion of the California experience with social host liability see Sagadin v. Ripper, 175 Cal. App. 3d 1141, 1154–57, 221 Cal. Rptr. 675, 682–84 (1985). It must be noted that the California courts have found that the sole explicit exception to social host immunity is the furnishing of alcohol to an obviously intoxicated minor. *See* De Bolt v. Kragen Auto Supply, Inc., 182 Cal. App. 3d 269, 273, 227 Cal. Rptr. 258, 260 (1986).

45. *See generally* Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987) (statute limiting tort liability for person selling or furnishing alcoholic beverages to minors to those who willfully and unlawfully sell such beverages does not create a cause of action against a social host who served alcohol); United Serv. Auto. Ass'n v. Butler, 359 So. 2d 498, 500 (Fla. 1978) (declining to find cause of action against social host for negligent serving of alcohol to minor); Ling v. Jan's Liquors, 237 Kan. 629, 639–41, 703 P.2d 731, 738–39 (1985) (no cause of action exists against seller of liquor to a minor on theory that dispensing of liquor constituted direct wrong or actionable negligence, nor on the basis of statute prohibiting sale of liquor to minor); Holmquist v. Miller, 367 N.W.2d 468, 471–72 (Minn. 1985) (host not liable to an injured third party in a common law action for negligently serving alcohol to minor).

46. *See* Miller v. Moran, 96 Ill. App. 3d 596, 600–01, 421 N.E.2d 1046, 1048–49 (1981) (if liability of social hosts is to be created, it ought to be done by the legislature); Boutwell v. Sullivan, 469 So. 2d 526, 529 (Miss. 1985) (even in light of strong public policy to discourage driving under the influence of alcohol, the subject should be addressed by the legislature, particularly in view of the problems inherent in a host attempting to control a guest); Holmes v. Circo, 196 Neb. 496, 504–05, 244 N.W.2d 65, 69–70 (1976) (social host liability is a policy matter which should be left to the legislature); Yoshovich v. Wasson, 98 Nev. 250, 251, 645 P.2d 975, 976 (1982) (if

Supreme Court refused to impose liability on a social host on both common law negligence principles as well as a very narrow tort statute. Brennan, a minor, was served alcohol at a party and on his way home collided his automobile with the plaintiff's vehicle.[48] In very strong dicta, the *Bankston* court noted that civil liability for a social host has broad ramifications, and the prudent course for the judiciary to pursue is to defer to legislative initiative.[49] This deferential approach, while calling into question the common law rule, nonetheless signals its continued application in the absence of legislative action imposing civil liability on those who serve intoxicating liquors to minors who subsequently injure third parties. Such an approach has credence, given that judicial activism is a technique many courts choose not to practice.

B. Liability Premised Upon Common Law Negligence Principles

Given the modern tendency of courts to expand most areas of tort liability, it was perhaps inevitable that some courts would opt for a wholesale abrogation of the common law rule of non-liability of social hosts for the negligent acts of their intoxicated guests.[50] A cause of action against a social host has generally evolved from the trend of holding dram shop operators liable for the negligent acts of their intoxicated customers.[51] Statutes imposing liability on dram shop operators have been passed in thirty-seven states at one time or another.[52] However, many of these statutes have been repealed.[53] Further, dram shop acts generally are not applicable to social hosts in a non-commercial setting.[54] Thus, many courts have been forced to rely on common law

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civil liability is to be imposed on one who sells liquor to minor, it should be done by legislative act) (citing Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969)). Cf. Holmquist v. Miller, 367 N.W.2d 468, 472 (Minn. 1985) (legislation rendering ineffective prior judicial decisions imposing social host liability is conclusive that there is no common law cause of action against social hosts).

47. 507 So. 2d 1385 (Fla. 1987).

48. *Id.* at 1386.

49. *Id.* at 1387.

50. *See* Nehring v. LaCounte, 712 P.2d 1329, 1335 (Mont. 1986) (abandoning common law rule of immunity as a "Neanderthal approach to causation").

51. Comment, *Social Hosts*, *supra* note 1. The purpose of dram shop acts is to regulate and control the primary source of hazardous intoxication — taverns and other licensees. The rationale behind the dram shop acts is that the licensees benefit financially from furnishing alcohol, therefore, they should be the insurers of their customers' conduct. Special Project, *supra* note 1, at 1134. *See also* Cory v. Shierloh, 29 Cal. 3d 430, 440–41, 629 P.2d 8, 14, 174 Cal. Rptr. 500, 506 (1981) (limiting liability to commercial providers is reasonable in that such persons are experienced in business of selling liquor and can more readily detect the signs of intoxication and are in a better position to defray the cost of liability than a typical social host) (superceded by statute).

