LIQUOR AND LIABILITY: THE SOCIAL HOST

Ken Tacium*

When liquor has been served at house parties it is not unusual for guests to enter their automobiles and drive home intoxicated. The issue is whether the host of such a party can be held liable to members of the public at large for injuries caused by acts of his intoxicated guest. Canadian courts have not considered this question, but there is both Canadian and American authority which may provide useful guidance towards a resolution of the issue should it arise in Manitoba.

The Canadian Cases

The 1973 decision of the Supreme Court of Canada in *Jordan House Ltd.* v. *Menow*[1] provides support for such an action. This case involved the liability of a tavern owner to an intoxicated patron. The plaintiff, Menow, was a frequent patron of the defendant hotel's beverage room. It was well known to the defendant proprietor and his employees that Menow had a propensity to drink to excess and become obnoxious and boisterous. The hotel's employees were instructed not to serve him liquor unless he was accompanied by a responsible person. One particular evening Menow attended the beverage room in the company of his employer. The two drank several beers together before Menow's employer left. Menow remained and the employees of the hotel continued to serve him liquor beyond the point of obvious intoxication. He began to make a nuisance of himself with other patrons and was ejected from the hotel by the hotel employees. The defendant hotel, through its employees, knew that Menow would have to make his way home on foot down a wet, dark, and busy highway in his intoxicated condition. On his way home Menow was struck by a car while staggering near the center of the highway. The Supreme Court held the hotel liable in part[2] to Menow for the injuries he suffered.

This decision recognizes that in certain circumstances a tavern-keeper will be held liable for injury to a patron who drinks to excess on his premises if the patron is later ejected into a dangerous situation. Laskin J. acknowledged that the defendant had breached provisions of the Ontario liquor license and liquor control acts, but he preferred to base his decision on common law negligence principles. Laskin stressed the importance of the particular facts. In concluding his judgement he stated:

> The result to which I would come here does not mean (to use the words of the trial judge . . .), . . . that I would impose 'a duty on every tavern-owner to act as a watchdog for all patrons who enter his place of business and drink to excess'. A great deal turns on the knowledge of the operator (or his employees) of the patron and his condition where the issue is liability in negligence for injuries suffered by the patron.[3]

---

* Student, Faculty of Law, University of Manitoba. The author wishes to thank Professor Phil Osborne and Professor John Irvine for their assistance in the preparation of this paper. Any errors and omissions in the paper are solely those of the author.

1. [1974] S.C.R. 239, 38 D.L.R. (3d) 105, hereinafter referred to as *Jordan House*.
2. At trial, liability was apportioned equally between the defendant hotel, the defendant driver of the car which struck Menow, and the plaintiff himself for his contributory negligence. Only the defendant hotel appealed the finding of liability.
3. *Supra* n. 1, at 250 (S.C.R.), 113 (D.L.R.).

While this case imposed liability on a tavern keeper regarding his patron, it would likely extend to members of the public at large who are injured by the negligence of the intoxicated patron. Binchy notes in his article, "[t]he implications in regard to potential liability to third persons injured by drunken drivers are immense."[4] If the intoxicated consumer can make a successful claim for damages suffered as a result of his own wilful intoxication against the commercial supplier of his liquor, then common sense and justice would dictate that an innocent third party injured by the intoxicated consumer should have an even stronger claim against the supplier of liquor.

A Canadian case which lends some support to this view is *Jacobsen* v. *Kinsmen Club of Nanaimo*.[5] In that case a defendant who ran a beer garden was held liable to a third person who was injured as the result of an intoxicated patron's actions.[6] However, it is not a conclusive authority since the third person was also a patron and was on the premises at the time. Moreover, liability was based primarily on *The Occupiers' Liability Act*.