52. Comment, *Social Hosts, supra* note 1, at 474.

53. *Id.*

54. Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964) (Common applicable to seller of alcohol and not social host); *see also* Kohler v.

negligence principles and liquor control statute violations in order to find social hosts liable for the negligent acts of their intoxicated guests.[55]

In recent years courts have found that a cause of action exists, based upon common law negligence grounds, for failure to exercise ordinary care in furnishing intoxicating beverages to minors.[56] The rationale for abandonment of the common law rule of non-liability was aptly articulated by the New Jersey Superior Court in *Linn v. Rand*:[57]

> Our courts have not hesitated to place responsibility for tortious acts upon the person committing the wrong, nor have they refrained from removing old common law doctrines which granted immunity to wrongdoers. Why should a social host be given the special privilege of immunity from liability if he acts negligently with resulting harm to others?[58]

One court that imposed such liability held that one could be liable to a third party for negligently furnishing alcohol to a minor when the alcohol was a substantial factor in causing the third party's injuries.[59] Other courts have premised liability upon the knowledge of the host that the guest was a minor who had been consuming alcohol and who would thereafter be driving a motor vehicle.[60] Thus, some courts[61] have

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Wray, 114 Misc. 2d 856, 857, 452 N.Y.S.2d 831, 833 (1982) (dram shop act has no applicability to a social host in a non-commercial setting).

55. *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 324–25 (7th Cir. 1959), *cert denied*, 362 U.S. 903 (1966); Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 9 (1959); Schelin v. Goldberg, 188 Pa. Super. 341, 347, 1465 A.2d 648, 651 (1958).

56. *See* Ely v. Murphy, 207 Conn. 88, 540 A.2d 54, 58 (1988) (minor's consumption of alcohol is not an intervening cause which would insulate a social host from liability); McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 160–61, 496 N.E.2d 141, 145 (1986) (recognizing a common law cause of action against social hosts based upon a policy concern of dealing with drunk driving); Linn v. Rand, 140 N.J. Super. 212, 219–20, 356 A.2d 15, 19 (1976) (social host who serves excessive amounts of alcohol to visibly intoxicated minor liable for minor's negligent acts); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 640, 485 P.2d 18, 22 (1971) ("[t]here may be circumstances under which person could be held liable for allowing another to become dangerously intoxicated"); Koback v. Crook, 123 Wis. 2d 259, 265–66, 366 N.W.2d 857, 865 (1985).

57. 140 N.J. Super. 212, 217–18, 356 A.2d 15, 18 (1976).

58. *Id.*

59. *Koback*, 123 Wis. 2d at 276, 366 N.W.2d at 865 (social host who negligently serves or furnishes alcohol to a minor who becomes intoxicated, or whose driving ability is impaired as a result of the intoxicants, is liable to third persons for injuries in proportion to that negligence in which furnishing beverage to a minor was a substantial factor in causing the injuries) (citing Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984) (superceded by statute)).

60. *See Linn*, 140 N.J. Super. at 219–20, 356 A.2d at 19 (social host who serves alcohol to a visibly intoxicated minor, knowing he will be driving on the public highways, will be held liable for the minor's negligent acts); *Wiener*, 258 Or. at 643, 485 P.2d at 23 (social host who served alcohol to minor liable when host should have known minor would be driving motor vehicle); Harmann v. Hadley, 128 Wis. 2d 371, 376–77, 382 N.W.2d 673, 676 (1986) (social host liable when he furnishes liquor to a minor knowing that minor would consume the liquor and minor would be operating a motor vehicle); Bullis v. Pratt, 177 Cal. App. 3d 129, 130, 222 Cal.

found the furnishing of the intoxicating liquor to minors to be the proximate cause of the injuries suffered by the plaintiff.

Imposing liability on social hosts who furnish intoxicating liquors to minors appears to be less problematic for courts than extending liability to hosts for the negligent acts of their adult guests. Many courts recognize a distinction between adult and minor guests.[62] The Connecticut Supreme Court, in *Ely v. Murphy*,[63] succinctly expressed the logic of maintaining the common law rule of non-liability as it applied to adult guests, but found a cause of action grounded in common law negligence principles as applied to minors.[64] The *Ely* court stated:

> The proposition that intoxication results from the voluntary conduct of the person who consumes intoxicating liquor assumes a knowing and intelligent exercise of choice, and for that reason is more applicable to adults than to minors. With respect to minors, various legislative enactments have placed them at a disability in the context of alcohol consumption.[65]

In *Ely*, the defendants were the hosts of a high school graduation party where they furnished beer to those who attended the party.[66] The guests ranged in age from fifteen to nineteen; the legal drinking age in Connecticut at the time was nineteen.[67] The hosts did not monitor the consumption of beer by their guests, nor did they determine whether

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Rptr. 723, 728 (1986) (since statute provides immunity to social hosts, host could not be liable unless he knowingly provided alcohol to one who was unable to resist consumption because of some exceptional physical or mental condition; youth, by itself, is not such a condition). As the principle applies to adult guests see Elsperman v. Plump, 446 N.E.2d 1027, 1030 (Ind. App. 1983) (given the use of automobiles and increasing frequency of accidents involving drunk drivers, the consequences of serving liquor to an intoxicated person are reasonably foreseeable); *McGuiggan*, 398 Mass. at 159–60, 496 N.E.2d at 145 (social host who did not have actual or reasonable knowledge that adult guest is intoxicated is not liable to injured third parties).

61. *See* cases cited *supra* note 56; *see also* McClellan v. Tottenhoff, 666 P.2d 408, 414 (Wyo. 1983) (ultimate test concerning proximate cause is the foreseeability of injury to a third person).

62. *See, e.g.*, Congini v. Portersville Valve Co., 504 Pa. 157, 161, 470 A.2d 515, 517 (1983) (distinguishing between adults and minors, court held minors are incompetent of handling the effects of alcohol in the eyes of the law). *But see* Wilson v. Steinbach, 98 Wash. 2d 434, 440, 656 P.2d 1030, 1033 (1982) (relevant inquiry is whether there has been a breach of a standard of care and not whether the intoxicated tortfeasor is an adult or a minor).

63. 207 Conn. 88, 540 A.2d 54 (1988).

64. *Id.* at 88, 540 A.2d at 54. *See also* Montgomery v. Orr, 130 Misc. 2d 807, 812–13, 498 N.Y.S.2d 968, 973 (1986) (even though New York does not recognize a cause of action against a social host for the negligent acts of intoxicated adult guests, a social host who serves alcohol to a minor in violation of a statute may be held liable in common law negligence for injuries to third parties).

65. *Ely*, 207 Conn. at 91, 540 A.2d at 57.

66. *Id.* at 89, 540 A.2d at 55.

departing guests were fit to drive.[68] Foley, an eighteen year old guest at the party, was seen staggering to his car; moments later he struck another guest with his vehicle, killing him.[69] The *Ely* court recognized that the Connecticut legislature had prohibited the furnishing of alcohol to minors and held that:

> In view of the legislative determination that minors are incompetent to assimilate responsibly the effects of alcohol and lack the legal capacity to do so, logic dictates that their consumption of alcohol does not, as a matter of law . . . insulate one who provides alcohol to minors from liability for ensuing injury. [70]

Relying on the legislature's tacit acknowledgment that minors are less capable than adults of recognizing the effects of consumption of alcohol, the *Ely* court fashioned a common law remedy for injured parties against those who furnish intoxicating liquors to minors.[71] However, the *Ely* decision must not be construed as a total abrogation of the common law rule of non-liability. On the contrary, the *Ely* court's holding specifically applied to liability for the negligent acts of minors, based upon the disability of minors, and not to adult guests, whom the Connecticut court assumed could responsibly recognize the effects of alcohol.[72]

In sum, the continued viability of the common law rule of absolute immunity of social hosts is questionable, particularly in light of the radical change in society since the inception of the rule. As the Georgia Supreme Court has noted:

> [T]he common law rule . . . arose before invention of the automobile. Hence, many of the early cases involved injuries to the consumer of the alcohol or crimes (e.g., murder, battery) committed by the consumer while under the influence of alcohol, as opposed to negligence of the consumer in driving a vehicle resulting in injury to others. As Judge Cardozo said . . . 'Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day.'[73]

C. *Statutory Duty*

Statutory prohibitions against furnishing alcohol to minors have often served as a vehicle for courts to circumvent the harsh common

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68. *Id.*
69. *Id.* at 90, 540 A.2d at 55–56.
70. *Id.* at 92, 540 A.2d at 58.
71. *Id.* at 91, 540 A.2d at 57.
72. *Id.*
73. Sutter v. Hutchings, 254 Ga. 194, 195 n.3, 327 S.E.2d 716, 717 n.3 (1985) (citing MacPherson v. Buick Motor Co., 217 N.Y. 382, 391, 111 N.E. 1050, 1053 (1916)).

law rule of absolute immunity and impose liability upon social hosts for the negligent acts of their intoxicated guests.[74] A claim based upon ordinary negligence differs from one based on the violation of a statutory prohibition against furnishing alcohol to minors.[75] Under an ordinary negligence theory of liability, the standard of care is that of a reasonable person under similar circumstances; the statute itself will provide the standard of care when liability is predicated on negligence per se.[76]

The mere fact that a legislature has proscribed the furnishing of alcohol to minors does not necessarily signal that courts will impose civil liability under the liquor control statute. Some courts have refused to extend liability to social hosts under such statutes, holding that the criminal statutes do not supply a civil cause of action.[77] On the other hand, at least one court has imposed liability under a broad dram shop act on a social host who furnished (as opposed to sold) alcohol to a minor.[78] The finding of a civil remedy under a liquor control statute has hinged on the literal language of the statute for some courts.[79] Other courts have looked to the intent of the legislature in enacting the

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74. *See* Sagadin v. Ripper, 175 Cal. App. 3d 1141, 1157, 221 Cal. Rptr. 675, 684 (1985) (liability is premised on the meaning of "furnish"); *Sutter*, 254 Ga. at 197, 327 S.E.2d at 719 (state statute forbidding the furnishing of alcohol to minor provides a statutory duty to protect third parties); Brattain v. Herron, 159 Ind. App. 663, 674, 309 N.E.2d 150, 156 (1974) (social host who gave alcohol to brother in violation of statute prohibiting furnishing of alcohol to minor was held liable to injured third party. Court found no distinction between one who sells and one who gives alcohol to minor); Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 10, 453 N.E.2d 430, 433 (1983) (sale of alcohol to minor is evidence of negligence); Thaut v. Finley, 50 Mich. App. 611, 613, 213 N.W.2d 820, 822 (1973); Walker v. Key, 101 N.M. 631, 635, 686 P.2d 973, 977 (1984) (statute prohibiting delivering alcohol to minor states a cause of action against the social host). *But see* Strange v. Cabrol, 37 Cal. 3d 720, 722–23, 691 P.2d 1013, 1015–17, 209 Cal. Rptr. 347, 349 (1984) (liquor licensee who knowingly sold alcohol to minor in violation of statute not liable to injured third party where other statute provided that furnishing alcoholic beverages is not the proximate cause of injuries resulting from intoxication).