A more conclusive authority holding a commercial vendor liable to an injured third person for the act of an intoxicated patron is the case of *Schmidt* v. *Sharpe*.[7] This case involved a single motor vehicle accident in which the plaintiff, riding as a passenger in the first defendant's car, was injured. The plaintiff and the first defendant (Sharpe), both minors, had several beers in the defendant hotel's beverage-room prior to the accident. The evidence indicated that Sharpe would have been noticeably impaired at the time he was served liquor in the hotel because he had consumed twelve cans of beer earlier in the day. After the accident Sharpe gave a breathalyser reading of .15%. The plaintiff alleged that the hotel was negligent for serving alcohol to Sharpe while he was already under, or apparently under, the influence of alcohol, and also for serving alcohol to a minor. The jury decided in favour of the plaintiff, but apportioned liability at 55% to the defendant Sharpe, 15% to the defendant hotel, and 30% to the plaintiff for his contributory negligence.[8]

The *Jordan House* case held a commercial vendor liable only to an intoxicated patron, while the *Schmidt* case extended this duty to third persons injured by the intoxicated person's act. The more difficult issue to determine is whether this principle should be extended beyond commercial vendors to include social hosts. Since the *Jordan House* decision was reached on the basis of common law negligence principles, extending liability to include a social host would not appear to be unreasonable, for the risk created by the act or omission of a social host in relation to his intoxicated guest is identical to that created by the commercial vendor and his intoxicated patron. As Laskin J. states in his judgement:

---

4. W. Binchy, "Drink Now — Sue Later" (1975), Can. Bar Rev. 344 at 355.

5. (1976), 71 D.L.R. (3d) 227 (B.C.S.C.).

6. In this case, intoxicated patrons of a beer garden were climbing a support to an overhanging beam to 'moon' other patrons below. After several persons had performed this feat successfully, a less agile fellow known only as Sunshine attempted the display, and fell from the beam onto the plaintiff below. A far better magician than an acrobat, Sunshine vanished without a trace. The only claim the plaintiff made was against the proprietors of the beer garden.

7. (1984), 27 C.C.L.T. 1 (Ont. S.C.).

8. Damages were assessed at $1,631,664.

> The common law assesses liability for negligence on that basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another.[9]

The case of *Hempler* v. *Todd*[10] may support an action against a social host, though the case is not directly on point. The case involved an automobile accident where the deceased and the defendant were riding together in the defendant's car. The evidence indicated that the deceased would have been obviously intoxicated at the time of the accident. There was some dispute whether the deceased or the defendant was driving the car when the accident occurred, and though the Court tended to believe that the defendant was driving, the Court would have held the defendant liable in either case. Assuming the deceased was behind the wheel when the accident occurred, Hall J. stated:

> Todd [the defendant] owed a duty to the deceased not to allow him to drive the vehicle when he, Todd, knew or ought to have known that he was placing the deceased in a position of personal danger. For Todd to have allowed the deceased to so drive was in the circumstances clearly negligent.[11]

The *Hempler* case stands for the proposition that giving car keys to an intoxicated person whom one knows will be driving is negligent. By analogy, it can be argued that a social host who gives an extra drink to a well primed party guest, whom the host knows has car keys and will later be driving, is also negligent.

Further support for imposing this duty on a social host is provided, in Manitoba, by section 178 of *The Liquor Control Act*.[12] This section does not provide for any civil cause of action, but it does impose a statutory duty on *any* person not to give, sell, or supply liquor to any person apparently under the influence of alcohol. This provision clearly makes no distinction between commercial vendors and social hosts.[13] Following the principle in *R.* v. *Saskatchewan Wheat Pool*,[14] a breach of this statutory provision can be raised as evidence of negligence, and can be used as a fortifying element to impose a common law duty of care upon the person in breach of the provision.

---

9. *Supra* n. 1, at 247 (S.C.R.), 110 (D.L.R.)

10. (1970), 74 W.W.R. 758 (Man Q.B.).

11. *Ibid.*, at 761.

12. (178) No person shall
    (a) permit drunkenness to take place in any house, building, or premises of which he is owner, tenant, or occupant; or
    (b) permit or suffer any person apparently under the influence of liquor to consume liquor in any house, building, or premises of which the first named person is owner, tenant, or occupant; or
    (c) give, sell, or otherwise supply liquor to any person apparently under the influence of liquor.

13. Some may argue however, that section 300 of Manitoba's *The Liquor Control Act* prevents any common law development in this area. Section 300 provides a limited statutory cause of action in cases of liquor related fatalities to the deceased consumer's dependants. This argument would be based on the canon of statute construction, *expressio unis est exclusio alterius*. However, it is submitted that section 300 would not prevent the imposition of a common law duty. In Ontario, a similar statutory provision in *The Liquor License Act* R.S.O. 1960, c. 218, s. 67 relating to fatalities (as well as injury to person or property of a third party, a provision absent in the Manitoba statute) did not prevent the imposition of liability in the *Jordan House* case.

14. (1983), 23 C.C.L.T. 121 (S.C.C.). In this case the Canadian Wheat Board sought to recover damages from the Saskatchewan Wheat Pool for the delivery of infested grain contrary to subsection 86(c) of the *Canada Grain Act*. Like section 178 of the Manitoba's *The Liquor Control Act*, subsection 86(c) of the *Canada Grain Act* does not give rise, in and of itself, to an independant tort action. The Board made no claim in negligence, instead it relied solely on what it alleged was a statutory breach. The S.C.C. held that the notion of a nominant tort of statutory breach, giving rise to a damage claim on proof of breach, should be rejected, and that proof of statutory breach, causative of damages, may be evidence of negligence.

If one accepts that the *Jordan House* decision is based on "the knowledge of the operator (or his employees) of the patron", then the decision would lend itself to imposing a duty of care upon social hosts as this type of personal relationship between the supplier and consumer of the alcohol occurs more often in the social rather than the commercial situation. One may argue that the personal relationship is key because it places a moral obligation on the dispenser of alcohol which may further justify the imposition of liability when due care for the intoxicated guest or patron is not taken.

However, the *Jordan House* case must be looked at more closely to see if the personal relationship is key to the decision. It is submitted that the commercial aspect of the relationship was at least as significant as the personal relationship which existed between the operator and the patron. For instance, in support of his finding, Laskin J. cited the case of *Dunn* v. *Dominion Atlantic Railway*.[15] In that case an employee of the defendant railway ejected an intoxicated passenger from a train at a dark, unattended station platform. The passenger's body was later found mangled after having been hit by a passing train. The Supreme Court of Canada (Davies C.J. dissenting) held the defendant liable for not exercising due care in respect of the safety of its intoxicated passenger. Here there was no personal relationship between the railway and the passenger; it was a purely commercial one. In addition, cases which have subsequently applied *Jordan House* have done so in purely commercial situations.[16]

The American Cases

Though the following discussion of American authority is far from exhaustive, a survey of cases in selected American jurisdictions where liability has been imposed against social hosts may prove useful.

In *Kelly* v. *Gwinnell*[17] the Supreme Court of New Jersey allowed a plaintiff's cause of action against a social host who had provided liquor to the driver who injured the plaintiff in an automobile accident. The facts indicated that the defendant driver, Gwinnell, had thirteen drinks of scotch at the defendant host's home before getting into his car and driving home. After the accident which injured the plaintiff, a blood test revealed that Gwinnell had a blood alcohol content of .28%. It was determined that Gwinnell must have been showing signs of obvious intoxication before leaving the host's home.

Wilentz C.J. held the defendant host liable by common law negligence principles. However, he made it clear that his decision was also supported by policy considerations regarding the high rate of drunk driving.

In his dissenting opinion, Garibaldi J. argued that policy decisions are best left to the legislatures. He noted that any prior judicial attempts to

15. (1920), 52 D.L.R. 149 (S.C.C.).

16. *Jacobsen* v. *Kinsmen Club of Nanaimo, supra* n. 5; *Crocker* v. *Sundance Northwest Resorts Ltd.* (1983), 25 C.C.L.T. 201 (Ont. H.C.).

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

establish such a cause of action have been abrogated or restricted by subsequent legislative action. He also lists the state courts which considered this issue and denied the cause of action.[18]

The Illinois Supreme Court in *Miller* v. *Moran*[19] denied a cause of action against a social host, overruling the earlier unreported County Court case of *Tadey* v. *Estate of Doe*.[20] Illinois, like many States in the U.S.,[21] has enacted dram shop legislation which allows a statutory cause of action against tavern owners who serve liquor to obviously intoxicated patrons when the patron's negligence causes injury to a third party. However, the Illinois legislation limits recovery from a tavern owner to $20,000 for loss of support, and $15,000 for injury to person or property.[22]

In *Tadey,* the Court went beyond the State's dram shop legislation to impose liability in a non-commercial setting. A group of teenagers gathered at the host teenager's home to drink beer and smoke marijuana. One of the boys later left the premises in his car with the teenage host as his passenger. An automobile accident resulted in which the two teenagers were killed and the plaintiff driver of the other car was injured. After settling for the policy limit on the deceased driver's auto insurance, the plaintiff filed a negligence claim against the estate of the deceased teenage host and against the host's father — the owner of the premises where the party was held. The plaintiff alleged that the teenage host was negligent at common law for allowing his teenage guests to drink beer and smoke marijuana, and that the father should have controlled the activities on his premises. The jury returned a verdict in favour of the plaintiff in the amount of $90,000 against the deceased teenager's estate, but exempted the father from liability on the grounds that he had no knowledge nor sufficient reason to believe that a drinking party was taking place in his home.