75. Special Project, *supra* note 1, at 1085.

76. *Id.* at 1086.

77. *See* United Serv. Auto. Ass'n v. Butler, 359 So. 2d 498 (Fla. 1978); Holmes v. Circo, 196 Neb. 496, 500, 244 N.W.2d 65, 69–70 (1976) (in absence of legislation specifically providing a civil remedy, tavern owner or operator is not liable to a third person injured by intoxicated person to whom the tavern owner served liquor in violation of a liquor control statute); Yoscovitch v. Wasson, 98 Nev. 250, 252, 645 P.2d 975, 976 (1982) (violation of a penal statute prohibiting the sale of alcohol to minors is not negligence per se); Hulse v. Driver, 11 Wash. App. 509, 512, 524 P.2d 255, 258 (1974) (civil liability will not be imposed solely on the basis of violation of criminal statute prohibiting the supplying of liquor to minor).

78. *Martin*, 508 So. 2d at 1141.

79. *See Butler*, 359 So. 2d at 500 (holding statute prohibiting sale or gift of liquor to minors applied only to business establishments and did not create a civil cause of action against a social host who dispensed liquor to minor); Ling v. Jan's Liquors, 237 Kan. 629, 639–49, 703 P.2d 731, 739 (1985) (since statute prohibiting dispensing of alcoholic beverages to certain classes of persons was intended to regulate sale of liquor and not to impose civil liability, a violation of such statute is not negligence per se, 1988).

statute to determine if a civil action is viable under the statute.[80] In *Thaut v. Finley*,[81] the Michigan Court of Appeals succinctly stated the logic of imposing liability on a social host who furnishes intoxicating liquors to a minor in violation of a statute proscribing such activity. The court stated:

> [V]iolation of a statute is negligence per se if the statute was intended to protect a class of persons, including the plaintiff, from the type of harm which resulted from its violation. This is so, even though the statute does not contain a provision respecting civil liability . . . it would be absurd to maintain that one of the purposes of the statute in question was not to protect the public from the risk of injury caused by intoxicated minors.[82]

Considering the *Thaut* court's broad application of the negligence per se doctrine, it would be difficult to imagine, under any set of circumstances, where civil liability would not be imposed under such a statute. It must be noted, however, that most courts have not been amenable to such an all-inclusive interpretation of the negligence per se doctrine, choosing instead to proceed cautiously in expanding social host liability.[83]

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80. *See* Sutter v. Hutchings, 254 Ga. 194, 197, 327 S.E.2d 716, 720 (1985) (social host owed duty to those using highways not to subject them to an unreasonable risk of harm by furnishing alcohol to a noticeably intoxicated person under legal drinking age and who hostess knew would soon be driving, where legislative intent was to control drunk driving to protect those on highways); Chausse v. Southland Corp., 400 So. 2d 1199, 1203 (La. 1981) (corporation that sold beer to a minor in violation of a statute held liable to third parties for injuries because the purpose of the statute was to place the entire responsibility upon person selling liquor to minor and to protect minors from their own negligence by drinking), *cert. denied*, 404 So. 2d 278, *cert. denied*, 404 So. 2d 497, and *cert. denied*, 404 So. 2d 498 (1981); Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 10–11, 453 N.E.2d 430, 434 (1983) (legislative objective in enacting liquor control statute was to protect the public and minors); Munford, Inc. v. Peterson, 368 So. 2d 213, 216 (Miss. 1979) (although statute prohibiting sale of beer to a minor was enacted for the regulation of the manufacture and sale of beer, it was also adopted for the protection of the public); Walker v. Key, 101 N.M. 631, 634, 685 P.2d 973, 976 (1984) (liquor control statute was intended to protect minors and to protect the general public from the risk of injury caused by intoxicated minors).

81. 50 Mich. App. 611, 213 N.W.2d 820 (1973).

82. *Id.* at 613, 213 N.W.2d at 821–22.

83. *See* cases cited *supra* notes 79–80; *see also* Montgomery v. Orr, 130 Misc. 2d 807, 813–14, 498 N.Y.S.2d 968, 973 (1986) (proof of violation of statute is not negligence per se, but is some evidence of negligence for the jury to consider; it is for the jury to determine the causal relationship between the violation of the statute and the injury). *But see* Congini v. Portersville Valve Co., 504 Pa. 157, 163 n.4, 470 A.2d 515, 518 n.4 (1983) (finding of negligence per se merely satisfies plaintiff's burden of establishing defendant's negligent conduct; plaintiff still must establish causation of injuries and damages as a result of the statutory violation).

D. Ohio Decisions

1. Common Law Rule of Absolute Social Host Immunity

The Ohio case law addressing social host liability is sparse. The Ohio courts have adhered to the common law rule of absolute immunity of social hosts, as set out in *Christoff v. Gradsky*.[84] In *Christoff*, the defendant sold alcohol to an adult purchaser who was already so intoxicated that he was unable to exercise ordinary care, and whose subsequent death allegedly resulted from such sale of alcohol.[85] In affirming the common law rule of absolute immunity of social hosts, the *Christoff* court held that, in the absence of an order of the department of liquor control prohibiting the sale of alcohol to the decedent, a cause of action does not lie because the common law gives no remedy for injury or death that follows the mere sale of liquor to an ordinary man.[86] However, perhaps recognizing the harsh effect the common law rule has on injured third parties, the Ohio Supreme Court has fashioned two exceptions to the rule of absolute immunity of social hosts for the negligent acts of their intoxicated guests.