While Stanner states early in his article that the plaintiff's cause of action rested on common law entirely apart from the Illinois Dram Shop Act,[23] he later adds that the impact of dram shop legislation in various states has led to the gradual erosion of the common law bars to recovery. However, the *Tadey* decision demonstrates the inequity to social hosts who, unlike commercial vendors, are not protected by the dram shop recovery limits. In *Tadey,* the defendant host was held liable on a $90,000 claim, while under Illinois dram shop legislation, the maximum amount of recovery would have been $35,000. This is a highly questionable result since a

---

18. *Kowal* v. *Hofher,* 436 A.2d 1 (Conn. 1980); *Miller* v. *Moran,* 421 N.E.2d 1046 (Ill. 1981); *Behnke* v. *Pierson,* 175 N.W.2d 303 (Mich. 1970); *Cole* v. *City of Spring Lake Park,* 314 N.W.2d 836 (Minn. 1982); *Runge* v. *Watts,* 589 P.2d 145 (Mont. 1979); *Hamm* v. *Carson City Nugget,* 450 P.2d 358 (Nev. 1969); *Olsen* v. *Copeland,* 280 N.W.2d 178 (Wisc. 1979); *Edgar* v. *Kajet,* 389 N.Y.S.2d 631 (New York 1976); *Klein* v. *Raysinger,* 470 A.2d 507 (Pa. 1983); etc.

19. 421 N.E.2d 1046 (1981).

20. Unreported — Illinois Circuit Court (Will County) 12th Circuit, No. 1: W73G, 1118L (1973) (cited in Stanner's article: L. Stanner, "Liability of Social Host for Off Premises Negligence of Inebriated Guest" (1980), 68 Illinois Bar J. 396).

21. In 1853, the Indiana legislature passed a statute similar to the contemporary dram shop acts. Ohio and Pennsylvania followed with similar legislation in 1854, as did New York and Maine in the 1850's. These laws were apparently passed as a result of a growing sentiment which favoured prohibition. H. McGough, "DramShop Acts" (1967), A.B.A. Section of Ins., Neg., and Comp. L. Proceedings 448.

22. Ill. Rev. Stat. 1977, ch. 43 s. 135 (cited in Stanner's article n. 20 at 326).

23. *Ibid.*

commercial vendor draws a financial benefit by selling liquor whereas a social host does not.

In *Miller* v. *Moran*[24] the Illinois Court of Appeal overuled the unreported *Tadey* case although without making specific reference to it. In *Miller,* an injured motorist sued a social host who had furnished liquor to the driver responsible for the automobile accident. The Court denied the claim stating that if such liability is to be imposed it should be done by the legislature and not the courts. Trapp J. stated that another compelling factor to deny liability is that a social host could face unlimited liability whereas a commercial vendor is protected by the $35,000 dram shop recovery limit — a criticism made by Stanner of the *Tadey* decision.[25]

Stanner feels that it is in states where no dram shop legislation exists where its effect on the common law is greatest. California is such a state. However, the law in California with regard to this issue appears to have gone full circle.

The first California case to argue that a tavern keeper had an affirmative duty to protect the safety of an intoxicated patron was *Cole* v. *Rush.*[26] A saloon patron was fatally injured in a fall during a brawl after consuming a large quantity of liquor. The patron's widow and minor children were denied recovery against the tavern owner on the grounds that the proximate cause of injury was the consumption rather than the provision of the alcohol.

The law remained unchanged until the decision in *Vesley* v. *Sager.*[27] That case involved the liability of a tavern owner to a member of the public at large. An injured motorist brought the action against the tavern owner and the intoxicated driver of the other car who had been drinking in the tavern. It was found that the tavern owner knew the patron was becoming excessively intoxicated, that the patron would be driving when he left the premises, and that the only route from the tavern was down a steep, narrow, and winding mountain road, and yet the tavern owner continued to serve the patron liquor until the early hours of the morning.