2. Two Exceptions

In the often cited case of *Mason v. Roberts*,[87] the Ohio Supreme Court articulated the possible exceptions to the common law rule of absolute immunity of social hosts. The plaintiff in *Mason* brought a wrongful death action against, among others, the owner of a tavern. The suit alleged that employees of the tavern had served liquor to Roberts, who was already intoxicated, in violation of section 4301.22 of the Ohio Revised Code[88] which prohibits the sale of liquor to an intoxicated person.[89] Roberts thereafter assaulted plaintiff's decedent, another patron of the tavern, fatally injuring him.[90]

The *Mason* court recognized that, at common law, a cause of action was not maintainable against one who sold or furnished intoxicating liquor to a person who, as a result of consuming such intoxicants, caused injury to an innocent person.[91] The court noted that the common law principle presumed that "it was the consumption rather than

84. 140 N.E.2d 586 (Ohio 1956).

85. *Id.* at 587.

86. *Id.* at 589.

87. 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

88. OHIO REV. CODE ANN. §4301.22 (Baldwin 1989).

89. *Mason*, 33 Ohio St. 2d at 30, 294 N.E.2d at 886. §4301.22 of the Ohio Revised Code states, in pertinent part: "(B) No sales shall be made to an intoxicated person." OHIO REV. CODE ANN. §4301.22 (B) (Baldwin 1989).

90. *Mason*, 33 Ohio St. 2d at 29, 294 N.E.2d at 885.

91. *Id.* at 33, 294 N.E.2d at 887.

the sale which constituted the proximate cause of the harm done the third party."[92] Recognizing that the logic of the common law rule is questionable, the *Mason* court articulated the following exceptions to the rule: (1) the cause may be left for the jury where there is evidence that, to the seller's knowledge, the will of the purchaser of alcohol was so impaired as to have made it possible for the purchaser to refrain from drinking, and (2) the sale of intoxicants may be determined to be the proximate cause of subsequent harm to a third party when such sale is contrary to statute.[93] Thus, the *Mason* court extended, in a limited fashion, liability to social hosts for the negligent acts of their intoxicated guests. However, it must be recognized that the *Mason* court addressed its exceptions to the sale of intoxicating liquors.

In keeping with the exceptions to the common law rule set out in *Mason*, the Ohio Court of Appeals for Hamilton County extended liability to a social host for serving alcohol to a visibly intoxicated person in *Taggart v. Bitzenhofer*.[94] There, the defendant's employee continued to serve alcohol to Michael Rohe, who was visibly intoxicated, after he had displayed a pistol and threatened to kill Taggart.[95] Shortly thereafter Rohe shot and killed Taggart.[96] The *Taggart* court held that violation of section 4301.22 of the Ohio Revised Code,[97] which prohibits the sale of beer and intoxicating liquor to an intoxicated person, is negligence per se and such a violation creates a civil cause of action.[98] In dicta, the *Taggart* court appears to have adopted the broad definition of negligence per se that the Michigan Court of Appeals did in

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92. *Id.*

93. *Id.* The *Mason* court also held that §4399.01 of the Ohio Revised Code, Ohio's Dram Shop Act, does not provide the exclusive remedy against a liquor permit holder. *Mason*, 33 Ohio St. 2d at 32, 294 N.E.2d at 887.

94. 35 Ohio App. 2d 23, 299 N.E.2d 901 (1972), *aff'd per curiam*, 33 Ohio St. 2d 35, 294 N.E.2d 266 (1973). *Mason* was decided by the court of appeals on the same day as *Taggart*. The Ohio Supreme Court decisions were also issued contemporaneously.

95. *Id.* at 24, 299 N.E.2d at 902.

96. *Id.*

97. *See supra* note 88 and accompanying text.

98. *Taggart*, 35 Ohio App. 2d at 29, 299 N.E.2d at 904. *See also* Ono v. Applegate, 62 Haw. 131, 136, 612 P.2d 533, 538 (1980) (person injured by an inebriated driver may recover from tavern which provided alcohol to driver in violation of statute prohibiting sale or service of alcohol to person already under the influence of alcohol); Grayson Fraternal Order of Eagles v. Claywell, 736 S.W.2d 328, 334 (Ky. 1987) (dram shop operator could be held liable for furnishing liquor to an intoxicated person in violation of statute for death and personal injuries of third parties); Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 348 (Miss. 1986) (third party is protected under beverage control statute prohibiting sale to visibly intoxicated person from negligent acts of intoxicated person, and has cause of action against one furnishing alcohol in violation of such a statute); Lopez v. Maez, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982) (cause of action for wrongful death is stated against liquor licensee who sold liquor to an intoxicated person, in violation of statute, where server knew or should have known that customer was driving car and where injury to third persons was a reasonably foreseeable result of driving while intoxicated).