Wright C.J. criticized the common law rule in *Cole* v. *Rush,* but decided the case in favour of the plaintiff on the basis of breach of statutory duty by the defendant tavern owner. The relevant legislation is the *Business and Professions Code* section 25602 which reads:

> 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.[28]

Wright C.J. felt that the central issue in the case was one of duty, not proximate cause.[29] He concluded that a duty of care could be imposed in

---

24. *Supra* n. 19.
25. *Supra* n. 20.
26. 289 P. 2d 450 (Cal. 1955).
27. 486 P. 2d 151, 95 Cal. Rptr. 623 (1971).
28. *West's Annotated California Codes.*
29. 95 Cal. Rptr. 623 (1971) at 631.

this case by breach of the statute. Section 25602 of the *Code* is clearly penal in character and does not provide for any civil liability. However, Wright asserted, "In this State a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm the plaintiff suffered as a result of violation of the statute."[30] Moreover, section 23001 of the *Business and Professions Code*[31] states that one of the purposes of the *Alcoholic Beverage Control Act* is to protect the safety of the people of the State.

Following on the heels of this decision was *Brockett* v. *Kitchen Boyd Motor Company*[32] which extended the *Vesley* ruling to a non-commercial situation. A minor became intoxicated at a company Christmas party and subsequently drove home intoxicated causing an automobile accident which injured the plaintiff driver of the other car. It was held that any person, whether in the business of dispensing alcoholic beverages or not, who disregards the legislative mandate that liquor not be furnished to a minor, breaches a duty of care to anyone who is injured as a result of the minor's intoxication. Liability was based on section 25658 of the *Business and Professions Code*[33] which forbids anyone from supplying liquor to a minor, rather than to a "habitual drunkard" or "obviously intoxicated person" as provided for in section 25602 of the *Code*.

In 1976 a case came before the Supreme Court of California where reliance on breach of statutory duty could not be used to impose liability on the commercial vendor. In *Bernhard* v. *Harrah's Club*[34] a California resident brought an action against a Nevada tavern owner claiming his sale of alcoholic beverages to the intoxicated patron who caused the automobile accident was the proximate cause of his injury. The accident occurred on a California highway, and the Court had to resolve the choice of law issue, which they did in the plaintiff's favour, before turning to the negligence claim.

Sullivan J. concluded that section 25602 of the *Business and Professions Code* could not be applied extra-territorialy against the Nevada tavern owner. To the defendant's argument that there could be no liability without breach of statute Sullivan replied, ". . . our decision in *Vesley* was much broader than defendant would have it."[35] Sullivan stated that the old com-

---

30. *Ibid.*

31. *West's Annotated California Codes.* Section 23001 of the *Business and Professions Code* reads:

> This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes.

32. 100 Cal. Rptr. 752 (1972).

33. *West's Annotated California Codes.* Section 25658 of the *Business and Professions Code* states:

> (a) Every person who sells, furnishes, or gives . . . any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor . . .

In the *Brockett* case (*supra* n. 32, at 756), Gargano J. stated that under this section a person's duty is unequivocal, wishing to avoid the broader whether a social host could be held liable under section 25602 of the *Code*.

34. 546 P. 2d 719 (Cal. 1976).

35. *Ibid.*, at 726.

mon law rule in *Code* v. *Rush* had been overuled by the *Vesley* decision: "Although we chose to impose liability on the *Vesley* defendant on the basis of his violating the applicable statute, the clear import of our decision was that there was no bar to civil liability under modern negligence law."[36]

In 1978 the case of *Coulter* v. *Superior Court of San Mateo*[37] entended this principle to include a social host where the intoxicated guest was an adult. In a short dissent, Clark J. stated that his colleagues were incorrect in allowing this cause of action.

The plaintiff in this case was injured in an auto accident while riding as a passenger. The car was being driven at the time by a person named Williams who was intoxicated. She lost control of the car and it slammed into a cement abutment.[38] The plaintiff charged that the host of the party where Williams became intoxicated served Williams excessive amounts of alcohol, that the defendant knew or ought to have known that Williams was becoming excessively intoxicated, and that the defendant knew Williams would be driving an automobile when she left. Richardson J. felt the case could be decided on general negligence principles. "We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated person intends to drive a motor vehicle creates a *reasonably foreseeable* risk of injury to those on the highway."[39] Richardson felt the defendant could also be held liable for the injury under section 25602 of the *Business and Professions Code.* The defendants tried to argue that the rule in *Vesley* should be confined to commercial situations, but Richardson felt there was no compelling reason to do so. The wording in the *Code* made no distinction between commercial and social situations.

The *Coulter* decision was delivered on April 26, 1978, and on September 19, 1978, Governor Jerry Brown approved Senate Bill 1645 which amended the *Business and Professions Code* section 25602 and *Civil Code* section 1714. To section 25602, the following provisions were added:

> (b) No person who sells, furnishes, gives or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) [*supra* n. 28] of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person . . .
>
> (c) The Legislature hereby declares that this section be interpreted so that the holdings in such cases as Vesley v. Sager . . . Bernhard v. Harrah's Club . . . and Coulter v. Superior Court . . . be abrogated in favour 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.[40]

Section 1714 was amended as follows:

---

36. *Ibid.*

37. 577 P. 2d 669 (Cal. 1978).

38. No mention is made of volenti or contributory negligence on the plaintiff's part for accepting the ride with Williams, as the plaintiff was seeking a mandamus to review orders sustaining the defendant's demurrers which denied the plaintiff's cause of action.

39. *Supra*, n. 37 at 674.

40. *West's Annotated California Codes.*

(b) It is the intent of the Legislature to abrogate the holdings in cases such as Vesley v. Sager . . . Bernhard v. Harrah's Club . . . and Coulter v. Superior Court . . . and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person resulting from the consumption of such beverages.[41]

The California State Legislature was obviously concerned with the extent of judicial activism and expressed its disapproval by passing the above amendments. It appears that the holding in *Cole* v. *Rush* was reinstated, but one commentator feels that the legislation still allows an action for injury to the consumer of the alcohol against a commercial vendor.[42]

If the amendments were solely in response to the *Coulter* decision which allowed a cause of action against a social host, they were far too broad because they also wiped out decisions holding commercial vendors liable. In his article, Hall indicates that the Legislature in California does not publish a record of its findings and debates, so one can only surmise as to which social policies influenced the law-makers on this issue.[43]

In addition to academic hostility to the amendments, the courts in California were not pleased with the breadth of the legislation. In 1981 the plaintiff in *Harris* v. *Trojan Fireworks Company*[44] challenged the constitutionality of the amendments before the Fourth District Court of Appeal. Garst J.A. was willing to hold the amendments unconstitutional as violative of the equal protection clauses of both the United States and the State of California. However, his colleagues would not concur with him on this point.

After leaving a company Christmas party in his car in an intoxicated condition, a company employee caused an accident, killing the driver of the other vehicle. The deceased's parents filed a wrongful death claim contending that the employee's company, Trojan Fireworks, was responsible under the doctrine of *respondeat superior.* Garst J.A., now speaking for the majority of the court, stated, ". . . there is sufficient connection between the employment or the employer's Christmas party and the employee's negligent act to justify holding the employer financially responsible for injuries occasioned by the employee's accident."[45] Since the party was held during work hours and was intended to improve employee-employer relations, Garst reasoned that the employee's intoxication occurred within the scope of his employment.

---

41. *Ibid.* In *Clendening* v. *Shipton,* 149 Cal. App.3d 191 (1983) it was held that the amendments do not operate retroactively. The incident in question here occurred on February 19, 1978, while the amendments did not come into force until January 1, 1979.

42. A. Trippie, "California Liquor Liability: Cole v. Rush Revived?" (1979), Loyola L.A.L. Rev. 387.

43. D. Hall, "Liquor, the Law, and California: One Step Forward — Two Steps Backward" (1979), 16 San Diego L.R. 355 at 363.

44. 174 Cal. Rptr. 452 (1981).

45. *Ibid.*, at 456.