Thaut.[99] The *Taggart* court stated: "since a violation of a specific requirement of law constitutes negligence per se, it follows that . . . [defendant], in selling alcohol to an intoxicated person failed to safeguard the other patrons and was negligent and because that act was specifically forbidden by law, the sale constituted negligence per se."[100]

The Ohio courts have not yet extended liability to a social host under the first exception set out in *Mason*.[101] In *Baird v. Roach, Inc.*,[102] the Court of Appeals for Franklin County, while "assuming that the gratuitous serving of liquor to a social or business guest can give rise to liability on the part of the host under Ohio law,"[103] nevertheless refused to impose liability on the defendant social host.[104] In *Baird*, two employees of the defendant, Roach, Inc., attended Roach's annual picnic where they were served and consumed intoxicating liquors.[105] The employees then left the picnic to drag race, where one or both of their vehicles went left of the highway center colliding with the automobile in which the plaintiff was a passenger.[106] Noting that the facts of the *Baird* case did not fit the *Mason* exceptions because the complaint failed to allege such circumstances,[107] the *Baird* court stated:

> Assuming that the gratuitous serving of liquor to a social or business guest can give rise to liability on the part of the host under Ohio law, such liability would be imposed only where the host knew that the person to whom the liquor was furnished would consume it and either was, or would become, intoxicated and would probably act in such a manner while intoxicated as to create an unreasonable risk of harm to third persons.[108]

If there were any doubts as to the extent to which the Ohio courts would recognize exceptions to the common law rule of absolute immunity of social hosts, they were dispelled in the Ohio Supreme Court's decision in *Settlemyer v. Wilmington Veterans Post No. 49*.[109] In *Settlemyer*, the plaintiff alleged that the defendant, Wilmington Veterans Post, gratuitously provided alcoholic beverages to Alice Berlin, and that the defendant knew or should have known Berlin was intoxicated.[110]

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99. *See supra* note 82 and accompanying text.
100. *Taggart*, 35 Ohio App. 2d at 28, 299 N.E.2d at 904.
101. *See supra* note 93 and accompanying text.
102. 11 Ohio App. 3d 16, 462 N.E.2d 1229 (1983).
103. *Id.* at 19, 462 N.E.2d at 1233.
104. *Id.* at 16, 462 N.E.2d at 1230.
105. *Id.*
106. *Id.*
107. *Id.* at 18, 462 N.E.2d at 1232.
108. *Id.* at 19, 462 N.E.2d at 1233.
109. 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984).
110. *Id.*

The plaintiff further alleged that, as a proximate result of defendant's negligence in providing liquor to Berlin, her vehicle collided with the vehicle driven by the plaintiff's decedent, causing his death.[111]

The *Settlemyer* court recognized the common law rule of non-liability as extreme, "because in effect, it cloaked the providers of intoxicants with a blanket immunity from potential lawsuits."[112] However, the court noted that the wholesale abrogation of the common law rule would also be extreme and "could open the door to unlimited liability wherein a seller or provider could be placed in the situation of a veritable insurer of the alcohol recipient's misdeeds."[113] The *Settlemyer* court, thus, was unwilling to completely abandon the common law rule and open the door to the potential ramifications of sweeping social host liability.

The Ohio Supreme Court distinguished the *Settlemyer* facts from the *Mason* exceptions and found that a cause of action did not exist against the Veterans Post.[114] The court held that *Mason* dealt with the sale of intoxicating liquor by a commercial provider, whereas the *Settlemyer* case involved the gratuitous furnishing of alcohol by a social host.[115] Further, the *Settlemyer* court found *Mason* inapplicable because of the absence of any statutory duty on the part of the defendant.[116] The court noted that no statute in Ohio precludes furnishing, as opposed to selling, liquor to an intoxicated adult.[117]

The *Settlemyer* court refused to expand the *Mason* exceptions and create a cause of action for the plaintiff.[118] The court reasoned that a social host who gratuitously furnishes alcohol to a guest should not be held to the same standard as a commercial provider, who has a proprietary interest in providing alcohol, but who should be expected, because of greater resources, to exercise greater control over patrons.[119] Finally, the court in *Settlemyer* noted that any extension of liability of social providers of intoxicating liquors should be left to the discretion of the

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111. *Id.* at 124, 464 N.E.2d at 522.

112. *Id.* at 125, 464 N.E.2d at 523.

113. *Id.*

114. *Id.* at 126, 464 N.E.2d at 523. Perhaps responding to the confusion created by the *Settlemyer* decision, it was subsequently limited to its facts in Gressman v. McClain, 40 Ohio St. 3d 359, 351, 533 N.E.2d 732, 735 (1988), *reh'g denied*, 41 Ohio St.3d 723, 535 N.E.2d 315 (1988).

115. *Settlemyer*, 11 Ohio St. 3d at 126, 464 N.E.2d at 523.

116. *Id.*

117. *Id.* at 127, 464 N.E.2d at 524.

118. *Id.*

119. *Id. But see* Terry v. Markoff, 26 Ohio App. 3d 20, 22–23, 497 N.E.2d 1133, 1136 (1986) (a non-profit organization holding an Ohio liquor license, which provides alcohol on a pay-as-you-go basis, may be held liable to a patron who was assaulted by another patron who was allegedly intoxicated, on the basis of violation of Ohio Revised Code §4301.22(B)).

legislature.[120]

IV. ANALYSIS

The Ohio Supreme Court's decision in *Mitseff v. Wheeler*[121] is consistent with that court's refusal to completely abandon the common law rule of absolute immunity of social hosts. Instead, the court loosely relied on the *Mason v. Roberts*[122] exceptions in providing a remedy for the plaintiff.