Three days after this California Court of Appeal decision was handed down, the State's Supreme Court likewise confirmed the constitutionality of the 1978 amendments in the case of *Corey* v. *Shierloh*.[46] The suit was brought by the injured, intoxicated consumer against the social host who supplied his liquor. In dismissing the plaintiff's appeal, Richardson J. concluded that the 1978 amendments precluded such a cause of action. Before affirming their constitutionality he gave the following disclaimer:

> Before testing the classifications herein presented we caution that our constitutional inquiry does not seek to determine whether the 1978 amendments were or are wise, sound, necessary, or in the public interest. There are ample reasons for concluding otherwise.[47]

A different approach to the issue was taken by the State Legislature of Minnesota, which it is suggested, is the proper approach to take. In 1972, the case of *Ross* v. *Ross*[48] allowed a claim against a social supplier of alcohol by an injured third party. However, a 1977 amendment to the *Minnesota Civil Damages Act*[49] precluded this cause of action while retaining an action against a commercial vendor. The legislative distinction was accomplished by deleting the words "or giving" from the provision describing the manner of supplying the liquor. In spite of this amendment, a case came before the Supreme Court of Minnesota where the plaintiff sought to hold a social host liable for the injury caused by his intoxicated guest. In the case of *Cole* v. *City of Spring Lake Park*[50] the host argued he was immune to such a claim by reason of the 1977 amendment. The Court considered the transcript of the Senate floor debate and agreed.

Conclusion

How far should Canadian courts go with the imposition of an affirmative duty of care on the providers of intoxicants? To discharge this duty the supplier of liquor may be under an onerous burden to guard against and prevent another's intoxication. Should a person over-indulge, the supplier would then be forced to take reasonable steps to see that the intoxicated person does not do injury to himself or to members of the public at large. Preventing an apparently intoxicated person from leaving the premises until sober may lead to an allegation of false imprisonment or possible violent reaction from the intoxicated person. The reasonable suggestion to take a taxi home may be disregarded as intoxicated people show a tendency to be unmoved by logic. Any form of affirmative duty should not be imposed lightly as it infringes upon the principle of individual responsibility.

With respect to commercial suppliers of alcohol, the *Jordan House* decision should be extended to cover innocent third parties injured as the

---

46. 629 P. 2d 8 (Cal. 1981).

47. *Ibid.*, at 12.

48. 200 N.W. 2d 149 (Minn. 1972).

49. *Minnesota Civil Damages Act*. The relevant portion of the Act reads:

> Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against any person who, by *illegally selling*, or *bartering*, intoxicating liquors, caused the intoxication of such person, for all damages sustained; . . . [cited in *Cole* case n. 50]

50. 314 N.W. 2d 836 (Minn. 1982).

result of the acts of an intoxicated patron. This appears to be what was done in the *Schmidt*[51] case, at least where a minor is served liquor, but the jury gave no reasons for holding the commercial vendor liable. Although no logical legal reason exists to exclude a social host from the same liability, it is nevertheless suggested that this would be the proper approach.

From the perspective of 'loss shifting', this approach would make sense. A commercial vendor can add the increased liability insurance cost into the price he charges for the liquor he serves. This added cost is then borne by the consumers who create the risk in the first place. Even if the social host were protected by some form of homeowner's insurance, he alone must bear the added cost of that insurance himself since he does not dispense his liquor for any financial remuneration. A second reason for making the distinction is that commercial vendors have sober employees serving liquor, who also have experience in dealing with intoxicated persons.

In a number of states in the U.S., dram shop legislation imposing liability against commercial vendors has been in force for years. The legislatures have refused to extend liability to include social hosts. In California, a state without dram shop legislation, progressive decisions holding commercial vendors liable were abrogated by the legislature as a result of courts extending liability too far. New Jersey is currently the only state which, by common law, allows a cause of action against a social host.

The horrifying number of alcohol-related automobile accidents resulting in death and injury must be considered when approaching this issue. Would expanding civil liability have any deterrent effect on the incidence of drunken driving? This is a matter best left to legislative debate.

It is submitted that the imposition of this duty on a social host with the possibility of unlimited liability would clearly be inappropriate in terms of loss shifting. If any move is to be made extending liability, let it be against the suppliers of liquor who can cover it with their profits in the trade. After all, the innocent victim is not without a remedy. He can go directly to the perpetrator of the injury — the intoxicated driver. Unless the intoxicated driver is without insurance (a rarity in a Province such as Manitoba with universal auto insurance) his policy is available to the innocent victim.

51. *Supra* n. 7.