The defendant in *Mitseff* argued that he owed no duty to third parties for damages resulting from his furnishing his guest with intoxicating liquors, based on the Ohio Supreme Court's decision in *Settlemyer*.[123] However, the court quickly distinguished *Settlemyer* from the facts in *Mitseff*, stating, "*Settlemyer* concerned a social host providing alcohol to one who was apparently an adult guest, an act that is not precluded by statute."[124] Conversely, the defendant in *Mitseff* provided alcohol to a minor, in clear violation of section 4301.69 of the Ohio Revised Code.[125] In very plain language, although citing no rationale for its finding, the Ohio Supreme Court held that the statute creates a civil remedy for one injured by a minor who had been furnished alcohol in violation of statute, against the host providing the alcohol.[126]

The logic of the *Mitseff* decision and the finding of a civil remedy is unquestionable, in light of the precedents in Ohio. It cannot be said that the decision will open the door to any sweeping extension of social host liability in Ohio. On the contrary, the *Mitseff* court fit its decision loosely within the narrow exceptions to the common law rule set out in *Mason*. While *Mason* discussed the sale of intoxicating liquors in violation of a statute, *Mitseff* is reconcilable with that exception in that the statute at issue in *Mitseff* specifically precluded the sale or furnishing of alcohol to minors. Further, the *Taggart v. Bitzenhofer*[127] court previously found that violation of a liquor control statute is negligence per se. Therefore, the *Mitseff* finding of negligence per se is not surprising. The fact that the statute at issue in *Taggart* applies to the sale of alcohol does not defeat the soundness of the *Mitseff* reasoning, which relied on a statutory provision prohibiting the furnishing of alcohol to minors.

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120. *Settlemyer*, 11 Ohio St. 3d at 127, 464 N.E.2d at 524.
121. 38 Ohio St. 3d 112, 526 N.E.2d 798 (1988).
122. 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).
123. *Mitseff*, 38 Ohio St. 3d at 112, 526 N.E.2d at 799.
124. *Id.* at 114, 526 N.E.2d at 800.
125. Id.
126. *Mitseff*, 38 Ohio St. 3d at 114, 526 N.E.2d at 800.
127. 35 Ohio App. 2d 23, 299 N.E.2d 901 (1972), *aff'd per curiam*, 33 Ohio St. 2d 35, 294 N.E.2d 266 (1973).

Rather, the plaintiff in *Mitseff* was clearly within the class of persons designed to be protected by the statute, particularly if the broad negligence per se rationale of the Michigan Court of Appeals in *Thaut v. Finley*[128] was, as it appears, accepted by the Ohio courts in *Taggart*.[129] In a subsequent decision, the Ohio Supreme Court unequivocally stated that the violation of a liquor control statute is negligence per se: "[w]here a legislative enactment imposes a specific duty for the protection of others, a person's failure to observe that duty constitutes negligence per se."[130]

It is readily apparent that the Ohio courts will exercise a great deal of restraint in expanding the liability of social hosts; instead, they will defer to the sound discretion of the legislature to provide remedies for injured third parties. The *Mitseff* decision reflects the continued deference of the Ohio courts to the authority of the Ohio legislature in creating civil remedies for injured persons.

If there is any deficiency in the *Mitseff* decision, it is that the court did not articulate its rationale when it found that the statute provided a civil remedy against those who furnish alcohol to minors. Instead, the court merely stated that "the statute created a duty that appellee, because of Johnson's age, refrain from furnishing Johnson with alcohol."[131] A reader of the opinion, thus, cannot discern whether the Ohio Supreme Court found a cause of action against social hosts who provide alcohol to minors based upon legislative intent, public policy considerations, or upon the theory that the violation of any penal statute creates a civil remedy. While the latter theory might signal sweeping tort liability, it is unlikely that it was the sole basis for the decision and such a theory should not be relied upon.

Considering that the Ohio courts have strictly adhered to the rationale of the *Mason* decision, it is more likely that the Ohio Supreme Court's decision in *Mitseff* was predicated on *Mason*. In dictum, the *Mason* court stated that the purpose of liquor control statutes is that they "shall be liberally construed, to the end that the health, safety and welfare of the people of this state shall be protected and temperance in the consumption of alcoholic liquors fostered and promoted by sound and careful control and regulation of their manufacture, sale and distribution."[132] Therefore, applying the *Mason* rationale, the *Mitseff* court

128. 50 Mich. App. 611, 613, 213 N.W.2d 820, 822 (1973).

129. *See supra* notes 82 & 99 and accompanying text; *see also* Tomlinson v. McCutcheon, 554 F. Supp. 186, 189–90 (N.D. Ohio 1982) (a violation of Ohio's Dram Shop Act constitutes negligence per se).

130. Gressman v. McClain, 40 Ohio St. 3d 359, 362, 533 N.E.2d 732, 735 (1988).

131. *Mitseff*, 38 Ohio St. 3d at 114, 526 N.E.2d at 800.

132. *Mason*, 33 Ohio St. 2d at 27, 294 N.E.2d at 887.

may have liberally construed the statute at issue, finding that because of the obvious legislative determination implicit in the statute that minors possess an inability to reasonably discern the effects of alcohol, a civil remedy existed against one who furnishes alcohol in violation of that statute. Given the utter silence of the *Mitseff* court as to the rationale for its decision, this theory cannot be presumed; however, it would appear to be the most logical and well reasoned.

The legal effect of the *Mitseff* decision is to extend liability to social hosts in Ohio who furnish alcohol to minors in violation of Ohio Revised Code section 4301.69, when the minor subsequently injures a third party as a result of his or her intoxication.[133] The practical effect of the decision is that hosts must absolutely refrain from furnishing or providing alcohol to minors, under any circumstances, in order to avoid being found liable in a civil action for damages resulting from the minor's negligent acts that are committed while intoxicated.

It is questionable whether liability will be extended to one who unknowingly makes alcohol available to a minor, as opposed to directly furnishing the alcohol to a minor. Such a situation is unlikely to result in liability under the *Mitseff* decision because the statute may require some affirmative action on the part of the host in order to constitute a violation of the statute.[134] However, at least one court has found a social host liable even where the host merely provided a "hospitable environment" for consumption of alcohol by minors.[135]

In *MacLeary v. Hines*,[136] the host did not physically give any alcohol to the minor, nor did the minor consume any alcohol the host made available.[137] Instead, the minor consumed alcohol he purchased himself.[138] The *MacLeary* court extended social host liability beyond furnishing alcohol to minors in violation of statute, to those who intentionally aid minors in consuming liquor.[139] The court held that a host

133. *Mitseff*, 38 Ohio St. 3d 112, 526 N.E.2d 798.

134. *See, e.g.*, Sagadin v. Ripper, 175 Cal. App. 3d 1141, 1157, 221 Cal. Rptr. 675, 684 (1985) (the word "furnish" in the statute requires affirmative action on the part of the furnisher; father who tacitly authorized son to furnish father's alcohol to minor guests committed an act of misfeasance, which was affirmative conduct enough to conclude that father "furnished" alcohol to minors); Christensen v. Parrish, 82 Mich. App. 409, 412, 266 N.W.2d 826, 828 (1978) (a social host who did not supply alcohol consumed in her home, and who was not present when the minor was served, does not have a common law duty to prevent others from furnishing alcohol to minors). *But see* Macleary v. Hines, 817 F.2d 1081 (3d Cir. 1987) (social host can be liable when he opens his premises for underage drinking, regardless of who purchased or furnished the alcohol).

135. *Macleary*, 817 F.2d at 1081 (applying Pennsylvania law).

136. *Id.*

137. *Id.* at 1082.

138. *Id.*

139. *Id.* at 1083 (citing Fassett v. Delta Kappa Epsilon, 807 F.2d 1150 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987)).

> who knowingly and intentionally allows premises over which [the host has control] to be used for the purposes of consumption of alcohol by minors has created an unreasonable risk of intoxication of the minor [and may therefore be liable for injuries if the jury finds] the use of the premise to be a substantial factor in bringing about the intoxication of the minor guest.[140]

In light of the cautious approach of the Ohio courts in extending social host liability, it is very questionable whether the *MacLeary* rationale would be accepted in Ohio. The continued cautious approach of the Ohio courts is evident in a recent Ohio Supreme Court decision, *Gressman v. McClain*,[141] where the court impliedly limited social host liability in Ohio to cases where there has been a violation of some legislatively-mandated standard of conduct.[142]

Although recent decisions do not indicate any clear national trend in extending social host liability, the *Mitseff* decision is consistent with the overall questioning of the common law rule of non-liability of social hosts and the fashioning of alternative theories of recovery for injured persons.

V. CONCLUSION

Social host liability is a very perplexing area of tort law. While some jurisdictions continue to adhere to the common law rule of non-liability of social hosts for the negligent acts of their intoxicated guests, other jurisdictions, by fashioning remedies for injured parties based on ordinary negligence principles or violation of liquor control acts, have suggested that the common law rule is anachronistic in modern society.

The Ohio courts have proceeded cautiously in extending liability to social hosts. In recognizing two possible exceptions to the common law rule of non-liability of social hosts, as set forth in *Mason v. Roberts*,[143] the Ohio courts have fashioned a means of circumventing the harsh effects of the rule without the wholesale abrogation of it. The *Mitseff v. Wheeler*[144] decision, in imposing liability on social hosts based on violation of Ohio's statute prohibiting the sale or furnishing of intoxicating liquors to minors, signals the continued questioning of the common law rule. Considering the cautious language of *Mitseff* and other Ohio decisions on social host liability, however, the complete abrogation of the common law rule of absolute immunity of social hosts in Ohio is unlikely in the absence of action by the Ohio legislature, particularly

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140. *Id.* at 1081.
141. 40 Ohio St. 3d 359, 533 N.E.2d 732 (1988).
142. *Id.* at 362, 533 N.E.2d at 735.
143. 33 Ohio St.2d 29, 294 N.E.2d 884 (1973).
144. 38 Ohio St.3d 112, 526 N.E.2d 798 (1988).

given the fact that the Ohio Supreme Court found in *Gressman v. McClain*[145] that social host liability must be based upon the violation of a statutory norm.[146] The *Mitseff* decision signals that the Ohio courts will continue to adhere to the *Mason* exceptions to the common law rule of absolute immunity of social hosts, proceeding cautiously in expanding social host liability in Ohio.

Mary Katherine Huffman

145. 40 Ohio St. 3d at 359, 533 N.E.2d at 732 .
146. *Id.* at 362, 533 N.E.2d at 735.